

## **Speech**

### Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability

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Thank you, Anne [Sheehan] for that generous introduction, for your leadership on the SEC's Investor Advisory Committee and, most importantly, for championing the interests of investors for so many years. ICGN is a vital global forum for investors to share insights and ideas, but also important because of its steadfast focus on the well-being of the broader markets, the world economy and indeed our planet. Although I would rather be with you in person today, it is a pleasure and privilege to be here by way of videoconference from Washington, D.C. where I need to be to monitor the impact of recent international events for all of you.

Investors and regulators everywhere share a common interest in effective disclosures, robust corporate governance practices and strong corporate cultures, which are fundamental for fair and efficient markets and to achieve sustainable value. But, as the preamble to ICGN's Global Governance Principles acknowledges,<sup>[1]</sup> there are differences from jurisdiction to jurisdiction as to what precisely we are trying to achieve and the tools available to us. So, I thought I would begin by discussing the regulatory framework in the United States with respect to corporate governance matters and how the SEC, long known as "the disclosure agency," fits into the framework. Then, reflecting on the extent of the SEC's disclosure authority, I will discuss my perspective on the work we are doing on three important subjects on your agenda – board diversity; non-GAAP financial measures; and sustainability reporting.

#### **The Role of the SEC in Corporate Governance**

Dictating corporate governance practices in the United States is generally outside the scope of the SEC's regulatory authority. And there is no national uniform code of governance for public companies as there is in many other countries.<sup>[2]</sup> Rather, in the United States, corporate governance is, with some exceptions, the domain of each of our fifty states under their corporate law, which tends to accord shareholders relatively limited rights over corporate management and governance.<sup>[3]</sup>

The SEC has an impact on corporate governance through its disclosure powers – requiring public companies to provide investors with the information they need to make informed investment and voting decisions.<sup>[4]</sup> The SEC thus does not decide who may sit on a corporate board, but our rules do require disclosure about those who serve or are nominated to serve as directors and, importantly, why they were selected to serve.<sup>[5]</sup>

In some cases, legislation is passed that specifically provides both substantive requirements and disclosure requirements intended to bring about substantive change. For example, under the Sarbanes-Oxley Act, directors who are members of an audit committee of public companies listed on national

exchanges must be independent<sup>[6]</sup> and, if at least one member is not a “financial expert,” companies must disclose that fact and say why.<sup>[7]</sup> In a similar vein, although the SEC cannot set the form or amount of pay of corporate executives, our rules have long required detailed disclosure about executive compensation.<sup>[8]</sup> The Dodd-Frank Act enacted in 2010 also empowered the SEC and other financial regulators to establish permissible parameters for incentive compensation at certain financial institutions to avoid incentivizing the kind of excessive risk-taking associated with the financial crisis.<sup>[9]</sup> A joint agency rule proposal to do that is now out for public comment.<sup>[10]</sup>

Given the nature of the largely state law-based governance framework for U.S. companies, it has been a continuing challenge for investors – institutional as well as retail – to play as significant a role in corporate governance as the more empowered shareholders in many European companies.<sup>[11]</sup> Indeed, in past years, some have analogized the role of investors in U.S. companies to what some parents say to their children: you are to be seen, but not heard.<sup>[12]</sup> While this characterization was always an exaggeration, it does underscore the challenge. But the picture has changed – for the better – and active and engaged shareholders and the efforts of the ICGN are part of the movement that continues to lead the charge.

Direct engagement with shareholders of U.S. companies, particularly with institutional shareholders, has increased significantly in recent years – a development that I have strongly encouraged.<sup>[13]</sup> This engagement has been buttressed with rights shareholders have under SEC rules, specifically Rule 14a-8, to have their own proposals included in a company’s proxy statement to be voted on by all shareholders. These proposals can cover a wide range of issues, including environmental, social and corporate governance ones. This is an avenue that shareholders increasingly use to get traction and initiate meaningful dialogue with boards and executives for changes on issues of importance to them.<sup>[14]</sup>

There are significant success stories resulting from these efforts and the private ordering by companies responding to shareholder views. Prominent examples include the near disappearance of staggered boards,<sup>[15]</sup> majority vote standards becoming the norm across the S&P 1500,<sup>[16]</sup> and the recent successes of proxy access proposals resulting in 35% of the S&P 500 adopting proxy access, compared to 1% two years ago.<sup>[17]</sup>

From time to time, the U.S. Congress also acts to directly provide shareholders rights not accorded to them by state law. “Say on pay,” for example, was a mandate in the Dodd-Frank Act, which enabled shareholders to cast a non-binding vote on a company’s executive compensation.<sup>[18]</sup>

