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ESG Legislation – Ten Bills for Public Companies to Watch in 2021

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What a week. The election has been called. However, the debate over mandatory ESG reporting is just heating up. With the presumed election of Joe Biden as President, House control remaining with the Democrats and the Democrats making at least some gains in the Senate, there may be further momentum behind ESG legislation. In this Alert, we discuss ten ESG-themed bills that would require additional disclosures and other compliance activities by public companies. The bills cover a diverse range of topics: (1) Uyghur labor in supply chains (two bills); (2) forced labor and human rights more generally (three bills); (3) ESG metrics and strategy; (4) climate change; (5) political expenditures (two bills); and (6) tax transparency.

The bills run the gamut in their approach, from high-level principles-based to prescriptive. Although most of the bills likely have little chance of becoming law in their current form, they are expected to be part of any Congressional discussions on these topics.

Not surprisingly, Congressional support for ESG-themed legislation has largely, although not entirely, been along party lines. As further described below, the exception has been forced labor legislation, in particular relating to Uyghur labor in supply chains. The principal Democratic argument in favor of mandatory ESG reporting boils down to additional transparency being necessary to protect investors, since investors increasingly view at least some ESG factors as material. However, in some cases, bill sponsors also are expressly seeking to use mandatory ESG reporting to advance other policy goals. Republican detractors in contrast have focused on the regulatory burden, both for individual companies and at the macro level by potentially discouraging companies from going or remaining public. The prevailing Republican view is that the market can more efficiently and effectively set appropriate ESG disclosure standards.

In this Alert, we focus specifically on legislative initiatives at the federal level. Over the next four years, we also expect the SEC to on its own initiative take a more proactive approach toward ESG reporting, whether through additional rulemaking or guidance or both. To date, much of the SEC rulemaking is this area – such as that relating to conflict minerals, resource extraction payments and pay ratio disclosure – has been required by Congress. However, the SEC has on its own gradually been wading into this area, as discussed further in this Alert.

Commissioners Caroline Crenshaw and Allison Herren Lee – the two Democratic SEC Commissioners – both have indicated in public statements they favor additional mandatory ESG-related reporting. We expect the next SEC Chair to be of a similar view.

Accordingly, whether by legislation, SEC action or a combination of the two, we expect to see additional ESG reporting requirements for public companies.

UYGHUR LABOR IN SUPPLY CHAINS

Uyghur Forced Labor Prevention Act

The Uyghur Forced Labor Prevention Act would establish a presumption that goods produced in the Xinjiang Uyghur Autonomous Region (XUAR) of China or through certain government programs are produced using forced labor and therefore prohibited from being imported into the United States under the Tariff Act. The Act also would require disclosure by public companies of specified activities with a potential nexus to human rights abuses.

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As further indicated below, the Uyghur Forced Labor Prevention Act has broad bipartisan support in the House.

For additional information on the Uyghur Forced Labor Prevention Act, see our earlier Alert here.

Procedural Details

House:

Bill number: H.R.6210

Sponsor: James P. McGovern (Democrat, Massachusetts); 87 co-sponsors (64 Democratic and 23 Republican).

Date of introduction: March 11, 2020

Additional action: Passed by the House on September 22, 2020, by a vote of 406-3.

Senate:

Bill number: S.3471

Sponsor: Marco Rubio (Republican, Florida); 25 co-sponsors (15 Republican and 10 Democratic).

Date of introduction: March 12, 2020

Additional action taken: Referred to the Committee on Foreign Relations.

Prohibition on Importing XUAR Goods into the United States

Section 307 of the Tariff Act prohibits the importation into the United States of "goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part" by convict, forced or indentured labor. The goods are subject to seizure and the importer may be subject to civil and criminal penalties.

The Act would establish a presumption that goods, wares, articles and merchandise mined, produced or manufactured wholly or in part in the XUAR, or by persons working with the XUAR government for purposes of the poverty alleviation program or the pairing-assistance program, come within the Section 307 prohibition. This portion of the Act would take effect 120 days after its enactment.

The import prohibition would not apply if the Commissioner of Customs and Border Protection (CBP) (1) determines, by clear and convincing evidence, that any specific goods, wares, articles or merchandise were not produced wholly or in part by convict, forced or indentured labor under penal sanctions and (2) submits to the appropriate congressional committees and makes available to the public a report containing that determination.

As some readers may recall, Section 302A of the Countering America's Adversaries Through Sanctions Act (CAATSA), which deals with North Korean labor, is set up similarly. For a further discussion of that Act, which was adopted in late 2017, and the related guidance, see our earlier Alerts here, here and here. CAATSA and the relevant guidance thereunder are likely to inform CBP's compliance program expectations under this portion of the Act. In addition, reflecting the additional scrutiny being applied to products produced with XUAR labor, in July, the U.S. Department of State, along with the U.S. Department of the Treasury, the U.S. Department of Commerce and the U.S. Department of Homeland

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Security, issued a business advisory concerning forced labor risks associated with the XUAR. For a further discussion of the advisory, see our earlier Alert here.

Disclosure Requirements

The Act would require issuers that file periodic reports under Section 13(a) of the Exchange Act to disclose in their annual or quarterly reports under the Exchange Act if, during the period covered by the report, the issuer or any of its affiliates:

- Knowingly engaged in an activity with an entity or the affiliate of an entity engaged in creating or providing technology or other assistance to create mass population surveillance systems in the XUAR, including any entity in the XUAR included on the Department of Commerce's Entity List.

  "Mass population surveillance system'' is defined in the Act as "installation and integration of facial recognition cameras, biometric data collection, cell phone surveillance, and artificial intelligence technology with the 'Sharp Eyes' and 'Integrated Joint Operations Platform' or other technologies that are used by Chinese security forces for surveillance and big-data predictive policing."

- Knowingly engaged in an activity with an entity or an affiliate of an entity building and running detention facilities for Uyghurs, Kazakhs, Kyrgyz and other members of Muslim minority groups in the XUAR.

- Knowingly engaged in an activity with an entity or an affiliate of an entity described in Section 7(c)(1) of the Act, including (1) any entity engaged in the pairing-assistance program or (2) any entity for which the Department of Homeland Security has issued a Withhold Release Order under Section 307 of the Tariff Act.

  Section 7(c)(1) of the Act requires the Secretary of State to periodically prepare a report that, among other things, includes, to the extent practicable, a list of (1) entities in China or affiliates of those entities that directly or indirectly use forced or involuntary labor in the XUAR and (2) foreign persons that acted as agents of the foregoing entities or their affiliates to import goods into the United States.

- Knowingly conducted any transaction or had dealings with (1) any person whose property and interests in property were sanctioned by the Secretary of State for the detention or abuse of Uyghurs, Kazakhs, Kyrgyz or other members of Muslim minority groups in the XUAR, (2) any person whose property and interests in property are sanctioned pursuant to the Global Magnitsky Human Rights Accountability Act or (3) any person or entity responsible for or complicit in committing atrocities in the XUAR.

  "Atrocities" has the meaning given the term in Section 6(2) of the Elie Wiesel Genocide and Atrocities Prevention Act, which is "war crimes, crimes against humanity and genocide."

The foregoing disclosure requirement would not include activities relating to (1) the importation of manufactured goods, including electronics, food products, textiles, shoes and teas, that originated in the XUAR or (2) manufactured goods containing materials that originated or are sourced in the XUAR.

If an issuer or one of its affiliates has engaged in any of the activities requiring disclosure, the issuer would be required to provide a detailed description of each such activity, including (1) the nature and extent of the activity, (2) the gross revenues and net profits, if any, attributable to the activity and (3) whether the issuer or its affiliate intends to continue the activity.

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In addition, the issuer would be required to separately file with the SEC, concurrently with the annual or quarterly report containing the disclosure, a notice that (1) the disclosure of that activity has been included in the report and (2) contains the information described in the preceding paragraph. Upon receiving the notice, the SEC would be required to promptly transmit the report to the President, the Committee on Foreign Affairs and the Committee on Financial Services of the House of Representatives and the Committee on Foreign Relations and the Committee on Banking, Housing, and Urban Affairs of the Senate. It also would be required to make the information available to the public by posting it on the SEC's website.

