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Disclosure Overload? Lessons For Risk Disclosure & ESG Reporting Reform From The Regulation S-K Concept Release

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DISCLOSURE OVERLOAD? LESSONS FOR RISK DISCLOSURE & ESG REPORTING REFORM FROM THE REGULATION S-K CONCEPT RELEASE

VIRGINIA HARPER HO*

ABSTRACT

In 2018 and 2019, the SEC released the first new rules to emerge from a decades-long project to "modernize and simplify" the disclosure obligations that apply to publicly traded companies under Regulation S-K. Most are pragmatic fixes that should make disclosure more user-friendly for investors and cheaper for companies. Largely missing, however, are any changes to the basic rules governing how companies provide information to investors about risk, including emerging "environmental, social, and governance" (ESG) risks. In part, this is because of persistent concerns that such reforms will result in costly over-disclosure that will overload investors and obscure useful information. Using data from nearly 300 public comments submitted during the SEC's own review of its reporting framework, this study challenges some of these key objections to ESG disclosure reform. As the first comprehensive empirical analysis of the public comment data across over 140 questions raised by the SEC, it also offers a valuable resource for current policy debates and sheds light on fundamental issues that will shape the future of risk disclosure reform.

* Professor of Law and Associate Dean for International & Comparative Law, University of Kansas. This Article has benefitted from the author's participation in several committees of the American Bar Association's Section of Business Law, the Section of International Law, and the Section on Environmental Regulation (SEER) on initiatives related to the issues explored here, including the SEC's Disclosure Effectiveness Initiative. However, the views expressed here do not represent the views of the ABA or any of its working groups. Special thanks for their comments on various aspects of this project are owed to Don Langevoort, Jill Fisch, Tom Lin, Hilary Allen, Arthur Laby, Michael Vandenbergh, Stephen Park, Josephine Sandler Nelson, Kathy Jaffari, James Coburn, and Veena Ramani, as well as to participants at the 2016 Lewis & Clark Business Law Forum, the 2017 J.B. & Maurice C. SHAPIRO Environmental Law Symposium at the George Washington University School of Law, the 2017 University of Sheffield Conference on Law, Finance, and Sustainability, the 2017 and 2019 National Business Law Conferences, and faculty workshops at Washington & Lee, Villanova, and the Chicago-Kent College of Law. The author wishes to particularly acknowledge the generous research assistance provided by Nicholas Birdsong and by Nancy Cleveland and interns at Sustrana, LLC during 2016 and 2017. Any errors are mine alone.

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Ho: Disclosure Overload? Lessons For Risk Disclosure & ESG Reporting

Excessive disclosure . . . can overload investors with immaterial information that can render more material information difficult to find and evaluate.
~ Exxon Mobil (2016)[1]

[H]igh levels of immaterial disclosure can obscure important information or reduce incentives for certain market participants to trade or create markets for securities.
~ Regulation S-K Concept Release (2016).[2]

INTRODUCTION

IN 2018 and 2019, the Securities and Exchange Commission (SEC) released the first new rules to emerge from a decades-long project to "modernize and simplify" the disclosure obligations that apply to publicly traded companies under Regulation S-K.[3] Most are technical changes that simplify corporate reporting and reduce duplication and redundancy, pragmatic fixes that should make disclosure more user-friendly for investors and cheaper for companies. Largely missing, however, are any changes to the basic rules governing how companies provide information to the market about risk, including emerging "environmental, social, and governance" (ESG) risks.[4] Using data obtained from the SEC's own review of its reporting framework under Regulation S-K, this Article challenges some of the key objections to ESG disclosure reform and sheds light on a range of fundamental issues that will shape the course of any future changes to how companies disclose risk.

1. Comment of David S. Rosenthal, Vice Pres., Exxon Mobil (Aug. 9, 2016), https://www.sec.gov/comments/s7-06-16/s70616-355.pdf [https://perma.cc/9SXC-E87M]. Unless otherwise indicated, all further references to comments in this Article are addressed to Brent J. Fields, Secretary of the Securities and Exchange Commission, in response to the Business and Financial Disclosure Required by Regulation S-K: Concept Release, 81 Fed. Reg. 23,916, 23,919 (Apr. 22, 2016) [hereinafter Concept Release].

2. Concept Release, *supra* note 1, at 23,919.

3. Disclosure Update and Simplification, 83 Fed. Reg. 50,148 (Oct. 4, 2018) [hereinafter 2018 Final Rules] (to be codified at 17 CFR pts. 210, 229–30, 240, 249 & 274) (amending numerous rules under Regulation S-X, which governs financial statements, as well as certain provisions of the Securities Act of 1933 (the '33 Act), the Securities Exchange Act of 1934 (the '34 Act), Regulation S-K, and other provisions); FAST Act Modernization and Simplification of Regulation S-K, 84 Fed. Reg. 12,674 (Apr. 2, 2019) (to be codified at 17 CFR pts. 229–30, 239–40, 249, 270 & 274–75) [hereinafter 2019 Final Rules]; Modernization of Regulation S-K Items 101, 103, and 105, Rel. No. 33-10668 (proposed Aug. 8, 2019) [hereinafter 2019 Proposed Rules]. The SEC had previously introduced final rules on other aspects of the disclosure regime beyond Regulation S-K, but the 2018 and 2019 amendments are the first to affect the content of Regulation S-K.

4. The term "ESG" is sometimes used to refer to "sustainability" or non-financial information, even though it is broader than the former and narrower than the latter. On the relationship among these terms, see Richard Barker & Robert G. Eccles, *Should FASB and IASB Be Responsible for Setting Standards for Nonfinancial Information?* 6–8 (Green Paper, Oct. 12, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3272250 [https://perma.cc/N5VN-NF4L].

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The absence of more ambitious modifications to risk disclosure thus far is due less to the SEC's prudence and incrementalism and more to the fact that disclosure reform has become increasingly contentious. A prime objection is the potential for over-disclosure—the fear that any expansion of reporting requirements will overload investors with insignificant information that will obscure what is truly material.[5] Corporations and business groups also raise concerns that new disclosure rules will expand the space for disclosure-related litigation, impose higher compliance costs on reporting companies, and discourage listings on U.S. securities exchanges.[6]

Investors, on the other hand, increasingly assert that the problem of companies' public filings is more one of *under*-reporting and information asymmetries than disclosure overload.[7] Many argue that corporations are failing to identify emerging environmental or social risks as material to investors and so important risk-related information is not being adequately disclosed under existing rules.[8]

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5. This concern was first articulated by the United States Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 448–49 (1978) ("[I]f the standard of materiality is unnecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information a result that is hardly conducive to informed decisionmaking."), *quoted in* Basic v. Levinson, 485 U.S. 224, 231 (1988).

6. Concept Release, *supra* note 1, at 23,919 (noting all of these as factors weighing against expansive disclosure rules). *See generally* CTR. FOR CAPITAL MKTS. COMPETITIVENESS, U.S. CHAMBER OF COMMERCE, ESSENTIAL INFORMATION: MODERNIZING OUR CORPORATE DISCLOSURE SYSTEM (2017), https://www.centerforcapitalmarkets.com/wp-content/uploads/2013/08/U.S.-Chamber-Essential-Information_Materiality-Report-W_FINAL-1.pdf [https://perma.cc/WP2Z-6M5E] (arguing that ESG information does not fall within the Supreme Court's definition of materiality and that advocates of ESG disclosure "seek to reconceptualize materiality to advance their own objectives").

7. In 2018, institutional investors representing over $5 trillion in assets under management joined a petition urging the SEC consider new rulemaking on ESG disclosure by public companies. *See* Cynthia A. Williams & Jill E. Fisch, Request for Rulemaking Petition on Environmental, Social and Governance Disclosure (Oct. 1, 2018), https://www.sec.gov/rules/petitions/2018/petn4-730.pdf [https://perma.cc/ETY9-YTRN]; *see also id.* at 14–16 (citing four prior petitions on gender pay ratio, human capital management, human rights, political spending disclosure, and tax disclosure); Council of Institutional Investors, Congressional Submitted Testimony, *Hearing on Building a Sustainable and Competitive Economy: An Examination of Proposals to Improve Environmental, Social and Governance Disclosures Before the H. Subcomm. on Investor Protection, Entrepreneurship, and Capital Markets*, 116th Cong. 2 (July 9, 2019) [hereinafter CII Testimony], https://www.cii.org/files/issues_and_advocacy/correspondence/2019/July%209%202019%20(finalI)%20Subcommittee%20hearing%20letter.pdf [https://perma.cc/8X29-JF7P] (arguing that ESG disclosures in public filings are inadequate with respect to ESG risk).

8. CII Testimony, *supra* note 7; *see also* Williams & Fisch, *supra* note 7, at 2, 10–12; KIRAN VASANTHAM ET AL., 2019 INSTITUTIONAL INVESTOR SURVEY 15–16 (2019), https://www.morrowsodali.com/uploads/insights/attachments/ae189c6414e1ef6b0eed5b7372ecb385.pdf [https://perma.cc/P6XX-QTHH] (last visited

Demand from investors and regulators for more information on emerging ESG risks has been on the rise in recent years, fueled by growing recognition of their financial materiality.[9] Governments and multilateral institutions,[10] including the United Nations,[11] the OECD,[12] the G20,[13] the International Organization of Securities Commissions (IOSCO),[14] the International Accounting Standards Board (IASB),[15] the Worldwide Federation of Exchanges,[16] and the International Organization for Standardization (ISO),[17] are all promoting ESG disclosure reform as a way

July 10, 2019) (finding that 80% of institutional investors support the integration of ESG factors into existing mandatory disclosures).

9. *See generally* Gunnar Friede et al., *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, 5 J. SUSTAINABLE FIN. & INV. 210 (2015) (analyzing this evidence since the 1970s); *see also* TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (TCFD), FINAL REPORT: RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES 5–11 tbls.1 & 2 (2017) https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-2017-TCFD-Report-11052018.pdf [https://perma.cc/V9MH-5Z5T] (identifying the financial impacts of climate-related risk).

10. *See generally* WIM BARTELS, ET AL., KPMG INT'L ET AL., CARROTS & STICKS: GLOBAL TRENDS IN SUSTAINABILITY REPORTING REGULATION AND POLICY (2016) https://assets.kpmg/content/dam/kpmg/pdf/2016/05/carrots-and-sticks-may-2016.pdf [https://perma.cc/8VMS-Z2TN] (identifying approximately 400 measures in over sixty countries); *see also* REPORTING EXCHANGE, https://www.reportingexchange.com [https://perma.cc/XNV9-6JPE] (last visited Sept. 25, 2019) (subscription based) (identifying seventy governments that have now adopted sustainability reporting measures, 80% of which are mandatory).

11. *See About the PRI*, PRI, http://www.unpri.org/pri/about-the-pri/ [https://perma.cc/49N2-UPLR] (last visited Feb. 21, 2019) (describing the United Nations' voluntary framework for institutional investors who commit to engaging with corporations around non-financial performance).

12. *See generally* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INVESTMENT GOVERNANCE AND THE INTEGRATION OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS (2017), https://www.oecd.org/finance/Investment-Governance-Integration-ESG-Factors.pdf [https://perma.cc/SQ2U-YY3H].

13. *See About the Task Force*, TASK FORCE ON CLIMATE RELATED FINANCIAL DISCLOSURES, https://www.fsb-tcfd.org/about/ [https://perma.cc/PD4A-ESC3] (last visited Feb. 21, 2019) (explaining the mandate of the TCFD from the G20's Financial Stability Board).

14. *See* INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, STATEMENT ON DISCLOSURE OF ESG MATTERS BY ISSUERS 1 (2019), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD619.pdf [https://perma.cc/3S96-S6BW] (acknowledging the potential impact of ESG matters on issuer operations and investment risk and return).

15. *See, e.g.*, *Speech: IASB Chair on What Sustainability Reporting Can and Cannot Achieve*, IFRS (Apr. 2, 2019), https://www.ifrs.org/news-and-events/2019/04/speech-iasb-chair-on-sustainability-reporting/ [https://perma.cc/Y7TX-X9LR] (noting the IASB's support for ESG reporting harmonization and the limits of disclosure as a form of regulation).

16. *The World Federation of Exchanges Publishes Five Sustainability Principles for Member Exchanges*, WORLD FED'N EXCHS. (Oct. 4, 2018), https://www.world-exchanges.org/news/articles/world-federation-exchanges-publishes-five-sustainability-principles-member-exchanges [https://perma.cc/V7C4-C9KN].