As you can tell even from this brief description, corporate governance in the United States is a patchwork driven by state law, supplemented by federal law including SEC regulations, private ordering prompted by shareholder advocacy, and sheer doggedness by all of you. While this regulatory patchwork can be frustrating, we all have some powerful tools at our disposal. Regulators have disclosure and enforcement powers that can be used on a range of issues. Investors can directly engage with boards and senior management, use shareholder proposals, vote out directors and, if all else fails, vote with your feet. Different investors, of course, may have different objectives and interests. Investors with relatively short-term investment objectives, for example, often will have very different perspectives than long-term investors on a variety of matters, including those related to corporate governance, buybacks and sustainability practices, to name just a few. So, we can seldom say that a particular practice or disclosure is “what investors as a whole want.” It is not that simple.

You may ask then what is the appropriate role for the SEC in this space. Once again, there is not a simple answer. As you consider that question, we must recognize the limits of the SEC’s authority, including as it relates to the environmental, social and governance matters that are of increasing

importance to a growing number of investors and other constituents. If we are not sufficiently mindful of the scope of our authority and other legal requirements, the courts will remind us, as they have before. [\[19\]](#)

The range of issues on which investors and companies can effectively engage on together, however, is not so circumscribed. When investors find that common ground between their concerns and the business objectives of a company, they can achieve traction with boards and senior management, and your potential universe of impact and influence is nearly limitless. That is why I would urge you to not only seek disclosures on the issues you care deeply about, but to also focus on the underlying corporate action where you want to see initiatives and changes by companies consistent with your priorities, whether it be on climate change, cybersecurity risks, political spending, or a whole host of other subjects. While specific disclosures can certainly provide more transparency and further certain goals, practices that are designed solely to satisfy disclosure requirements may not meaningfully address the underlying issues that are at the root of your priority. As the Global Reporting Initiative's ("GRI") Reporting 2025 Project Analysis on Sustainability put it, commenting on improving sustainability disclosure: "Despite the increasing transparency, change towards a sustainable economy is progressing slowly."[\[20\]](#)

This challenge does not at all minimize the critical importance of robust disclosure –transparency is indeed the premise upon which the U.S. capital markets have been built and it is their source of strength. Investors and potential investors must be given the information they need to make informed investment and voting decisions. And it is also our responsibility at the SEC, using the "materiality" lens, [\[21\]](#) to ensure that our disclosure regime evolves to continue to provide the total mix of information necessary for the "reasonable investor" whose priorities and investing behavior also continue to evolve. [\[22\]](#)

To that end, in connection with the staff's ongoing disclosure effectiveness review, the SEC recently issued a broad-based concept release seeking input from investors, issuers and other affected market participants on our business and financial disclosure requirements.[\[23\]](#) Our overall challenge is to re-focus the lens of disclosure to better serve today's investors. The challenge for investors is even greater – to use your voices not only to inform us about the disclosures you need to make informed decisions, [\[24\]](#) but also to influence corporate behavior to better protect and generate sustainable corporate value.

Having now set the table at a 30,000-foot level, let me turn specifically to three of your agenda items and discuss our efforts and my perspective on each of them: diversity on boards; non-GAAP financial measures; and sustainability reporting. I have chosen these three areas to highlight because of their importance, my own focus on them, and because they each also serve to illustrate the challenges that investors and the SEC face in our respective roles.

### **Board Diversity**

Diversity on boards, and in organizations more generally, is very important to me and I have not shied away from expressing my strong views on the topic.[\[25\]](#) As a former member of a public company board and its audit committee, I have seen first-hand what the research is telling us – boards with diverse members function better and are correlated with better company performance.[\[26\]](#) This is precisely why investors have – and should have – an interest in diversity disclosure about board members and nominees.

As you know, major efforts are underway in the United States and elsewhere to improve board diversity. Many qualified candidates are out there and there are extensive resources available to nominating committees that can provide a rich supply of highly qualified and diverse candidates.<sup>[27]</sup> A few statistics underscore the importance of these efforts.

Minority directors on boards of the top 200 companies on the S&P 500 have stagnated at 15% for the last several years, and the percentage of these companies with at least one minority director actually declined from 90% in 2005 to 86% in 2015.<sup>[28]</sup> In 2009, women held only 15.2% of board seats at Fortune 500 companies<sup>[29]</sup> and that number has only risen to 19.9% in the past six years<sup>[30]</sup>; 73% of new directorships in 2015 at S&P 500 companies went to men.<sup>[31]</sup> At this rate, the GAO has estimated that it could take more than 40 years for women's representation on boards to be on par with men's.<sup>[32]</sup> The low level of board diversity in the United States is unacceptable.

