

HEARING BEFORE THE SUBCOMMITTEE ON INVESTOR PROTECTION,
ENTREPRENEURSHIP, AND CAPITAL MARKETS OF THE COMMITTEE ON
FINANCIAL SERVICES OF THE UNITED STATES HOUSE OF REPRESENTATIVES

Building a Sustainable and Competitive Economy: An Examination of Proposals to Improve
Environmental, Social and Governance Disclosures

Testimony of Paul S. Atkins
July 10, 2019

Chairwoman Maloney, Ranking Member Huizenga, and Members of the Subcommittee:

Thank you for inviting me to appear here today to discuss Environmental, Social, and Governance, or “ESG” disclosures, and the Securities and Exchange Commission (“SEC”) disclosure regime more generally. From 2002 to 2008, I served as a Commissioner of the SEC, and before that I served on the staff of two former SEC Chairmen, in addition to roles in private practice. In 2009, I founded Patomak Global Partners, a Washington, DC based consultancy, and have served as the Chief Executive Officer since that time.

Background on SEC Disclosure

History and Purpose

For more than 85 years, the securities laws of the United States, and in particular the Securities Act of 1933, have been based primarily on the principle of disclosure. This was a conscious decision of the drafters of the statutes.¹ The SEC’s statutory mission is to maintain fair, orderly, and efficient markets, facilitate capital formation, and to protect investors. It carries out the last part by ensuring market participants have accurate material information about the securities in which they invest. As described on the Commission’s website, “The laws and rules that govern the securities industry in the United States derive from a simple and straightforward concept: all investors, whether large institutions or private individuals, should have access to certain basic facts about an investment prior to buying it, and so long as they hold it.”² Various competing and special interests have from time to time attempted to control the type of disclosures required by the SEC. However, over the years, the Commission has generally focused on disclosure of “material” information.

Materiality

The requirement of materiality is derived from SEC Rule 10b-5, which was promulgated pursuant to the SEC’s authority under section 10(b) of the Securities Exchange Act of 1934. Section 10(b) makes it unlawful, in connection with the purchase or sale of any security, to use or employ “any manipulative or deceptive device or contrivance in contravention of such rules

¹ See Commissioner Troy Paredes, *Remarks at The SEC Speaks in 2013*, U.S. Sec. & Exch. Comm’n (Feb. 22, 2013), <http://www.sec.gov/news/speech/2013/spch022213tap.htm#P222267>.

² See U.S. Sec. & Exch. Comm’n, *What We Do*, <https://www.sec.gov/Article/whatwedo.html> (last modified June 10, 2013).

and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”³ Rule 10b-5 provides that, in connection with the purchase or sale of any security, it shall be unlawful “[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading.”⁴ In 1975, the SEC stated “[i]n administering the disclosure process under the Securities Act and the Securities Exchange Act, the Commission has generally . . . require[d] disclosure only of such information as the Commission believes is important to the reasonable investor—material information.” It furthered that this requirement is “necessary in order to insure meaningful and useful disclosure documents of benefit to most investors without unreasonable costs to registrants and their shareholders.”⁵

The courts have since expounded on what information is “material” and warrants disclosure. The objective standard for materiality was set by the Supreme Court in *TSC Industries v. Northway* (1976).⁶ As Justice Thurgood Marshall wrote for the majority in the context of a controversy regarding a proposed merger, an omitted fact is material only if there is “a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.”⁷ Fundamentally, it is not enough that some investors may view a fact as important; rather, it must be important to the *reasonable* investor. As former SEC Chair Mary Jo White eloquently stated, “what some investors might want may not be what reasonable investors need.”⁸ In the forty-plus years since the Supreme Court decision in *TSC Industries*, the Supreme Court has repeatedly upheld the doctrine of materiality, including most recently in 2011 in *Matrixx Initiatives, Inc. v. Siracusano*.⁹ Importantly, the Commission continues to abide by its own precedents and those of the Supreme Court, rather than adhere to other approaches that would dilute the focus on materiality.

³ See 15 U.S.C. § 78j(b) (2006).

⁴ See 17 C.F.R. § 240.10b-5 (2011).

⁵ See 40 Fed. Reg. 51, 656 (Oct. 16, 1975).