Upon receiving a report from the SEC, the President would be required to determine whether an investigation is needed into the possible imposition of sanctions under the Global Magnitsky Human Rights Accountability Act or under the Act, or whether criminal investigations are warranted arising out of the importation of goods produced by forced labor.

Other Provisions of the Act

Other provisions of the Act also could impact public companies and their supply chains, although it is too early to speculate on what those impacts may be.

Among other things, within 120 days after its enactment, the Act would require the Forced Labor Enforcement Task Force established under the United States-Mexico-Canada Agreement Implementation Act to submit to the appropriate congressional committees a report that contains an enforcement strategy to effectively address forced labor in the XUAR. The enforcement strategy would be required to describe the specific enforcement plans of the U.S. government regarding (1) goods, wares, articles and merchandise imported into the United States directly from the XUAR, (2) goods, wares, articles and merchandise imported into the United States from China that are mined, produced or manufactured in part in the XUAR or by persons working with the XUAR government for purposes of the poverty alleviation program or the pairing-assistance program and (3) goods, wares, articles and merchandise that are imported into the United States from third countries that are mined, produced or manufactured in part in the XUAR or by persons working with the XUAR government for purposes of the poverty alleviation program or pairing-assistance program.

The strategy would be required to include, among other things, (1) a description of the actions taken by the U.S. government to address forced labor in the XUAR, (2) a list of products made wholly or in part by forced or involuntary labor in the XUAR and a list of businesses that sold products in the United States made wholly or in part by forced or involuntary labor in the XUAR, (3) a list of facilities and entities that source material from the XUAR or by persons working with the XUAR government for purposes of the poverty alleviation program or pairing-assistance program, a plan for identifying additional facilities and entities and facility- and entity-specific enforcement plans, including issuing specific WROs with regard to the listed facilities or entities, and (4) a list of high-priority sectors for enforcement, which will be required to include cotton and tomatoes, and a sector-specific enforcement plan for each high-priority sector.

Uyghur Forced Labor Disclosure Act

The Uyghur Forced Labor Disclosure Act would require annual disclosures by issuers that import manufactured goods that originated in the XUAR or manufactured goods containing materials that originated or are sourced in the XUAR.

Like the Uyghur Forced Labor Prevention Act bill, this bill also has bipartisan support, although less bipartisan support than the former.

Procedural Details

Bill number: H.R.6270

Sponsor: Jennifer Wexton (Democrat, Virginia); five Democratic co-sponsors.

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Date of introduction: March 12, 2020

Additional action taken: Passed by the House on September 30, 2020, by a vote of 253 to 163. Referred to the Senate Committee on Banking, Housing, and Urban Affairs on October 1, 2020.

Disclosure Requirements

The Act would require the SEC to issue rules requiring issuers that file an annual report or proxy statement under the Exchange Act to disclose in each such report or proxy statement whether, during the period it covers:

- The issuer or any of its affiliates directly or indirectly engaged with an entity or the affiliate of an entity to import (1) manufactured goods, including electronics, food products, textiles, shoes, and teas, that originated in the XUAR or (2) manufactured goods containing materials that originated or are sourced in the XUAR.

- With respect to any goods or materials described above, whether the goods or materials originated in forced labor camps.

- With respect to each manufactured good or material described under the first bullet point above, (1) the nature and extent of the commercial activity related to the good or material, (2) the gross revenue and net profits, if any, attributable to the good or material and (3) whether the issuer or the affiliate of the issuer intends to continue with such importation.

As used in the Act, "forced labor camp" means (1) any entity engaged in the mutual pairing assistance program that subsidizes the establishment of manufacturing facilities in the XUAR, (2) any entity using convict labor, forced labor or indentured labor described under Section 307 of the Tariff Act and (3) any other entity that the SEC determines is appropriate.

FORCED LABOR AND HUMAN RIGHTS GENERALLY

For the last several years, forced labor and other human rights issues in corporate supply chains have been an increasing area of focus globally by regulators, investors, consumers and other stakeholders. The legislation in this area largely breaks down into four broad categories: (1) disclosure-only; (2) diligence-based; (3) trade-based; and (4) contract-based. Proposed legislation falling into the first two categories is described below. Trade- and contract-based human rights legislation generally is not discussed in this Alert since it is not specific to public companies. For an overview of some of the forced labor and other human rights legislation not specific to public companies, see our earlier Alert here. Links to some of our other Alerts on enacted, pending and proposed forced labor and other human rights legislation are included in the discussion below.

Reflecting the increasing focus on human rights by institutional investors, on October 22, 2020, Principles for Responsible Investment (PRI) released a publication entitled *Why And How Investors Should Act On Human Rights*. This publication is part of the formal kick-off of PRI's multiyear agenda for its work towards respect for human rights being implemented in the financial system. As noted in the publication, to understand their exposure to human rights risks and the actions required to address these risks, investors need to request information from the companies they invest in.

PRI is contemplating a four-year transition for embedding respect for human rights in investment activities. In the first year, investors would understand and start implementing the UN Guiding Principles on Business and Human Rights. In years two and three, the majority of PRI signatories would be implementing the UN Guiding Principles. In the fourth year, all PRI signatories would respect human rights. PRI has over 3,000 signatories, representing over $100 trillion in assets under management.

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Business Supply Chain Transparency on Trafficking and Slavery Act

The Business Supply Chain Transparency on Trafficking and Slavery Act would require public companies to disclose information describing measures taken to identify and address conditions of forced labor, slavery, human trafficking and the worst forms of child labor within their supply chains. These types of conduct are broadly referred to as modern slavery.

Disclosure-only modern slavery legislation thus far has been adopted in four jurisdictions: California, the United Kingdom and in Australia at the Commonwealth level and in New South Wales. The idea behind disclosure-only modern slavery legislation is that it creates, in the words of the UK government, a "race to the top." For a further discussion of the disclosure-only modern slavery legislation that has been adopted in these jurisdictions, see the following Ropes & Gray Alerts, among others: California – here; United Kingdom – here, here, here, here and here; Australia (Commonwealth) – here, here, here and here; and New South Wales – here.

Disclosure-only modern slavery legislation has been proposed, but not yet adopted, in several additional jurisdictions, including Canada, Hong Kong, Tasmania and Washington State. For a further discussion of some of these instruments, see our earlier Alerts here and here.

Procedural Details

Bill number: H.R.6279

Sponsor: Carolyn Maloney (Democrat, New York); one Republican co-sponsor.

Date of introduction: March 13, 2020

Additional action taken: Referred to the House Committee on Financial Services.

Subject Issuers

"Covered issuers" would have disclosure obligations under the Act. These are defined as issuers that have annual worldwide global receipts in excess of $100 million.

Key Terms

Several of the key terms used in the Act are defined:

- "Supply chain," with respect to a covered issuer, means all labor recruiters, suppliers of products, component parts of products and raw materials used by the covered issuer in the manufacturing of its products, whether or not the covered issuer has a direct relationship with the supplier.
- "Forced labor," "slavery" and "human trafficking" mean any labor practice or human trafficking activity in violation of national and international standards, including International Labour Organization (ILO) Convention No. 182, the Trafficking Victims Protection Act and acts that would violate the criminal provisions related to slavery and human trafficking under chapter 77 of title 18, United States Code, if they had been committed within the jurisdiction of the United States.
- "The worst forms of child labor" means child labor in violation of national and international standards, including ILO Convention No. 182.

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Required Disclosures

Within one year after the enactment of the Act, the SEC, in consultation with the Secretary of State, would be required to promulgate regulations requiring covered issuers required to file reports with the SEC under Section 13 of the Exchange Act to include annually in those reports (1) disclosure whether the covered issuer has taken any measures during the year covered by the report to identify and address conditions of forced labor, slavery, human trafficking and the worst forms of child labor within the covered issuer's supply chain and (2) a description of the measures taken.