17. *See Sustainable Finance*, INT'L ORG. STANDARDIZATION, https://www.iso.org/committee/7203746.html [https://perma.cc/Q9RA-FQUU] (last visited Sept. 21,

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to help capital markets more accurately price environmental and social risks and to encourage companies to become more accountable for the external impacts of their operations.[18] Regulators are also increasingly concerned about the systemic effects of climate-related risk on financial markets and aware of the need to make sure markets can more efficiently direct capital toward sustainable uses.[19] While there have been some efforts in Congress to take up these issues,[20] the SEC has thus far resisted investor calls for ESG disclosure reform, and current reporting requirements for U.S. public companies deal with these questions in a largely ad hoc manner.[21]

Fortunately, a rich source of data already exists that sheds light on whether the federal disclosure framework suffers from critical gaps or instead exacerbates over-disclosure. In 2016, as part of its comprehensive review of the federal disclosure regime, the SEC issued an ambitious concept release seeking public comment on the effectiveness of certain reporting requirements under Regulation S-K that apply to public companies (the Concept Release).[22] In the Concept Release, the SEC

2019) (establishing a technical committee to develop standards for sustainable finance and integrating ESG and sustainability considerations into financial analysis).

18. These two objectives have different rationales and justifications; for the first, those rationales are directly economic, while the second rests more directly on public policy and stakeholder-oriented rationales. Virginia Harper Ho & Stephen Park, *Non-Financial Reporting: Optimizing Private Ordering in Public Disclosure*, 41 U. PENN. INT'L L.J. 249, 270–76 (2019).

19. *See* EUROPEAN UNION HIGH-LEVEL WORKING GRP. ON SUSTAINABLE FIN., FINANCING A SUSTAINABLE EUROPEAN ECONOMY 20–22 (2017) [hereinafter EU REPORT ON SUSTAINABLE FINANCE], https://ec.europa.eu/info/sites/info/files/170713-sustainable-finance-report_en.pdf [https://perma.cc/JCS6-4WMF]; *see also About the Sustainable Development Goals*, UNITED NATIONS, https://www.un.org/sustainabledevelopment/sustainable-development-goals/ [https://perma.cc/3XG9-XBYL] (last visited, Feb. 21, 2019).

20. A bill to address climate risk disclosure was introduced in the Senate in 2018. Climate Risk Disclosure Act of 2018, S. 3481, 115th Cong. (2018). In July 2019, the House of Representatives' Committee on Financial Services' Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets held hearings on "Proposals to Improve Environmental, Social, and Governance Disclosure," including several bills on the topic that were pending in Congress at the time of the hearings. *See generally Hearing: Building a Sustainable and Competitive Economy: An Examination of Proposals to Improve Environmental, Social, and Governance Disclosures*, U.S. HOUSE OF REPRESENTATIVES COMM. REPOSITORY (July 10, 2019 2:00 PM), https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=109770 [https://perma.cc/4SDY-MDC7] (referencing the "ESG Disclosure Simplification Act of 2019," the "Shareholder Protection Act of 2019," the "Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019," and the "Climate Risk Disclosure Act of 2019," among others).

21. *See generally infra* Section III.B; *see also* Virginia Harper Ho, *Nonfinancial Disclosure & the Costs of Private Ordering*, 55 AM. BUS. L.J. 407, 425–30 (2018) (surveying these rules and the state of ESG disclosure).

22. Due to space limitations, the full list of questions in the Concept Release is not reproduced here. To review the public comments on the Concept Release, see Comments on Concept Release: Business and Financial Disclosure Required by

raised questions on many aspects of risk disclosure. It also for the first time sought input on whether ESG issues are material to investors and whether the current reporting framework already elicits adequate ESG information.[23] The SEC received over 25,000 comments, including over 375 unique responses.[24] Most focused entirely on the eight questions covering ESG issues without responding to the hundreds of other areas on which the SEC sought guidance. Eighty percent urged the SEC to improve how companies disclose ESG information in their public filings.[25]

This Article presents the results of the first in-depth empirical analysis of the public comments to the Concept Release, and the only one thus far to focus on risk-related disclosure.[26] It utilizes a hand-collected dataset drawn from the public comments submitted in response to the Concept Release as of December 31, 2017, as well as further evidence of corporate and investor perspectives on risk-related disclosure since then.[27] It begins by presenting a descriptive analysis of over 140 of the questions raised in the Concept Release,[28] creating a rich foundation for the second part of the analysis, which uses these data to test competing hypotheses about the extent to which investors and public companies are concerned about over-disclosure under Regulation S-K with respect to risk disclosure generally and ESG information specifically.

This study seeks to identify where investor and reporting company views differ significantly from each other on the need for disclosure reform, and to assess the extent to which areas of disagreement are most

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Regulation S-K, Rel. Nos. 33-10064, 34-77599 [hereinafter Regulation S-K Comments], https://www.sec.gov/comments/s7-06-16/s70616.htm [https://perma.cc/37FT-27DU] (last visited Feb. 11, 2020).

23. Concept Release, *supra* note 1, at section IV.F ("Disclosure of Information Related to Public Policy and Sustainability Matters").

24. *See* Regulation S-K Comments, *supra* note 22.

25. SUSTAINABILITY ACCOUNTING STANDARDS BD., THE STATE OF DISCLOSURE 2016: AN ANALYSIS OF THE EFFECTIVENESS OF SUSTAINABILITY DISCLOSURE IN SEC FILINGS 4 (2016) [hereinafter SASB], https://www.sasb.org/knowledge-hub/state-of-disclosure-2016/ [https://perma.cc/C2PJ-8VGS]; *see also* TYLER GELLASCH, TOWARDS A SUSTAINABLE ECONOMY: A REVIEW OF COMMENTS TO THE SEC'S DISCLOSURE EFFECTIVENESS CONCEPT RELEASE 21 (2016), https://www.ussif.org/Files/Public_Policy/Comment_Letters/Sustainable_Economy_Report.pdf [https://perma.cc/28WQ-NA5A] (noting that if form letter responses are included, support for ESG reform exceeds 99%).

26. There are three primary prior analyses of the public comments: Comment of J. Robert Brown, Jr., Professor of Law, Univ. of Denver Sturm Coll. of Law, Comment to the Regulation S-K Concept Release (Oct. 3, 2016), https://www.sec.gov/comments/s7-06-16/s70616-374.pdf [https://perma.cc/EU5C-FB9M] (analyzing previously submitted comments); SASB, *supra* note 25; and GELLASCH, *supra* note 25.

27. *See infra* Part II (explaining the methodology used in this study). The analysis presented here is also supported by evidence of corporate and investor perspectives on risk-related disclosure since the Concept Release. *See, e.g.*, CTR. FOR CAPITAL MKTS. COMPETITIVENESS, *supra* note 6.

28. *See infra* Appendix, at Table 1 (detailing the coverage of this study relative to all Concept Release questions).

relevant to future SEC rulemaking proposals. These questions remain critical as Congress and the SEC continue to assess the need for further disclosure reform,[29] particularly because the SEC's rulemaking to date addresses ESG disclosure and other core aspects of risk disclosure raised in the Concept Release only to a limited extent.[30]

This study moves beyond the few prior reports on the Regulation S-K Concept Release in several important ways. First, these reports either focus narrowly on the eight Concept Release questions on ESG disclosure or present high-level summaries of respondents' views.[31] Earlier reports have therefore failed to capture the extent to which ESG disclosure issues are integrally related to basic elements of the current disclosure framework covered in the Concept Release, namely:

- the scope of the Commission's statutory authority;[32]
- the nature of disclosure requirements;[33]
- disclosure of risk factors, risk management, and forward-looking information;[34]
- the continued relevance of Industry Guides;[35] the use of scaled or phased disclosures;[36] and
- the use of company websites, hyperlinking, and other aspects of disclosure delivery.[37]

This study takes advantage of the large number of unique responses to the Concept Release to produce a more nuanced, empirically grounded analysis. It is the first comprehensive analysis of the Regulation S-K public comment data with respect to ESG and risk disclosure.

The findings here confirm that concerns about *investors*' disclosure overload are overblown and indeed, outdated.[38] While many investors support some streamlining of risk-related disclosure, most investor comments focus on the *under-disclosure* of material information, not the reverse. The empirical results discussed in Part III below confirm that respondents' support for, or opposition to, ESG disclosure reform has less to do with ESG and more to do with their underlying views on materiality, the value of prescriptive disclosure, and how satisfied they are with the current state of reporting. At the same time, this study also finds a surpris-

29. 2019 Final Rules, *supra* note 3, at 9 (confirming the Commission's intent to consider further changes to the disclosure regime on the basis of earlier requests for comment, including the Regulation S-K Concept Release).

30. On the scope of the prior rules, see generally 2018 Final Rules, *supra* note 3; see also 2019 Final Rules, *supra* note 3, at 9–10 (summarizing the 2019 amendments); 2019 Proposed Rules, *supra* note 3.

31. *See supra* note 26 (citing these reports).

32. *See* Concept Release, *supra* note 1, at section III.A.1 & section IV.F.

33. *See id.* at section III.B.

34. *See id.* at section IV.C.

35. *See id.* at section IV.E.

36. *See id.* at section IV.H.

37. *See id.* at part V.

38. *See infra* Sections III.B.7 & C and sources cited therein.

ing level of agreement among respondents on a number of the SEC's proposals to simplify risk-related disclosures, particularly with regard to market risk disclosures and Management's Discussion and Analysis (MD&A).

Part I of this Article introduces the SEC's ongoing review and reform of disclosure under Regulation S-K. Part II describes the data, research questions, and methodology of this study. Part III presents a detailed analysis of the comment responses, followed by the primary research findings and conclusions. Due to the length of the Concept Release, readers interested in the primary conclusions of this study may wish to focus on the empirical analyses in Section III.C, while those interested in particular aspects of the Concept Release or Regulation S-K should focus on Sections III.A–B.

I. UNDER-REPORTING, DISCLOSURE OVERLOAD & THE CHALLENGES OF RISK-RELATED DISCLOSURE REFORM

The Concept Release and the 2018 and 2019 disclosure reforms are part of a comprehensive review of the federal disclosure regime that Congress first mandated in 2012 under the Jumpstart Our Business Startups (JOBS) Act.[39] In 2015, Congress extended that mandate under the Fixing America's Surface Transportation (FAST) Act.[40] The primary purpose of this effort was to "modernize and simplify" the disclosure system for the benefit of both investors and reporting companies.[41] More particularly, Congress directed the SEC to "scale or eliminate" reporting rules in a manner that reduces the "costs and burdens" on emerging growth companies, smaller reporting companies (SRCs), and other issuers, and to eliminate unnecessary or redundant provisions, while still providing material information to investors.[42] Avoiding the twin problems of over- and under-reporting is therefore a basic goal of the SEC's ongoing review of the federal disclosure regime.[43]

This Part briefly introduces the SEC's disclosure reform project. It then explains the core positions that define the debate on over- and

39. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, § 108, 126 Stat. 306 (2012).

40. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015) [hereinafter, FAST Act].

41. *Id.* §§ 72002–72003.

42. *Id.* § 72002; *see also* Concept Release, *supra* note 1, at 23,921 (citing this authority).

43. Congress was particularly concerned about the potential burden of reporting obligations for smaller issuers and emerging growth companies (EGCs), but the SEC broadened its focus to consider the effectiveness of the disclosure framework for all companies. SEC, REPORT ON REVIEW OF DISCLOSURE REQUIREMENTS IN REGULATION S-K 1–4 (Dec. 2013) [hereinafter REGULATION S-K STUDY], https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf [https://perma.cc/5JWC-EG37].

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under-reporting and how these issues relate to broader questions surrounding how corporations disclose risk.

A. *The SEC's Disclosure Effectiveness Initiative*

The SEC issued the Concept Release in April 2016 as part of its "Disclosure Effectiveness Initiative,"[44] following a 2013 report to Congress on the disclosure framework and an initial public comment period that strongly informed the questions and proposals in the Concept Release.[45] The Concept Release contains 340 multi-part questions relating to the business and financial disclosure rules contained in Regulation S-K. Although it addresses the goals and manner of disclosure, as well as specific disclosure requirements, the Concept Release does not cover all aspects of Regulation S-K, nor does it address the financial disclosures required under Regulation S-X, which were part of a separate review.[46] Also excluded are some matters, such as executive compensation and corporate governance, on which the SEC sought input separately and which have been more frequently updated.[47] Until the recent issuance of the 2018 and 2019 amendments, the business and financial disclosures covered by the Concept Release had been largely unchanged since their adoption.[48]

The SEC received 26,887 responses to the Concept Release, among the highest response rates on any major SEC proposal in the past ten years.[49] As will become evident in Part III, the reason the Concept Release attracted such a strong public response was because it simultaneously raised questions about the compliance burdens of disclosure and the possibility of new ESG reporting rules.

Between 2018 and 2020, the SEC issued final and proposed rules that address a small subset of the issues raised in the Concept Release without responding to the core questions on ESG disclosure that attracted this his-

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44. *See generally Spotlight on Disclosure Effectiveness*, SEC, https://www.sec.gov/spotlight/disclosure-effectiveness.shtml [https://perma.cc/3DJB-U7LF] (last modified Dec. 13, 2016).

45. *See generally* REGULATION S-K STUDY, *supra* note 43.