⁶ See *TSC Industries v. Northway*, 426 U.S. 438, 439 (1976).

⁷ See *Id.* at 449.

⁸ See Chair Mary Jo White, *The Path Forward on Disclosure*, U.S. Sec. & Exch. Comm’n (Oct. 15, 2013), https://www.sec.gov/news/speech/spch101513mjw#_ftn7.

⁹ See *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1311 (2011).

Cost of Disclosure

While many seem to believe that disclosure is costless and harmless, the costs of disclosure are real. Not only is there the direct cost of the disclosure, which for just three provisions of the Dodd-Frank Act was estimated to be \$4.5 billion to \$6 billion, with annual ongoing costs between \$670 million and \$2.1 billion,¹⁰ but there is a cost to investors of “disclosure overload.” In 2013, then SEC Chair Mary Jo White decried the issue, noting: “When disclosure gets to be ‘too much’ or strays from its core purpose, it could lead to what some have called ‘information overload’ – a phenomenon in which ever-increasing amounts of disclosure make it difficult for an investor to wade through the volume of information she receives to ferret out the information that is most relevant.”¹¹ The concept of “disclosure overload” is not a new concept, as the Supreme Court recognized this very threat in *TSC Industries*, stating that “[s]ome information is of such dubious significance that insistence on its disclosure may accomplish more harm than good.” Moreover, SEC Chairmen and Commissioners, regardless of party affiliation, have recognized the real risks of disclosure overload.¹²

Even though the problem of disclosure overload was noted by the Supreme Court more than 40 years ago, mandatory disclosures have continued to increase since then. In particular, the Sarbanes-Oxley and Dodd-Frank Acts greatly increased the number of mandated public company disclosures. The issue has been studied across various disciplines and in international fora as well. One study notes that since 2010, several organizations including the Financial Accounting Standard Board (“FASB”) and the International Accounting Standard Board (“IASB”) have kicked-off projects on the development of disclosure framework reform, as a result of information overload.¹³ An IASB study found over 80 percent of respondents agreed that improvements could be made to the way financial information is disclosed, half of which felt such improvements were needed across all parts of the annual report, not just the financial

¹⁰ See Pay Ratio Disclosure, 80 Fed. Reg. 50,103 (Aug. 18, 2015); See also Conflict Minerals, 77 Fed. Reg. 56,273 (Sept. 12, 2012); See also Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,359 (Jul. 27, 2016).

¹¹ See Chair Mary Jo White, *The Path Forward on Disclosure*, U.S. Sec. & Exch. Comm’n (Oct. 15, 2013), https://www.sec.gov/news/speech/spch101513mjw#_ftn7.

¹² See, e.g., Commissioner Troy Paredes, *Remarks at The SEC Speaks in 2013*, U.S. Sec. & Exch. Comm’n (Feb. 22, 2013), https://www.sec.gov/news/speech/2013-spch022213taphm#P33_8287; See also Chair Mary Jo White, *The Path Forward on Disclosure*, U.S. Sec. & Exch. Comm’n (Oct. 15, 2013), https://www.sec.gov/news/speech/spch101513mjw#_ftn7.

¹³ See Dirk Beerbaum, *Disclosure Overload – A Literature Review*, SSRN (Oct. 5, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2669135.

statements.¹⁴ Hans Hoogervorst, head of the IASB, noted that “many companies present non-financial information on, for example, sustainability issues [and] for the investor, it is often difficult to see the woods through the multitude of information trees.”¹⁵

In addition to costs to investors, studies have also found that disclosure costs contribute to companies’ decision to go public or remain private.¹⁶ The Treasury Department under President Obama recognized this problem and in March 2011 convened a conference on access to capital. This conference led to the creation of the private-sector IPO Task Force “to examine the conditions leading to the IPO crisis and to provide recommendations for restoring effective access to the public markets for emerging, high-growth companies.”¹⁷ In its report to the Treasury Department, the IPO Task Force found that 72 percent of the CEOs surveyed cited public disclosure impact on business among their biggest concern about going public.¹⁸ Of public company CEOs surveyed, 92 percent named administrative burden of public reporting as one of the most significant IPO challenges. As part of a 2017 study, the Treasury Department conducted outreach to numerous stakeholders who cited nonfinancial disclosure requirements as a factor affecting public companies since the Sarbanes-Oxley Act.¹⁹ Similarly, an interim report by President Obama’s Council on Jobs and Competitiveness noted “well-intentioned regulations aimed at protecting the public from the misrepresentations of a small number of large companies have unintentionally placed significant burdens on the large number of smaller companies. As a result, fewer high-growth entrepreneurial companies are going public, and more are opting to provide liquidity and an exit for investors by selling out to larger companies. This hurts job creation, as the data clearly shows that job growth accelerates when companies go public, but often decelerates when companies are acquired.”²⁰

