June 16, 2022

The Honorable Gary Gensler, Chair
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Faith Stevelman
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RE: File Number S7-10-22, in support of the SEC's proposed governance disclosures on corporate climate risk

Dear Chair Gensler:

Having nearly three decades of experience as a scholar and law professor in the corporate and securities law field, I write in support of your agency's rulemaking on climate-related corporate disclosure.

In particular, I address these remarks to the importance of the proposed *governance* disclosures pertaining to boards, board committees and/or corporate managers. For the reasons enumerated below, I support making the disclosures mandatory, and in the more sweeping form proposed. While my remarks are responsive to the SEC's queries enumerated as #34 - #41, I frame my comments below in general terms.

Some context is required to appreciate the importance and propriety of the SEC's proposed governance disclosures. Most significantly, they are a vital component of a maximally efficient/"least restrictive means" approach to promoting market and investor protection in the climate risk area. As the SEC is aware, the American legal tradition largely eschews positive federal (Congressional) corporate governance requirements. In name of efficiency, state corporate law also eschews almost all mandatory, substantive legal requirements for boards and CEOs, notwithstanding that state law confers enormous authority on directors and CEOs to advance the interests of investors and the firm itself.

Under the business judgment rule, furthermore, almost all board and managerial decisions (including decisions *not* to act) are immune to shareholder fiduciary duty lawsuits, absent a showing of bad faith. Even so-called "Caremark" director risk-management and oversight duties are largely hortatory—unenforceable through investor litigation. With respect to the duty of care, charter exculpation and corporate indemnification have insulated boards and

CEOs from accountability via shareholder lawsuits. Hence, *neither statutory, nor fiduciary lawsuits by shareholders are a reliable means of ensuring that directors and/or CEOs are appropriately managing the risks to their firms and the public markets posed by climate change*.

As a recent law review article by Boston University law professor Madison Condon demonstrates, there are precise reasons to believe that material climate related financial risks are accumulating in the real, Main street economy and the Wall street financial economy. (See Madison Condon, *Market Myopia's Climate Bubble*, 2022 Utah Law Review 63 (2021).) As Professor Condon observes, absent the therapeutic of greater corporate climate transparency, we are running an insupportable risk of inefficient capital allocation and mounting systemic financial risk. The SEC's proposed governance disclosures are an important ingredient in mediating these risks—part of ensuring smart corporate and capital market adaptations and fending off a belated, catastrophic, sudden market correction.

Furthermore, the proposed climate governance disclosures reflect the broadened risk management and oversight mandate for boards and CEOs that is underway already in law and practice. Both the obvious, growing interest of investors in obtaining ESG data and the impact of social media on corporate goodwill demonstrate the perils of reckless or ineffectual senior-level corporate stewardship of environmental impacts. Heightened investor expectations of board committees in financial reporting oversight and overall risk management comport with the SEC's proposed climate change governance disclosures. With a co-author I recently published a law review article analyzing and supporting this expanded governance mandate. (See Faith Stevelman and Sarah C. Haan, *Boards in Information Governance*, 23 U. Penn. J. Bus. L. 179 (2020).)

Of course, investors cannot properly evaluate the financial returns to their invested capital without data to evaluate the risks their capital is exposed to, including governance risks and practices. Qualitative corporate governance disclosures are a critical component of the new climate risk disclosures proposed by the SEC in the public interest and for the protection of investors.

Respectfully,

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Faith Stevelman