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Memo

To: Vanessa Countryman, Secretary

From: Stephen M. Bainbridge

CC: n/a

Date: 6/8/22

Re: Comments on S7-10-22: The Enhancement and Standardization of Climate-Related Disclosures for Investors

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I signed the letter of 22 law professors opposing the SEC's pending climate change disclosure regime proposal. Now there is a new letter from 30 law professors supporting the proposal, whose primary authors are Jill Fisch (Penn), George Georgiev (Emory), Donna Nagy (Indiana), and Cynthia Williams (Osgoode Hall). I do not propose a point by point reply to their letter, but I do want to exercise a point of personal privilege and rise in objection to the way the Letter of 30 uses ***my*** work.

Back in 2010, the SEC issued interpretative guidance for disclosure of business or legal developments relating to climate change. I wrote a blog post on January 28, 2010, in which I concluded that the guidance didn't change very much and that some of the criticism directed at the guidance was overstated.

The Letter of 30 quotes from that post:

> A contemporaneous analysis of the Commission's 2010 guidance and of critics' reactions published by one prominent corporate law scholar concluded that "the requirement that firms discuss climate change is not new," that "[a]ffected corporations already know that they need to provide climate change-related disclosure," that "[c]orporate lawyers already know how to write such disclosures," and that "claims that these disclosures will be 'silly' or will produce a 'massive subsidy to charlatans' are overstated."[55] These observations from 2010 are equally valid with respect to the Commission's 2022 Proposal.
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> [55] See Stephen M. Bainbridge, The SEC's New Climate Control Disclosure Guidance: "Nonsense on Stilts"?, PROFESSORBAINBRIDGE.COM (Jan. 28, 2010) (summarizing and assessing commentary on the 2010 climate guidance, and noting further that the [principles-based] guidance might muddy the water so climate disclosures would become less rather than more informative for investors), https://www.professorbainbridge.com/professorbainbridgecom/2010/01/climate-control-disclosure.html (last visited: May 29, 2022).

I stand by the 2010 blog post ***and*** the Letter of 22. Inconsistent? I don't think so. Rather, with all due deference, I completely reject the claim that my 2010 observations are pertinent to the 2022 proposal.

1. The Times are Different

In 2010, despite a party-line split on the guidance, the Democrat majority on the SEC was careful to avoid staking out a political position and to at least appear to be keeping politics out of the process. As the Letter of 22 points out, the current Democrat majority on the SEC has jumped into the politics of climate change and come down on one side:

Climate change is a politically-charged issue. The Proposal would compel corporations and officials to regularly speak on these issues, explaining the views and opinions of their boards and officers.

Indeed, the proposal "would require companies to disclose extensive climate-related risks that have little to do with firms' current financial outlook but serve an ulterior political purpose." The SEC is mandating the new disclosure regime in response to demands from politically powerful institutional investors with a specific progressive political agenda on climate change:

> Another subgroup of investors the Proposal unfairly favors are those who, unlike traditional investors, are not focused on economic gain from their investments. For instance, the boards of public employee pension funds, such as CalPERS, include government appointees and elected officials, all of whom respond to politics, including the politics of climate change. Less overtly, the Proposal benefits fund managers promoting virtues other than investor protection, such as the pension funds of the AFL-CIO, which advocate shareholder proposals pushing a labor agenda.

The SEC once prided itself on being one of the most apolitical agencies in the federal government. The 2022 proposal reflects the increasing role political considerations are playing in the SEC's rule making procedures. Not surprisingly, this has generated pushback from Congress, such as the "letters from 19 Senators and 40 House Members challenging the SEC's power and urging it to withdraw the Proposal."

Context matters. Given the increasingly polarized political debate over climate change, the Letter of 22 counseled that the SEC should defer to Congress on a matter of such "vast economic and political significance." Indeed, the Letter of 22 suggests that it would be unconstitutional for the SEC to do otherwise.

2. The 2010 Guidance was Modest and Built on Longstanding Principles

Speaking of "vast economic and political significance," there is an enormous difference between the 2010 Guidance and the 2022 proposal. The 2010 Guidance required only 29 pages. Most of that was background and context. The substantive guidance consisted of just 6 pages of principles-based recommendations. (FWIW, I note in passing that my views on principles-based regulation have evolved since 2010. I'm much more favorably inclined towards that regulatory mode these days, but that it a broad question for another day.)

The 2010 Guidance created no new disclosure requirements. Rather, it provided guidance as to how climate change disclosures might need to be worked into the existing framework. The SEC's 2022 Proposal admits as much:

> The guidance did not create new legal requirements nor modify existing ones. Instead, it highlighted climate-related topics that registrants should consider in seeking to meet their

> existing disclosure obligations (e.g. the impact of legislation, regulation, international accords, indirect consequences, physical risks, etc.) and in what section they should be discussed.

Second, the 2010 Guidance actually was concerned at least as much with the potential adverse impact of climate change regulation as it was with climate change itself. The SEC warned, for example, that "significant developments in federal and state legislation and regulation regarding climate change ... may trigger disclosure obligations." This was self-evidently true. Companies had long included potential regulatory change as a risk factor, to cite but one example. Similarly, the SEC suggested that international accords or treaties might materially impact corporate profitability. In sum, out of the four issues the SEC saw as raising potential disclosure obligations only one related to the "physical effects of climate change."