¹⁴See Kirstina Reitan, *Joint Effort Needed to Tackle Disclosure Problem*, IFRS (Jan. 24, 2013), <https://www.ifrs.org/news-and-events/2013/01/joint-effort-needed-to-tackle-disclosure-problem/>.

¹⁵ See Hans Hoogervorst, *Better Communication*, IFRS (June 30, 2016), <https://www.ifrs.org/-/media/feature/news/speeches/2016/hans-hoogervorst-zurich-conference-2016.pdf?la=en>.

¹⁶ See Michael Dambra et al., *The JOBS Act and IPO Volume: Evidence That Disclosure Costs Affect the IPO Decision*, J. Fin. Econ., (Aug. 25, 2014), <http://leeds-faculty.colorado.edu/bhagat/JOBSAct-IPO-Volume.pdf>.

¹⁷ See IPO Task Force, *Rebuilding the IPO On-Ramp*, U.S. Sec. & Exch. Comm’n (Oct. 20, 2011), https://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf.

¹⁸ See *Id.* at 38.

¹⁹ See Steven Mnuchin, Craig Phillips, *A Financial System That Creates Economic Opportunities*, U.S. Dep’t of the Treasury (Oct. 2017), <https://www.treasury.gov/press-center/press-releases/documents/a-financial-system-capital-markets-final-final.pdf>.

²⁰ See Jobs Council, *Taking Action, Building Confidence*, Jobs Council (Oct. 2011), http://files.jobs-council.com/jobscouncil/files/2011/10/Jobscouncil_InterimReport_Oct11.pdf.

The Need for More Public Companies

The benefits to the economy and jobs market of more companies going public has been well documented. It is estimated that 90% to 92% of job growth occurs after IPO, with most of that growth occurring in the first five years following IPO.²¹ A study by the Kauffman Foundation estimated that the 2,766 companies that went public from 1996 to 2010 collectively employed 2.2 million more people in 2010 than they did before they went public, while total sales among these companies increased by over \$1 trillion during the same period.²² Another study found that emerging growth companies' post-IPO employment increased 156%.²³ Likewise, a 2017 study concluded that successful IPOs are a critical component of both post-IPO job creation and new firm creation by giving employees in companies that successfully go public the wealth necessary to absorb the risk of creating a firm or joining a startup.²⁴ Robust public markets also come with enhanced transparency and incorporate the maximum amount of information, which aids in price discovery and investor protection.

Unfortunately, another well-known fact is that public company offerings have been on the decline in the United States, with only half as many public companies available for investors to invest in compared to twenty years ago. This trend in the United States is unusual compared to other countries with similar institutions and economic development, as one study found that while U.S. listings dropped by about half since 1996, listings in a sample of developed countries increased by 48%.²⁵

In 1996, when IPOs were at their peak, there were more than 600 IPOs in one year, yet there were approximately 260 IPOs total between 2008 and 2010.²⁶

²¹ See IPO Task Force, *Rebuilding the IPO On-Ramp*, U.S. Sec. & Exch. Comm'n (Oct. 20, 2011),

https://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf; See also The

The Economist, *A Helping Hand for Startups*, The Economist (Oct. 8, 2011),

<http://www.economist.com/node/21531482>; See also IHS Global Insight, *Venture Impact Study 2010*.