The bill goes on to provide more specifically that the disclosure would be required to include, under the heading "Policies to Address Forced Labor, Slavery, Human Trafficking, and the Worst Forms of Child Labor," information describing to what extent, if any, the covered issuer conducts any of the following activities:

- Whether the covered issuer maintains a policy to identify and eliminate the risks of forced labor, slavery, human trafficking and the worst forms of child labor within its supply chain. The disclosure would be required to include the text of the policy or a substantive description of the elements of the policy, and the actions the covered issuer has taken pursuant to or in the absence of a policy.

- Whether the covered issuer maintains a policy prohibiting its employees and employees of entities associated with its supply chain from engaging in commercial sex acts with a minor.

- The efforts of the covered issuer to evaluate and address the risks of forced labor, slavery, human trafficking and the worst forms of child labor in its product supply chain. If these efforts have been made, the disclosure would be required to (1) describe any risks identified within the supply chain, and the measures taken toward eliminating those risks, (2) specify whether the evaluation was (or was not) conducted by a third party, (3) specify whether the process includes consultation with independent labor organizations (as that term is defined in Section 2 of the National Labor Relations Act), workers' associations or workers within workplaces and incorporates the resulting input or written comments from the consulted parties, and, if so, the disclosure would be required to describe the entities consulted and specify the method of consultation, and (4) specify the extent to which the process covers entities within the supply chain, including entities upstream in the product supply chain and entities across lines of products or services throughout the covered issuer's product manufacturing.

- The efforts of the covered issuer to ensure that audits of suppliers within the supply chain of the covered issuer are conducted to (1) investigate the working conditions and labor practices of the suppliers, (2) verify whether the suppliers have in place appropriate systems to identify risks of forced labor, slavery, human trafficking and the worst forms of child labor within their own supply chain and (3) evaluate whether such systems are in compliance with the policies of the covered issuer or efforts in the absence of such policies.

- The efforts of the covered issuer to (1) require suppliers in the supply chain to attest that the manufacture of materials incorporated into any product and the recruitment of labor are carried out in compliance with laws regarding forced labor, slavery, human trafficking and the worst forms of child labor, (2) maintain internal accountability standards, supply chain management and procurement systems and reporting procedures for employees, suppliers, contractors or other entities within its supply chain failing to meet the covered issuer's standards regarding forced labor, slavery, human trafficking and the worst forms of child labor, including a description of the standards, systems and procedures, (3) train the employees and management who have direct responsibility for supply chain management on issues related to forced labor, slavery, human trafficking and the worst forms of child labor, particularly with respect to mitigating risks within the supply chains of products, and (4) ensure that labor recruitment practices at all suppliers associated with the supply chain comply with the covered issuer's policies or efforts in the absence of such policies for eliminating exploitive labor practices that

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contribute to forced labor, slavery, human trafficking and the worst forms of child labor, including by complying with audits of labor recruiters and disclosing the results of the audits.

- The efforts of the covered issuer, in cases where forced labor, slavery, human trafficking and the worst forms of child labor have been identified within the supply chain, to ensure that remedial action is provided to those who have identified as victims, including support for programs designed to prevent the recurrence of those events within the industry or sector in which they have been identified.

  "Remedial action" is defined in the Act as activities or systems that an issuer puts in place to address non-compliance identified through monitoring or verification, which may apply to individuals adversely affected by the non-compliant conduct or address broader systematic processes.

The covered issuer also would be required to include information disclosed pursuant to the Act on its website through a conspicuous and easily understandable link to the relevant information that is labeled "Global Supply Chain Transparency."

Additional Information to Be Furnished by the SEC

In addition, the SEC would be required to make available to the public in a searchable format on the SEC's website (1) a list of covered issuers required to disclose any measures taken to identify and address conditions of forced labor, slavery, human trafficking and the worst forms of child labor within the covered issuer's supply chain and (2) a compilation of the information submitted by covered issuers.

Slave-Free Business Certification Act

The Slave-Free Business Certification Act would require large companies to audit their supply chains for forced labor and make related disclosures. In contrast to disclosure-only modern slavery legislation, the Act would require companies to take specific compliance actions to address modern slavery. In this regard, the Act is philosophically aligned with the Federal Acquisition Regulation anti-human trafficking provisions, the Conflict Minerals Rule and numerous adopted, pending and proposed mandatory human rights due diligence laws in Europe. For a further discussion of some of these laws and regulations, see our earlier Alerts here, here, here, here, here, here, here, here, here and here.

The Slave-Free Business Certification Act would apply not only to public companies, and it would be administered by the Department of Labor rather than the SEC. However, we have included the Act in this Alert since it would disproportionately affect public companies.

Identical bills were introduced in both the Senate and House, as further described below.

Procedural Details

Senate:

Bill number: S.4241

Sponsor: Josh Hawley (Republican, Missouri)

Date of introduction: July 21, 2020

Additional action taken: Referred to the Committee on Health, Education, Labor, and Pensions.

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House:

Bill number: H.R.7824

Sponsor: Ken Buck (Republican, Colorado)

Date of introduction: July 29, 2020

Additional action taken: Referred to the House Committee on Education and Labor.

Subject Companies

For purposes of the Act, "covered business entities" would be issuers, within the meaning of Section 2(a) of the Securities Act, that have annual, worldwide gross receipts of more than $500 million.

"Issuer" is broadly defined in Section 2(a) of the Securities Act to include every person who issues or proposes to issue any security, with certain exceptions and differences for certificates of deposit, voting-trust certificates, collateral-trust certificates, certificates of interest or shares in unincorporated investment trusts, equipment-trust certificates or like securities and fractional undivided interests in oil, gas or other mineral rights.

"Security" also is defined broadly in Section 2(a) to include any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, pre-organization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas or other mineral rights, any put, call, straddle, option or privilege on any security, certificate of deposit or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option or privilege entered into on a national securities exchange relating to foreign currency or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

Calculating Gross Receipts

Under the Act, gross receipts are the gross amount, including cash and the fair market value of other property or services received, gained in a transaction that produces business income from (1) the sale or exchange of property, (2) the performance of services or (3) the use of property or capital.

For purposes of the calculation, the following are excluded:

- The repayment, maturity or redemption of the principal of a (1) loan, (2) bond, (3) mutual fund, (4) certificate of deposit or (5) similar marketable instrument.
- Proceeds from the issuance of a company's own stock or the sale of treasury stock.
- Amounts received as the result of litigation, including damages.
- Property acquired by an agent on behalf of another party.
- Federal, state, or local tax refunds or other tax benefit recoveries.

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- Certain contributions to capital.
- Income from the discharge of indebtedness.
- Amounts realized from exchanges of inventory that are not recognized under the Internal Revenue Code.

Audit Requirement

Covered business entities would be required annually to conduct an audit of their supply chain to investigate the presence or use of forced labor by the covered business entity or its suppliers, including by direct suppliers, secondary suppliers and on-site service providers of the covered business entity.

For purposes of the Act, "forced labor" would mean any labor practice or human trafficking activity in violation of national and international standards, including (1) ILO Convention No. 182, (2) the Trafficking Victims Protection Act and (3) any act that would violate the criminal provisions related to slavery and human trafficking under chapter 77 of title 18 of the U.S. Code if the act had been committed within the jurisdiction of the United States.

An "on-site service provider" would be any entity that provides workers who perform, collectively, a total of not less than 30 hours per week of on-site services for a covered business entity. An "on-site service" would mean any service work provided on the site of a covered business entity, including food service work and catering services.

Audit Components

Audits conducted pursuant to the Act would be required to meet specified requirements.

Worker interviews. The auditor would be required to select a cross-section of workers to interview that represents the full diversity of the workplace. If applicable, this would be required to include men and women, migrant workers and local workers, workers on different shifts, workers performing different tasks and members of various production teams. If individuals under the age of 18 are employed at the facility of the direct supplier or on-site service provider, the auditor would be required to interview a representative group using age-sensitive interview techniques. The auditor would be required to use audit tools to ensure that each worker is asked a comprehensive set of questions. In addition, the auditor would be required to collect from interviewed workers copies of the workers' pay stubs, in order to compare the pay stubs with payment records provided by the direct supplier.