46. *See Spotlight on Disclosure Effectiveness Review*, *supra* note 44.

47. *See* Request for Comment on Subpart 400 of Regulation S-K Disclosure Requirements Relating to Management, Certain Security Holders, and Corporate Governance Matters, Release No. 33-10198, 114 SEC Docket 5254, at 3 (Aug. 25, 2016), https://www.sec.gov/rules/other/2016/33-10198.pdf [https://perma.cc/N3WX-T23Y] (soliciting comments on subpart 400).

48. Concept Release, *supra* note 1, at 23,921.

49. GELLASCH, *supra* note 25, at 15 (reporting that "the Concept Release garnered more public comments than all but five of the 161 major proposals issued by the SEC since 2008"). This figure includes 9,893 submissions (Form A) from a campaign by Public Citizen that urged new disclosure rules on corporate political spending, overseas tax payments, and adoption of sustainability plans. An additional 16,302 form submissions (Form B) focused on country-specific reporting of subsidiaries, tax obligations, and employee-related disclosures. Forms A and B are available at www.sec.gov/comments/s7-06-16/s70616-34.htm [https://perma.cc/D7J5-5SXJ] (last visited June 10, 2019).

toric level of public attention.[50] For the most part, the new rules amend Regulation S-K to eliminate requirements that in the view of the Commission had "become redundant, duplicative, overlapping, outdated, or superseded," given other required disclosures and the evolution of U.S. GAAP.[51] Table 1 of the Appendix identifies the aspects of the 2018 and 2019 Final Rules and the 2019 and 2020 Proposed Rules that relate to issues covered by the Concept Release. Where relevant to this study, these changes are described in Part III below. The Agency has indicated that it intends to consider again the input it has received from the Concept Release in future rulemaking initiatives,[52] though at the time of this writing, the future of ESG reform remains uncertain.

B. *Under- or Over-Reporting? Risk & the Debate over ESG Disclosure Reform*

The vast majority of the public comments to the Concept Release focused to some extent and often exclusively on ESG disclosure issues.[53] The level of attention ESG disclosure attracted is particularly striking in view of the broad scope of the Concept Release: these questions represent only 8 of its more than 300 questions. The scale of the response on these issues is also significant in light of the fact that the SEC had already issued guidance in 2010 explaining that disclosure of material ESG information is required under several provisions of Regulation S-K.[54] These include, for example, mandatory environmental disclosures, MD&A, and risk factor disclosures, all of which are discussed in Part III below.[55] One reason for this strong response is that the debate over whether public companies are burdened by over-disclosure, prone to systematically under-disclose, or

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50. The sole exception is the proposed addition of human capital to the list of factors companies may disclose as material under Item 101(c). 2019 Proposed Rules, *supra* note 3; *see also infra* Section III.B.2 (discussing this proposal). None of the rules adopted to date address ESG issues, nor do the 2020 proposed amendments. *See generally* 2018 Final Rules, *supra* note 3; 2019 Final Rules, *supra* note 3; Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Rel. No. 33-10750 (proposed Jan. 30, 2020) [hereinafter 2020 Proposed Rules]. Because the first congressionally mandated SEC staff report on the Concept Release was released in November 2016 soon after the presidential election (and when public comments were still being received), its proposals were extremely modest, nonpartisan, and uncontroversial. *See* REPORT ON MODERNIZATION AND SIMPLIFICATION OF REGULATION S-K (2016) [hereinafter REGULATION S-K REPORT], https://www.sec.gov/files/sec-fast-act-report-2016.pdf [https://perma.cc/JQJ2-9JQ4].

51. 2018 Final Rules, *supra* note 3, at 50,148; 2019 Final Rules, *supra* note 3, at 12,674.

52. 2019 Final Rules, *supra* note 3, at note 9.

53. *See infra* Section III.B.7 (analyzing comments on these questions).

54. SEC, COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE, 75 Fed. Reg. 6290 (2010) [hereinafter 2010 CLIMATE GUIDANCE], https://www.sec.gov/rules/interp/2010/33-9106.pdf [https://perma.cc/2B6G-AD62].

55. *See id.* at 6295–97 (explaining their application to material climate-related disclosure).

both was already well underway as of mid-2016 when the Concept Release was released for public comment.[56]

Of course, mandatory disclosure is widely accepted as essential to investor protection, market efficiency, and capital formation.[57] Disclosure mandates are necessary because of the recognized managerial biases that result in the underproduction of information, particularly negative information,[58] and because of the public benefits and cost savings that arise from the standardization of disclosure's content, format, and quality.[59] Disclosure mandates also serve an important corporate governance function in reducing agency costs, as managers who are subject to greater transparency are less likely to engage in shirking or self-dealing.[60] Transparency and reputational interests can themselves compel changes in corporate behavior,[61] even if formal enforcement of disclosure rules is weak.[62] For these reasons disclosure is a common "soft" regulatory tool

56. For a survey of this debate in the legal literature, see Harper Ho, *supra* note 21, at 431–40.

57. The Concept Release itself observes that "[l]owering information asymmetries between managers of companies and investors may enhance capital formation and the allocative efficiency of the capital markets. . . . [Disclosure] may lead to more accurate share prices, discourage fraud, heighten monitoring of the managers of companies, and increase liquidity." Concept Release, *supra* note 1, at 23,919; *see also* INT'L ORG. OF SEC. COMM'NS, OBJECTIVES AND PRINCIPLES OF SECURITIES REGULATION 3 (2017), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf [https://perma.cc/XUN9-S6FX (observing that the purpose of mandatory disclosure is to protect investors from fraud, to promote "fair, efficient and transparent markets," and to reduce systemic risk).

58. *See* Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 759–62 (2006) (discussing disincentives against transparency in the secondary markets); *see also* Luca Enriques, Gerard Hertig, Reinier Kraakman & Edward Rock, *Corporate Law and Securities Markets, in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 243, 246–47 (Reinier Kraakman et al., eds., 3d ed. 2017) (summarizing the empirical evidence of underreporting).

59. *See* Michael D. Guttentag, *Protection from What? Investor Protection and the JOBS Act*, 13 U.C. DAVIS BUS. L.J. 207, 224–26 (2013) (highlighting the fairness interests in a level playing field as a key rational for mandatory disclosure); *see also* John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 733–34 (1984) (describing as "social waste" the transaction costs in the under and overproduction of securities research that arise in the absence of mandatory disclosure).

60. *See* Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 336–38 (1979) (explaining these effects as part of investor protection); Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment,* 85 VA. L. REV. 1335, 1335–56 (1999) (presenting these arguments); Goshen & Parchomovsky, *supra* note 58, at 718 (same).

61. On the role of disclosure as a regulatory and private governance tool, see Harper Ho & Park, *supra* note 18, at 273–88 (discussing these goals and the interactions between public and private disclosure regimes). A seminal article on this point is Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1342–45 (1996).

62. *See, e.g.*, Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 GEO. L.J. 968 (2019) (explaining

used by both governments and private standard setters.[63] All of these goals are undermined in in the absence of disclosure regulation, since firms and their managers have strong incentives to under-report—particularly when it comes to risk.[64]

However, the sheer length of public filings has expanded dramatically over time, perhaps in response to disclosure rules that may have become outdated or irrelevant.[65] In *TSC Industries v. Northway*,[66] and later in *Basic v. Levinson*,[67] the Supreme Court expressed concern that excess immaterial information might produce disclosure overload, working against the goals of mandatory disclosure and hurting investors by obscuring material information.[68]

In addition, most of the "specialized disclosures" the SEC adopted at Congress's direction under the 2010 Dodd-Frank Act have been highly unpopular among affected companies. These include reporting on the use of conflict minerals, payments to foreign governments by extractive sector companies, mine safety, and business activities in Iran.[69] Most specialized disclosures have faced legal challenge and some were struck down in

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the weakness of disclosure rules and fraud-on-the-market litigation in compelling and enforcing risk disclosure).

63. *See* Harper Ho & Park, *supra* note 18, at 273–88 (presenting a typology of public and private approaches).

64. *See generally* Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101 (1997) (describing cognitive biases that lead to the under-identification and under-disclosure of risk and negative risk events); *see also* Harper Ho, *supra* note 21, at 440–43 (explaining why establishing appropriate risk disclosure rules is particularly difficult).

65. Ernst & Young observed in a 2012 report that the size of disclosures had quadrupled in the preceding years. ERNST & YOUNG, TO THE POINT: NOW IS THE TIME TO ADDRESS DISCLOSURE OVERLOAD (2012), http://www.lexissecuritiesmosaic.com/gateway/sec/speech/$FILE_TothePoint_BB2367_DisclosureOverload_21June2012.pdf [https://perma.cc/VHM4-FQ5J]. This study was cited by the Financial Accounting Standards Board (FASB) in support of its own disclosure effectiveness review, which was ongoing at the same time as the SEC's review of Regulation S-K. *What You Need to Know About Disclosure Framework*, FASB (2014) https://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1176164203721 [https://perma.cc/7GK4-JE36].

66. 426 U.S. 438 (1978).

67. 485 U.S. 224 (1988).

68. *Id.* at 231 (citing *TSC Indus.*, 426 U.S. at 448–49).

69. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, §§ 1502–1504, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 78m (2018)); 17 C.F.R. § 229.104 (2019) (mine safety); *see also* Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 219, 126 Stat. 1214, 1235–36 (2012); Conflict Minerals, 77 Fed. Reg. 56,274 (Sept. 12, 2012); Mine Safety Disclosure, 76 Fed. Reg. 81,762 (Dec. 28, 2011). The SEC's final rule on Payments to Governments by Resource Extraction Issuers, Exchange Act Release No. 34-78167 (2016), was repealed February 14, 2017 by Pub. L. No. 115-4, 131 Stat. 9 (2017), and a proposed replacement is currently pending. Disclosure of Payments by Resource Extraction Issuers, 85 Fed. Reg. 2522 (Dec. 18, 2019).

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whole or in part on constitutional or administrative law grounds.[70] Since 2016, the Trump Administration's deregulatory policies have also led to several efforts to further pare back on disclosure rules and to prevent the adoption of new reporting requirements.[71] For companies and some SEC commissioners, the prospect of new ESG disclosure mandates also raises many of the same concerns that specialized disclosures did about the potential costs of any expansion of reporting obligations, and the potential for firms to face increased exposure to disclosure-related litigation.[72]

Some of these concerns are heightened because of the nature of ESG information, for example:

(i) The term "ESG" is subject to a wide range of interpretations, so its scope is potentially open-ended in the absence of narrowing definitions established by regulation or legislation.

(ii) ESG information is often related to the business and legal risks associated with corporate operations and therefore will often be forward-looking and difficult to quantify or predict with certainty.

(iii) Like cybersecurity risk, ESG risks are often described as "emerging," and therefore the materiality of particular ESG information may be more likely to change over time and to vary across issuers.

(iv) Evidence from market participants suggests that which ESG issues are material to companies and their investors varies by industry sector.[73]

These features also raise challenges for regulators considering whether and how to craft appropriate disclosure rules.

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70. *See* Disclosure of Payments by Resource Extraction Issuers, Pub. L. No. 115-4, 131 Stat. 9 (2017) (repealing the resource extraction payments rule)*; see also* Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d. 518, 522, 524 (D.C. Cir. 2015) (invalidating part of the conflict minerals disclosure rules).

71. *See, e.g.*, Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (limiting the adoption of new federal regulations unless other regulations are proposed for repeal). The Financial CHOICE Act of 2017, H.R. 10, 115th Cong., tit. III, §§ 311–341 (2017), if passed, would have imposed procedural limits on new guidance or rule-making by the SEC and other financial regulators.

72. *See, e.g.*, Hester M. Peirce, *My Beef with Stakeholders: Remarks at the 17th Annual SEC Conference, Center for Corporate Reporting and Governance*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Sept. 24, 2018), https://corpgov.law.harvard.edu/2018/09/24/my-beef-with-stakeholders-remarks-at-the-17th-annual-sec-conference-center-for-corporate-reporting-and-governance/ [https://perma.cc/TGH7-EPYZ] (opposing ESG disclosure as opening a Pandora's Box).

73. *See generally* Mozaffar Khan et al., *Corporate Sustainability: First Evidence on Materiality*, 91 ACCT. REV. 1697 (2016) (assessing the materiality of indicators developed by SASB); *see also* TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, FSB, IMPLEMENTING THE RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (2017), https://www.fsb-tcfd.org/wp-content/uploads/2017/12/FINAL-TCFD-Annex-Amended-121517.pdf [https://perma.cc/2BAB-JYCR] (providing sector-specific indicators).

