SOME LIABILITY CONSIDERATIONS RELATING TO ESG DISCLOSURES

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EXECUTIVE SUMMARY

This is a general discussion of certain U.S. liability considerations associated with environmental, social, and governance ("ESG") reporting by public companies.

The federal securities laws are a principal source of potential liability relating to ESG disclosures. Because "[s]ilence, absent a duty to disclose, is not misleading," Basic v. Levinson, 485 U.S. 224, 239 n.17 (1988), companies sometimes can avoid liability under these laws by declining to speak at all on a particular subject. Additionally, companies generally do not face liability for immaterial statements or omissions, and the application of the materiality concept to ESG issues is often uncertain. These factors, coupled with the potentially severe consequences of acknowledging that a company is experiencing ESG-related difficulties, may provide strong incentives against meaningful ESG disclosure.

But there may be countervailing considerations. Federal and state laws impose a limited number of specific ESG disclosure requirements on issuers. In addition, a number of general Securities and Exchange Commission ("SEC") disclosure requirements, such as Item 303 in the SEC's Regulation S-K, may require meaningful ESG disclosures in some contexts. Liability under Item 303 is far from absolute, however. The Supreme Court will soon resolve a division among the courts as to whether Item 303 creates any privately enforceable duty to disclose. And management effectively has significant discretion under Item 303 regarding whether disclosure must be made.

The securities laws generally also require that, when companies do elect to speak on a subject, they must provide enough information to avoid misleading investors. This rule is not limited to SEC filings. It often extends to statements in less formal contexts, such as press releases and perhaps even sustainability reports and advertising. But most courts recognize an important exception that likely eliminates liability for many vague corporate "green" slogans. They hold that so-called soft "puffing" statements are not actionable under the securities laws. Nonetheless, the prohibition against half-truths—along with the statutory and common-law safe harbors applicable to forward-looking statements that are accompanied by meaningful cautionary language—may sometimes provide companies the opportunity to reduce their liability exposure by making more detailed and substantive ESG disclosures in lieu of boilerplate.

Paradigmatic "fraud on the market" class actions predicated on ESG misrepresentations or omissions often are likely to fail due to plaintiffs' inability to demonstrate loss causation or cognizable damages. But due in part to the increasing prevalence of socially conscious investors and activists, more attempts may be made to use less conventional remedies to enforce disclosure requirements. These include actions for injunctive relief and state law "blue sky" remedies. Further, more fulsome ESG disclosure occasionally may reduce the likelihood of litigation under the proxy rules, which allow companies to exclude shareholder proxy proposals that have been substantially implemented.

ESG disclosures also may result in liability under theories other than the securities laws. False, misleading, or inadequate ESG disclosures conceivably may give rise to claims under unfair and deceptive acts and practices (“UDAP”) statutes and other similar causes of action. The plaintiffs in such actions may include consumers and competitors. Recently, some shareholders dissatisfied with the extent of a company's ESG disclosures have filed lawsuits demanding books and records pursuant to state corporation law. As with proxy proposals, companies sometimes may be able to fend off some such lawsuits more easily to the extent they have already made meaningful ESG disclosures. Finally, while state corporate law does not include specific ESG disclosure requirements, it may provide additional avenues, including breach of fiduciary lawsuits and demands on the board of directors, for activist shareholders desiring additional disclosures.

BACKGROUND

There is no one definition of ESG. A useful description of ESG is that it is “a generic term used in capital markets and used by investors to evaluate corporate behaviour and to determine the future financial performance of companies. ESG factors are a subset of non-financial performance indicators which include sustainable, ethical and corporate governance issues such as managing the company's carbon footprint and ensuring there are systems in place to ensure accountability.”[1] As this and other definitions suggest, ESG reporting potentially covers a wide array of topics.

Despite the diversity of ESG subjects, several generalizations may be useful for present purposes.

1. ESG issues tend to be nonfinancial, forward-looking, and focused on the medium- to long-term future.

2. While more extensive ESG information is required by European and other authorities, as further discussed below, with limited exceptions, the SEC does not specifically mandate particular ESG disclosures. Various nongovernmental organizations, however, have sought to provide guidance regarding appropriate ESG disclosures.

3. Although ESG issues often do not have an obvious, quantifiable effect on a company's financial statements, many consumers and investors may consider them important. Many consumers may prefer purchasing from companies that they believe are socially and environmentally conscious, and in some cases sales and profits could be significantly affected when there are revelations that companies' actual ESG practices are not as claimed. <u>See generally</u> Donald S. Siegel & Donald F. Vitaliano, <u>An Empirical Analysis of the Strategic Use of Corporate Social Responsibility</u>, 16 J. Econ. & Mgmt. Strategy 773 (2007). Further, an increasing number of socially conscious or socially responsible investors require that companies in which they invest meet certain social responsibility criteria as determined by stock market indices (such as the Dow Jones Sustainability Index), proprietary metrics, or otherwise. <u>See generally</u> Michael S. Knoll, <u>Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investment</u>, 57 Bus. Law. 681 (2002). Many such investors must divest holdings that do not meet such requirements. ESG issues also are significant, albeit less so, to other types of investors, and some have suggested that more detailed ESG reporting may have a positive impact on stock price. <u>See generally</u> Douglas Y. Park, <u>Investor Interest in Nonfinancial Information: What Lawyers Need to Know</u>, January 2015 Business Law Today 1. It may be that this is a far different situation from

the comparatively miniscule investor interest in ESG disclosure issues in the mid-1970s, when the SEC and federal courts gave significant attention to environmental disclosures. See, e.g. Cynthia A. Williams, The Securities and Exchange Commission and Corporate Social Transparency, 112 Harv. L. Rev. 1197, 1262–63, 1267–68, 1287–89 (1999).

4. Many activists (including individuals and nonprofit organizations) are interested in influencing corporate policies relating to ESG issues, even though they may have no relationship with the company as customers or significant investors. See, e.g., Harvard Climate Justice Coal. v. President & Fellows of Harvard Coll., No. 15-P-905, 2016 WL 5818595 (Mass. App. Ct. Oct. 6, 2016) (dismissing for lack of standing lawsuit by unincorporated association of students demanding that university's endowment divest from fossil fuel companies). Some such activists may purchase a small number of shares to endow them with standing under corporate law to litigate ESG issues. See, e.g., Adam J. Sulkowski, Ultra Vires Statutes: Alive, Kicking, and a Means of Circumventing the Scalia Standing Gauntlet in Environmental Litigation, 24 J. Envtl. L. & Litig. 75 (2009); Moin A. Yahya, The Law & Economics of "Sue and Dump": Should Plaintiffs' Attorneys Be Prohibited from Trading the Stock of Companies they Sue?, 39 Suffolk L. Rev. 425 (2006); Bruce H. Kobayashi & Larry E. Ribstein, Outsider Trading as an Incentive Device, 40 University of California, Davis L. Rev. 21, 51–66 (2006). [2]

5. The ESG disclosures provided by some companies—including in stand-alone "sustainability reports"—tend to be vague and superficial, and typically appear outside formal SEC filings. Such limited information is often referred to pejoratively as "greenwashing."