The auditor also would be required to interview a representative of the labor organization or other worker representative organization that represents workers at the facility or, if no such organization is present, attempt to interview a representative from a local worker advocacy group.

The Act contemplates both on-site and off-site interviews. The Act indicates that, in cases where there are indications of egregious violations that employees may hesitate to discuss at work, interviews should be off-site of the facility and during non-work hours. Interviews could be conducted individually or generally in groups. All worker responses would be required to be confidential and not shared with management.

Management interviews. The auditor also would be required to interview a cross-section of the management of the supplier, including human resources personnel, production supervisors and others. The auditor would be required to use audit tools to ensure that managers are asked a comprehensive set of questions.

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Documentation review. The auditor would be required to conduct a documentation review to provide tangible proof of compliance and to corroborate or find discrepancies in the information gathered through the worker and management interviews. At a minimum, the auditor would be required to review the following:

- Age verification procedures and documents.
- A master list of juvenile workers.
- Selection and recruitment procedures.
- Contracts with labor brokers, if any.
- Worker contracts and employment agreements.
- Introduction program materials.
- Personnel files.
- Employee communication and training plans, including certifications provided to workers including skills training, worker preparedness, government certification programs and systems or policy orientations.
- Collective bargaining agreements, including collective bargaining representative certification, descriptions of the role of the labor organization and minutes of the labor organization's meetings.
- Contracts with any security agency, and descriptions of the scope of responsibilities of the security agency.
- Payroll and time records.
- Production capacity reports.
- Written human resources policies and procedures.
- Occupational health and safety plans and records, including legal permits, maintenance and monitoring records, injury and accident reports, investigation procedures, chemical inventories, personal protective equipment inventories, training certificates and evacuation plans.
- Disciplinary notices.
- Grievance reports.
- Performance evaluations.
- Promotion or merit increase records.
- Dismissal and suspension records of workers.
- Records of employees who have resigned.
- Worker pay stubs.

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Closing meeting with management. The auditor would be required to hold a closing meeting with the management of the covered business entity to report any violations and nonconformities found in the facility and determine the steps forward to address and remediate any problems.

Covered Business Entity Reporting Requirements

Each year, covered business entities would be required to prepare a report describing the results of the audit required by the Act and the efforts of the covered business entity to eradicate forced labor from its supply chain and on-site services.

At a minimum, the report would be required to contain the following:

- The policies to prevent the use of forced labor by the covered business entity, its direct suppliers and its on-site service providers.
- What policies or procedures, if any, the covered business entity uses (1) for the verification of product supply chains and on-site service provider practices to evaluate and address risks of forced labor and whether the verification was conducted by a third party, (2) to require direct suppliers and on-site service providers to provide written certification that materials incorporated into the product supplied or on-site services, respectively, comply with the laws regarding forced labor of each country in which the supplier or on-site service provider is engaged in business, (3) to maintain internal accountability standards and procedures for employees or contractors of the covered business entity failing to meet requirements regarding forced labor and (4) to provide training on recognizing and preventing forced labor, particularly with respect to mitigating risks within the supply chains of products and on-site services of the covered business entity, to employees, including management personnel, of the covered business entity who have direct responsibility for supply chain management or on-site services.
- The findings of each audit required under the Act, including the details of any instances of found or suspected forced labor.
- A written certification, signed by the chief executive officer of the covered business entity, that (1) the covered business entity has complied with the requirements of the Act and exercised due diligence in order to eradicate forced labor from the supply chain and on-site services of the covered business entity, (2) to the best of the chief executive officer's knowledge, the covered business entity has found no instances of the use of forced labor by the covered business entity or has disclosed every known instance of the use of forced labor and (3) the chief executive officer and any other officers submitting the report or certification understand that the False Statements Act applies to the information contained in the report.

The report would be required to be submitted to the Secretary of Labor. The report also would be required to be published on the covered business entity's public website, with a conspicuous and easily understood link on the homepage of the website that leads to the report. If the covered business entity does not have a public website, the report would be required to be provided to any consumer within 30 days after a request for the same.

The Secretary of Labor would in turn each year be required to submit a report to Congress regarding the covered business entities that (1) have failed to conduct audits required under the Act for the preceding year or have been adjudicated in violation of any other provision of the Act or (2) have been found to have used forced labor, including the use of forced labor in their supply chain or by their on-site service providers.

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Audit Reports

The auditor would be required to prepare an audit report that includes the following:

- The direct supplier's or on-site service provider's (1) documented processes and procedures that relate to eradicating forced labor and (2) documented risk assessment and prioritization policies as such policies relate to eradicating forced labor.
- A description of the worker interviews, manager interviews and documentation review required under the Act.
- A description of all violations or suspected violations by the direct supplier of any U.S. forced labor laws or, if applicable, the laws of another country.
- For each violation described in the report, a description of any corrective and protective actions recommended for the direct supplier consisting of, at a minimum, (1) the issues relating to the violation and any root causes of the violation, (2) the implementation of a solution and (3) a method to check the effectiveness of the solution.

Contract Requirements

Covered business entities would be required to include in contracts with direct suppliers and on-site service providers a requirement that (1) the supplier or provider not retaliate against any worker for participating in an audit relating to forced labor and (2) worker participation in an audit will be protected through the same grievance mechanisms available to the worker for any other type of workplace grievance.

Enforcement

Under the Act, the Secretary of Labor could assess civil damages up to $100 million if a covered business entity violates the audit or reporting requirements of the Act. The covered business entity would first have the opportunity for a hearing.

In addition, the Secretary of Labor would be able to assess punitive damages of up to $500 million against a covered business entity for willful violations of the Act.

The Secretary of Labor also would be able to request the Attorney General institute a civil action for relief, including a permanent or temporary injunction, restraining order or any other appropriate order, if the Secretary believes that a violation of the Act constitutes a hazard to workers.

Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act

The Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act would require public companies to conduct an annual human rights analysis and include a Human Rights Risk and Impact Report in their annual report. Like the Slave-Free Business Certification Act, the Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act would extend beyond reporting.

Procedural Details

Bill number/sponsor/date of introduction: None. Discussion draft introduced in the House Committee on Financial Services, Subcommittee on Investor Protection, Entrepreneurship and Capital Markets on July 10, 2019.

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Mandatory Human Rights Analysis

Issuers that are required to file an annual report under Section 13 of the Exchange Act would be required to conduct an annual analysis to:

- Identify the existence of any human rights risks in their operations and value chain that are known or should be known, and rank any risks identified based on their severity.

  "Human rights risks" are defined as a potential adverse impact that an action of the issuer may have on the enjoyment of human rights, including those rights encompassed in (1) the Universal Declaration of Human Rights, (2) the International Covenant on Civil and Political Rights, (3) the International Covenant on Economic, Social, and Cultural Rights and (4) the eight core conventions of the ILO.

  Under the Act, an issuer's "value chain" consists of (1) any recruiters of workforce labor, and suppliers of products, component parts and raw materials used by the issuer in manufacturing any of its products, even if the relationship with the recruiter or supplier is indirect; and (2) entities that receive products or services from the issuer, other than for personal use.

- Identify the existence of any human rights impacts in their operations and value chain that are known or should be known, and rank any impacts identified based on their severity.

  "Human rights impacts" are defined as an adverse impact that an action of the issuer has had on the enjoyment of human rights, including those rights encompassed in the instruments listed in the definition of human rights risks.

When ranking human rights risks, issuers would be required to consider the gravity and extent of any potential harm to human rights and any anticipated challenges in remedying such harm. When ranking human rights impacts, issuers would be required to consider the gravity of the human rights impacts, the extent of harm and any challenges in remedying the harm.

Reporting

Issuers would be required to include the following in their annual report, under a heading labeled "Human Rights Risk and Impact Report":

- A brief description of the business structure of the supply chain, including subsidiaries and business relationships, to the extent not otherwise disclosed in the report.
- A description of any process through which the issuer educates executives, employees, contractors, sub-contractors and other actors in its value chain about any human rights policies of the issuer.
- A description of the human rights analysis conducted pursuant to the Act (which is earlier described).
- The results of the human rights analysis conducted pursuant to the Act, including the ranked lists of any identified human rights risks and impacts.
- A description of any action, including the establishment of any monitoring process, taken by the issuer to avoid or mitigate any (1) human rights risks and impacts identified in the current analysis and (2) human rights risks and impacts identified in the analysis described in the most recent annual report.