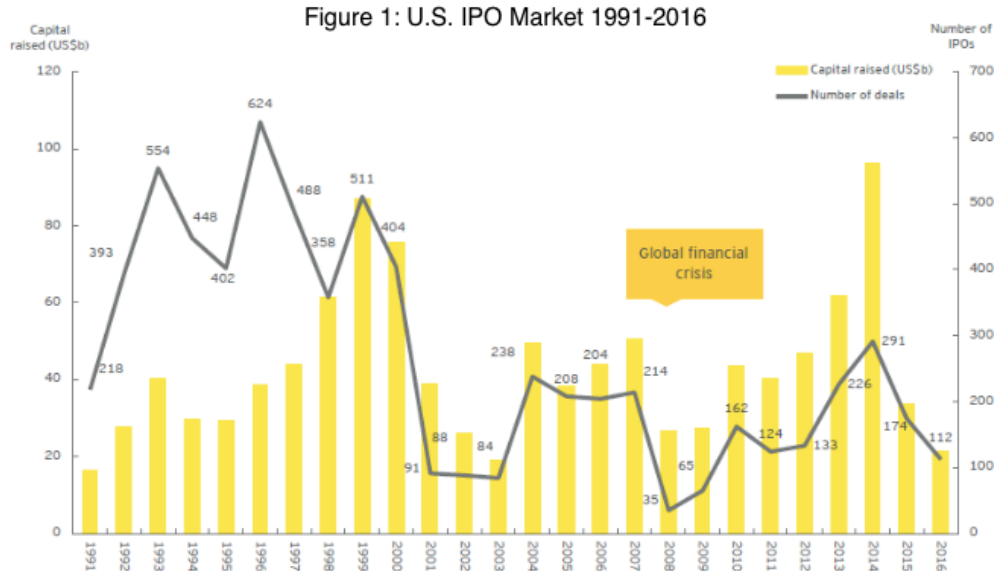
²² See Kauffman Foundation, *Post-IPO Employment and Revenue Growth for U.S. IPOs June 1996-2010*, Kauffman Foundation (May 21, 2012), <https://www.kauffman.org/what-we-do/research/2012/05/postipo-employment-and-revenue-growth-for-us-ipos-june-19962010>.

²³ See Martin Kenney, Donald Patton & Jay R. Ritter, *Post-IPO Employment and Revenue Growth for U.S. IPOs, June 1996-2010*, at 1 (May 2012).

²⁴ See Tania Babina et al., *Going Entrepreneurial? IPOs and New Firm Creation*, Semantic Scholar (Feb. 2017), https://pdfs.semanticscholar.org/baaa/6ceb811c36e7c3de3cef63f47ec7347f170b.pdf?_ga=2.77677204.1889961591.1562339932-774756550.1562339932.

²⁵ See Craig Doidge et al., *The U.S. Listing Gap*, 123 J. of Fin. Econ. 464, 467 (Mar. 2017).

²⁶ See Les Brorsen, *Looking Behind the Declining Number of Public Companies*, Harvard Law School Forum (May 18, 2017), <https://corpgov.law.harvard.edu/2017/05/18/looking-behind-the-declining-number-of-public-companies/>.



Source: Looking Behind the Declining Number of Public Companies, EY May 18, 2017

In light of this and other data, Congress in April 2012 swiftly acted. Led by Members of this Committee the “Jumpstart Our Business Startups” or “JOBS” Act was enacted. The JOBS Act recognized that the public-company disclosure regime inhibits companies from going public and thus established a regime to lessen those requirements on new emerging-growth companies.

When firms conduct an IPO and offer securities in public markets, everyday investors gain an investment opportunity and can participate in these markets with minimal hurdles or restrictions. In contrast, if firms choose not to go public and raise capital through a private offering or an exempt offering, these sales can be subject to limitations and restrictions on who can participate. To the extent that regulatory requirements are impacting companies’ decisions to go public, many ordinary investors are losing out on this valuable investment opportunity, especially compared to high net-worth individuals who are more able to participate in private offerings. One venture capital firm, Andreessen Horowitz, compared the return multiples for technology-related firms of the 1980s with such newer technology firms as Twitter and Facebook in the 2000s. In 1986, Microsoft returned just over 200x in private value creation, while its public value creation was roughly 600x. Oracle had similar return ratios in the same year. Contrast this with Facebook in 2012 and Twitter in 2013, nearly all of whose returns were private.²⁷

²⁷See Morgan Bender et al., *US Tech Funding*, LinkedIn Slide Share (June 2015), <https://www.slideshare.net/a16z/state-of-49390473>

Since the passage of the JOBS Act, the number of IPOs per year has been almost 190, compared to an average 100 per year in the five years prior to enactment. While this is a significant improvement, there is still more that can be done. Unfortunately, as discussed in further detail below, the draft bills under consideration today would inhibit rather than facilitate more IPOs. While the bills are likely well-intentioned, the reality is that many of them set requirements already provided elsewhere in law, at best, or would mostly engender the type of unintended consequences prior efforts have visited upon public companies, their investors and U.S. economic growth.