I continue to urge that CEOs and boards of public companies act aggressively to alter this landscape and to do so quickly. Not only is it the right thing to do – it makes good business sense. I was pleased to see that the Business Roundtable, whose CEO members lead companies with \$7 trillion in annual revenues and over 16 million employees, announced in April that it was “putting diversity front and center in their search for board directors.”<sup>[33]</sup> I will be looking to see the results of their announcement. You can do your part by continuing to exercise your voices (loudly) to keep the issue of board diversity front and center – and demand concrete actions and meaningful progress now.

The role of the SEC on board diversity, as on many other important corporate governance issues, is focused on disclosure. The SEC does not have the authority to mandate board diversity, but, in 2009, the Commission adopted a rule requiring companies to disclose whether, and if so, how their nominating committees consider diversity and, if they have a policy on diversity, how its effectiveness is assessed.<sup>[34]</sup> The rule does not define diversity and the adopting release made clear that there was no single way required to define the term. It left it to companies to say what they mean by diversity in their policies and disclosures.

What has been the impact of our rule? Companies' disclosures on board diversity in reporting under our current requirements have generally been vague and have changed little since the rule was adopted. Very few companies have disclosed a formal diversity policy and, as a result, there is very little disclosure on how companies are assessing the effectiveness of their policies.<sup>[35]</sup> Companies' definitions of diversity differ greatly, bringing in life and work experience, living abroad, relevant expertise and sometimes race, gender, ethnicity, and sexual orientation. But these more specific disclosures are rare and, not surprisingly, there are investors who are not satisfied.<sup>[36]</sup>

Some companies, however, have done a good job of providing more useful information to investors on board diversity. A growing number of company proxy statements have recently begun to voluntarily provide an analysis of data, accompanied by pie charts and bar graphs, to describe the state of the board's gender, race and ethnic diversity composition, sometimes in addition to other categories – that is one of the positive results of private ordering. This more specific information is clearly more useful to investors. And based on the voluntary disclosures we have seen, it appears that it would not be difficult for companies to prepare disclosures that would include the more specific categories of diversity investors are seeking.

To respond to these issues, I announced in January that I had directed the SEC staff to review our rule and the extent and quality of disclosures that have followed, with an eye toward revising the rule if there was a need. And, I can report today that the staff is preparing a recommendation to the Commission to propose amending the rule to require companies to include in their proxy statements more meaningful

board diversity disclosures on their board members and nominees where that information is voluntarily self-reported by directors. Some may oppose even minimally more prescriptive diversity disclosure requirements. My view is that the SEC has a responsibility to ensure that our disclosure rules are serving their intended purpose of meaningfully informing investors. This rule does not and it should be changed. Our lens of board diversity disclosure needs to be re-focused in order to better serve and inform investors.

### **Non-GAAP Financial Measures**

Let me now turn to another of your agenda items, non-GAAP financial measures, which implicate the centerpiece of our disclosure regime – the disclosure of financial information. This is familiar territory for us all. Our rules require companies to file financial statements prepared in accordance with U.S. generally accepted accounting principles (“U.S. GAAP”) or, in the case of foreign private issuers, International Financial Reporting Standards (“IFRS”).<sup>[37]</sup> This essential disclosure requirement makes great sense: accounting standards developed through a robust process conducted by an independent accounting standard setter – the Financial Accounting Standards Board (“FASB”) in the United States – that provide comparability among companies on the financial information that is most critical to investors.

While periodically reporting financial results according to U.S. GAAP is the lodestar of our disclosure regime, we also allow, indeed require, companies to tell their own stories in their MD&A. We ask companies to explain and analyze their results of operations through the eyes of management. As you know, MD&A, earnings releases, and investor presentations produced by companies often include non-GAAP financial measures to convey, in management’s assessment, a clearer picture of how they see the company’s results of operations in a way that GAAP results alone may not convey.

Not surprisingly, our rules governing these communications make clear that the presentation of non-GAAP measures cannot be misleading and require that they be reconciled to the appropriate GAAP measure so that investors and analysts can compare them to the one that is consistently defined under the GAAP requirements.<sup>[38]</sup> I generally think it is a good idea to provide companies with this flexibility and we do hear that investors want non-GAAP information. But recently I have had significant concerns about companies taking this flexibility too far and beyond what is intended and allowed by our rules.