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- For any action taken, the issuer's assessment of the action's efficacy and a description of any outcomes of the action.

- If no action was taken, an explanation of why no action was taken.

- A description of any process the issuer has in place to avoid and mitigate any human rights impacts that it has caused or may cause and, if no such process is in place, a reasoned explanation of why no such process is in place.

ESG METRICS AND STRATEGY

Most institutional investors now take ESG factors into account in connection with investment, engagement and voting decisions. Investors' need for consistent, comparable, financially relevant disclosures is addressed by the Sustainable Accounting Standards Board standards and the recommendations of the Task Force on Climate-related Financial Disclosures (the TCFD recommendations are further discussed later in this Alert), as well as in part by other standards and frameworks such as those of the Global Reporting Initiative, the United Nations Global Compact, the World Economic Forum and CDP. However, all of these disclosures are voluntary. As a result, they are followed to varying degrees, made largely outside of SEC filings and in many cases not easily comparable.

Although current statutes and rules require public company disclosure on a limited number of ESG topics, the disclosure requirements largely are principles-based and generally do not require issuers to report specific ESG metrics.

During January 2020, the SEC published guidance on the disclosure of key performance indicators and metrics in the Management's Discussion and Analysis of Financial Condition and Results of Operations section of filings. Although the guidance is not specific to ESG-related key performance indicators (KPIs) and metrics, some of the KPIs and metrics contemplated by the guidance are of that nature. Examples cited in the guidance that could fall into this category include (1) voluntary or involuntary employee turnover rate, (2) total energy consumed and (3) data security measures (e.g., the number of data breaches or number of accountholders affected by data breaches). However, the guidance does not require issuers to disclose ESG KPIs or metrics. For a further discussion of the guidance, see our earlier Alert here.

In its May 2020 report, the Investor-as-Owner Subcommittee of the SEC's Investor Advisory Committee recommended that the SEC begin in earnest an effort to update the reporting requirements for issuers to include material, decision-useful ESG factors. The Subcommittee provided the following reasons for its recommendation:

- Investors require reliable, material ESG information upon which to base investment and voting decisions.

- Investors are not being served or protected by the piecemeal, ad hoc, inconsistent information currently in the mix.

- Issuers should directly provide material information to the market relating to ESG issues used by investors to make investment and voting decisions.

- Issuers are not always the primary source of the ESG data being used by investors to make investment and voting decisions, with a patchwork of information in the mix and third-party data sources filling the void.

  The Subcommittee characterized the information in the market as inconsistent and unreliable, and expressed the view that investors and third-party data providers should have accurate and comparable primary-source information deemed by the issuer to be material upon which to base their analysis, and that consistent standards and oversight should govern disclosure of this data.

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- Requiring disclosure of material ESG data and information will level the playing field between issuers.

  The Subcommittee expressed the view that smaller issuers, or those that are capital-constrained, can be at a disadvantage for investment since they are not as able to provide the same amount or level of detail of ESG-related data as larger issuers. According to the Subcommittee, SEC reporting obligations that require a single standard of material, decision-useful information based upon data that companies already use to make their business decisions would level the playing field among issuers.

- To ensure the flow of capital to the U.S. markets and to U.S. issuers of all sizes.

  The Subcommittee noted that many investors view material ESG factors as critical drivers of risks and returns in their investment decisions, both in the short term and the long term. According to the Subcommittee, requiring disclosure of this information by issuers will facilitate the flow of capital to U.S. issuers of all sizes from investors with or without ESG-related investment mandates. The Subcommittee also expressed the view that, in time, without the availability of reliable ESG-related material information for all U.S. issuers, capital may be redirected by investors to companies outside the United States that are required by non-U.S. regulators to report ESG data.

- The United States should take the lead on ESG disclosure.

  The Subcommittee recommends that the SEC take the lead on this issue by establishing a principles-based framework that will provide the issuer-specific material, decision-useful information that investors require to make investment and voting decisions. The Subcommittee goes on to note that this disclosure should be based upon the same information that companies use to make their own business decisions. The Subcommittee expressed the concern that, if the SEC does not take the lead, it is highly likely that other jurisdictions will impose standards in the next few years that U.S. issuers will directly or indirectly be bound to follow.

For a further discussion of the Subcommittee's recommendations, see our earlier Alert here.

Proposed Congressional legislation calling for broad-based ESG reporting is intended to address at least some of the concerns shared by the Subcommittee.

ESG Disclosure Simplification Act

The ESG Disclosure Simplification Act would require registrants to annually disclose information concerning ESG metrics, including their connection to long-term strategy.

The bill is intended to address investor calls for more ESG information to inform investment, voting and other engagement decisions.

Procedural Details

Bill number: H.R.4329

Sponsor: Juan Vargas (Democrat, California); one Democratic co-sponsor.

Date of introduction: September 13, 2019

Additional action taken: Passed with amendments by the House Committee on Financial Services by a vote of 31-22, along party lines, on September 20, 2019. Placed on the Union Calendar on January 7, 2020.

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Disclosure Requirements

Issuers of securities registered under Section 12 of the Exchange Act or that are required to file annual reports under Section 15(d) of that Act would be required to disclose the following in any proxy or consent solicitation material for an annual meeting of shareholders:

- A clear description of the issuer's views about the link between ESG metrics (as defined by the SEC in further rulemaking) and the issuer's long-term business strategy.
- A description of any process the issuer uses to determine the impact of ESG metrics on its long-term business strategy.

The foregoing information would be permitted to be included in a notes section of the filing.

In addition, the Act would require the SEC to adopt regulations:

- Requiring issuers to, in filings that require audited financial statements, disclose ESG metrics.
- Defining ESG metrics.

In adopting the foregoing regulations, the Act indicates the SEC may, as it determines appropriate, incorporate any internationally recognized, independent, multi-stakeholder ESG disclosure standards.

De Facto Materiality of ESG Metrics

The Act provides that ESG metrics as defined by the SEC would be "de facto material" for purposes of the Exchange Act and the Securities Act.

Establishment of Sustainable Finance Advisory Committee

The Act would require the SEC to establish a permanent Sustainable Finance Advisory Committee. Within 180 days after its first meeting, the Committee would be required to submit to the SEC recommendations concerning the ESG metrics the SEC should require issuers to disclose. The Committee also would be required to submit a report to the SEC within 18 months after the Committee's first meeting that identifies the challenges and opportunities for investors associated with sustainable finance and recommends policy changes to facilitate the flow of capital towards sustainable investments, in particular environmentally sustainable investments. In addition, the Committee would be charged with advising the SEC on sustainable finance when solicited.

The Committee would consist of up to 20 members serving four-year terms. The members would represent individuals and entities with an interest in sustainable finance, such as (1) experts on sustainable finance, (2) operators of financial infrastructure, (3) entities that provide analysis, data or methodologies that facilitate sustainable finance, (4) insurance companies, pension funds, asset managers, depository institutions or credit unions or (5) other financial institutions that intermediate investments in sustainable finance or manage risks related to sustainable development.

CLIMATE CHANGE

In 2010, the SEC published an interpretive release addressing how existing disclosure requirements could apply to climate-related issues. Consistent with the view that the federal securities laws' existing principles-based disclosure regime is sufficiently flexible to accommodate ESG disclosures, the interpretive release identified four items in Regulation S-K that may require disclosures relating to climate change. However, the guidance does not require specific

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climate-related disclosures, and most climate-related disclosures sit outside of SEC filings, in corporate social responsibility or sustainability reports. The 2010 guidance is further discussed here.

Many companies publish qualitative and quantitative information as part of their voluntary reporting on environmental and climate-related matters. Qualitative disclosure includes information on governance, strategy and risk, such as board oversight, initiatives to reduce environmental impacts, physical and transition risks of climate change and efforts to mitigate those risks. Quantitative disclosures include historical metrics and targets concerning energy usage (total and renewable), greenhouse gas emissions, water usage, land use and waste generation. An increasing number of companies are reporting science-based targets.