DISCUSSION

ESG reporting implicates liability considerations under a number of federal and state statutes and common-law theories. The discussion below focuses on one of the principal areas of concern—the securities laws—and touches on other areas.

I. ESG DISCLOSURES AND FEDERAL AND STATE SECURITIES LAWS

In addition to government enforcement, the federal and state securities laws provide a broad array of private remedies to shareholders who are actually or constructively misled by corporate disclosures.

The most significant for present purposes are the causes of action afforded by Section 11 of the Securities Act of 1933 ("Securities Act") and Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 ("Exchange Act").

Subject to certain limited defenses, Section 11 imposes essentially absolute liability on issuers and other enumerated defendants who make materially false or misleading statements or omissions in registration statements filed with the SEC. See 15 U.S.C. § 77k. Any plaintiff who purchases a security in a public offering and can trace his purchases to the registration statement may sue. See, e.g., Lee v. Ernst & Young, LLP, 294 F.3d 969, 976 (8th Cir. 2002).

Section 10(b) and Rule 10b-5 impose liability for a far broader range of misstatements, including those made in contexts other than SEC filings. The elements of a claim under Section 10(b) and Rule 10b-5 are (1) a material misrepresentation or omission by the defendant, (2) scienter, an intent to deceive, (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission, (5) economic loss, and (6) loss causation. See, e.g., Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1317 (2011).

Both Section 11 and Rule 10b-5 claims are frequently the basis for class actions that allege very large damages. See generally Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

It appears that many company officials have concerns about making more detailed and meaningful disclosure of ESG issues than some companies provide today. See, e.g., SASB Comment Letter at 16.

The concerns are understandable. As the Supreme Court has made clear, companies sometimes can avoid liability by refraining from speaking on a particular topic:

§ 10(b) and Rule 10b–5(b) do not create an affirmative duty to disclose any and all material information. Disclosure is required under these provisions only when necessary "to make ... statements made, in the light of the circumstances under which they were made, not misleading. 17 CFR § 240.10b–5(b); see also [Basic v. Levinson, 485 U.S. 224, 239 n. 17 (1988)] ("Silence, absent a duty to disclose, is not misleading under Rule 10b–5"). Even with respect to information that a reasonable investor might consider material, companies can control what they have to disclose under these provisions by controlling what they say to the market.

Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1321–22 (2011). Accord City of Livonia Emps.' Ret. Sys. v. Boeing Co., 711 F.3d 754, 759 (7th Cir. 2013) ("There is no duty of total corporate transparency.").

While this is a significant background principle, it leaves unresolved important questions relating to ESG reporting. These include: (1) when are ESG disclosures material for purposes of the securities laws, (2) when do companies that otherwise might prefer to remain silent have a duty to speak regarding ESG issues, (3) when do selective statements about corporate ESG issues trigger a duty to make additional, more detailed disclosures, and (4) whether, given that investors and activists often will be unable to show causation and damages as required for a prototypical federal securities lawsuit, there are alternative remedies that should be of concern to companies.

A. Materiality and ESG Disclosures

Materiality is a crucial concept under the securities laws. There is generally no liability for failure to disclose immaterial information, and even false statements typically are not actionable unless they are material.

Whether a fact is material "depends on the significance the reasonable investor would place on the withheld or misrepresented information." Basic Inc. v. Levinson, 485 U.S. 224, 240 (1988). In particular, a misrepresentation or omission is material if there is a "substantial likelihood" that the information "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988), quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). The Supreme Court has been "careful not to set too low a standard of materiality" out of concern that "a minimal standard might bring an overabundance of information within its reach, and lead management simply to bury the shareholders in an avalanche of trivial information, a result that is hardly conducive to informed decisionmaking." Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988), quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976). For contingent events, the Supreme Court applies the probability/magnitude test, which obliges companies to balance "the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." Basic Inc. v. Levinson, 485 U.S. 224, 237 (1988).

Materiality is highly contextual and fact-dependent, and requires thoughtful consideration. See generally TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976) ("The determination [of materiality] requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inference to him, and these assessments are peculiarly ones for the trier of fact.").

Nonetheless, in many instances, application of the materiality standard to ESG topics poses no great conceptual difficulty. For example, given the large associated costs, the court in In re BP P.L.C. Sec. Litig., 922 F. Supp. 2d 600 (S.D. Tex. 2013) concluded that several of the oil company's alleged misstatements regarding its key safety measures in corporate sustainability reports and elsewhere were material. See also In re Tronix, Inc. Sec. Litig., Civ. Action No. 09-cv-06220-SAS (S.D.N.Y.) (lawsuit alleging that company failed to disclose hundreds of millions of dollars of environmental liabilities). More generally if a company's customers are focused on ESG issues, revelations that a company has made misrepresentations regarding such matters can be expected to significantly impact profits and revenues.

But while materiality is often tied closely to a significant and easily measurable impact on the bottom line, this is not always so, and ESG disclosures present some difficult questions.

Courts and the SEC staff make a preliminary assumption that an inaccuracy that causes a financial account to be misstated by 5% or less is **not** material. See, e.g., ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co., 553 F.3d 187, 197 (2d Cir. 2009); SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150, 45150–52 (1999). See also Parnes v. Gateway 2000, Inc., 122 F.3d 539, 547 (8th Cir. 1997) (alleged misrepresentations with regard to two percent of total assets were immaterial as a matter of law); In re Westinghouse Sec. Litig., 90 F.3d 696, 715 (3d Cir. 1996) (a misstatement was immaterial where only one percent of assets was allegedly misclassified). This focus on quantitative materiality is consistent with the fact that (as discussed elsewhere) there are relatively few specific SEC line-item mandates for ESG disclosures.

Certain qualitative factors may overcome any presumption of immateriality, however. These include: (1) concealment of an unlawful transaction, (2) significance of the misstatement in relation to the company's operations, and (3) management's expectation that the misstatement will result in a significant market reaction. See, e.g., ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co., 553 F.3d 187, 198 (2d Cir. 2009); SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150, 45150–52 (1999).