Finally, the fact that most publicly traded companies already produce ESG information in some form raises the question of whether more targeted ESG disclosure rules, whatever their form, are necessary. Over 85% of companies in the S&P 500 produce voluntary sustainability reports, so some of this ESG information is already publicly available to investors and the capital markets.[74] Although their quality and comparability are uneven across firms,[75] some companies also voluntarily include sustainability or other ESG concepts in their Form 10-Ks, annual reports, or proxy statements.[76] In addition, companies must already disclose ESG information in their public filings if expressly required to do so under existing disclosure rules and if necessary to make disclosed information not misleading.[77] Several current SEC commissioners and business organizations have therefore expressed the view that ESG disclosure is best left to private ordering—companies can elect to voluntarily disclose ESG information, and investors can engage directly with the companies they invest in, file shareholder proposals seeking disclosure, or litigate if they believe corporate disclosures are materially inadequate.[78]

However, by 2016, international organizations, foreign regulators, and institutional investors had already begun to raise concerns about the

74. GOVERNANCE & ACCOUNTABILITY INST., FLASH REPORT: 86% OF S&P INDEX COMPANIES PUBLISH CORPORATE SUSTAINABILITY/RESPONSIBILITY REPORTS IN 2018 (2019), https://www.ga-institute.com/press-releases/article/flash-report-86-of-sp-500-indexR-companies-publish-sustainability-responsibility-reports-in-20.html [https://perma.cc/ZW4V-4K8E]. Smaller companies are far less likely to produce sustainability reports. ERNST & YOUNG, IS YOUR NONFINANCIAL PERFORMANCE REVEALING THE TRUE VALUE OF YOUR BUSINESS TO INVESTORS? 9 (2017) http://www.ey.com/Publication/vwLUAssets/EY_-_Nonfinancial_performance_may_influence_investors/$FILE/ey-nonfinancial-performance-may-influence-investors.pdf [https://perma.cc/GVE4-6TEX] (finding that the level and quality of sustainability reporting among smaller public companies is significantly lower than for larger public companies). There is some evidence, however, that this information is not efficiently incorporated into market prices. *See, e.g.*, Harrison Hong, et al., *Climate Risks and Market Efficiency* (NAT'L BUREAU ECON. RES., Working Paper No. 22,890, 2016), http://www.nber.org/papers/w22890.pdf [https://perma.cc/27TX-XRHX] (analyzing cross-sectional data from thirty countries and finding that stock markets do not efficiently price climate risk).

75. On these limits, see SASB, *supra* note 25; Williams & Fisch, *supra* note 7, at 9–12; see also *infra* Section III.B.7 (identifying similar concerns in the Concept Release comments).

76. INT'L INTEGRATED REPORTING COUNCIL (IIRC) INSTITUTE & SUSTAINABLE INVESTMENTS INSTITUTE (SI2), STATE OF INTEGRATED AND SUSTAINABILITY REPORTING 29–33 (2018) [hereinafter IIRC] (reporting that 40% of the S&P 500 include ESG concepts in their public filings); Era Aganosti et al., *E&S Disclosure Trends in SEC Filings 2018–2019*, WHITE & CASE LLP (June 26, 2019), https://www.whitecase.com/publications/alert/es-disclosure-trends-sec-filings-2018-2019 [https://perma.cc/6D9S-5H67] (reporting that over 90% of the top fifty Fortune 100 firms increased the environmental and social disclosures in Form 10-Ks and proxy statements from 2018–2019).

77. 17 C.F.R. § 230.408 (2001); 17 C.F.R. § 240.12b-20 (2013).

78. *See, e.g.*, Peirce, *supra* note 72; CTR. FOR CAPITAL MKTS. COMPETITIVENESS, *supra* note 6.

costs and risks to investors of corporate under-reporting of ESG information.[79] Surveys of institutional investors in the U.S. and abroad continue to find rising demand for ESG information, matched with growing dissatisfaction with its limited accessibility, comparability, and consistency.[80] Voluntary sustainability reports are also subject to different materiality and reliability standards than those that apply to public filings, and ESG information in such reports is costly to identify, obtain, and incorporate in investment analysis.[81] These factors have led most investors to rely primarily on the more limited ESG information companies provide in their public filings, which is more accessible and is reported in a consistent, analyzable format.[82]

Nonetheless, there is also evidence that material ESG information is *under-reported* in public filings, in part because of companies' failure to identify ESG information as material and in part because of a lack of integration between the corporate risk management, internal controls, and reporting functions that apply to public filings, and those through which voluntary reports are produced.[83] For example, in its 2018 guidance on the integration of ESG-related risks into enterprise risk management, the

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79. *See generally supra* notes 11–17 and sources cited therein. On the economic rationales of institutional investor demand for ESG information, see generally Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647 (2016) (drawing on empirical studies in finance, accounting, and business ethics).

80. These surveys find, on average, that 70% to 80% of institutional investors consider ESG information as important or essential to investment analysis. *See, e.g.*, PRICEWATERHOUSE COOPERS LLC, SUSTAINABILITY GOES MAINSTREAM: INSIGHTS INTO INVESTOR VIEWS 6–9 (2014), http://www.truevaluemetrics.org/DBpdfs/Sustainability/PwC/pwc-sustainability-goes-mainstream-investor-views.pdf [https://perma.cc/W3CZ-9FTW]; PRICEWATERHOUSE COOPERS LLC, SUSTAINABILITY DISCLOSURES: IS YOUR COMPANY MEETING INVESTOR EXPECTATIONS? 7 (2015), https://greenmoney.com/sustainability-disclosures/ [https://perma.cc/N2NM-PCLP] (finding that "82% of investors were dissatisfied with how risks and opportunities are identified and quantified in financial terms" and "79% were dissatisfied with the comparability of sustainability reporting between companies in the same industry"); ERNST & YOUNG, TOMORROW'S INVESTMENT RULES 2.0 12–13 & fig.2.2 (2015), https://www.ey.com/Publication/vwLUAssets/ey-ccass-institutional-investor-survey-2015/$FILE/ey-ccass-institutional-investor-survey-2015.pdf [https://perma.cc/8UHZ-4ASS] (reporting that over 80% of surveyed investors considered minimizing ESG risk as essential or important); ERNST & YOUNG, *supra* note 74, at 6, 18 (finding that nearly reporting that nearly 70% of surveyed institutions identified corporate nonfinancial performance as "pivotal" in investment decisions).

81. *See* IIRC, *supra* note 76, at 26–33 (discussing these limitations); *see also* Comment of Barry C. Melancon, President & Chief Executive Officer, Am. Inst. of Certified Pub. Accountants (AICPA) (July 20, 2016) [hereinafter, AICPA Comment Letter], https://www.sec.gov/comments/s7-06-16/s70616-194.pdf [https://perma.cc/Q9RF-FLZT].

82. *See, e.g.*, Council of Institutional Investors Congressional Submitted Testimony, *supra* note 7.

83. *See* IIRC, *supra* note 76, at 26 (discussing firms' materiality judgments on sustainability); AICPA Comment Letter, *supra* note 81. *See generally* SASB, *supra* note 25 (reporting on analysis of nearly 600 Form 10-Ks).

Committee of Sponsoring Organizations of the Treadway Commission (COSO)[84] identified the causes of the lack of alignment between voluntary ESG disclosures and mandatory risk disclosures to include lack of "cross-functional collaboration between risk management and sustainability practitioners" and a lack of alignment between the sustainability specialists responsible for ESG risk disclosure and those responsible for management and disclosure of strategic, operational, or financial risks.[85] Institutional investor support for ESG rulemaking petitions and more recent surveys of institutional investors underscore these concerns.[86]

In short, the Concept Release was issued against the backdrop of widespread controversy over how much disclosure is enough and how much is too much, particularly as it relates to ESG information. To be sure, the SEC has already modified the form and content of disclosure rules to reduce immaterial disclosure and to ensure that material information reaches investors as cheaply and effectively as possible.[87] Congress has also, through legislation, intervened at times to reduce the potential burden and litigation risk of periodic reporting, for example, by establishing statutory safe harbors.[88] As discussed in Part III, most of the Concept Release is intended to gauge public perception on whether these tools should be more widely used and whether the existing rules strike the right balance.

II. ANALYTICAL FRAMEWORK

Because of its broad scope and the strong response it generated, the Concept Release and the data it elicited are an important resource for Congress, the SEC, and policy advocates as they consider future disclosure

84. COSO is a joint initiative of the American Accounting Association, the American Institute of Certified Public Accountants, Financial Executives International, the Association of Accountants and Financial Professionals in Business, and the Institute of Internal Auditors for the development of enterprise risk management and internal control frameworks. *See About Us*, COSO, https://www.coso.org/Pages/aboutus.aspx [https://perma.cc/84LP-ZFZ7] (last visited Feb. 10, 2020).

85. COSO & WORLD BUS. COUNCIL SUSTAINABLE DEV. (WBSCD), ENTERPRISE RISK MANAGEMENT: APPLYING ENTERPRISE RISK MANAGEMENT TO ENVIRONMENTAL SOCIAL AND GOVERNANCE-RELATED RISKS 5 (2018), https://www.coso.org/Documents/COSO-WBCSD-ESGERM-Guidance-Full.pdf [https://perma.cc/A3RQ-9K6Y] (citing results of a 2017 survey of WBCSD member companies).

86. *See, e.g.*, Williams & Fisch, *supra* note 7; *see also* VASANTHAM ET AL., *supra* note 8 (presenting the results of a 2019 survey).

87. Many of these tools are considered in the Concept Release, *supra* note 1, and in Part III, *infra*, including: (i) the use of Industry Guides and other sector-specific guidance; (ii) automatic sunsets or review periods for new rules; (iii) scaled or phased disclosure or exemptions that would apply to smaller or newer issuers; and (iv) the use of materiality qualifiers.

88. A prime example is the safe harbors for forward-looking information established in the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. §§ 77z-2 & 1578 u-5 (2018).

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reforms. This Part describes the core research questions, hypotheses, data, and methodology of this study. Part III presents the results.

A. *Research Questions & Hypotheses*

The purpose of this study is two-fold. First, it provides an in-depth descriptive account of whether, in the view of Concept Release respondents, the current reporting regime should be expanded, reduced, or amended to facilitate better risk-related disclosure, potentially to include material ESG information. Table 1 in the Appendix identifies the topics covered by the Concept Release and those that are included in this analysis.[89] Second, this study attempts to answer several key questions about where respondents align on the issue of over-disclosure and to identify factors that affect respondents' support for or opposition to ESG disclosure reform. The research questions relevant to each of these two goals are presented below.

1. *Risk-Related Business & Financial Disclosure in Regulation S-K: A Descriptive Analysis*

Sections III.A and III.B below present the descriptive analysis of respondents' views on risk-related disclosure under Regulation S-K. It begins with an analysis of comments on general topics addressed at the start of the Concept Release that are broadly relevant to disclosure reform: (i) the nature of disclosure requirements, that is, whether principles-based disclosure, prescriptive rules, or a mixed approach is optimal; (ii) the audience for disclosure; and (iii) whether new disclosure rules should be adopted on a temporary basis. With respect to these issues, reporting companies are expected to prefer the greatest flexibility and space for managerial judgment and to oppose any expansion of disclosure obligations. They are therefore expected to prefer principles-based disclosure over line-item rules and to urge that any reforms be adopted, if at all, only on a temporary basis. Investors and investor advocacy organizations, in contrast, are expected to be more supportive of prescriptive rules adopted on a permanent basis. Both groups may be willing to support reforms that simplify disclosure, depending on the nature of the reform.

The next set of topics analyzed here cover specific provisions of Regulation S-K that relate to risk disclosure: (i) Item 101 (Description of the Business); (ii) Item 303 (Management's Discussion & Analysis); (iii) Item 105 (formerly, Item 503(c)) (Risk Factors); and (iv) Item 505 (Market Risk & Risk Management).[90] As indicated on Table 1 of the Appendix,

89. Table 1 also identifies those provisions that have been amended by the 2018 and 2019 Rules. Excluded from this study are disclosures outside of Regulation S-K, such as those under the proxy rules, and those not raised in the Concept Release.

90. Item 103, 17 C.F.R. § 229.103 (2012), which requires disclosure of material legal proceedings, is not included in the Concept Release and so is referenced only to a limited extent in Section III.B.2, *infra* (analyzing comments on Item 101).

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infra, several topics in the Concept Release that relate to financial risk but that overlap to some extent with the content of financial reports are not included in this study; where the questions in these sections are not relevant to risk disclosure, they are also excluded.[91] Sections of the Concept Release concerning the format, presentation, and delivery of disclosure are not addressed separately but instead are discussed as they relate to risk disclosure.

In general, reporting companies and others who favor giving greater discretion to management are expected to support proposals to reduce line-item disclosures, provide a safe harbor from litigation over disclosed information, or add materiality qualifiers to existing provisions.[92] Investors would be expected to support the opposite in order to obtain the most expansive, specific, and comparable disclosures possible.

The final section of Section III.B below analyzes comments on section IV.F of the Concept Release, which addresses whether Regulation S-K should be amended to introduce new ESG reporting requirements. Respondents' perspectives on these issues are generally expected to parallel their views on risk disclosure rules in Regulation S-K. Reporting companies are generally expected to resist new ESG disclosures, to dispute ESG materiality, and to favor the status quo, while investors are expected to believe that material ESG information is under-disclosed and that current rules, SEC guidance, and voluntary sustainability disclosures are inadequate.