In 2017, the recommendations of the Financial Stability Board's (FSB) Task Force on Climate-related Financial Disclosures were published. The objective of the TCFD recommendations is to encourage companies to evaluate and disclose, as part of their financial filing preparation and reporting processes, the material climate-related risks and opportunities pertinent to their business activities. The information reported is intended to help investors and other financial market participants, such as lenders and insurance underwriters, to assess and price climate-related risks and opportunities. The TCFD framework includes 11 recommended disclosure topics centered around four elements: (1) governance; (2) strategy; (3) risk management; and (4) metrics and targets. There also is supplemental guidance, including suggested metrics, for the financial sector (banks, insurance companies, asset owners and asset managers) and non-financial groups (energy, transportation, materials and buildings and agriculture, food and forest products). In 2020, guidance on scenario analysis for non-financial companies and risk management integration and disclosure was published. For a further discussion of the TCFD and other voluntary reporting initiatives, see our earlier Alert here.

According to the FSB, more than 1,500 organizations – including financial institutions responsible for assets of approximately $150 trillion – have expressed their support for the TCFD recommendations. For example, in his January 2020 letter to CEOs, BlackRock's Larry Fink requested that companies disclose climate-related risks in line with the TCFD recommendations, including their plans for operating under the scenario contemplated by the Paris Agreement.

On October 29, 2020, the FSB published its 2020 status report on TCFD disclosures. According to the report, disclosure of climate-related financial information aligned with the TCFD recommendations has steadily increased since the recommendations were published in 2017. Disclosure of climate-related information aligned with the TCFD recommendations increased by six percentage points, on average, across the 11 recommended disclosure topics between 2017 and 2019. However, the report highlighted the continuing need for progress in improving levels of TCFD-aligned disclosures given the urgent demand for consistency and comparability in reporting.

According to the report, for 2019, nearly 60% of the world's 100 largest public companies supported the TCFD, reported in line with the TCFD recommendations, or both. The FSB found that, on average across the TCFD recommendations, 42% of companies with a market capitalization greater than $10 billion disclosed at least some information in line with each individual TCFD recommendation in 2019, while 15% of companies with a market capitalization of less than $2.8 billion did so. Energy companies and materials and buildings companies led on disclosure, with an average level of TCFD-aligned disclosures of 40% for energy companies and 30% for materials and buildings companies in 2019. According to the report, expert users of disclosure identified the impact of climate change on a company's business and strategy as the most useful information for financial decision-making. However, that information had the lowest level of disclosure across the recommendations, with just one in 15 companies making that disclosure.

House and Senate Democrats have advocated for mandatory climate risk reporting by public companies. In addition to the House and Senate bills discussed below, House and Senate Democrats called for enhanced public disclosure in recent comprehensive reports addressing climate change.

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On June 30, 2020, the House Select Committee on the Climate Crisis released a 538-page report on addressing climate change: *Solving The Climate Crisis – The Congressional Action Plan For A Clean Energy Economy And A Healthy, Resilient, And Just America.* The nine-member (all Democratic) committee was chaired by Kathy Castor (Democrat, Florida).

In its report, the House Select Committee recommended Congress pass legislation to require public companies to report climate risks in their financial disclosures to the SEC, and that Congress direct the SEC to update its guidance to provide clear and enforceable triggers for disclosure of climate-related physical, transition and liability risks. The House Select Committee also recommended that Congress establish a federal advisory committee on sustainable finance to make recommendations to the SEC regarding the environmental, social and governance metrics that the SEC should require issuers to disclose in their financial statements.

On August 25, 2020, the Senate Democrats' Special Committee on the Climate Crisis released its report, *The Case for Climate Action – Building A Clean Economy For The American People.* The ten-member Committee was chaired by Brian Schatz (Democrat, Hawaii). In its 260-page report, the Committee advocated for a number of measures to address climate change. Specific to public company disclosure, the Committee recommended that the SEC issue updated rules demanding that companies disclose climate risks and that the SEC take enforcement action against companies that fail to do so. Specifically, the Committee was of the view that the SEC should require all public companies to disclose their greenhouse gas emissions, exposure to physical and transition risks and climate risk management strategy.

In addition, in its September 9, 2020 report, the Climate-Related Market Risk Subcommittee of the Market Risk Advisory Committee of the Commodity Futures Trading Commission expressed the view that a mandatory, standardized disclosure framework for material climate risks, including disclosure guidance that is closely aligned with developing international consensus, would improve the utility and cost-effectiveness of disclosures. The principles for effective climate risk disclosure for financial regulators to consider that were recommended by the Subcommittee were mainly derived from the TCFD. Among other things, the Subcommittee recommended that regulators require listed companies to disclose Scope 1 and 2 emissions.

The *Biden Plan for a Clean Energy Revolution and Environmental Justice* also contemplates additional climate-related disclosures by public companies. The Biden Plan lists under its Day One executive actions requiring public companies to disclose climate risks and the greenhouse gas emissions in their operations and supply chains.

Climate Risk Disclosure Act

The Climate Risk Disclosure Act would require public companies to annually disclose information regarding climate change-related risks and related risk mitigation strategies. A similar bill was introduced in the Senate in 2018 (S.3481), which was superseded by the 2019 Senate bill described below.

Procedural Details

Senate:

Bill number: S.2075

Sponsor: Elizabeth Warren (Democrat, Massachusetts); 16 Democratic co-sponsors.

Date of introduction: July 10, 2019

Additional action: Referred to the Committee on Banking, Housing, and Urban Affairs.

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House:

Bill number: H.R.3623 (substantially similar to S.2075)

Sponsor: Sean Casten (Democrat, Illinois); 35 Democratic co-sponsors.

Date of introduction: July 5, 2019

Additional action taken: Reported (amended) by the Committee on Financial Services and placed on the Union Calendar on October 27, 2020.

General Disclosure Requirements

Issuers that file reports under Section 13 or 15(d) of the Exchange Act (referred to as "covered issuers") would be required to include in their annual report information regarding:

- The identification and evaluation of potential financial impacts of, and any risk-management strategies relating to, physical risks and transition risks posed to the covered issuer by climate change.

  Under the Act, "physical risks" are defined as financial risks to long-lived fixed assets, locations, operations or value chains that result from exposure to physical climate-related effects, including (1) increased average global temperatures and increased frequency of temperature extremes, (2) increased severity and frequency of extreme weather events, (3) increased flooding, (4) sea-level rise, (5) ocean acidification, (6) increased frequency of wildfires, (7) decreased arability of farmland, (8) decreased availability of fresh water and (9) any other financial risks to long-lived fixed assets, locations, operations or value chains determined appropriate by the SEC.

  "Transition risks" are defined as financial risks attributable to climate change mitigation and adaptation, including efforts to reduce greenhouse gas emissions and strengthen resilience to the impacts of climate change, including (1) costs relating to international treaties and agreements, federal, state and local policy, new technologies, changing markets, reputational impacts relating to changing consumer behavior and litigation and (2) assets that may lose value or become stranded due to any of the costs described in (1) above.

- A description of any established corporate governance processes and structures to identify, assess and manage climate-related risks.

- A description of specific actions that the covered issuer is taking to mitigate identified risks.

Covered issuers also would be required to incorporate into their disclosure:

- Quantitative analysis to support any qualitative statements made.

- A discussion of the short-, medium- and long-term resilience of any risk management strategy, and the evolution of applicable risk metrics, of the covered issuer.

- The total cost of carbon attributable to the direct and indirect greenhouse gas emissions of the covered issuer, using, at a minimum, the social cost of carbon.

  The "social cost of carbon" is defined as the monetized present value, discounted at a 3% or lower discount rate, in dollars, per metric ton of carbon dioxide or carbon dioxide equivalent, of the net global costs over 300 years

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that result from changes in (1) net agricultural productivity, (2) decreases in capital and labor productivity, (3) effects on human health, (4) property damage from increased sea level rise, flooding, wildfires and frequency and severity of extreme weather events, (5) the value of ecosystem services and (6) any other type of economic, social, political or natural disruption.