This somewhat open-ended analysis leaves unresolved important issues relating to ESG disclosures. As already noted, it appears that an increasing number of investors may be interested in ESG issues. For some investors, this is undoubtedly a function of the financial importance of ESG issues. But others—including certain socially responsible investors—are categorically precluded from investing in (and/or must divest) shares of companies that fail to meet designated social responsibility criteria. If there is a critical mass of such investors in a particular company, their collective preferences as reflected in refusals to purchase or divestments of shares may impact a company's stock price, thus implicating factor (3) above: "management's expectation that the misstatement will result in a significant market reaction." Even if there is no measurable effect on stock prices, such investors may well view the ESG information as "having significantly altered the 'total mix' of information made available." Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988). If ESG investors are "reasonable investors" within the meaning of Basic, and they comprise a significant portion of investors, then it might be argued that the information nonetheless would satisfy the definition for materiality. Cf. SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) ("The speculators and chartists of Wall and Bay Streets are also 'reasonable' investors entitled to the same legal protection afforded conservative traders."). See generally Cynthia A. Williams, The Securities and Exchange Commission and Corporate Social Transparency, 112 Harv. L. Rev. 1197, 1262–63, 1288–89 (1999); David A. Hoffman, The "Duty" to Be a Rational Shareholder, 90 Minn. L. Rev. 537 (2006); Peter H. Huang, Moody Investing and the Supreme Court: Rethinking the Materiality of Information and the Reasonableness of Investors, 13 Sup. Ct. Econ. Rev. 99 (2005); Alan Dye and Todd Aman, 42 Sec. Reg. L. J. Art. 1, Mandatory Disclosure of Corporate Political Spending: Prospects for New SEC Disclosure Requirements in an Atmosphere of Disclosure Reform (Fall 2014).

B. When do Companies Have a Duty to Disclose ESG Issues

Even if ESG information is material, at least under federal law, companies need not disclose it unless there is a legal duty to do so. See Basic v. Levinson, 485 U.S. 224, 239 n.17 (1988). Generally, a duty to disclose arises only: "(1) when a corporation makes a statement that is inaccurate, incomplete, or misleading without the disclosure of additional information, (2) when a statute or regulation requires disclosure; or (3) when a corporate insider trades on confidential information" in violation of a fiduciary duty. Roeder v. Alpha Industries, Inc., 814 F.2d 22, 26 (1st Cir. 1987). This section addresses the second scenario (when a statute or regulation requires disclosure). Section C below addresses the first scenario (half-truths). [3]

The federal securities laws impose a limited number of specific disclosure requirements relating to ESG issues. For example, in Section 1502 of the Dodd-Frank Act, Congress mandated that the SEC develop rules to require companies registered under the Exchange Act to disclose certain information regarding conflict minerals from the Democratic Republic of the Congo or nearby countries. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1502(a), 124 Stat. 1376, 2213 (2010). See 15 U.S.C. § 78m(p)(1). The SEC's initial rulemaking efforts under this provision were successfully challenged and nullified in litigation. See Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. Apr. 14, 2014), on rehearing, Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015).

Section 1503 of Dodd-Frank requires issuers that operate mines to include certain mine safety information in their periodic reports filed under the Exchange Act. See 15 U.S.C. § 78m-2. Section 1504 of Dodd-Frank requires the SEC to issue rules requiring issuers that extract oil, natural gas, or minerals to disclose payments made to the U.S. or foreign governments for the purpose of developing these resources. 15 U.S.C. 78m(q). The SEC's first rulemaking effort to implement Section 1504 was vacated. See American Petroleum Institute v. SEC, 953 F. Supp. 2d 5, 24 (D.D.C. 2013). A subsequent rulemaking effort was finalized in June 2016. See https://www.sec.gov/rules/final/2016/34-78167.pdf.

The Iran Threat Reduction and Syria Human Rights Act of 2012 § 219(a), 15 U.S.C. § 78m(r), obliges public companies to report on their dealings with Iran in certain circumstances.

Other sources of law also effectively impose ESG reporting requirements.[4]

Notwithstanding the relatively few specific ESG disclosure mandates, the general SEC disclosure requirements, primarily Regulation S-K, are the more significant potential source of ESG reporting requirements.[5]

By its terms, Regulation S-K likely requires some companies to make ESG disclosures. For example, the SEC has published an interpretive release providing guidance regarding climate change disclosures. See Release No. 33-9106, Commission Guidance Regarding Disclosure Related to Climate Change (February 2, 2010). The interpretive release takes the position that climate change disclosures may be required under particular disclosure items in Regulation S-K, depending upon a company's circumstances. These relevant disclosure items include Description of Business (Item 101 of Regulation S-K), Legal Proceedings (Item 103 of Regulation S-K, which includes a requirement to disclose environmental law penalties over $100,000), Risk Factors (Item 503(c) of Regulation S-K), and Management's Discussion and Analysis of Financial Condition and Results of Operations (Item 303 of Regulation S-K). The SEC's interpretive release sets forth several topics that companies should consider in considering whether to make climate change disclosures, such as: (1) the impact of legislation and regulation regarding climate change, and (2) the actual and potential material impacts of the physical effects of climate change on a company's business. Although the release covers only climate change, its reasoning may have applicability to other ESG contexts as well.

As the foregoing discussion shows, current SEC rules contemplate ESG disclosures in certain circumstances. Nonetheless, in assessing potential liability, complications remain, particularly with respect to Item 303 of Regulation S-K (Management Discussion and Analysis), which is perhaps the most significant of the items discussed above. See generally Oxford Asset Management, Ltd. v. Jaharis, 297 F.3d 1182, 1192 (11th Cir. 2002) (the essential obligation imposed by Item 303 is to explain "[i]f there has been an important change in your company's business or environment that significantly or materially decreases the predictive value of your reported results" so as to prevent "the latest reported results from misleading potential investors").

First, the Supreme Court is set to resolve a split of authority concerning whether Item 303 of Regulation S-K creates a duty to disclose for purposes of private lawsuits under Section 10(b) and Rule 10b-5. See Leidos, Inc. v. Indiana Public Retirement System, Dckt. No. 16-581 (cert. granted Mar. 27, 2017).