2. *The Over-Disclosure Debate*

The second part of this study focuses on the question of over-disclosure itself, and its primary goals are also two-fold. The first is to identify whether there are statistically significant differences in the views of investors, the business community (referred to here as "issuers"), and others on risk-related disclosure, ESG reporting, and information overload.[93] The specific research questions related to this objective are:

(1) Are there significant differences among issuer and investor views on whether *over*-disclosure is a critical problem? Are issuers or investors equally worried about over-disclosure?

(2) Are there significant differences among issuer and investor views on whether *under*-disclosure of ESG information is a critical problem?

91. These include for example, section IV.D of the Concept Release (concerning Items 201, 202, 701, and 703), and section IV.G of the Concept Release (regarding exhibits).

92. Mandatory disclosures may be qualified by the addition of language such as "if material" so that only information deemed material to investors by the corporation must be disclosed.

93. Table 2 of the Appendix, *infra*, explains the categorization of respondents.

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(3) Are there significant differences among issuer and investor views on whether over- or under-disclosure problems affect the risk-related provisions of Regulation S-K (Items 101, 303, 503 (now 105), & 305)?

(4) Do respondents' views vary significantly with regard to the appropriate approach to disclosure (i.e., the use of prescriptive, principles-based, or mixed approaches to disclosure)?

These questions generate the following hypotheses, based on the literature reviewed in Part I. Further context in support of these hypotheses is presented throughout the analysis of the findings in Section III.B below.

H1: Investors are less concerned about over-disclosure than issuers.

H2: Investors are more concerned than issuers about under-disclosure of ESG information.

H3: Investors are more concerned about under-disclosure of material information on risk.

H4: Investors are more likely than issuers to support prescriptive disclosure rules.

The second goal is to clarify the source of the expected (and observed) variation in respondents' views on the need for ESG disclosure using a regression analysis. Specifically:

(5) Are respondents' views on the value of ESG disclosure correlated with or affected by their views on the value of prescriptive disclosure or their degree of satisfaction with the current reporting framework?

Hypothesis 5 relates to this question:

H5: Respondents' support for (opposition to) ESG disclosure reform is positively (negatively) related to (w) their alignment with investors and other consumers of disclosure or with issuers, as producers of disclosure; (x) their support for prescriptive disclosure; (y) their views on ESG materiality; and (z) their views on the adequacy of the current reporting framework.

B. *The Public Comment Data*

To test these hypotheses, this study utilizes a dataset based on the full set of 375 unique comments posted to the SEC's website as of December 31, 2017.[94] Of these, comments were identified for inclusion in the dataset if they focused on risk-related disclosure, which was defined as those comments that addressed any question or concept in either section III.C or section IV.F of the Concept Release. Section III.C is the part of the Concept Release that addresses the core risk-related disclosure rules in Regulation S-K and section IV.F of the Concept Release focuses on "public

94. Three additional comments not included in this study were filed as of December 2018.

policy and sustainability matters."[95] Ambiguity was resolved in favor of inclusion, resulting in 282 comments in the dataset. Together these represent 75% of the total pool of 375 unique comments. Excluded from this study are the more than 25,000 form responses submitted by two investor campaigns.[96] Had these been included, they would have dramatically amplified support for new disclosure requirements with respect to ESG issues, specifically disclosure of political contributions, foreign tax payments, sustainability strategy, and the identification of foreign subsidiaries.

1. *Compilation & Data Coding*

The next step in compiling the dataset was to code each comment for any response to any of the 140 questions, as well as sub-questions, within the Concept Release that relate in some way to risk-related disclosure, as shown on Table 1 of the Appendix. These represent 40% of the 340 numbered questions in the Concept Release. In addition, each subpart of a multi-part question in the Concept Release was coded separately, resulting in multiple unique variables for many of the numbered questions. Because some questions elicited only narrative responses, not every question of relevance to the study is included in the quantitative analysis. Examples from the narrative responses are included in Part III where relevant.

Every comment was hand-coded three times to ensure accuracy and consistency—first by two research assistants, then by the author. At the initial stage of review, research assistants identified each specific question from the risk-related sections of the Concept Release that the comment addressed in any way. The respondent's position on the issue was noted if it was clear (e.g., support or oppose), and responses were noted as "unspecified" if the comment addressed the issue but did not state a clearly identifiable position. The goal of this approach was to identify most broadly those who had an interest in or view on a particular issue.

In some cases, comments identified specific responses by question number; in such cases, the response was coded as responding only to the identified question. Otherwise, the comment was coded as responsive to each question to which it could pertain. The purpose of this approach was to give the broadest expression to all clear positions expressed in each comment. Non-responses were disregarded in the analysis, since respondents mention only the issues of concern to them. After all basic responses to particular questions were coded, the author reviewed each comment letter twice: first to confirm its support or opposition to specific questions was coded appropriately and to identify common alternative responses, and a second time to confirm the accuracy of the initial coding.[97]

95. Concept Release, *supra* note 1, at 23,969–73.

96. On the investor campaigns, see *supra* note 49.

97. A clear limitation of relying on a single researcher to code the data is that it raises the possibility of error and subjectivity. However, because of the sheer

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2. *Unique Features of the Public Comment Data*

Several general features of SEC public comment data deserve mention, as they affect the conclusions that should be drawn from the results. The first is that public comments are not representative of the underlying populations the respondents may represent. Individuals submitting responses are likely to hold stronger opinions than those who do not, and most comments are submitted by advocacy organizations, companies, and other institutions. Second, most commentators do not, and in the case of this lengthy Concept Release possibly could not, respond to all of the questions the SEC raises. There are therefore many questions in this study that garnered few or no responses,[98] and others for which a quantitative analysis of the responses is impossible due to the small number of comments on that question.[99] Indeed, these factors often prevent any kind of empirical analysis of public comments of the kind done here. At the same time, the decision to respond to a specific question is a strong indicator of its importance to the respondent. For these reasons, the analysis here only considers the views of respondents relative to others who expressed a position on the same issue.

The nature of public comment data also introduces other unavoidable sources of subjectivity into any analysis. Because the underlying data is textual, much of the richness of the responses is best reflected in the language of the comments, but the selection of some of these voices necessarily amplifies them over others. In addition, the process of coding both generic and highly specific responses as "pro" or "con" inevitably sacrifices nuance and complexity for the sake of quantification.

A final question is whether to weight certain comments more heavily than others. Here, as is typical of public comments, 60% of the respondents are organizations, not individuals, and some of these organizations represent tens or hundreds of individuals or even other organizations with their own institutional members.[100] Organizational responses arguably should carry more weight than individual responses, since they reflect the collective views of many individuals or even organizations.[101] However, because not all comments indicate the number of individuals they re-

number of questions and responses involved, utilizing parallel coding by multiple researchers was considered impractical and more prone to inconsistency. The idiosyncratic nature of each comment also made automated tools less useful.

98. *See, e.g.*, *infra* note 167 and accompanying text (regarding the limited responses to Concept Release questions concerning the cost-benefit impacts of proposed MD&A disclosures).

99. For example, responses on the question of whether current MD&A rules result in immaterial disclosures were too limited to permit analysis of differences among respondent groups. *See, e.g.*, *infra* Table 12 (reporting responses to Question 89 of the Concept Release).

100. On the demographics of respondents, see *infra* Part III.

101. The identity of the speaker often also affects the weight the SEC affords a particular comment because of the reputation or experience of the commentator.

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present, it is not possible to adjust or weight all responses and so any effort to do so in select cases would inevitably be arbitrary. In addition, many responses here include statements endorsing the comments of another respondent; although these endorsements have been identified in the dataset, this analysis does not weight responses receiving endorsements more heavily since it is difficult to know whether an endorsement applies to all elements of a given comment or not.[102] Therefore, in this study, each comment is weighted equally.

C. *Methodology*

This Article uses basic descriptive statistics and Fisher's exact test of independence to test Hypotheses 1 through 4 and to identify statistically significant variation among investor, issuer, and other respondents' views on each Concept Release question.[103] Insignificant test results would instead suggest that there is substantial agreement across the three respondent groups (investors, public companies or trade associations (i.e., issuers), and other respondents) with respect to that variable (i.e., question). These results are reported in Part III for specific questions in the Concept Release. Table 3 of the Appendix and Section III.C of the analysis report the results of the Fisher exact tests for the variables that relate to Hypotheses 1 through 4, respectively.

As shown in Table 3 of the Appendix, multiple variables based on specific questions in the Concept Release are relevant to each of Hypotheses 1 through 4. Because the Concept Release contained general questions associated with the independent variables for Hypotheses 2 and 4, a tetrachoric correlation analysis was used to test whether the specific variables (i.e., questions) identified in this study[104] as indicating support for ESG disclosure reform (Hypothesis 2) and the use of prescriptive rules (Hypothesis 4) are in fact correlated with those variables in the dataset.[105]

102. Eighteen of the 282 total comments (6%) endorsed those of others, totaling 57 endorsements. However, few comments received multiple endorsements; the SASB received the highest number (4), followed by the National Association of Manufacturers (3).

103. As shown in Table 2 of the Appendix, *infra*, respondents were categorized for ease of analysis into three groups: "investors," "issuers," and "other." *See also infra* Section III.A (reporting descripive statistics on these groups). Fisher's exact test does not indicate the source of any observed nonrandom association between the group responses.

104. *See infra* Appendix, at Table 2.

105. Specifically, the tetrachoric correlation analysis in this study confirms which individual variables are correlated with (i) support for ESG reform; (ii) opposition to ESG reform; (iii) support for the use of prescriptive disclosure rules; (iv) opposition to the use of prescriptive disclosure rules; and (v) respondent views on ESG materiality. *See infra* Appendix, at Table 3. These results are not reported here but are on file with the author. Tetrachoric correlation analysis can be used with dichotomous variables, such as the "pro" and "con" responses to Concept Release questions, and the results indicate the positive or negative directionality of the correlation. *See generally* John S. Ubersax, *Introduction to the Tetrachoric and Polychoric Correlation Coefficients*, http://john-uebersax.com/stat/tetra.htm [https:/

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The results confirm that responses to the individual questions shown on Table 3 are an appropriate basis on which to draw conclusions regarding Hypotheses 2 and 4.

For the SEC to correctly interpret the public comments, it is also useful to undestand *why* respondents support or oppose a given measure rather than simply observing that they do. This study uses three separate methods to measure the effects of the factors that are expected to affect respondents' views (Hypothesis 5). First, textual review of the comments themselves provides an initial indication of these effects; some of this language is incorporated in the notes throughout. Second, logistic regression is used to isolate the independent effects that certain respondent characteristics, namely the identity of the respondent and their views on general disclosure principles, have on their support or opposition to ESG disclosure reform.[106] To test the robustness of the findings and symmetric responses, multiple models are used: in the first set of models (together, Model I), the dependent variable is support for ESG reform, and in the second set of models (together, Model II), the dependent variable is opposition to ESG reform. Further detail on these models is provided in Section III.B below. Third, the tetrachoric correlation analysis used to test the variables associated with Hypotheses 1 through 4 is also used as a further robustness check on the results of the regression analysis.

III. RESEARCH FINDINGS & POLICY IMPLICATIONS

This Part presents the research findings in two parts. Following a description of the Concept Release respondents in Section III.A, Section III.B provides a detailed descriptive analysis of investor and issuer views on each of the risk-related disclosure topics within the Concept Release.[107] Again, due to the broad scope of the Concept Release, Section III.B is somewhat lengthy, so readers interested in the broader conclusions of this study should proceed to Section III.C. Section III.C presents the research findings from the empirical tests of the five hypotheses outlined above. Further descriptive data as well as supporting detail for those empirical tests are found in the Appendix. These findings challenge common misperceptions about information overload and reveal surprising areas of agreement between investors and issuers regarding potential directions for future risk disclosure reform.

/perma.cc/Z6SN-R396] (last revised Sept. 8, 2015). This analysis was only possible for Hypotheses 2 and 4 because the Concept Release included specific questions that reflected the independent variables for these hypotheses—support for ESG reform, and support for prescriptive disclosure, respectively.

106. The tetrachoric correlation discussed above supports preliminary findings but cannot control for possible spurious relationships among variables; thus, this third method is used. Because these data reflect respondents' views at a single point in time, the regression analysis cannot be used to establish a causal relationship; however, it can identify correlations among the dependent and independent variables.

107. *See infra* Appendix, at Table 1 (detailing the scope of this study).