In too many cases, the non-GAAP information, which is meant to supplement the GAAP information, has become the key message to investors, crowding out and effectively supplanting the GAAP presentation. Jim Schnurr, our Chief Accountant, Mark Kronforst, our Chief Accountant in the Division of Corporation Finance and I, along with other members of the staff, have spoken out frequently about our concerns to raise the awareness of boards, management and investors.<sup>[39]</sup> And last month, the staff issued guidance addressing a number of troublesome practices which can make non-GAAP disclosures misleading: the lack of equal or greater prominence for GAAP measures; exclusion of normal, recurring cash operating expenses; individually tailored non-GAAP revenues; lack of consistency; cherry-picking; and the use of cash per share data.<sup>[40]</sup> I strongly urge companies to carefully consider this guidance and revisit their approach to non-GAAP disclosures. I also urge again, as I did last December, that appropriate controls be considered and that audit committees carefully oversee their company’s use of non-GAAP measures and disclosures.<sup>[41]</sup>

We are watching this space very closely and are poised to act through the filing review process, enforcement and further rulemaking if necessary to achieve the optimal disclosures for investors and the markets.

### **Sustainability Disclosures**

The third and final item on your agenda that I will cover today is sustainability reporting – obviously, a topic of great importance, interest and complexity.

I will start with the baseline. Our rules and guidance are clear that, to the extent issues about sustainability are material to a company's financial condition or results of operations, they must be disclosed.<sup>[42]</sup> But deciding whether such disclosures are triggered in a particular context is often easier said than done when trying to calibrate materiality to phenomena that have a longer term horizon than most other financial metrics do. And measuring whether and how a company will sustain its performance in a changing global physical and legal environment, which is itself uncertain, is not an easy undertaking.

To begin with, sustainability encompasses a very broad range of topics that may relate to a company's risk profile, trends or uncertainties that could affect financial performance.<sup>[43]</sup> These could include climate change, resource scarcity, corporate social responsibility, and good corporate citizenship.<sup>[44]</sup> The importance of such issues can also vary significantly by industry and company.

Despite the complexities, a considerable amount of very good work is being done and disclosures on certain sustainability issues are increasingly being made, both in reports separate from companies' financial filings and also in some companies' annual reports.<sup>[45]</sup> In 2015, 75% of the S&P 500 companies published a sustainability or corporate responsibility report<sup>[46]</sup> and over 90% of the world's 250 largest companies did so.<sup>[47]</sup>

A number of organizations have also published useful guidelines or are developing sustainability disclosure frameworks and metrics.<sup>[48]</sup> The GRI Sustainability Framework, for example, is now being widely used by companies to prepare their sustainability reports.<sup>[49]</sup> Another organization, the Sustainability Accounting Standards Board ("SASB"), is developing voluntary sustainability standards for approximately eighty industries in ten sectors.<sup>[50]</sup> These and other constructive efforts continue to mature sustainability reporting.

Still, many believe that current sustainability reporting, even as it continues to evolve, is not adequate.<sup>[51]</sup> Some advocate for more companies to report and on more comparable sustainability indicia and with more consistency.<sup>[52]</sup> Others push for "integrated reporting" where traditional financial reporting is combined with what to date has been primarily confined to a company's social responsibility or sustainability report.<sup>[53]</sup>

At this juncture, the path forward on enhancing sustainability reporting is clearly still developing. Unlike financial disclosures, established and agreed upon sustainability metrics for reporting do not yet exist. In many countries outside of Europe and South Africa, sustainability reporting is still largely voluntary.<sup>[54]</sup> And as you know, there is much debate about climate change and how to address it.

Currently, disclosure of sustainability information under SEC rules is being addressed by a combination of our materiality-based approach to disclosure, guidance on certain issues,<sup>[55]</sup> and shareholder engagement on a range of sustainability topics, whether through direct dialogue with management or our Rule 14a-8 shareholder proposal process. Although we are seeing increased disclosure and engagement on sustainability matters, we are taking a more focused look at such disclosures, particularly related to climate change, in our annual filings reviews.

We understand, however, that there are those who do not believe that our materiality-based approach to sustainability disclosure goes far enough.<sup>[56]</sup> That is one of the reasons we included a discussion of the topic in our recent Regulation S-K Concept Release and solicited input from investors and others on

whether we should consider line-item disclosure on certain issues.<sup>[57]</sup> I encourage you to share your perspectives and give us your input on whether changes are needed, and if so, what specifically should be changed.<sup>[58]</sup>

There is, in short, more work and thinking to be done on sustainability reporting at the SEC, and by companies and investors, including on whether, when, where, and how to provide disclosure and what precisely should be provided. The issue has our attention. But disclosure alone will not achieve the ultimate results many investors and other constituents are seeking.

And so I urge investors who are seeking to alter corporate behavior on sustainability to continue to use your stewardship and influence to bring about the strategic, supply chain and business model changes you think need to be made by companies to address the underlying risks and priorities. Encourage and prod companies to acknowledge sustainability objectives that are in line with what makes the most sense for their businesses, demand that they describe what they are doing to achieve those objectives and how they are doing against your expectations. We at the SEC will continue to closely monitor developments and to engage with investors and others as we review and enhance our current rules to fulfill our obligation to investors to provide them with the information they need to make investment and voting decisions in today's world.

