

Public Officials Weigh in on SEC Regulation S-K Concept Release

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Current and former holders of political office are among the many who wrote in to the SEC with comments on its Regulation S-K concept release. Former New York City Mayor Bloomberg, current chair of the Sustainability Accountability Standards Board (SASB) weighed in, favoring disclosure about sustainability and climate risks, particularly sector-specific standards.

Three U.S. senators (Senators Whitehouse, Markey and Boxer) urged the Commission to provide investors with more information about the risks associated with climate change. Another letter signed by six Congressmen (Cartwright, Lieu, Lowenthal, Pocan, Ellison, Tonko) echoed this view. In addition, thirteen U.S. senators, led by Senator Franken, want the SEC to require large public companies to include country-by-country reporting of certain financial, tax and operational data in their annual reports, primarily to provide enhanced tax disclosure that would make more clear the amount of corporate profits residing in other countries.

The North Carolina State Treasurer asked the SEC to consider creating an independent group to periodically review the scope, content and format of public disclosure, in response to a question the SEC raised in the concept release about whether there should be automatic sunset provisions for some disclosure requirements. The letter also focused on the need for standardized formatting so that investors can compare information across thousands of companies, and more information on board composition that would include a chart showing nominees' gender, race and ethnicity along with skills and experiences.

Other letters from public officials tended to focus primarily on sustainability, or environmental, social and governance (ESG) disclosure. The New York State Comptroller argued that recent guidance from the Department of Labor stated that plan fiduciaries subject to ERISA should consider ESG issues since they "may have a direct relationship to the economic value" of the investment, which indicates that those factors are not simply policy considerations but economic ones.

The New York City's Comptroller office defined sustainability broadly to include multiple risks related to the environment, human capital and rights and political activity, noting that they have long encouraged their portfolio companies to use the Global Reporting Initiative (GRI) framework. The desire for the SEC to regulate and require climate-related disclosure was echoed by the Insurance Commissioner of California and the State Treasurer of Connecticut.

Three former Treasury Secretaries (Paulson, Robin and Schultz), as active members of the Risky Business Project (RBP), endorsed the SEC enforcing mandatory disclosure of the material effects of climate change, recognizing that meaningful disclosure will vary by industry since they would manifest itself differently between, for example, agricultural companies compared to real estate companies.

The attorney generals of Colorado and Oklahoma disagree on requiring any additional disclosure of ESG information, arguing that it would suggest that the SEC favors disclosure of policy-driven issues instead of being focused on traditional materiality standards.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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