- Any other information or climate-related or greenhouse gas emissions metric that the SEC determines is necessary, appropriate to safeguard the public interest or directed at ensuring that investors are informed.

In connection with preparing any qualitative or quantitative risk analysis statement required by the Act, a covered issuer would be required to consider:

- A baseline scenario that includes the physical impacts of climate change resulting in an increase in the global average temperature of 1.5°C or more above pre-industrial levels.

  The 2018 Senate bill contemplated a 2°C scenario. This was changed to 1.5°C in the 2019 bill in recognition of the findings in the October 2018 *Special Report on Global Warming of 1.5°C* published by the Intergovernmental Panel on Climate Change (IPCC). The IPCC concluded that "with clear benefits to people and natural ecosystems, limiting global warming to 1.5°C compared to 2°C could go hand in hand with ensuring a more sustainable and equitable society." The IPCC is the UN body for assessing the science related to climate change. The IPCC was created in 1988 by the World Meteorological Organization and the United Nations Environment Programme. Its objective is to provide governments at all levels with scientific information that they can use to develop climate policies.

- A well-below 1.5°C scenario.

- Any additional climate analysis scenario considered appropriate by the SEC.

In addition, the rules issued by the SEC under the Act would be required to:

- Include reporting standards for estimating and disclosing direct and indirect greenhouse gas emissions by the covered issuer and its affiliates that separate, to the extent practicable, the total emissions of each specified greenhouse gas by the covered issuer and include greenhouse gas emissions by the covered issuer during the year covered by the report.

- Include reporting standards for disclosing, with respect to the covered issuer, the total amount of fossil fuel-related assets owned or managed by the covered issuer and the percentage of fossil fuel-related assets as a percentage of total assets owned or managed by the covered issuer.

- Establish a minimum social cost of carbon to be used in preparing climate-related disclosures.

- Specify requirements for, and the disclosure of, input parameters, assumptions and analytical choices to be used in climate scenario analyses required under the Act, including (1) present value discount rates, (2) time frames to consider, including 5-, 10- and 20-year time frames, and (3) the minimum pricing of greenhouse gas emissions.

Information disclosed pursuant to the Act would be required to be provided in an interactive data format.

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Industry-specific Disclosures

The rules issued by the SEC would be required to establish climate-related risk disclosure guidance that, to the extent practicable, is tailored for industries within specific sectors of the economy, including finance, insurance, transportation, electric power, mining, non-renewable energy and any other sector determined to be appropriate by the SEC.

In addition, covered issuers engaged in the commercial development of fossil fuels would be required to report the following:

- An estimate of the total and a disaggregated amount of direct and indirect greenhouse gas emissions attributable to (1) combustion, (2) flared hydrocarbons, (3) process emissions, (4) directly vented emissions, (5) fugitive emissions or leaks and (6) land use changes.

- A description of (1) the sensitivity of fossil fuel reserve levels to future price projection scenarios that incorporate the social cost of carbon into hydrocarbon pricing, (2) the percentage of the reserves that will be developed under various climate change scenarios and (3) a forecast for the development prospects of each reserve under the climate change scenarios.

- The potential amount of direct and indirect greenhouse gas emissions that are embedded in hydrocarbon reserves, with each calculation presented as a total and in subdivided categories by type of reserve.

- The methodology used for detecting and mitigating fugitive methane emissions, including (1) the frequency with which applicable assets of the covered issuer are observed for methane leaks, (2) the processes and technology used to detect methane leaks, (3) the percentage of assets the covered issuer inspects under that methodology and (4) quantitative and time-bound reduction goals of the covered issuer with respect to methane leaks.

- The amount of water withdrawn from freshwater sources for use and consumption in operations.

- The percentage of the water that comes from regions of water stress or that face wastewater management challenges.

- Any other information the SEC determines is necessary, appropriate to safeguard the public interest or directed at ensuring that investors are informed.

Additional Rulemaking; Disclosure Backstop

Within two years after the enactment of the Act, the SEC would be required to issue rules with respect to the information covered issuers would be required to disclose under the Act. Rulemaking would be required to be done in consultation with the Environmental Protection Agency, the Secretary of Energy, the National Oceanic and Atmospheric Administration, the Office of Management and Budget and any other federal agency determined to be appropriate by the SEC.

If the SEC has not issued rules implementing the Act within two years after its enactment, until rules are issued, a covered issuer would be deemed in compliance with the requirements of the Act if its disclosures satisfy the TCFD recommendations. This backstop was an addition made in 2019 to the similar bill introduced by Senator Warren in 2018.

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POLITICAL SPENDING

Increased transparency and accountability in corporate political spending has been a significant stakeholder focus for almost 20 years. More than nine years ago, in August 2011, a bipartisan group of scholars petitioned the SEC to require political spending disclosure.

In the absence of mandatory political spending disclosure, investors have submitted a significant number of shareholder proposals seeking disclosure. Approximately 1,000 such shareholder proposals have been submitted over the last 20 years. According to ISS, for the 2020 annual meeting season, 95 political spending proposals were submitted, slightly down from 102 for 2019. Seven of the proposals received majority support, more than for any other E&S-related category.

Shareholder Protection Act and Shareholder Political Transparency Act

The Shareholder Protection Act would require shareholder authorization before a public company could make certain political expenditures, as well as periodic disclosures of expenditures for political activities. Bills relating to this Act have been introduced in both the Senate and House.

Another bill has been introduced in the House, calling for the adoption of the Shareholder Political Transparency Act. The principal difference from the proposed Shareholder Protection Act is that the Shareholder Political Transparency Act would not require shareholder approval of political expenditures, as further described below.

Except as noted, the summary below is of the more comprehensive Shareholder Protection Act proposed in the Senate.

Procedural Details

Senate:

Bill number: S.1630

Sponsor: Robert Menendez (Democrat, New Jersey); 16 Democratic co-sponsors.

Date of introduction: May 23, 2019

Additional action taken: Referred to the Committee on Banking, Housing, and Urban Affairs.

House:

Shareholder Protection Act:

Bill number: H.R.4991

Sponsor: Tom Malinowski (Democrat, New Jersey); one Democratic co-sponsor.

Date of introduction: September 25, 2019

Additional action taken: Referred to the House Committee on Financial Services.

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Shareholder Political Transparency Act:

Bill number: H.R.5929

Sponsor: Bill Foster (Democrat, Illinois); 19 Democratic co-sponsors.

Date of introduction: February 21, 2020

Additional actions taken: Referred to the House Financial Services Committee. Consideration and Mark-up Sessions were held on February 27 and 28, 2020. On February 28, 2020, the Committee ordered to the bill to be reported (amended) with 33 Yeas and 25 Nays.

Expenditures for Political Activities Defined

Under the Act, the following would be expenditures for political activities:

- An independent expenditure as defined in section 301(17) of the Federal Election Campaign Act.
- An electioneering communication as defined in section 304(f)(3) of the Federal Election Campaign Act and any other public communication as defined in section 301(22) of that Act that would be an electioneering communication if it were a broadcast, cable or satellite communication.
- Dues or other payments to trade associations or organizations described in section 501(c) of the Internal Revenue Code and exempt from tax under section 501(a) of that Code that are, or could reasonably be anticipated to be, used or transferred to another association or organization for the purposes described in the preceding bullets.

The following expressly would not be expenditures for political activities:

- Direct lobbying efforts through registered lobbyists employed or hired by the issuer.
- Communications by the issuer to its shareholders and executive or administrative personnel and their families.
- The establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation.

Proxy Statement and Shareholder Vote Requirements

The Act would require that each solicitation of a proxy, consent or authorization by an issuer with a class of equity securities registered under Section 12 of the Exchange Act:

- Contain a description of the specific nature of any expenditure for political activities proposed to be made by the issuer for the forthcoming fiscal year that has not been authorized by a vote of its shareholders, to the extent the specific nature is known by the issuer.
- Contain the total amount of expenditures for political activities proposed to be made by the issuer for the forthcoming fiscal year.
- Provide for a separate vote of the issuer's shareholders to authorize such expenditures for political activities in the total amount described as required above.