## Conclusion

It is obviously not possible in my time with you today to do justice to all of the important issues of mutual interest and priority on your conference agenda. What I can say in closing is that your engagement on behalf of investors and your promotion of good corporate governance around the world is very impressive and important to the SEC. I look forward to a continuing and active dialogue with you for the benefit of all investors and our global economic well-being. I wish you a very productive conference.

Thank you.

[1] See generally ICGN Global Governance Principles, available at <https://www.icgn.org/policy>.

[2] See *OECD Corporate Governance Factbook 2015* at pages 20-21 for a list of the national corporate governance codes and principles in 40 countries, available at <http://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf>. See also European Corporate Governance Codes Network, available at <http://www.ecgcn.org/Corporate-Governance-Reports.aspx> for links to the corporate governance codes and guidance in 28 European countries. See also Stephen Davis, Jon Lukomnik, David Pitt-Watson, *What They Do With Your Money: How the Financial System Fails Us and How to Fix It*, Yale University Press (2016), at pages 227-228.

[3] D. Gordon Smith, Matthew Wright, Marcus Kai Hintze, *Private Ordering with Shareholder Bylaws*, 80 *Fordham L. Rev.* 125, 140 (2011) (describing the limits of shareholder power under Delaware law).

[4] See Preamble of the Securities Act (stating it is "An Act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." 48 Stat. 74 (1933). In enacting the mandatory disclosure system under the Exchange Act, Congress sought to promote complete and accurate information in the secondary trading markets. See S. Rep. No. 73-1455, 73rd Cong., 2nd Sess., 1934 at 68 (stating "[o]ne of the prime concerns of the exchanges should be to make available to the public,

honest, complete, and correct information regarding the securities listed”) and H.R. Rep. No. 73-1383, 73rd Cong., 2nd Sess., 1934 at 11 (stating “[t]here cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy.”).

[5] See Item 401 of Regulation S-K.

[6] See Section 301 of the Sarbanes-Oxley Act; NYSE Manual Section 303A.07(a); NASDAQ Rule 5605(c)(2)(A)(i).

[7] See Section 407 of the Sarbanes-Oxley Act and Item 407(d)(5) of Regulation S-K.

[8] See Item 402 of Regulation S-K; SEC Staff Report on Review of Disclosure Requirements in Regulation S-K, at 54, *available at* <https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf> (discussing the history of executive compensation disclosure requirements).

[9] See Section 956 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

[10] Joint Agency Proposed Rule: Incentive-based Compensation Arrangements, Release No. 34-77776 (May 6, 2016), *available at* <https://www.sec.gov/rules/proposed/2016/34-77776.pdf>.

[11] See, e.g., Arthur R. Pinto, *The European Union’s Shareholder Voting Rights Directive from an American Perspective: Some Comparisons and Observations*, 32 Fordham Int’l L.J. 587, 612 (2009) (“In Europe, shareholders are generally considered to have more power to act within the shareholder meeting compared to U.S. shareholders and this power relates to the shareholder ability to add to the agenda.”); Sofie Cools, *The Real Difference between the US and Continental Europe: Distribution of Powers*, 30 Del. J. Corp. L. 697, 703 (2005) (“[Comparing the U.S. to Continental Europe underscores] just how few legal powers shareholders have in the United States and how fundamental the distribution of legal powers is in shaping the character of corporate life.”)

[12] See, e.g., Sanford M. Jacoby, *Convergence by Design: The Case of CalPERS in Japan*, 55 Am. J. Comp. L. 239 (2007), at n. 15.

[13] See Mary Jo White, Chair, U.S. Securities and Exchange Commission, *A Few Observations on Shareholders in 2015* (Mar. 19, 2015), *available at* <https://www.sec.gov/news/speech/observations-on-shareholders-2015.html>.

[14] See, e.g., Shareholders set to file record number of ESG-related proposals in 2015 (Mar. 12, 2015), *available at* <http://www.irmagazine.com/articles/sustainability/20660/shareholders-set-file-record-number-esg-related-proposals-2015/>; Proxy Preview, Record Number of Social and Environmental Shareholder Resolutions Filed in 2015 (Mar. 5, 2015), *available at* <http://www.proxypreview.org/wp-content/uploads/2015/03/release-record-number-of-social-and-environmental-shareholder-resolutions-filed-in-2015.pdf>; and Proxy Access Proposals, posted by Avrohom J. Kess, Simpson Thacher & Bartlett LLP (Aug. 10, 2015), *available at* <https://corpgov.law.harvard.edu/2015/08/10/proxy-access-proposals/>.