Third, the 2010 Guidance consistently emphasized the concept of materiality. Climate change issues only had to be disclosed if they met the longstanding definition of materiality.

Fourth, there was no suggestion that every company would have to disclose any particular facts. The 2010 Guidance noted that "regulatory, legislative and other developments" might be significant for "some companies." Likewise, the SEC noted that "some companies might suffer financially" is certain laws were passed. In sum, the phrase "some companies" and "some registrants" appear four times in the 2010 Guidance. In contrast, the phrases "all companies" or "all registrants" do not appear in the guidance.

Finally, the issue of whether to provide disclosure and the issue of how to present it was left to the individual issuer. A typical formulation in the 2010 Guidance provided, for example, that:

> Depending on the nature of a registrant's business and its sensitivity to public opinion, a registrant may have to consider whether the public's perception of any publicly available data relating to its greenhouse gas emissions could expose it to potential adverse consequences to its business operations or financial condition resulting from reputational damage.

There is no mandated disclosure. There is not even a mandate to consider disclosure. The necessity of disclosure is recognized to depend on company-specific considerations.

In sum, as my blog post from 2010 concluded, the complaints about the 2010 guidance were largely unwarranted. There was no radical change being effected. To be sure, the number of companies including climate change disclosures in their SEC documents rose after the 2010 Guidance was issued. According to a Gibson Dunn analysis, however, the guidance overall had little longterm impact:

> ... the 2010 Climate Change Guidance was not a focus of SEC staff comments in the years that followed. According to a 2018 Government Accountability Office report (the "GAO Report"), the SEC staff issued a limited number of climate change comments to public companies and often without citing the 2010 Climate Change Guidance. For example, the GAO Report noted that based on a review of SEC filings by companies in five industries particularly "affected by climate change-related matters" (oil and gas, mining, insurance, electric and gas utilities, and food and beverage), the SEC staff issued only 14 comment letters relating to climate-related disclosures to 14 companies, out of the over 41,000 comment letters issued from January 1, 2014, through August 11, 2017.

My 2010 self would not have been surprised by that outcome. I anticipated that the negative reaction to the guidance was much ado about little.

3. The 2022 Proposal is a Vast Change that Radically Departs from Traditional Disclosure Practices

The 2022 Proposal is completely different from the 2010 Guidance. The core document is a whopping 490 pages long with 1068 footnotes.

Unlike the 2010 Guidance, the 2022 Proposal creates an entirely new disclosure regime. According to the SEC's fact sheet, that new regime requires registrants to provide disclosure in 14 categories and sub-categories. The Proposal itself reports that:

> We are proposing to add 17 CFR 210.14-01 and 14- 02 (Article 14 of Regulation S-X) and 17 CFR 17 CFR 229.1500 through 1506 (subpart 1500 of Regulation S-K) under the Securities Act1 and the Exchange Act,2 and amend 17 CFR 239.11 (Form S-1), 17 CFR 239.18 (Form S-11), 17 CFR 239.25 (Form S-4), and 17 CFR 239.34 (Form F-4) under the Securities Act, and 17 CFR 249.210 (Form 10), 17 CFR 249.220f (Form 20-F), 17 CFR 249.306 (Form 6-K), 17 CFR 249.308a (Form 10-Q), and 17 CFR 249.310 (Form 10-K) under the Exchange Act.

Unlike the 2010 Guidance, the 2022 Proposal mandates disclosure. For example, it proposes requiring "all registrants to disclose their Scopes 1 and 2 emissions." In total, the words require, requiring, requirement appear on 386 pages of the proposal. The word mandatory appears on 45.

In fact, the 2022 Proposal itself recognizes that the 2010 guidance is extremely modest compared to the current proposal. At pages 306-307, for example, the Proposal states:

A number of the Commission's existing disclosure requirements may elicit disclosure about climate-related risks; however, many of these requirements are principles-based in nature and thus the nature and extent of the information provided depends to an extent on the judgmentof management. As discussed above, in 2010, the Commission published interpretive guidance on existing disclosure requirements as they pertain to business or legal developments related to climate change. The 2010 Guidance emphasized that if climate-related factors have a material impact on a firm's financial condition, disclosure may be required under current Item 101 (Description of Business), Item 103 (Legal Proceedings), Item 105 (Risk Factors), or Item 303 (MD&A) of Regulation S-K.

Conclusion

In sum, the 2010 Guidance and the 2022 Proposal are very different beasts. the 2010 Guidance at least arguably was no big deal. The 2022 Proposal is unarguably a very big deal.

I recognize and appreciate that the Letter of 30 took some pains to note that I didn't think highly of the 2010 Guidance. I also recognize and appreciate that the Letter of 30 deploys my analysis in a section of their letter making a historical argument about earlier environmental and climate-related disclosure rather than in a section dealing specifically with the 2022 Proposal.

As such, I would have let the Letter of 30 slide but for the statement that:

> These observations from 2010 are equally valid with respect to the Commission's 2022 Proposal.

It is for that statement to which I take umbrage to the Letter of 30. I therefore felt it necessary to object to any suggestion that my 2010 analysis is in any way pertinent to the 2022 Proposal.