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A. *Concept Release Respondents*

As shown in Table 2 of the Appendix, comments on the Concept Release were submitted by a wide range of respondents, including academics, current and former government officials, advocacy groups, corporations, trade associations, and retail and institutional investors (asset owners and asset managers), as well as various professionals and other experts. To facilitate analysis, respondents were categorized as "investors," "issuers," and "other," as shown in Figure 1.[108] Of the 72 advocacy organizations and other non-governmental organizations (NGOs) whose comments are included in this study, 21% are business-oriented, 57% are investor-oriented, and 22% are academic, governmental or other organizations that do not self-identify exclusively with companies or investors. The category of "investors" includes individual and institutional asset owners and asset managers, and investor-oriented NGOs; together, these 219 comments represent 78% of the 282 comments in this study.[109] Based on the subset of investors whose comments reported the figure, investor respondents represent over $89.38 trillion in assets under management (AUM).[110] As Table 2 indicates, only 16% of investor comments were from public pension funds, labor union funds, or religious institutions, which are the investors who have historically engaged in shareholder activism around ESG issues.[111] The category of "issuers" includes companies, industry or trade

108. The limited number of comment letters in each of these three groups cautions against further subdividing respondent categories, for example, by sector. The term "issuer" is used here for ease of reference rather than "registrant" even though the disclosure rules at issue in the Concept Release are not limited to the offering context. On this distinction, see 2019 Final Rules, *supra* note 3, at 12,688 n.159.

109. This study also includes 81 comments that are modified versions of the Public Citizen form letter (Form A), which states that corporations should disclose their political spending, foreign tax payments on a per-country basis, and "sustainability plans." Letter Type A, SEC, www.sec.gov/comments/s7-06-16/s70616-34.htm [https://perma.cc/8YGF-6KAA] (last visited Feb. 12, 2020). These represent 28.7% of all comments in this study and 46.5% of all investor comments. Inclusion of the modified Public Citizen comments increases support for the materiality of these particular issues and for prescriptive reforms generally but does not otherwise affect the results presented here. Eleven foreign institutional investors, including Hermes and Norges Bank, submitted comments, as well as 2 individuals located abroad; these total 5.9% of the investor comments. The few foreign-based organizations not representing asset owners or managers, such as the London-based Climate Disclosure Standards Board (CDSB) and the Geneva-based World Business Council for Sustainable Development, are not included in this percentage.

110. These numbers have not been independently verified or adjusted, and reflect only AUM reported in a comment as of that date.

111. This figure is around 40% if individuals are excluded. Of the "Big 4" institutional investors—BlackRock, State Street, Fidelity, and Vanguard, only State Street submitted a comment on the Concept Release. *See* Comment of Rakhi Kumar, Head of Corp. Gov., State Street Global Advisors (SSGA) & Christopher McKnett, Head of ESG Inv., SSGA (July 20, 2016), https://www.sec.gov/comments/s7-06-16/s70616-160.pdf [https://perma.cc/J9GN-RJF3].

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associations, business-oriented NGOs, and their advisors, including law firms and accounting firms; together these 28 comments represent 10% of all comments in this study. "Other" includes 35 academics, government representatives, stock exchanges,[112] and standard setters, such as the Sustainability Accounting Standards Board (SASB) and the Global Reporting Initiative (GRI); together "other" respondents account for 12% of the comments in this study.

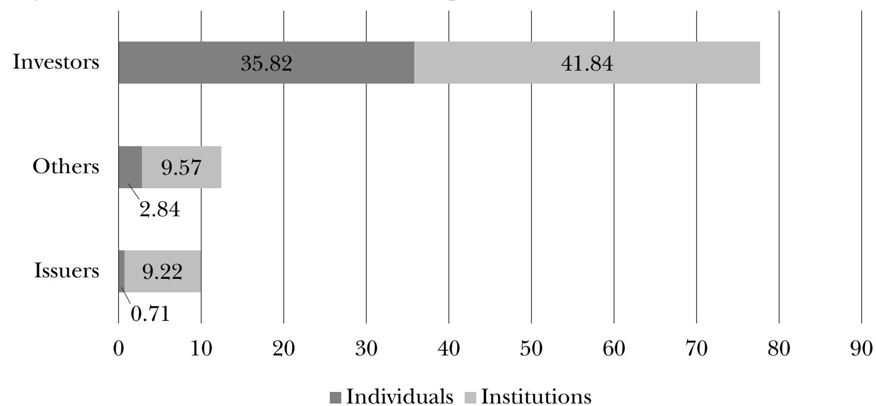
Figure 1 also indicates the percentage of each of these three groups that are institutional or individual respondents. Individuals account for 39% of all respondents and 46.12% of all investor respondents in this study. Over 60% of responses were submitted by organizations, including institutional investors, industry groups, and advocacy organizations.

Which investors make up the bulk of the Concept Release comments is an important threshold question in considering what the Concept Release tell us about over-disclosure. Specifically, if investor public comments represent ESG-oriented or "socially responsible" strategies, then they may not reflect mainstream trends in the market. Investors that identify themselves as responsible investors, socially responsible investors (SRI), SRI fund managers, and NGOs that advocate on ESG issues (together, SRI respondents) may be more likely to favor expanded ESG disclosures and may be less concerned about the materiality of this information because of their broader ethical or policy goals. However, of the 219 investors included in this study, only 29% identified themselves in these terms. Similarly, only 24% of all NGOs in this study, all of which are investor-oriented, identified themselves as an SRI advocacy group.[113]

112. Two stock exchanges, NASDAQ and the London Stock Exchange Group, submitted comments. *See* Comment of Edward S. Knight, Executive Vice President, Gen. Counsel & Chief Regulatory Officer, NASDAQ, Inc. (Sept. 16, 2016), https://www.sec.gov/comments/s7-06-16/s70616-368.pdf [https://perma.cc/KV7S-HGUS]; Jonathan Jachym, Head of N. Am. Regulatory Strategy & Gov't. Relations, London Stock Exch. Grp., FTSE Russell (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-294.pdf [https://perma.cc/SQ5S-K6SP].

113. Investor-oriented NGOs account for 60% of the NGOs in this study, while business advocacy and neutral groups each account for approximately 20% of all NGOs in this study. *See infra* Appendix, at Table 2. Examples in this study include Investors Against Genocide, the Tri-State Coalition for Responsible Investment (now Investor Advocates for Social Justice), and the U.S. Sustainable Investment Forum.

Figure 1: Institutional & Individual Respondents.



B. *Risk-Related Business & Financial Disclosures in Regulation S-K: Descriptive Analysis*

The following analysis of responses to specific questions raised by the Concept Release generally follows the structure of Regulation S-K, with some modification for emphasis; as a result, most topics are presented in the order that they appear in the Concept Release. Positive or negative responses are reported relative to the total number of responses to that question; comments that provided no response on an issue are disregarded.[114] Approximately 40% of the comments addressed risk disclosures to some extent, and nearly all comments in this study (98%) included some reference to the ESG topics covered in section IV.F of the Concept Release, as shown in Table 4 of the Appendix.

1. *The Nature & Audience of Disclosure Requirements; Permanency of New Rules. Questions 1–23.*[115]

The first twenty-three questions of the Concept Release tackle four basic questions related to how well the current disclosure regime works and the potential for over-disclosure: (1) How should the SEC balance a prescriptive or principles-based approach to disclosure? (2) How diverse is the intended audience for disclosure, and how should disclosure be calibrated to that audience? (3) How should the SEC balance the potential costs and benefits of disclosure? and (4) Should the SEC adopt new rules only on a temporary basis? The following discussion considers these issues in this order.

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114. In order to account for the imbalance in the number of investor and issuer submissions and in the percentage of institutional responses across groups, the analysis presented here reports the percentage of supporters or opponents relative to the total number of comments submitted by that group of respondents, unless otherwise noted.

115. Concept Release, *supra* note 1, at 23,924–31.

a. Principles-Based & Prescriptive Disclosure; Materiality Considerations. Questions 6–13.[116]

This section of the Concept Release asks whether the SEC should expand the use of principles-based disclosure, increase its use of quantitative and qualitative materiality thresholds, or adopt an alternative "objectives-oriented" approach.[117] In its 2013 Regulation S-K Study, the SEC concluded that "any recommended revisions [to Regulation S-K] should emphasize a principles-based approach as an overarching component of the disclosure framework . . . while preserving the benefits of a rules-based system . . . ."[118] This balance is reflected in the current reporting framework.

Principles-based disclosure rules offer flexibility, since they give reporting companies greater discretion to decide how the disclosure principle applies to their particular circumstances and whether any disclosure is necessary. The most important example of principles-based disclosure is the use of materiality qualifiers, which only mandate a disclosure if *the reporting company* determines that the information is material to investors. However, this same flexibility reduces disclosure comparability and may lead to under-reporting.[119]

Line-item mandatory disclosures and other prescriptive rules aid comparability and can reduce the risk of under-reporting because they are "bright-line" rules and are not subject to management discretion.[120] How-

116. *Id.* at 23,927–28

117. *Id.* at 23,926–28.

118. REGULATION S-K STUDY, *supra* note 43, at 98.

119. *See* Comment of Members of Congress 1 (July 20, 2016), https://www.sec.gov/comments/s7-06-16/s70616-175.pdf [https://perma.cc/ZB66-53Y8] (voicing concerns about the lack of comparability of disclosures for rules within the Regulation S-K framework that defer to issuer materiality judgments); *see also* Comment of Kurt N. Schact & James C. Allen, CFA Institute 5 (Oct. 6, 2016) [hereinafter Comment of CFA Institute], https://www.sec.gov/comments/s7-06-16/s70616-375.pdf [https://perma.cc/WMN9-GC56] ("CFA Institute has been a strong proponent of prescriptive standards with regard to financial reporting because registrants have shown a tendency to interpret principles in a manner that is most beneficial to them rather than most beneficial to investors. In general, principles-based requirements will [cause issuers to] withhold disclosure based on an internal determination that the information is immaterial; . . . group information in a manner that obfuscates negative performance or conditions; [a]nd third, different issuers will apply the 'principles' differently, thus making the information incomparable across different issuers."); Comment of F. Michael Zovistoski, President, N.Y. State Soc'y Certified Pub. Accountants 4 (July 19, 2016), https://www.sec.gov/comments/s7-06-16/s70616-150.pdf [https://perma.cc/3L7T-5W7F] ("[W]ith a strictly principles-based approach, what is required to be disclosed would be left to the discretion of management."); Comment of Douglas Hoffner, Interim Chief Executive Officer, Cal. Pub. Emp.'s Retirement Sys., at app. 1–2 (July 21, 2016) [hereinafter, Comment of CalPERS], https://www.sec.gov/comments/s7-06-16/s70616-267.pdf [https://perma.cc/DMZ4-295C] (advocating a mixed approach and noting that "the fact that registrants determine what is material to reasonable investors is problematic in getting meaningful and comparable disclosure").

120. Concept Release, *supra* note 1, at 23,925–27.

ever, because many prescriptive rules apply to all reporting companies across the board, they may result in over-reporting of immaterial information if they are used in circumstances where the materiality of a given issue varies widely among firms.

As explained in the Concept Release, under an alternative "objectives-oriented" approach, "standard setters would develop new rules by clearly articulating the accounting objective of the standard and providing sufficient detail and structure so that the standard can be applied on a consistent basis[;]" these standards would be "based on a consistently-applied conceptual framework, minimize exceptions and avoid the use of bright-line tests." [121]

Importantly, issuer and investor respondents generally agreed that any disclosure reforms should be grounded on the *TSC Industries* definition of materiality.[122] Less than 10% of investor comments deviated from this materiality standard and these comments largely supported expanding disclosure to include information that may not be material in the short term but directly impacts financial performance and may be leading indicators of material future risk.[123]

Nearly all respondents in this study expressed a view on these initial questions, but issuer positions diverged widely from those of investors and other respondents. As Table 5 of the Appendix shows, only a few issuer comments (10%) supported any kind of prescriptive disclosure, in contrast to 88% of investors. Instead, 75% of issuers affirmatively opposed the use of prescriptive disclosures, in contrast to less than 6%of investors.[124] Sixteen percent of all respondents, and an equivalent percentage of each

121. *Id.* at 23,927.

122. Under the Supreme Court's standard of materiality, as established in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, (1976), information is "material if there is a substantial likelihood that a *reasonable shareholder* would consider it important in deciding how to vote" or "that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information" available to the investor in reaching a voting or investment decision. *Id.* at 448–49 (emphasis added); *see also* Basic, Inc. v. Levinson, 485 U.S. 224, 231 (1988) (extending the *TSC Industries* standard to section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934).

123. *See, e.g.*, Comment of Josh Zinner, Chief Executive Officer, and Sarah Margolis, Associate Program Director, Interfaith Center on Corporate Responsibility (ICCR) (July 14, 2016), https://www.sec.gov/comments/s7-06-16/s70616-103.pdf [https://perma.cc/AYT7-3F2P]. Twenty investor comments (7% of investor comments) are adapted from the ICCR form and tend to include this language. *See, e.g.*, Comment of Andrew Behar, Chief Executive Officer, As You Sow (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-198.pdf [https://perma.cc/2QNN-2Q5C].