Invoking various rationales, a number of cases have held that Item 303 is not the source of a duty to disclose for purposes of a Rule 10b-5 case. See, e.g., In re NVIDIA Corp. Securities Litigation, 768 F.3d 1046, 1056 (9th Cir. 2014) ("we hold that Item 303 does not create a duty to disclose for purposes of [Rule 10b-5].").[6]

The Second Circuit reached the opposite conclusion, but also emphasized that any misstatement or omission claim under Section 10(b) and Rule 10b-5 based on Item 303 must meet the materiality threshold discussed above in Section A. See Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 103 (2d Cir. 2015) ("we conclude that a violation of Item 303's disclosure requirements can only sustain a [Rule 10b-5] claim … if the allegedly omitted information satisfies Basic's test for materiality"). See also Indiana Pub. Ret. Sys. v. SAIC, Inc., 818 F.3d 85 (2d Cir. 2016), cert. granted sub nom. Leidos, Inc. v. Indiana Pub. Ret. Sys., 137 S. Ct. 1395 (2017). Cf. Oran v. Stafford, 226 F.3d 275, 287 (3d Cir. 2000) ("Item 303's disclosure obligation "extend[ed] considerably beyond those required by Rule 10b-5.").

As already noted, the Supreme Court has agreed to resolve this split of authority. In Leidos, Inc. v. Indiana Public Retirement System, Dckt. No. 16-581 (cert. granted Mar. 27, 2017), the Court granted a petition for certiorari to decide whether the Second Circuit erred in holding that Item 303 of Regulation S-K creates a duty to disclose that is actionable under Section 10(b) of the Exchange Act and SEC Rule 10b-5.

Regardless of whether Item 303 triggers a duty to disclose for purposes of private 10b-5 lawsuits, it presumably remains subject to potential enforcement by the SEC.

Second, separate from the duty-to-disclose issue, the items in Regulation S-K do not by their terms require disclosure of all (or even all material) ESG matters. See generally In re Canandaigua Sec. Litig., 944 F. Supp. 1202, 1210, 1212 (S.D.N.Y. 1996) ("there are cognizable, definitive limits to the disclosure required by S–K 303:"

the language of the rule may not be stretched to "circumvent the settled doctrine that there is no affirmative duty to disclose information"). For example, the SEC has made clear that disclosure under Item 303 of Regulation S-K generally is required only when: "a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial conditions or results of operations." Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 101 (2d Cir. 2015), quoting Management's Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 6835, 43 S.E.C. Docket 1330, 1989 WL 1092885, at *4 (May 18, 1989) (emphasis added). These conditions may effectively provide discretion to omit ESG disclosures in many circumstances. See, e.g., Indiana Public Retirement System v. SAIC, Inc., 818 F.3d 85, 95 (2d Cir. 2016) ("Item 303 requires the registrant to disclose only those trends, events, or uncertainties that it actually knows of when it files the relevant report with the SEC. It is not enough that it should have known of the existing trend, event, or uncertainty."); In re Sofamor Danek Group, Inc., 123 F.3d 394 (6th Cir. 1997) (Item 303 did not require disclosure of alleged illegal promotion policies where management had no basis for knowing with the required degree of certainty that the effects of these practices would have a material adverse impact on future operating results).[7] Further, Item 303 ordinarily does not require companies to disclose projections or other forward-looking information. See, e.g., In re Lyondell Petrochemical Co. Sec. Litig., 984 F.2d 1050, 1053 (9th Cir. 1993) (failure to disclose a projection not actionable unless there is a nondisclosure of facts or known trends that were "known only to the company"); Porter v. Shearson Lehman Bros. Inc., 802 F. Supp. 41 (S.D. Tex. 1992) (brokerage firm had no duty to disclose projections in internal memoranda of oil and gas investment since this type of "soft" information need not be disclosed so long as the "hard" facts are adequately disclosed). 17 C.F.R. § 229.303(a), Instruction 7 ("[r]egistrants are...not required to supply forward-looking information. This is to be distinguished from presently known data which will impact upon future operating results, such as known future increases in costs of labor or materials.").

Similarly, while there are relatively few published cases construing Item 103 of Regulation S-K (legal proceedings), that provision seemingly also is subject to a number of important limitations. For example, one court recently construed narrowly the requirement in Item 103 that a company disclose "pending legal proceeding[s]" and "proceeding[s] known to be contemplated by government authorities. See In re Lions Gate Entm't Corp. Sec. Litig., No. 14–CV–5197 (JGK), 2016 WL 297722, at *12–*13 (S.D.N.Y. Jan. 22, 2016) (before SEC commenced administrative proceeding, corporation had no duty under Item 103 to disclose SEC investigation or notices indicating that SEC Enforcement Division was considering recommending that SEC file a civil action against corporation and its executives). See also City of Westland Police & Fire Ret. Sys. v. MetLife, Inc., 928 F. Supp. 2d 705, 711 (S.D.N.Y. 2013) (state investigation was not a "pending legal proceeding"). Compare Indiana Public Retirement System v. SAIC, Inc., 818 F.3d 85, 93 (2d Cir. 2016) (disclosure of possible future legal proceedings may be required in certain circumstances by Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 5, Accounting for Contingencies Paragraphs 3, 10 (1975)); id. at 95 n.8 (distinguishing Lions Gate as involving an uncertainty "arising out of a run-of-the-mill civil enforcement investigation by the SEC" and requiring disclosure pursuant to Item 303 where company "was aware that it faced serious, ongoing criminal and civil investigations that exposed it to potential criminal and civil liability and that ultimately did result in criminal charges and substantial liability").

In short, the current disclosure framework may oblige some companies to make ESG disclosures in certain circumstances. It does not require companies to make all such disclosures that investors likely consider important.

C. When Selective Statements About Corporate ESG Issues Trigger Obligations to Disclose More

For many companies, the question likely is not whether to disclose any information relating to ESG issues, but the location, detail, and quality of ESG information to be disclosed.

As noted above, many companies publish sustainability reports. Often these consist of vague disclosures that can resemble advertising.

This approach has potential advantages and disadvantages from the standpoint of the federal securities laws.