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Issuers would not be allowed to make an expenditure for political activities unless the expenditure is of the nature of those proposed by the issuer in accordance with the Act and it has been authorized by a vote of the majority of the outstanding shares of the issuer.

As noted above, this portion of the Shareholder Protection Act would not be part of the Shareholder Political Transparency Act.

Liability for Violations of the Shareholder Approval Requirement

A violation of the Act's shareholder authorization requirement would be considered a breach of the fiduciary duty of any officer or director who authorized the expenditure. An officer or director of an issuer who authorizes an expenditure for political activities in violation of the Act would be jointly and severally liable to any person or class of persons that held shares at the time the expenditure was made in an amount that is equal to three times the expenditure.

Board Vote on Expenditures over $50,000

Within 180 days after the enactment of the Act, the SEC would be required to issue rules requiring the national securities exchanges to prohibit the listing of any class of equity security of an issuer that has not amended its bylaws to expressly provide that a vote of its board of directors would be required on any expenditure for political activities (1) that is more than $50,000 and (2) that would result in the total amount spent by the issuer for a particular election to be more than $50,000. This portion of the Shareholder Protection Act also would not be part of the Shareholder Political Transparency Act.

The issuer would be required to disclose the votes of each member of its board on any such vote within 48 hours, including in a clear and conspicuous location on its website.

This section of the Act indicates that, for purposes of the Federal Election Campaign Act, an expenditure for political activities by an issuer would not be treated as made in concert or cooperation with, or at the request or suggestion of, a candidate or committee solely because a member of the board of directors of the issuer voted on the expenditure as required under the Act.

Additional Reporting Requirements

Issuers would be required to include information on expenditures for political activities in quarterly and annual reports.

Quarterly Reporting. Issuers with a class of equity securities registered under Section 12 of the Exchange Act would be required to submit to the SEC and its shareholders a quarterly report containing:

- A description of any expenditure for political activities made during the preceding quarter.
- The date of each expenditure for political activities.
- The amount of each expenditure for political activities.
- The votes of each board member authorizing the expenditure for political activity (not part of the Shareholder Political Transparency Act).
- If the expenditure for political activities was made in support of or in opposition to a candidate, the name of the candidate and the office sought by, and the political party affiliation of, the candidate.

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- The name or identity of trade associations or organizations described in section 501(c) of the Internal Revenue Code and exempt from tax under section 501(a) of the Code that receive dues or other payments that would be required to be described as discussed under "Proxy Statement and Shareholder Vote Requirements" above.

Annual Reporting. Issuers would be required to include in their annual report a summary of each expenditure for political activities made during the preceding year in excess of $10,000, and each expenditure for political activities for a particular election if the total amount of the expenditures for that election are in excess of $10,000.

In addition, the Shareholder Political Transparency Act would require (1) a description of the specific nature of any expenditure for political activities the issuer intends to make for the forthcoming fiscal year, to the extent the specific nature is known to the issuer, and (2) the total amount of expenditures for political activities intended to be made by the issuer for the forthcoming fiscal year. This tracks proxy statement disclosure that would be required under the Shareholder Protection Act.

CORPORATE TAX TRANSPARENCY

As noted by Principles for Responsible Investment in its 2018 publication, *Evaluating and Engaging On Corporate Tax Transparency: An Investor Guide*, investor interest in how investee companies approach tax-related issues is growing. The Guide highlights four key arguments for enhanced corporate tax transparency:

- The amount of corporate income tax a company pays is material to its profitability. Investors therefore seek to understand the extent to which future cash flows rely on the use of artificial tax structures that may be challenged in the future.

- Corporate tax avoidance activities may suggest underlying legal, operational, reputational, financial and/or governance risks. Companies that pursue aggressive tax minimization activities may be sending a signal regarding the board's or management team's risk tolerance, which, if high, could result in a variety of damaging outcomes for the business.

- Investors want reassurance that the tax practices of investee companies can withstand stakeholder scrutiny and potential regulatory changes.

- Corporate taxes support society's tangible (i.e., infrastructure) and intangible (i.e., education, governance/legal, etc.) needs. Strong government institutions create a solid foundation for competition, growth and other factors that enable long-term business sustainability at investee companies. Corporate income taxes are an important part of most governments' revenue base and therefore help to support this.

Disclosure of Tax Havens and Offshoring Act

The Disclosure of Tax Havens and Offshoring Act would require certain issuers to annually disclose information relating to the tax jurisdiction, income and assets of their constituent entities on a country-by-country basis. According to the press release put out by the bill sponsors, the Act would "require corporations to disclose their financial reporting on a country-by-country basis so Americans can see the extent to which corporations are abusing tax havens or offshoring jobs."

Procedural Details

Senate:

Bill number: S.1609

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Sponsor: Chris Van Hollen (Democrat, Maryland); six Democratic and one Independent co-sponsors.

Date of introduction: May 22, 2019

Additional action taken: Referred to the Senate Committee on Banking, Housing, and Urban Affairs.

House:

Bill number: H.R.5933

Date of introduction: February 21, 2020

Sponsor: Cynthia Axne (Democrat, Iowa); 17 Democratic co-sponsors.

Additional action: Referred to the House Financial Services Committee.

Subject Entities

Under the Act, "covered issuers" would be required to provide specified information, as further discussed below, concerning their "constituent entities."

A "covered issuer" is an issuer that is a member of a multinational enterprise group and the multinational enterprise group of which the issuer is a member has annual revenue for the preceding calendar year of not less than an amount determined by the SEC to conform to U.S. or international standards for country-by-country reporting.

A "constituent entity" is, with respect to a covered issuer, any separate business entity of that issuer.

Required Disclosures

The Act would require covered issuers to file with the SEC a report that includes the following information concerning its constituent entities:

- The complete legal name of the constituent entity.
- The tax jurisdiction, if any, in which the constituent entity is resident for tax purposes.

  As used in the Act, the term "tax jurisdiction" is a country or a jurisdiction that is not a country but that has fiscal autonomy, including a territory or possession of the United States that has fiscal autonomy.
- The tax jurisdiction in which the constituent entity is organized or incorporated, if different from the tax jurisdiction of residence.
- The tax identification number, if any, used for the constituent entity by the tax administration of the constituent entity's tax jurisdiction of residence.
- The main business activities of the constituent entity.

In addition, the Act would require the following information for each tax jurisdiction in which one or more of the constituent entities is resident, aggregated or consolidated for the constituent entities resident in each tax jurisdiction:

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- Revenues generated from transactions with other constituent entities.
- Revenues not generated from transactions with other constituent entities.
- Profit or loss before income tax.
- Total income tax paid on a cash basis to all tax jurisdictions.
- Total accrued tax expense recorded on taxable profits or losses.
- Stated capital.
- Total accumulated earnings.
- Total number of employees on a full-time equivalent basis.
- Net book value of tangible assets, which, for purposes of the Act, does not include cash or cash equivalents, intangibles or financial assets.

The foregoing information also would be required, in aggregated or consolidated form, for any constituent entity or entities that have no tax jurisdiction of residence. In addition, if a constituent entity is an owner of a constituent entity that does not have a jurisdiction of tax residence, the owner's share of the revenues and profits of the entity that does not have a jurisdiction of tax residence is required to be aggregated or consolidated with the information for the owner's tax jurisdiction of residence.

Reporting

The reporting period under the Act would be the period of the covered entity's applicable financial statements prepared for the 12-month period that ends with or within the taxable year of the covered issuer. If the covered issuer does not prepare an annual applicable financial statement, then the reporting period would be the 12-month period that ends on the last day of the taxable year of the covered issuer.

The deadline for filing a report under the Act would be the due date (including extensions) for filing the covered issuer's tax return in the tax jurisdiction in which the covered issuer's multinational enterprise group is resident.

Information provided pursuant to the Act would be required to be provided in a machine-readable format prescribed by the SEC and would be required to be made available to the public online.

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