124. Comments from the business community and law firms in response to the 2013 Regulation S-K Study had also expressed strong support for principles-based disclosure. Concept Release, *supra* note 1, at 23,939–40 & 23,926 n.117 (citing comments by the CFA Institute, Shearman & Sterling, the U.K. Financial Reporting Council, the Business Roundtable, and the Center for Capital Markets Competitiveness of the U.S. Chamber of Commerce).

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respondent group, urged the SEC to maintain a mixed approach that includes both principles-based and prescriptive elements. Seven comments (not shown in Table 5) also supported objectives-oriented disclosure as a form of principles-based disclosure, although some questioned how it might work in practice.[125] The differences in responses among the three groups on the use of prescriptive disclosure are significant at a less than 1% level; differences among groups with respect to mixed or objectives-based approaches are not significant, indicating equally high levels of support for mixed disclosure approaches among respondent groups.

b. Audience for Disclosure. Questions 14–20.[126]

Here, the Concept Release addresses the extent to which disclosure rules should be directed only at sophisticated investors or should continue to be directed at a broader range of shareholders. It also seeks input on how different investors utilize disclosure, and whether the needs of market participants other than investors should be taken into account in considering disclosure reform.[127]

The question of who is in fact the "reasonable investor" the disclosure system is designed to serve is directly connected to questions of over-disclosure.[128] Respondents who seek to reduce the disclosure burden on companies tend to argue that only sophisticated investors are the proper target of disclosure, whereas those concerned about "Main Street" or retail investors may see a need for more detailed disclosure and for more accessible presentation of information.[129]

Approximately 20% of respondents addressed this question, and nearly 70% of them agreed that the term "reasonable investor" should continue to be understood to encompass *all* investors, whether sophisticated or not. As shown in Table 6 of the Appendix, around 20% of investors and a similar percentage of issuers argued that disclosures should be

125. *See, e.g.*, Comment of CalPERS, *supra* note 119, at app. 1–2; Comment of Nancy J. Schroeder, Chair, Fin. Reporting Comm., Inst. of Mgmt. Accountants (July 29, 2016), https://www.sec.gov/comments/s7-06-16/s70616-341.pdf [https://perma.cc/4DF3-WBU8]; Comment of Ernst & Young, LLP (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-223.pdf [https://perma.cc/2499-E5PM]; Comment of John Matthews, Dir. of Fin., Governance & SEC Reporting, PNC Fin. Servs. Grp. (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-227.pdf [https://perma.cc/8TGD-SC9Q]; Comment of Michael L. Gullette, Vice President, Accounting & Fin. Mgmt., Am. Bankers Ass'n (July 15, 2016), https://www.sec.gov/comments/s7-06-16/s70616-105.pdf [https://perma.cc/JH3E-H28Y].

126. Concept Release, *supra* note 1, at 23,929–30.

127. *Id.* at 23–52.

128. The *TSC Industries* materiality standard is defined in terms of the "reasonable investor." *See supra* note 122.

129. *See* Concept Release, *supra* note 1, at 23,951 (discussing comments to the Regulation S-K study to this effect).

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designed for sophisticated investors,[130] while several investor responses argued the opposite—that "Main Street" or retail investors are the proper audience of disclosures.[131]

d. Disclosure Costs & Benefits. Questions 21–23.[132]

These three questions are among multiple places in the Concept Release where the SEC seeks input on how it should evaluate the costs and benefits of disclosure, and "reduce costs for registrants while still providing investors with the information that is important or useful to making informed investment and voting decisions."[133] Respondents generally incorporated responses to these questions into their discussion of other portions of the Concept Release rather than responding directly to section III.B.3, so cost-benefit issues are integrated below into the analysis of other key topics. Although many sections of the Concept Release sought quantified estimates of the costs related to particular disclosures, few responses addressed cost issues and none in this study did so with specific estimates.[134] In general, however, issuers who discussed these topics tended to emphasize the costs of mandatory disclosure, while investors either did not address cost concerns or emphasized the cost savings *to investors* that would result from standardizing reporting requirements.[135]

e. Support for Sunset Provisions. Questions 1–5.[136]

Sunsetting is a means of addressing over-disclosure concerns in the event the SEC introduces new disclosure rules. It allows for new rules to be adopted on a temporary basis in order to permit an assessment of effectiveness before the rule is abandoned or becomes permanent. Less than 5% of respondents addressed the SEC's questions on whether new rules

130. *See, e.g.*, Comment of Shearman & Sterling, LLP (Aug. 31, 2016), https://www.sec.gov/comments/s7-06-16/s70616-367.pdf [https://perma.cc/TH7V-UCXL]; Comment of Ams. for Fin. Reform (Aug. 10, 2016) [hereinafter, Comment of Ams. for Fin. Reform], https://www.sec.gov/comments/s7-06-16/s70616-358.pdf [https://perma.cc/96LF-38CN]; Comment of Jeanette L. Ourada, Vice President & Comptroller, Chevron Corp. (July 22, 2016), https://www.sec.gov/comments/s7-06-16/s70616-315.pdf [https://perma.cc/4WUC-ZT2U].

131. *See, e.g.*, Comment of CFA Institute, *supra* note 119; Comment of Ams. for Fin. Reform, *supra* note 130.

132. Concept Release, *supra* note 1, at 23,931.

133. *Id.*

134. Examples of questions seeking quantified cost estimates include Question 7 of the Concept Release, *supra* note 1, at 23,927 ("What would be the costs and benefits of [a principles-based] approach for investors and registrants?"); see also, Question 106 of the Concept Release, *supra* note 1, at 23,945 ("What would be the costs and benefits of requiring registrants in certain industries to disclose standardized performance metrics?").

135. *See, e.g.*, *infra* Section III.B.7 (discussing potential cost savings of ESG standardization).

136. Concept Release, *supra* note 1, at 23,924.

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should be subject to automatic sunsets.[137] As Table 7 of the Appendix shows, most investors who responded (66.67%) did so to oppose sunsetting, while most issuers and other respondents generally did so to support it.[138]

The SEC had also suggested an alternative—that it review and report within a short period after the adoption of new rules on the rule's effectiveness.[139] Although too few responses addressed this question to allow any comparison among views on that option, some expressed support for such a review.[140]

2. *General Description of the Business; Environmental & Employment-Related Disclosures. Item 101. Questions 24–41, 49–59.*[141]

Item 101's general description of the business includes several topics that may affect the company's risk profile. For example, the description of the business's development required under Item 101(a) could include discussion of material business, legal, or regulatory risks.[142] Item 101(c) requires certain limited disclosures on intellectual property, environmental, and employment-related matters.[143] Although government contracting and intangible assets disclosure may also reveal key areas of risk to investors, the analysis of Item 101 here focuses on questions that address current and potential environmental or social (i.e., employment-related) risks, as noted on Table 1 in the Appendix.

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137. *See infra* Appendix, at Table 7.

138. The CFA Institute, however, noted that sunsetting risk disclosures "would ignore the emerging risks a company faces" and would therefore "not serve investors' interests." Comment of CFA Institute, *supra* note 119, at 4; *see also* Heather Slavkin Corzo, Dir. Office of Inv., AFL-CIO 6 (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-305.pdf [https://perma.cc/49MU-GVLT] (opposing sunsetting as contributing to systemic risk).

139. It is noteworthy that the SEC's 2018 Final Rules were adopted subject to this kind of post-adoption review requirement: the SEC will review the amendments within five years of their effective date to assess their impact on "disclosure and capital formation." 2018 Final Rules, *supra* note 3, at 50,151.

140. *See* Comment of Davis Polk & Wardwell, LLP 4 n.6 (July 22, 2016), https://www.sec.gov/comments/s7-06-16/s70616-313.pdf [https://perma.cc/AH9N-UERA] ("[S]eeking repeal of requirements . . . after their enactment imposes an additional layer of costs on both registrants and the Commission. Nevertheless, we suggest that some sort of formal review (with or without Commission action) would . . . ensure that disclosure requirements remain sufficiently responsive to changing circumstances . . . .").

141. Concept Release, *supra* note 1, at 23,931–33, 23,935–36.

142. 17 C.F.R. § 229.101(a)(1) (2019).

143. *Id.* § 229.101(c).

a. General Development of the Business, Item 101(a)(1); Narrative Description. Item 101(c). Questions 24–30, 31–41.[144]

Item 101(a) requires a "description of the general development of the business" and disclosure of certain significant, non-ordinary course events such as bankruptcy proceedings, mergers, or other material changes in the operations of the business.[145] Similarly, Item 101(c) requires a narrative description of the business. To the extent material, the description of each reporting segment must include disclosure of the material effects of compliance with environmental laws, the number of employees, and ten other specific items related to operations.

This section of the Concept Release asked whether Item 101(a) and Item 101(c) are still useful, how they might be improved, and whether they elicit redundant or outdated information. For Item 101(c), the SEC also asked whether this information should instead be incorporated in other discussions of risk, such as the MD&A, and whether the rule should continue to require that companies identify the segments of their business for whom these disclosed matters are significant.

Although these questions did not specifically mention ESG matters or non-financial risk, as Table 8 shows, a few comments (less than 15, or 5%) mentioned ESG factors as relevant to Item 101(a) or Item 101(c), for example, referencing the importance of ESG as an integral part of business strategy.[146] Only 3 were issuers.[147] Several comments recommended deleting Item 101 disclosures in favor of requirements to disclose only if there are material changes in the business.[148] Changes to Rule 101(a) proposed by the SEC in 2019 would instead eliminate the current five-year timeframe for disclosing information necessary to an understanding of the business, substitute disclosure based on materiality principles for the pre-

144. Concept Release, *supra* note 1, at 23,931–33.

145. 17 C.F.R. § 229.101(c) (2019).

146. *See, e.g.*, Comment of Michelle de Cordova, NEI Inv., Vancouver, Canada (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-229.pdf [https://perma.cc/L3N6-NP9K]; Comment of Principles for Responsible Inv. 3 (July 19, 2016) [hereinafter, Comment of PRI], https://www.sec.gov/comments/s7-06-16/s70616-149.pdf [https://perma.cc/6R5U-2RT8].

147. *See* Comment of Matthew D. Brusch, CAE & Michael C. McGough, CAE, Interim Co-Chief Executive Officers, Nat'l Inv. Relations Inst. (Aug. 4, 2016), https://www.sec.gov/comments/s7-06-16/s70616-350.pdf [https://perma.cc/VPN2-A6EN]. The NIRI is a trade association of over 1,600 company representatives. *See also* Comment of Brendan Williams, Executive Vice President, Am. Fuel & Petrochem. Mfrs. (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-282.pdf [https://perma.cc/QB7P-RMWR]; Comment of Corporate Governance Coalition for Investor Value (July 20, 2016), https://www.sec.gov/comments/s7-06-16/s70616-188.pdf [https://perma.cc/2KJ9-97SF]. The coalition is a business advocacy organization and its members "represent American businesses." *Id.*

148. *See, e.g.*, Comment of Davis Polk & Wardwell, *supra* note 140.

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scriptive list of topics to be disclosed, and permit later filings to simply cross-reference and update the initial filing.[149]

b. Environmental Disclosure. Item 101(c)(1)(xii). Questions 49–51.[150]

Item 101(c)(1)(xii) requires certain environmental disclosures and is therefore also relevant to an assessment of companies' sustainability risks.[151] Specifically, it requires a registrant to provide material estimated capital expenditures for environmental control facilities for its current and succeeding fiscal years and for further periods the registrant deems material.[152]

Questions 49 to 51 in the Concept Release asked first whether Item 101(c) environmental disclosures should be expanded or reduced, whether disclosure regarding compliance with emissions regulations is useful to investors, and whether similar disclosures should be required about the material effects of other regulations. As Table 9 of the Appendix shows, these questions attracted a limited number of responses (around 6% of all respondents), but the contrast between the perspectives of business interests (i.e., issuers) and others is clear. These differences are statistically significant at the 5% or 10% levels. The 2019 Proposed Rules would extend this disclosure to include the material effects of compliance with material government regulations, not only environmental laws; they would not alter the current disclosures regarding environmental capital expenditures.[153]

Although Item 103, which requires a description of material pending legal proceedings, was not part of the Concept Release, many issuers discussed the quantitative materiality thresholds that apply to Item 103 disclosure and that require companies to disclose proceedings under the environmental laws to which a governmental authority is a party if the anticipated penalties or fines are in excess of $100,000.[154] All issuer comments referencing Item 103 opposed any expansion of environmental disclosure and any use of quantified materiality thresholds generally.[155]

149. 2019 Proposed Rules, *supra* note 3, at 44,360–63.

150. Concept Release, *supra* note 1, at 23,935

151. These requirements were adopted in 1973 pursuant to congressional mandate under the National Environmental Policy Act of 1969 (NEPA), 40 U.S.C. §§ 4321–4347. In the Concept Release, the Commission refers to the environmental compliance requirements incorporated in Item 101 as mandatory disclosures that, like the specialized disclosures adopted by the SEC in recent years, are "not necessarily financial in nature." Concept Release, *supra* note 1, at 23,922 & n.61.