To begin with, potential liability for securities fraud is not limited to SEC filings or even necessarily to statements primarily aimed at investors. Instead, under Section 10(b) and Rule 10b-5, an alleged misstatement need only be "in connection" with a potential purchase or sale of securities, which has been interpreted broadly to reach any conduct "touching" or "coinciding" with a purchase or sale of securities. See, e.g., S.E.C. v. Zandford, 535 U.S. 813, 825 (2002); Superintendent of Ins. of State of N. Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 12–13 (1971). As some courts have put it, a plaintiff therefore need only show that the information was "disseminated in a medium upon which a reasonable investor would rely." Semerenko v. Cendant Corp., 223 F.3d 165, 176 (3d Cir. 2000). Thus, false or misleading statements contained in such formats as sustainability reports and perhaps even advertising, may be the basis for securities lawsuits. See, e.g., In re Carter-Wallace, Inc. Sec. Litig., 150 F.3d 153 (2d Cir. 1998) (technical and detailed advertisements in sophisticated medical journals could constitute statements made "in connection with" a securities transaction."); In re BP P.L.C. Sec. Litig., 922 F. Supp. 2d 600 (S.D. Tex. 2013) (sustainability report was a potential basis for securities fraud claim). But cf. Lindblom v. Mobile Telecommunications Technologies Corp., 985 F. Supp. 161 (D.D.C.1997) (press release about company's products was not issued in connection with the purchase or sale of securities).

Further, the securities laws proscribe not only outright falsehoods, but also misleading statements. See, e.g., Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1088, 1094 (1991); Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989, 2000 & n.3 (2016); Meyer v. Jinkosolar Holdings Co., Ltd., 761 F.3d 245, 250 (2d Cir. 2014) ("once a company speaks on an issue or topic, there is a duty to tell the whole truth," "[e]ven when there is no existing independent duty to disclose information" on the subject). As one court put it, "[e]ven a statement which is literally true, if susceptible to quite another interpretation by the reasonable investor, may properly be considered a material misrepresentation." Kleinman v. Elan Corp., 706 F.3d 145, 152 (2d Cir. 2013).

Although it is thus clear that ESG statements in a variety of contexts potentially could be actionable, courts have recognized an important limitation. Vague or "puffing" statements are often deemed immaterial under the federal securities laws. See generally Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309, 1315 n.2 (2011) (noting, but declining to rule on, puffery doctrine). For example, in In re Ford Motor Co. Sec. Litig., 381 F.3d 563, 570 (6th Cir. 2004), the company claimed that its products were of superior quality and that it sought to be the leader in corporate social responsibility. Id. The Sixth Circuit found that these statements were "mere corporate puffery or hyperbole that a reasonable investor would not view as significantly changing" the total mix of information available. Id. Such "rosy affirmations" from corporate managers are "numbingly familiar to the marketplace--

loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor" would consider them material. Id. at 570–71.

Similarly, in Indiana Public Retirement System v. SAIC, Inc., 818 F.3d 85, 97–98 (2d Cir. 2016), the court held that general statements in a company's annual report that it had a "culture of high ethical standards, integrity, operational excellence, and customer satisfaction" and a "reputation for upholding the highest standards of personal integrity and business conduct" are insufficiently specific to be actionable even if defendants were aware of facts undermining the positive statements about the company's commitment to ethics and integrity. Id. at 97.

Therefore, "green" boasts or slogans that some companies may make about their reputations and practices ordinarily will not meet the materiality requirement. However, as the Second Circuit further explained, the puffery doctrine may not apply (and liability may ensue) if a company makes "specific statements that emphasize its reputation for integrity or ethical conduct as central to its financial condition or that are clearly designed to distinguish the company from other specified companies in the same industry." Indiana Public Retirement System v. SAIC, Inc., 818 F.3d 85, 97 (2d Cir. 2016).

More specific ESG statements that disclose material risks may sometimes enhance liability protection under the federal securities laws. The Private Securities Litigation Reform Act of 1995 affords companies a safe harbor from liability for forward-looking statements. See 15 U.S.C. § 78u-5. The safe harbor eliminates liability for a forward-looking statement in certain circumstances, including when the forward-looking statement is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ from those in the forward-looking statement. See 15 U.S.C. § 78u-5. Similarly, courts have developed a common-law "bespeaks caution" doctrine that provides similar and potentially broader protections. See, e.g., Geffon v. Micrion Corp., 249 F.3d 29, 36–37 (1st Cir. 2001) (optimistic statements are not actionable when tempered with warnings of potential risks); In re Donald J. Trump Casino Securities Litig., 7 F.3d 357, 364 (3d Cir. 1993) (bespeaks caution doctrine for forward-looking statements). Under either the statutory safe harbor or the common-law doctrine, boilerplate warnings often will be insufficiently "meaningful" to trigger protection. For example, in Loritz v. Exide Techs. et al., Fed. Sec. L. Rep. (CCH) at 98,142 (C.D. Calif. 2014), the court concluded that warnings that the issuer could not be sure either that "it has been, or will at all times be, in complete compliance with all environmental requirements" or that it "will not incur additional material costs or liabilities in connection with these requirements in excess of amounts it has reserved" were not specific enough where company knew of significant environmental exposure. See also In re Harman Int'l. Indus. Inc. Sec. Litig., 791 F. 3d (D.C. Cir. 2015); Semerenko v. Cendant Corp., 223 F.3d 165, 182 (3d Cir. 2000) (blanket statement that results of operations could vary in future years is not sufficient to satisfy the "bespeaks caution" doctrine).

By contrast, providing detailed and thoughtful risk disclosures may enable a company to avoid liability. See, e.g., Slayton v. Am. Exp. Co., 604 F.3d 758, 771, n.8 (2d Cir. 2010) (determining whether cautionary language is meaningful requires inquiry of what risks defendants faced). See also Harris v. Ivax Corp., 182 F.3d 799 (11th Cir. 1999); Miller v. Champion Enters. Inc., 346 F.3d 660 (6th Cir. 2003) (cautionary statements accompanying the forward-looking statements at issue were "meaningful," notwithstanding that plaintiffs alleged that corporate defendant knew of undisclosed risks at the time it made its forward-looking statements); GSC Partners CDO Fund v. Washington, 368 F.3d 228, 242 (3d Cir. 2004) (affirming dismissal of complaint based on safe harbor); Baron v. Smith, 380 F.3d 49, 53–54 (1st Cir. 2004) (same).

While broad, public disclosure of ESG or other risks to the market may sometimes have benefits, selective disclosure of ESG or other risks -- such as in survey responses provided only to certain investors -- could raise issues under the SEC's Regulation FD (Fair Disclosure). 17 C.F.R. § 243.100-243.103.[8]

D. Alternative Remedies Under the Securities Laws

As already noted, class actions under Section 10(b) and Rule 10b-5 and Section 11 are the private remedies of greatest concern to most companies.