Discussion of Draft Bills

ESG Disclosure Simplification Act

The *ESG Disclosure Simplification Act* requires companies to disclose their views about the link between ESG metrics and long-term business strategy and requires the Commission to define ESG metrics and companies to disclose those metrics. An advisory committee would be established to aid the Commission's determination of the metrics. The issue with ESG standards is that they are subjective, making them difficult to both define and measure. Commissioner Hester Peirce recently described the challenge of this kind of an approach: "ESG scoring is often arbitrary because these reports are read and analyzed by machines. Illustrating this arbitrariness, Sarah Teslik, a consultant on ESG issues, recommends that companies 'go look at the list of things they grade on and then disclose the way they talk. You may be doing something just right, but you called it a practice; you didn't call it a policy. And you only get credit if you call it a policy.'"²⁸

Additionally, the boards and management of public companies have a legal obligation to uphold fiduciary duty and maximize shareholder return with a focus on long term value creation. To the extent that these metrics prevent businesses from carrying out this obligation by focusing on obscure and subjective targets that might not be appropriate for their business model, this would conflict with their fiduciary duty.

The bill would also ordain the developed ESG metrics as "material" for the purposes of securities laws, upending almost a century of case law precedent, and opening the door for any

²⁸ See Commissioner Hester Peirce, *Scarlet Letters: Remarks Before the American Enterprise Institute*, U.S. Sec. & Exch. Comm'n (Jun. 18, 2019), <https://www.sec.gov/news/speech/speech-peirce-061819>.

type of information to be deemed “material,” based on the whim of a particular group of people at a particular time.

The Shareholder Protection Act

The *Shareholder Protection Act* would require public companies to disclose their political spending activity. The bill does not purport to have an investor protection or other related policy goal, but rather states it will “establish necessary accountability.” Given the current disclosures and data available, it is not clear where the accountability is lacking. The results of a 2016 report by the Committee for Economic Development (“CED”) found that even in light of the *Citizens United* decision, “most of the money raised and spent to support candidates in federal elections comes from individual donations subject to contribution limits and disclosed to the public ... [L]arge corporations or publicly held companies have not engaged in independent spending or contributed large sums to Super PACs.”²⁹ A follow up CED report supported this claim, and noted that labor unions “have played a larger role than the business community.”³⁰ Besides the fact that companies are already required to disclose political contributions, it is well-documented that many calling for these types of proposals are not looking to enhance shareholder value, but rather to prevent companies from exercising their freedom of speech.³¹ The bill states that, “historically, shareholders have not had a way to know, or to influence, the political activities of corporations they own.” In fact, a process does already exist for shareholders to bring matters to the attention of companies they own and that is the shareholder proposal process granted by SEC Rule 14a-8 that has been in place since 1942.³² Over the years, shareholder proposals requiring political and lobbying disclosures have

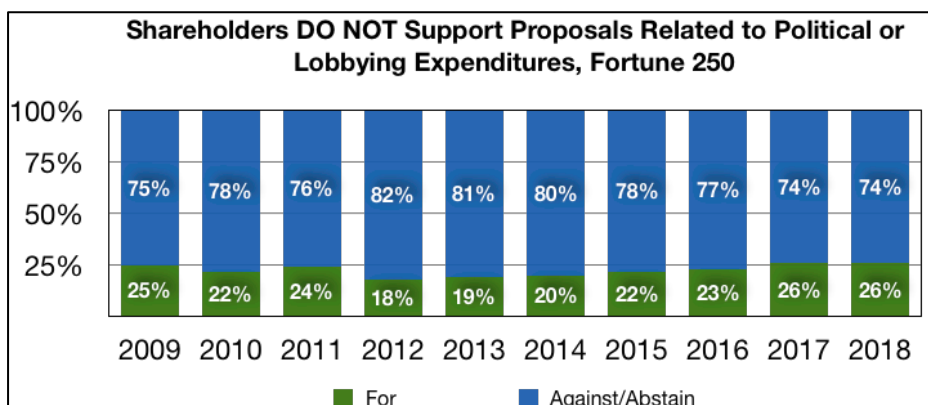
²⁹ See the Comm. For Econ. Dev. Of The Conference Bd., *The Landscape of Campaign Contributions*, Comm. For Econ. Dev. (Nov. 2016), <https://www.ced.org/reports/single/the-landscape-of-campaign-contributions>