[15] See, e.g., Shareholder Rights Project, *available at* <http://www.srp.law.harvard.edu/> (describing the major results of a project to assist institutional investors in moving S&P 500 and Fortune 500 companies towards annual elections).

[16] See ISS 2016 Board Practices Study, posted by Carol Bowie, Institutional Shareholder Services (Jun. 1, 2016), *available at* <https://corpgov.law.harvard.edu/2016/06/01/iss-2016-board-practices-study/>.



[17] See, e.g., Wall Street Journal, “Time to ReThink ‘One Share, One Vote’” (Jun. 23, 2016), [available at http://www.wsj.com/articles/time-to-rethink-one-share-one-vote-1466722733](http://www.wsj.com/articles/time-to-rethink-one-share-one-vote-1466722733); Sullivan & Cromwell LLP, Proxy Access 2016: Market Trends and Shareholder Proposal Developments (Nov. 10, 2015), [available at https://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_Proxy\\_Access\\_2016\\_Market\\_Trends\\_and\\_Shareholder\\_Proposal\\_Developments.pdf](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Proxy_Access_2016_Market_Trends_and_Shareholder_Proposal_Developments.pdf).

[18] See Section 951 of the Dodd-Frank Act. See also Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Release No. 33-9178 (Jan. 25, 2011), [available at https://www.sec.gov/rules/final/2011/33-9178.pdf](https://www.sec.gov/rules/final/2011/33-9178.pdf).

[19] See, e.g., *Business Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990).

[20] Sustainability and Reporting Trends in 2025 – Preparing for the Future – GRI’s Reporting 2025 Project: First Analysis Paper, May 2015, [available at https://www.globalreporting.org/resourcelibrary/Sustainability-and-Reporting-Trends-in-2025-1.pdf](https://www.globalreporting.org/resourcelibrary/Sustainability-and-Reporting-Trends-in-2025-1.pdf).

[21] See *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). See also SEC Staff Accounting Bulletin No. 99 – Materiality, Release No. SAB 99 (Aug. 12, 1999), [available at https://www.sec.gov/interps/account/sab99.htm](https://www.sec.gov/interps/account/sab99.htm) (SAB 99).

[22] As the Supreme Court has noted, determinations of materiality require “delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him....” *TSC Industries*, 426 U.S. at 450. See also SAB 99.

[23] Business and Financial Disclosure Required by Regulation S-K, Release No. 33-10064 (Apr. 13, 2016) (“Regulation S-K Concept Release”), [available at https://www.sec.gov/rules/concept/2016/33-10064.pdf](https://www.sec.gov/rules/concept/2016/33-10064.pdf).

[24] See, e.g., *Id.*; Request for Comment on the Effectiveness of Financial Disclosures about Entities Other than the Registrant, Release No. 33-9929 (Sep. 25, 2015), [available at https://www.sec.gov/rules/other/2015/33-9929.pdf](https://www.sec.gov/rules/other/2015/33-9929.pdf); Modernization of Property Disclosures for Mining Registrants, Release No. 33-10098 (Jun. 16, 2016), [available at https://www.sec.gov/rules/proposed/2016/33-10098.pdf](https://www.sec.gov/rules/proposed/2016/33-10098.pdf).

[25] See, e.g., Mary Jo White, Chair, U.S. Securities and Exchange Commission, *The Pursuit of Gender Parity in the American Boardroom*, Keynote Remarks at the Women’s Forum of New York Breakfast of Corporate Champions (Nov. 19, 2015), [available at https://www.sec.gov/news/speech/gender-parity-in-the-american-boardroom.html](https://www.sec.gov/news/speech/gender-parity-in-the-american-boardroom.html); Mary Jo White, Chair, U.S. Securities and Exchange Commission, *A Conversation with Chair Mary Jo White*, Keynote Session, 43<sup>rd</sup> Annual Securities Regulation Institute (Jan. 26, 2016), [available at https://www.sec.gov/news/speech/securities-regulation-institute-keynote-white.html](https://www.sec.gov/news/speech/securities-regulation-institute-keynote-white.html).

[26] See, e.g., McKinsey & Co., *Diversity Matters* (Apr. 2015), [available at http://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters](http://www.mckinsey.com/business-functions/organization/our-insights/why-diversity-matters); Deborah L. Rhode and Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make*, 39 Del. J. Corp. L., 2 (2014); Report of the National Association of Corporate Directors Blue Ribbon Commission, *The Diverse Board: Moving From Interest to Action* (National Association of Corporate Directors, 2012).