Key to both is whether particular misrepresentations can be tied to a subsequent drop in the company's share price. Because this link is often difficult to establish or absent in cases involving ESG disclosures, some commentators have expressed skepticism that these remedies act as a significant deterrent or incentive in this context. See, e.g., Cadesby B. Cooper, Note, Rule 10b-5 at the Intersection of Greenwash and Green Investment: The Problem of Economic Loss, 42 B.C. Envtl. Aff. L. Rev. 405 (2015). And some studies have suggested that SEC disclosure rules in certain areas (particularly ESG) are often disregarded. See, e.g., David W. Case, Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective, 76 U. Colo. L. Rev. 379, 410 (2005).

Significantly, however, there are a number of remedies other than the paradigmatic “fraud on the market” class action that do not impose certain of these requirements or that otherwise may be pursued by shareholders and other activists who are interested in ESG issues.

Companies that fail to meet the requirements of Item 303 of Regulation S-K or other SEC disclosure rules may run a risk of lawsuits for injunctive or other similar relief, even absent any cognizable damages to shareholders. Cf. Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 170–71 (2d Cir. 1999) (permitting shareholders to seek injunctive relief under Rule 10b-5 although they did not satisfy the purchaser-seller requirement applicable to 10b-5 actions seeking damages). Under Delaware and other states' corporate law, companies must comply with the law, irrespective of whether doing so maximizes profits. See, e.g., Melbourne Mun. Firefighters' Pension Trust Fund on Behalf of Qualcomm, Inc. v. Jacobs, No. 10872-VCMR, 2016 WL 4076369, at *9 (Del. Ch. Aug. 1, 2016) (citation and internal quotation marks and footnotes omitted) (“a fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity”); 1 Principles of Corporate Governance: Analysis and Recommendations § 2.01(b)(1) (1992). And a company that is engaged in an ongoing legal violation conceivably may be sued by a single shareholder either derivatively or in an individual (direct) action seeking to halt the alleged illegality. See, e.g., Allen v. El Paso Pipeline GP Co., 90 A.3d 1097, 1107–08 & n.6 (Del. Ch. 2014); Amalgamated Sugar Co. v. NL Industries, Inc., 644 F. Supp. 1229–30 (S.D.N.Y. 1986) (enjoining illegal poison pill); Wiener v. Eaton Vance Distributors, Inc., No. CIV.A. 10-10515-DPW, 2011 WL 1233131, at *5 (D. Mass. Mar. 30, 2011). Attorney's fees sometimes may be available to a prevailing plaintiff in such suits. See generally Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970); Sprague v. Ticonic National Bank, 307 U.S. 161, 167 (1939); Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162 (Del. 1989).

Litigation may also arise under the proxy rules. SEC Rule 14a-8 provides that shareholders may submit proposals for consideration, and the corporation is obligated to follow certain procedures upon receiving them, and must include them in the company proxy statement in certain circumstances. 17 C.F.R. § 240.14a-8.[9] There have been an increasing number of proxy proposals by which shareholders seek to obtain sustainability-related information. SASB Comment Letter at 11. See, e.g., Home Depot, Inc., SEC No-Action

Letter, 2011 WL 291324 (Mar. 25, 2011) (taking the position that a proposal seeking disclosure on political spending cannot be excluded as ordinary business). Although many of these requests are resolved informally, proxy-related disputes sometimes result in litigation. See, e.g., Trinity Wall St. v. Wal-Mart Stores, Inc., 992 F.3d 323 (3d Cir. 2015). The proxy rules may provide some incentive for companies to be proactive in this area, however. One of the grounds on which a shareholder proxy proposal may be excluded is if a company has substantially implemented it. See 17 CFR 240.14a-8(i)(10). While application of the "substantially implemented" standard is unclear in many circumstances, it may afford an opportunity for a company to voluntarily implement certain disclosures while avoiding certain burdensome or undesirable aspects of a shareholder proposal.

Finally, some state law remedies may not require a plaintiff to show loss causation. See, e.g., E.F. Hutton & Co., Inc. v. Rouseff, 537 So. 2d 978, 981 (Fla. 1989) ("proof of loss causation is not required in a civil securities proceeding under section 517.211 and 517.301… of the Florida Securities and Investor Protection Act"); Massachusetts Mut. Life Ins. Co. v. Residential Funding Co., LLC, 55 F. Supp. 3d 235 (D. Mass. 2014) (loss causation cannot be raised as an affirmative defense under the section of the Massachusetts Uniform Securities Act that parallels Section 12(a)(2) of the Securities Act). However, such state law remedies generally cannot be brought as class actions due to the Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3230, codified at 1507 15 U.S.C. § 78bb(f)(1)(A)), and they typically require a plaintiff to prove a jurisdictional nexus with the relevant state. Further, the claims typically can be asserted only against the securities seller, often the underwriter (and not the issuer).

II. LIABILITY CONSIDERATIONS UNDER OTHER LAWS

While exposure under the securities laws may be the greatest liability concern in determining the optimal level of ESG disclosure, other areas also may be pertinent.

A. Unfair Deceptive Acts and Practices Claims on Behalf of Customers or Competitors

Under UDAP statutes and other theories, state law provides an array of remedies for a company's competitors, customers, and others based on a company's false or misleading statements. See, e.g., Sullivan v. Oracle Corp., 51 Cal. 4th 1191, 1195–96 (Cal. 2011) (labor groups successfully sued stores for labeling garments "Sweat Free" when the stores actually sourced their products from sweatshops). See generally Carolyn L. Carter, Nat'l Consumer Law Ctr. Inc., Consumer Protection in the States 11–12 (2009), http://www.nclc.org/images/pdf/car_sales/UDAP_ Report_Feb09.pdf.; Eric L. Lane, Consumer Protection in the Eco-Mark Era: A Preliminary Survey and Assessment of Anti-Greenwashing Activity and Eco-Mark Enforcement, 9 J. Marshall Rev. Intell. Prop. L. 742 (2010). UDAP statutes broadly define unfair and deceptive behavior to include "immoral, unethical, oppressive, or unscrupulous" behavior. ABA Section of Antitrust Law, Consumer Protection Law Developments 378 n.50 (August Horvath et al. eds., 2009). A typical UDAP statute authorizes private lawsuits that provide injunctive relief, monetary damages, attorneys' fees, and, in some cases, enhanced and punitive damages. See ABA Section of Antitrust Law, Consumer Protection Law Developments 377, 381–84 (August Horvath et al. eds., 2009). UDAP statutes generally supplement common law remedies, including for fraud or breach of warranty.