³⁰ See the Comm. For Econ. Dev. Of The Conference Bd., *The Landscape of Campaign Contributions*, Comm. For Econ. Dev. (July 10, 2017), <https://www.ced.org/reports/the-landscape-of-campaign-contributions1>

³¹ See Joe Trotter, *New Report Unveils Effort to Censor Corporate Speech*, Inst. For Free Speech (June 5, 2014), <https://www.ifs.org/news/new-report-unveils-effort-to-censor-corporate-speech/>; See also Kimberly Strassel, *The Corporate Disclosure Ruse*, Wall Street Journal (May 31, 2012), <https://www.wsj.com/articles/SB10001424052702303552104577438553017191964>; See also Deneen Moore, *Union Activists' Strong-Arm Tactics*, Nat'l Ctr. For Pub. Pol'y Research (Sept. 25, 2006), <https://nationalcenter.org/project21/2006/09/25/union-activists-strong-arm-tactics-deneen-moore/> (Charles Schwab Corporation became a target of labor unions for the personal support of Social Security reform by the company's founder, Charles Schwab. “Although the company wanted to enhance shareholder value through this advocacy, its participation in the public policy debate and exercise of political freedoms seemed too much of a threat to union activists.”)

³² See 17 CFR § 240.14a-8 (2013).

consistently been rejected by shareholders. Last year, roughly 74% of Fortune 250 shareholders rejected these proposals.



Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019

This bill would require issuers that are required to file an annual report to conduct an annual analysis to identify any human-rights risks or impacts in the operations and value chain of the issuer and rank them based on severity. In addition to the impracticability for global companies with complicated supply chains to comply with this rule and the sheer compliance costs, which for a similar Dodd-Frank provision relating to conflict minerals was estimated to be \$3 to \$4 billion,³³ the SEC is not equipped to address public policy goals of this nature through its disclosure regime. This was demonstrated by preliminary observations of the conflict minerals disclosure rule. The U.S. Government Accountability Office found that “[c]ompany filings indicate companies exercised due diligence but most were unable to determine whether or not conflict minerals used came from covered countries, or whether they financed or benefited armed groups.”³⁴ What is worse is that a rule of this nature may have the opposite of the intended policy goal. Following implementation of the conflict minerals rule, an empirical analysis found that “[i]nstead of reducing violence, the evidence indicates the policies increased the incidents in which armed groups looted civilians and committed violence against them.”³⁵

³³ See Conflict Minerals, 77 Fed. Reg. 56,273 (Sept. 12, 2012)

³⁴ See Kimberly Gianopoulos, *SEC Conflict Minerals Rule: 2017 Review of Company Disclosures in Response to the U.S. Securities and Exchange Commission Rule*, U.S. Gov’t Accountability Office (Apr. 26, 2017), <https://www.gao.gov/assets/690/684300.pdf>; See also Kimberly Gianopoulos, *Company Reports on Mineral Sources in 2017 Are Similar to Prior Years and New Data on Sexual Violence Are Available*, U.S. Gov’t Accountability Office (June 2018), <https://www.gao.gov/assets/700/692851.pdf>.