[27] See, e.g., Women’s Forum of New York, [available at http://womensforumny.org/index.cfm/corporate-board-initiative/](http://womensforumny.org/index.cfm/corporate-board-initiative/); The Thirty Percent Coalition, [available at http://www.30percentcoalition.org/resources/](http://www.30percentcoalition.org/resources/); and Catalyst, [available at http://www.catalyst.org/catalyst-corporate-board-resource](http://www.catalyst.org/catalyst-corporate-board-resource).

- [28] 2015 Spencer Stuart Board Index, *available at* [https://www.spencerstuart.com/~media/pdf%20files/research%20and%20insight%20pdfs/ssbi-2015\\_110215-web.pdf](https://www.spencerstuart.com/~media/pdf%20files/research%20and%20insight%20pdfs/ssbi-2015_110215-web.pdf).
- [29] See Catalyst. 2009 Catalyst Census: Fortune 500 Women Board Directors, *available at* <http://www.catalyst.org/knowledge/2009-catalyst-census-fortune-500-women-board-directors-0>.
- [30] See Another Study Shows Little Progress Getting Women on Boards, Wall Street Journal (Jun. 14, 2016), *available at* <http://www.wsj.com/articles/another-study-shows-little-progress-getting-women-on-boards-1465876862>.
- [31] See Catalyst. 2015 *Catalyst Census: Women and Men Board Directors*. New York: Catalyst, 2016, *available at* <http://www.catalyst.org/knowledge/2015-catalyst-census-women-and-men-board-directors>.
- [32] See U.S. Government Accountability Office, Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements (Dec. 2015), *available at* <http://www.gao.gov/assets/680/674008.pdf>.
- [33] See Business Leaders Add Boardroom Diversity to Best Practices List (Apr. 20, 2016), *available at* <http://businessroundtable.org/media/news-releases/business-leaders-add-boardroom-diversity-best-practices-list>.
- [34] Proxy Disclosure Enhancements, Release No. 33-9089 (Dec. 2009), *available at* <http://www.sec.gov/rules/final/2009/33-9089.pdf>.
- [35] See *supra* n.32.
- [36] See, e.g., Petition for Amendment of Proxy Rule Regarding Board Nominee Disclosure—Chart/Matrix Approach, (Mar. 31, 2015), *available at* <https://www.sec.gov/rules/petitions/2015/petn4-682.pdf>.
- [37] See Acceptance From Foreign Private Issuers of Financial Statements Prepared in Accordance With International Financial Reporting Standards Without Reconciliation to U.S. GAAP, Release No. 33-8879 (Dec. 21, 2007), *available at* <https://www.sec.gov/rules/final/2007/33-8879.pdf>. Foreign private issuers also may file financial statements using another comprehensive body of accounting, but must provide a reconciliation to U.S. GAAP. See Item 17(c) of Form 20-F.
- [38] Regulation G (17 CFR 244.200 et seq.) and Item 10(e) of Regulation S-K (17 CFR 229.10(e)).
- [39] See, e.g., Mary Jo White, Chair, U.S. Securities and Exchange Commission, *Maintaining High-Quality, Reliable Financial Reporting: A Shared and Weighty Responsibility* (Dec. 9, 2015), *available at* <https://www.sec.gov/news/speech/keynote-2015-aicpa-white.html>; James V. Schnurr, Chief Accountant, U.S. Securities and Exchange Commission, *Remarks before the 12<sup>th</sup> Annual Life Sciences Accounting and Reporting Congress* (Mar. 22, 2016), *available at* <https://www.sec.gov/news/speech/schnurr-remarks-12th-life-sciences-accounting-congress.html>; Wesley R. Bricker, Deputy Chief Accountant, U.S. Securities and Exchange Commission, *Remarks before the 2016 Baruch College Financial Reporting Conference* (May 5, 2016), *available at* <https://www.sec.gov/news/speech/speech-bricker-05-05-16.html>; and Mark Kronforst, Chief Accountant, Division of Corporate Finance, U.S. Securities and Exchange Commission, *Remarks at 36<sup>th</sup> Annual Ray Garrett Jr. Corporate and Securities Law Institute* (Apr. 28, 2016).
- [40] See Division of Corporation Finance Compliance and Disclosure Interpretations on Non-GAAP Financial Measures, *available at* <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm>.

[41] See Mary Jo White, Chair, U.S. Securities and Exchange Commission, *Maintaining High-Quality, Reliable Financial Reporting: A Shared and Weighty Responsibility* (Dec. 9, 2015), available at <https://www.sec.gov/news/speech/keynote-2015-aicpa-white.html>.

[42] In addition to the information required to be disclosed, Securities Act Rule 408 and Exchange Act Rule 12b-20 require registrants to disclose such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading. See 17 CFR 230.408 and 240.12b-20. See also, e.g., Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 8, 2010), available at <https://www.sec.gov/rules/interp/2010/33-9106.pdf>.