In addition to enforcement by the Federal Trade Commission ("FTC"), the federal Lanham Act authorizes lawsuits by competitors and certain others (but generally not consumers) based on false advertising. See Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1390–93 (2014); 15 U.S.C. § 1125(a). The FTC has issued "Guides for the Use of Environmental Marketing Claims," commonly referred to as "Green Guides," see 16 CFR Part 260. Although not independent bases for a cause of action themselves, these may be relevant in private lawsuits.

So-called "greenwashing" may trigger liability under many of these theories. As the California Supreme Court put it: "To some consumers, processes and places of origin matter. . . . Whether a diamond is conflict free may matter to the fiancée who wishes not to think of supporting bloodshed and human rights violations each time she looks at the ring on her finger." Kwikset Corp. v. Superior Court, 246 P.3d 877, 889 (Cal. 2011) (footnote omitted). Thus, "when a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements . . . may be regulated to prevent consumer deception." Kasky v. Nike, Inc., 45 P.3d 243, 262 (Cal. 2002), cert. granted, 537 U.S. 1099 (2003), and cert. dismissed, 123 S. Ct. 2554 (2003).

At least in California, courts have construed the UDAP statutes as extending beyond advertising in the traditional sense. See Kasky v. Nike, Inc., 45 P.3d 243, 256, 257 (Cal. 2003) (California statute is not limited to "traditional advertising format" but more broadly encompasses "representations of fact about the business operations, products, or services of the speaker") (interpreting Cal. Bus. & Prof. Code § 17500).[10]

Although recent developments under both federal and state law may narrow the scope of potential UDAP claims, class and other large actions under these theories remain a basis for possible litigation. See, e.g., Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) (limiting the ability of Congress to recognize amorphous injuries for which plaintiffs have Article III standing); In re Tobacco II Cases, 207 P.3d 20, 31–38 (Cal. 2009) (notwithstanding state referendum limiting standing to plaintiffs who have lost money or property, unfair competition actions still may be brought as a class action as long as the named plaintiff has suffered an injury in fact).

The upshot for present purposes is that ESG statements in advertising, sustainability reports, and other contexts may subject companies to a risk of lawsuits, and accordingly should be carefully reviewed and considered.

B. State Law Corporate Books-and-Records Lawsuits

Section 220 of the Delaware General Corporation Law and similar statutory provisions and common law remedies in other jurisdictions authorize shareholders acting with a proper purpose to demand a potentially broad array of corporate books and records. See, e.g., Del. Code ann. Tit. 8 § 220; N.Y. Bus. Corp. Law §§ 624(b), 1315. See generally Restatement (Second) Conflict of Laws § 304 cmt. d (1971); Stockholder's right to inspect books and records of a foreign corporation, 19 A.L.R.3d 869. In some cases, such documents conceivably may encompass directors' e-mails and documents that in other contexts would be protected from disclosure by the attorney-client privilege. See, e.g., Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW, 95 A.3d 1264, 1273 (Del. 2014); Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752 (Del. Ch. 2016). In Delaware, documents obtained in a successful demand can be used as the basis to plead a shareholder derivative lawsuit that otherwise would be dismissed for lack of factual support. See, e.g., White v. Panic, 783 A.2d 543, 556–57 (Del. 2001). Investigating corporate wrongdoing is a proper purpose for seeking books and records, but the shareholder must have a credible basis to infer the possibility of wrongdoing that would warrant further investigation, which may be supported by "documents, logic, testimony, or otherwise." Espinoza v. Hewlett-Packard Co., 32 A.3d 365, 371, 372 n.19 (Del. 2011).

Recently, the Delaware Chancery Court denied a motion to dismiss an inspection request seeking information about the use of child labor and human trafficking in the Hershey's supply chain. See generally Rulings of the Court From Oral Argument on Exceptions to the Master's Final Report, La. Mun. Police Emps. Ret. Sys. v. Hershey Co., No. 7996-ML (Del. Ch. Mar. 18, 2014). The court found that plaintiffs had alleged a credible basis for wrongdoing based largely on Hershey's public announcement of an intention that, by 2020, all its cocoa suppliers would be certified as free from human rights abuses, and Hershey's public statements suggesting that it exercises significant control over its supply chain. The court inferred that this likely meant that, at the time of decision, some of Hershey's cocoa was the product of child labor, which may have violated the law of the countries in which the cocoa was produced. Id. at 8. See also Doe I v. Nestle USA, Inc., 766 F.3d 1013 (9th Cir. 2014) (recognizing potential for liability under Alien Tort Statute based on similar scenario). The court noted that, despite shareholder concerns, "Hershey has declined to provide any details about its sources of cocoa or to disclose its suppliers."

Hershey illustrates that shareholders may consider a company's public statements regarding ESG issues. This may suggest that it is at least sometimes worth vetting such statements with care. Additionally, companies sometimes may be able to avoid or defeat a books-and-records demand by disclosing additional information. At least in Delaware, shareholder demands are limited to documents that are "essential" to the shareholder's purpose and "unavailable from another source." Espinoza v. Hewlett-Packard Co., 32 A.3d 365, 371–72 (Del. 2011).

C. State Corporate Breach of Fiduciary Duty Lawsuits

Although state corporate law adds little in the way of specifics to the disclosure requirements of the federal securities laws here.[11] it nonetheless deserves some consideration in this context. Under the seminal Caremark decision, In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996), directors must ensure that there are reasonable reporting mechanisms in place to enable the board to monitor whether a company is legally compliant, including in areas that may bear on ESG issues. See Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006).[12] This suggests that at least some corporations already may have access to information enabling more detailed ESG disclosures. Further, at least in Delaware, the law generally mandates that the corporation's directors must seek to maximize shareholder welfare. See, e.g., Leo E. Strine, Jr., The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law, 50 Wake Forest L. Rev. 761 (2015). Cf. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182–83 (Del. 1986) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."). Accord Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) ("a business organization is organized and carried on primarily for the profit of the stockholders"). Maximizing shareholder welfare is not always the same as boosting the firm's short-term stock price. See, e.g., Paramount Communications, Inc. v. Time Warner Incorporated, TW, 571 A.2d 1140, 1150 (Del. 1989) ("absent a limited set of circumstances… a board of directors, while always required to act in an informed manner, is not under any *per se* duty to maximize shareholder value in the short term"). But the objectives may at least overlap in some instances, such as where a firm seeks to raise capital. Cf. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182–83 (Del. 1986) (where sale of the firm is inevitable, directors should focus on maximizing immediate value for the shareholders rather than long-term corporate well-being). As already noted above in the Background section, some research suggests that firms that provide better ESG-related information are more highly valued. At least in certain circumstances, then, some may argue that corporate fiduciary duties require directors to give appropriate consideration to making certain ESG-related disclosures.