³⁵ See Dominic Parker and Bryan Vadheim, *Resource Cursed or Policy Cursed?*, Univ. of Wis. (June 3, 2016), <https://aae.wisc.edu/dparker5/papers/ParkerVadheimJAERE.pdf>

For this reason, the SEC should focus on its mission of regulating capital markets and protecting investors, rather than being tasked with lofty goals it is not equipped to handle, such as “supporting the public interest in ensuring publicly traded companies do not cause or contribute to adverse human rights impacts...”.³⁶ Not to mention, shareholders have already rejected human-rights risk assessment proposals when they have come to a vote. This proxy season, of the eleven proposals that received a final vote, all of them were rejected, with an average support rate of 26%.³⁷ Finally, if the goal of this legislation is to reduce human rights violations, why does it only target public companies through the SEC disclosure regime, rather than all companies? Disproportionately requiring this costly, onerous disclosure from SEC-registered public companies only furthers the disincentive to go public, contributing to the public company issue discussed earlier.

Corporate tax disclosure bill

This bill would, among other things, require issuers to disclose in both annual and quarterly reports (1) the total pre-tax profit of the issuer during the period; (2) the total amount of state taxes paid by the issuer during the period; (3) the total amount of federal taxes paid by the issuer during the period; and, (4) the total amount of foreign taxes paid by the issuer during the period. The bill would also require issuers to disclose several metrics on a country-by-country basis.

Although much of this information is already collected by the IRS, including a country-by-country breakdown for multinational enterprise groups that report \$850 million or more of revenues in the preceding annual reporting period,³⁸ some groups have argued that the SEC should require disclosure of this information for investors. However, this information is not material.

Companies are already required to provide footnote disclosure of material tax items in financial statements. Moreover, when Congress previously explored requiring companies to file additional tax information with the Commission, then-SEC Chairman Harvey Pitt stated that “[w]e believe the disclosure on corporate tax matters a company supplies in its filings provides

³⁶ See H.R. ____, Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019 [DRAFT]

³⁷ Author’s calculations using ISS Corporate Solutions data

³⁸ See Internal Revenue Serv., *Frequently Asked Questions*, <https://www.irs.gov/businesses/international-businesses/frequently-asked-questions-faqs-country-by-country-reporting> (last updated May 16, 2019).

sufficient information and that the provision of tax returns to the Commission or public disclosure to public investors is not necessary.”³⁹ Furthermore, the SEC, the Department of Justice and other agencies can already request tax returns when needed for enforcement purposes in both tax and non-tax cases.

Climate Risk Disclosure Act of 2019

This bill would require public companies to disclose in their annual reports information relating to the financial and business risks associated with climate change and would require the SEC to establish climate-related risk disclosure metrics and guidance. The problem with this bill is that it seems to assume that there are not any climate-related disclosures today and that the SEC is equipped to develop specific requirements for climate-related disclosures. Both those assumptions are incorrect.

First, it is important to note that in 2010, the SEC published an interpretive release discussing how existing disclosure requirements may apply to climate-related issues.⁴⁰ For example, if a company’s physical facilities are exposed to extreme weather risks and the company is making significant business decisions related to relocation or insurance, to the extent that those matters are material, companies should already be disclosing them.

Second, while some sustainability advocates have called for these disclosures, there is disagreement about whether and what information would be considered material and useful by the reasonable investor. SEC Division of Corporation Finance Director Bill Hinman made this very point in a speech earlier this year stating, “market participants who do support additional sustainability disclosure requirements do not themselves uniformly recommend additional disclosure on the same sustainability issues.”⁴¹ If the proponents disagree on what should be disclosed, it seems doubtful that the SEC, which does not have expertise in climate-related matters, should develop such standards. As Director Hinman stated, “[s]ubstituting regulatory

³⁹ See Letter from Harvey Pitt, Chairman, U.S. Sec. Exch. Comm’n, to Charles Grassley, Senator, U.S. Senate (Aug. 15, 2002) (on file with Tax Notes)

⁴⁰ See U.S. Sec. & Exch. Comm’n; Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290 (Feb. 8, 2010) (codified at 17 C.F.R. Pt. 211, 231, 241).

⁴¹ See William Hinman, *Applying a Principles-Based Approach to Disclosing Complex, Uncertain and Evolving Risks*, U.S. Sec. & Exch. Comm’n (Mar. 15, 2019), <https://www.sec.gov/news/speech/hinman-applying-principles-based-approach-disclosure-031519>

prescriptions for market-driven solutions, especially while those solutions are evolving, in [his] view, is something [the SEC] need[s] to manage with utmost care.”⁴²

⁴² *Id.*