[43] See PricewaterhouseCoopers LLP, Sustainability goes mainstream: Insights into investor views, May 2014, available at <https://www.pwc.com/us/en/governance-insights-center/publications/sustainability-goes-mainstream-investor-views.html>. See also, e.g., World Federation of Exchanges, Exchange Guidance and Recommendation – October 2015, (“WFE Guidance”), available at <http://www.world-exchanges.org/home/index.php/news/world-exchange-news/world-exchanges-agree-enhanced-sustainability-guidance>.

[44] See, e.g., WFE Guidance.

[45] See e.g., The Conference Board, Inc., Sustainability Practices 2015: Key Findings, available at <http://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-corporate-governance/us-aers-ccg-sustainability-practices-report-the-conference-board-050815.pdf>.

[46] See Press Release, Governance & Accountability Institute, Seventy-Five Percent (75%) of the S&P 500 Index Published Corporate Sustainability Reports in 2014, available at <https://globenewswire.com/news-release/2015/06/10/743618/0/en/FLASH-REPORT-Seventy-Five-Percent-75-of-the-S-P-500-Index-Published-Corporate-Sustainability-Reports-in-2014.html>.

[47] See KPMG, Currents of Change: The KPMG Survey of Corporate Responsibility Reporting 2015 (Nov. 24, 2015), available at <https://www.kpmg.com/FR/fr/IssuesAndInsights/ArticlesPublications/Documents/Survey-of-CR-Reporting-112015.PDF>.

[48] See Mark Carney, Breaking the Tragedy of the Horizon – Climate Change and Financial Stability, speech (Sept. 29, 2015) (noting that there are nearly 400 initiatives to provide information), available at <http://www.bankofengland.co.uk/publications/Pages/speeches/2015/844.aspx>.

[49] For example, according to an industry study, about seventy percent of corporate responsibility reporting in the Americas uses the Global Reporting Initiative reporting framework. KPMG LLP, *Currents of Change: The KPMG Survey of Corporate Responsibility Reporting 2015* (Nov. 24, 2015), available at <https://assets.kpmg.com/content/dam/kpmg/pdf/2016/02/kpmg-international-survey-of-corporate-responsibility-reporting-2015.pdf>.

[50] See <http://www.sasb.org/sasb/vision-mission/>.

[51] See, e.g., Ernst & Young LLP, *Tomorrow's Investment Rules 2.0*, 2015 (“Tomorrow’s Investment Rules 2015”), at 19, available at [http://www.ey.com/Publication/vwLUAssets/EY-tomorrows-investment-rules-2/\\$FILE/EY-tomorrows-investment-rules-2.0.pdf](http://www.ey.com/Publication/vwLUAssets/EY-tomorrows-investment-rules-2/$FILE/EY-tomorrows-investment-rules-2.0.pdf) (stating that, in a survey of more than 200 institutional investors around the world, “...almost two-thirds of respondents say companies do not adequately disclose information about ESG risks, and nearly 40% call for companies to do so more fully in the future.”).

[52] See, e.g., Michelle Edkins, *Levelling the Playing Field on Sustainability Risk*, available at <https://www.blackrock.com/corporate/en-us/literature/publication/levelling-the-playing-field-on-sustainability-risk.pdf>.

[53] See International Integrated Reporting Council, *The International IR Framework*, Dec. 2013, available at <http://integratedreporting.org/wp-content/uploads/2015/03/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf>; Robert G. Eccles and George Serafeim, *Corporate and Integrated Reporting: A Functional Perspective* (Harvard Business School, Working Paper 14-094 May 5, 2014).

[54] See, e.g., The Hauser Center for Nonprofit Organizations; Initiative for Responsible Investment, "Current Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges" (2012), available at <http://hausercenter.org/iri/wp-content/uploads/2011/08/CSR-Disclosures-Update-6-27-13.pdf>.

[55] See Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 2, 2010), available at <https://www.sec.gov/rules/interp/2010/33-9106.pdf> and Division of Corporation Finance, Disclosure Guidance: Topic No. 2 Cybersecurity (Oct. 13, 2011), available at <https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm>.

[56] See, e.g., letters from Carbon Tracker Initiative (Feb. 13, 2015), Allianz Global Investors (Aug. 13, 2015) and Union of Concerned Scientists (May 5, 2015), available at <https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness.shtml>.

[57] See Regulation S-K Concept Release, at Section IV.F.3.

[58] Comments on the Regulation S-K Concept Release can be submitted online at: <https://www.sec.gov/cgi-bin/ruling-comments>.

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