D. State Law Demands on the Board of Directors

Finally, under the law of all states, shareholders may make a demand on a board to take legally required or permitted action. For example, a stockholder may demand that the company's board make additional disclosures. See, e.g., Raul v. Astoria Fin. Corp., No. CV 9169-VCG, 2014 WL 2795312, at *3–*4 (Del. Ch. June 20, 2014). The stockholder may sue if the demand is wrongfully refused. See, e.g., Levine v. Smith, 591 A.2d 194, 200 (Del. 1991), overruled on other grounds by Brehm v. Eisner, 746 A.2d 244, 253 (Del. 2000). Alternatively, a stockholder may have his attorneys' fees reimbursed under the corporate benefit doctrine if the board acts favorably on a demand and the demand was based on allegations that would have survived a motion to dismiss at the time the demand was made. See Raul v. Astoria Fin. Corp., No. CV 9169-VCG, 2014 WL 2795312, at *1, *8–*10 (Del. Ch. June 20, 2014).

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[1] Jean Rogers's letter on behalf of the Sustainability Accounting Standards Board ("SASB") to SEC Secretary Brent J. Fields (July 1, 2016) regarding SEC Regulation S-K Concept Release (the "SASB Comment Letter") at p. 3 n.5., quoting FT.com/Lexicon http://lexicon.ft.com/Term?term=ESG). The CFA Institute defines ESG as the "environmental, social and governance issues that Investors are considering in the context of corporate behavior." See The CFA Institute, Center for Market Integrity, Environmental, Social And Governance Factors At Listed Companies, A Manual For Investors, (2008) http://www.cfapubs.org/doi/pdf/10.2469/ccb.v2008.n2.1).

[2] Some legislators and law enforcement officials have similarly shown a heightened interest in ESG disclosure issues. See, e.g., Paul Barrett & Matthew Phillips, Can ExxonMobil Be Found Liable for Misleading the Public on Climate Change, http://www.bloomberg.com/news/articles/2016-09-07/will-exxonmobil-have-to-pay-for-misleading-the-public-on-climate-change.

[3] The third scenario (corporate insider trading on insider information) is not addressed in detail.

[4] For example, the Toxic Release Inventory, 42 U.S.C. § 11023, requires certain facilities to report to the government their annual releases of listed toxic pollutants. At the state level, the California Transparency in Supply Chains Act of 2010, Senate Bill 657 (2010), requires companies making sales in California to publicly disclose their efforts to eliminate the use of forced and slave labor throughout the company's supply chain. California Civil Code §1714.43(a).

[5] Securities Act registration statements, Exchange Act annual and periodic reports, and proxy solicitations are subject to the same disclosure requirements. Adoption of Integrated Disclosure System, Securities Act Release No. 6383, 47 Fed. Reg. 11380 (Mar. 3, 1982). These requirements are set forth in Regulation S-K, 17 C.F.R. §§ 229.10–.1208, and Regulation S-X. 17 C.F.R. §§ 210.1-01–210.12-29. Generally, Regulation S-X provides rules for accounting statement presentation, and Regulation S-K sets forth other nonfinancial disclosures companies must make about their operations, and governance. In addition to such line-item disclosure requirements, Securities Act Rule 408 and Exchange Act Rule 12b-20 require companies to include such further material information "as may be necessary to make the required statements, in light of the circumstances ... not

misleading." Id. §§ 230.408, 240.12b-20. The SEC discourages "boilerplate" or use of "generic language" in MD&A. See SEC Release No. 33-8350 (2003).

[6] See also In re Enron Corp. Sec. Derivative & ERISA Litig., 258 F. Supp. 2d 576, 632 n.63 (S.D. Tex. 2003) (similar); Anderson v. Abbott Labs., 140 F. Supp. 2d 894, 908 (N.D. Ill. 2001) (SEC disclosure rules, while perhaps informative, do not produce a duty to disclose for purposes of Section 10(b)). But cf. Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1296 (9th Cir. 1998) (alleged violations of Item 303 of Regulation S-K, SK-303 stated a claim under Section 11 of the Securities Act).

[7] See also J & R Marketing, SEP v. General Motors Corp., 519 F.3d 552, 558–59 (6th Cir. 2008) (no breach of any duty to disclose under Item 303 where plaintiff failed to establish that information was in fact known as opposed to knowable); Steckman v. Hart Brewing, Inc., 143 F.3d 1293 (9th Cir. 1998) (failure to foresee a slowdown and disclose it as a trend in the MD&A is not actionable).

[8] Regulation FD generally forbids selective disclosures of material nonpublic information, and instead requires broad public dissemination. While Regulation FD is not enforceable in private lawsuits, it has been the basis for a number of SEC enforcement actions. See, e.g., In the Matter of Lawrence D. Polizzotto, Securities Exchange Act Release No. 70337 (2013); In the Matter of Office Depot, Inc., Securities Exchange Act Release No. 34-63152 (2010).

[9] Some investors file demand letters with the SEC alleging that a corporation has failed to disclose required information. See Nina Hart Columbia Law School Sabin Center for Climate Change Law, Legal Tools for Climate Adaptation Advocacy: Securities Law § 3.1.3.3 (May 2015).

[10] This view may be subject to challenge under the First Amendment. The Supreme Court granted review in Kasky to consider the question, before subsequently later dismissing the appeal for unrelated reasons on the ground that the writ of certiorari was improvidently granted.

[11] State law may impose more specific ESG disclosure requirements in the context of so-called public benefit corporations. See generally Stephen I. Glover, Lisa A Fontenot, and Harrison A. Korn, A Corporate Paradigm Shift: Public Benefit Corporations, 30 Insights No. 10 at 20 (October 2016). Few if any large publicly traded corporations have chosen to organize as public benefit corporations.

[12] Relatedly, under Section 302 of the Sarbanes-Oxley Act, the chief executive officer and chief financial officer of a registered company must certify: (i) that they have reviewed the company's annual and quarterly reports and that, based on their knowledge, the reports do not contain any untrue statement of a material fact or omit any material fact, and fairly present, in all material respects, the true financial condition and results of the company; and (ii) that they are responsible for establishing and maintaining internal controls, that they designed the controls to ensure that material information is made known to the officers and others within the company, and that they have evaluated the adequacy of the controls. Sarbanes-Oxley Act of 2002 § 302, 15 U.S.C. § 7241.