152. 17 C.F.R. § 229.101(c)(1)(xii) (2019); Concept Release, *supra* note 1, at 23,922 (citing 1976 Environmental Release).

153. 2019 Proposed Rules, *supra* note 3, at 44,363–69 (discussing proposed Item 101(c)(2)(i)).

154. *See* Instruction 5.C to Item 103, 17 C.F.R. § 229.103 (2019).

155. These include comments by Edison Electric Institute and the American Gas Association Accounting Advisory Council (July 21, 2016), https://www.sec

In contrast, most investors favored the current quantitative materiality thresholds and expanding environmental disclosure in some form.[156] They also tended to emphasize that the environmental disclosures currently required are in fact material.[157] Differences among respondent groups on the merits of quantitative thresholds generally or in Item 103 specifically were highly statistically significant. The 2019 Proposed Rules would retain the Item 103 quantitative threshold for certain environmental litigation, but would raise it to adjust for inflation.[158]

c. Number of Employees. Item 101(c)(1)(xiii). Questions 54–59.[159]

Item 101(c)(1)(xiii) is the primary provision of Regulation S-K related to employment (i.e., "social") matters.[160] It currently requires limited disclosures related to the number of employees, which the SEC has interpreted to include "the number of persons retained as independent contractors" for registrants who generally hire independent contractors rather than employees.[161] As the SEC noted in the Concept Release, information on the number and type of employees may be "indicative of trends or shifts in a registrant's operations," as well as relevant to assess-

.gov/comments/s7-06-16/s70616-241.pdf [https://perma.cc/9SB7-WN3P]; Comment of Jeanette L. Ourada, Vice President & Comptroller, Chevron Corp., *supra* note 130; Comment of the National Investor Relations Institute (Aug. 4, 2016), https://www.sec.gov/comments/s7-06-16/s70616-350.pdf [https://perma.cc/WK8U-SD5D]; Exxon Mobil, *supra* note 1; and Comment of General Motors 2 (Sept. 30, 2016), https://www.sec.gov/comments/s7-06-16/s70616-373.pdf [https://perma.cc/RLD8-KC5A]. These comments expressed concern that monetary thresholds lock in quantitative floors that inevitably become so low over time that they sweep in immaterial information.

156. These included comments by Domini Soc. Invs. (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-221.pdf [https://perma.cc/7PZ4-G5BE]; Comment of Eric Hespenheide, Interim Chief Executive, Glo. Reporting Initiative (GRI) (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-220.pdf [https://perma.cc/GGK7-5C4Y]; Impax Asset Mgmt. Ltd. (July 19, 2016), https://www.sec.gov/comments/s7-06-16/s70616-169.pdf [https://perma.cc/37BE-8PNQ]; Comment of Sanford Lewis, Inv. Envtl. Health Network (July 15, 2016), https://www.sec.gov/comments/s7-06-16/s70616-133.pdf [https://perma.cc/G6HJ-8726]. Other supporters include Deloitte & Touche LLP (July 15, 2016), https://www.sec.gov/comments/s7-06-16/s70616-131.pdf [https://perma.cc/8A77-8532].

157. *See, e.g.*, Comment of E. Scott Pruitt, Attorney General of Oklahoma et al. (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-289.pdf [https://perma.cc/RYL9-2TBX].

158. 2019 Proposed Rules, *supra* note 3, at 44,372–74 (proposing to raise the Item 103 threshold to $300,000).

159. Concept Release, *supra* note 1, at 23,936.

160. "Social" ESG factors are generally understood to refer to labor, employment, and other matters related to human capital.

161. Concept Release, *supra* note 1, at 23,936 & n.224 (citing Regulation S–K Compliance and Disclosure Interpretations Question 203.01, https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm [https://perma.cc/H8JX-EBND]).

ments of its size and scale.[162] In response to several rulemaking petitions on human capital disclosure,[163] the 2019 Proposed Rules would substitute a principles-based approach and require disclosure of human capital resources and any related human capital measures used by management, to the extent material, in the disclosure topics under Item 101(c).[164]

The questions on employment-related disclosure under Item 101(c) attracted a large number of responses, mostly from investors. As Table 10 of the Appendix shows, most investors argued that all of the additional employment information suggested in the Concept Release is important; nearly all who responded also supported new disclosure on outsourcing or subcontracting practices in some form. Many investor responses also emphasized the materiality of employment-related (i.e., "social") information and related risks to their voting and investment decisions. In contrast, only 8 issuers responded to these questions, primarily to oppose any disclosure expansion and to support the current form of the rule.[165] The differences among the three respondent groups on all these questions are statistically significant at the 1% level.

3. *Management's Discussion & Analysis. Item 303. Questions 88–106.*[166]

The MD&A is intended to: "[i] Provide a narrative explanation of a registrant's financial statements that enables investors to see the registrant through the eyes of management; . . . [ii] enhance the overall financial disclosure and provide the context within which financial information should be analyzed; and . . . [iii] provide information about the quality of, and potential variability of, a registrant's earnings and cash flow, so investors can ascertain the likelihood that past performance is indicative of future performance."[167] Item 303(a) of the MD&A requires management's assessment of "known trends or uncertainties that have had or that the [company] reasonably expects will have a material impact" on the company's operational results, and the reasons behind those effects.[168] As the SEC recognized in its 2010 Climate Guidance, the MD&A is one of the

162. *Id.*

163. *See generally* Williams & Fisch, *supra* note 8. S*ee also* Human Capital Management Coalition Petition (July 6, 2017), https://www.sec.gov/rules/petitions/2017/petn4-711.pdf [https://perma.cc/47BC-YM7N].

164. 2019 Proposed Rules, *supra* note 3, at 44,369–72.

165. *See, e.g.*, Comment of Michael L. Gullette, Vice President, Accounting & Fin. Mgmt., Am. Bankers Ass'n, *supra* note 125.

166. Concept Release, *supra* note 1, at 23,942–45.

167. *Id.* at 23,941 & n.286 (citing the Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8350, 68 Fed. Reg. 75,056 (Dec. 19, 2003) [hereinafter, 2003 MD&A Interpretive Release], https://www.sec.gov/rules/interp/33-8350.htm [https://perma.cc/3PX7-8YJB]).

168. 17 C.F.R. § 229.303(a)(3)(ii) (2019); *see* Concept Release, *supra* note 1, at 23,942 & n.298 (discussing Item 303 with reference to the 2003 MD&A Interpretive Release, *supra* note 150).

primary potential sources of qualitative risk-related information, including ESG information, in the current disclosure framework.[169] However, because it is in narrative form, enhanced MD&A disclosure is unlikely to improve the comparability of ESG information.

The Concept Release includes nearly twenty topics related to the scope of the MD&A. Together, they address the quality and focus of analysis, the disclosure of forward-looking information, and reporting of key performance indicators (KPIs). All of these topics are particularly relevant in evaluating whether the MD&A is effective in eliciting disclosure on material ESG risk.

A relatively high percentage of respondents in this study commented on MD&A issues, although the number of respondents is small for many specific questions.[170] Responses on specific proposed changes to the MD&A reveal interesting similarities and differences between investors and issuers, although the limited responses to certain of these questions means that these results cannot be interpreted conclusively. In particular, most respondents agreed about the difficulties of any requirement to quantify risk. As Table 12 of the Appendix indicates, all responses on the question of whether the SEC should consolidate its MD&A-related guidance also support such a change.[171] However, issuers diverge from other respondents on most questions proposing additional risk-related disclosures.

As shown on Table 11 of the Appendix, approximately 10% of all comment submissions in this study explicitly referenced ESG-related matters in connection with the MD&A, indicating its relevance to material risk assessment. Interestingly, the percentage of issuers and business organizations to do so was even higher—nearing 20%.

a. Quality & Focus of Analysis. Questions 88–98.[172]

A number of the SEC's questions focused specifically on whether the MD&A currently elicits material information or results in over-disclosure, and whether changes should be made to prevent over-disclosure by narrowing the MD&A's potential scope. As Table 12 of the Appendix shows, only several respondents commented on these questions, but they did so to concur that Item 303 "result[s] in immaterial disclosures that may ob-

169. 2010 Climate Guidance, *supra* note 54. ESG risks such as climate-related risk may be related to "external or macro-economic matters" or changes in the regulatory environment that the SEC has recognized are relevant to the MD&A. *See, e.g.*, Concept Release, *supra* note 1, at 23,944 & n.327 (identifying these general concerns).

170. Appendix, *infra*, at Tables 11–15.

171. Both the SEC and its Division of Corporate Finance provide guidance on the MD&A, including SEC releases, the Division's Financial Reporting Manual and SEC staff Compliance and Disclosure Interpretations. *See* Concept Release, *supra* note 1, at 23,943.

172. *Id.* at 23,942–44.

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scure significant information."[173] The data do not permit clear inferences from silence, but it may be that most respondents believe that the MD&A generally elicits material information and is not overly broad.[174]

The question of whether the SEC should introduce a qualitative or quantitative materiality threshold for MD&A disclosure attracted more responses, and both investors and issuers opposed.[175] Some comments also stressed that the MD&A is a useful vehicle for helping companies disclose longer-term risks, particularly with respect to climate-change and other environmental risks.[176] No comments provided cost-benefit estimates for the MD&A; the single specific response on cost-benefit issues from CalPERS emphasized that shareholders "should have a greater voice in determining the value of disclosures" since they ultimately bear the costs of disclosure and depend upon it.[177]

Several of the questions in this section ask whether new format requirements might make the information in the MD&A more accessible to different audiences. The SEC has previously recommended that companies include an overview in the MD&A to highlight the information that is most important.[178] It has also encouraged companies to adopt a "layered approach" to MD&A disclosure, such as the use of overviews or introductions, to emphasize key information. As Table 12 shows, most respondents would support a new requirement that companies provide an executive-level overview in the MD&A, with a minority suggesting it be encouraged but not required. As a result, no significant differences among groups were identified on this question. A limited number of investors indicated they would find layered disclosure helpful, while the few issuer responses all indicated they see no benefit to the use of layered disclosure generally.[179] This difference was significant at the 10% level. Again, however, most of these questions attracted a limited number of responses.

173. *Id.* at 23,943.

174. Due to the limited data, no significant differences among groups on this question were identified. *See infra* Appendix, at Table 11.

175. Concept Release, *supra* note 1, at 23,942 (Question 89). Due to the limited number of responses, no significant difference among groups was identified.

176. Comment of CalPERS, *supra* note 119.

177. *Id.* at 17.

178. *See* Concept Release, *supra* note 1, at 23,942 & n.314 (citing 2003 MD&A Interpretive Release, *supra* note 150 ("The overview should provide insight into [management's view of] material opportunities, challenges and risks . . . on which the registrant's executives are most focused for both the short and long term, as well as the actions they are taking to address [them].").

179. Table 12 shows that of the 11 comments on layered disclosure, the 3 investors were divided, all 3 issuers opposed, and all 3 of the remaining comments supported its use. The SEC also sought guidance on whether auditor review should be required for the MD&A (Question 96). Seventy-two percent of the 15 responses on this question, including all of the auditor comments in this study, either deferred to the SEC on this question or opposed such a requirement. In light of these responses, the SEC staff's recommendations in 2016 indicated they would not encourage adopting such requirements. *See* REGULATION S-K REPORT, *supra* note 50.

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b. Forward-Looking Information. Questions 99–102.[180]

A key feature of the MD&A is that it elicits risk-related disclosure that is by its nature forward-looking.[181] Because of the uncertainty regarding future events, such forward-looking information is subject to a litigation safe harbor established under the Private Securities Litigation Reform Act (PSLRA) and several regulatory safe harbors.[182] The SEC has also encouraged optional disclosures of forward-looking information where future trends or events are unknown but anticipated, or where the impact of a known event, trend, or uncertainty is "less predictable."[183] Because ESG information that is material to investors typically relates to risk, ESG disclosure in the MD&A or in any new ESG disclosure rules raises many of these same compliance and liability concerns for public companies.

This section of the Concept Release addresses two critical questions about risk-related disclosure in the MD&A: (i) whether the SEC should revise or eliminate its current materiality standard for MD&A disclosure in favor of the narrower materiality standard established in *Basic v. Levinson* that applies to liability claims under Rule 10b-5; and (ii) whether the SEC should require, not simply encourage, companies to quantify "the material effects of known material trends or uncertainties."[184]

In *Basic v. Levinson,* the Supreme Court established a test for determining the materiality of forward-looking information that requires a balancing of the "probability that the event will occur and [its] anticipated magnitude . . . in light of the totality of the company activity."[185] As noted in the Concept Release, there is currently a circuit split among the courts that have considered whether Item 303 creates a general duty to disclose known risks such that an omission would give rise to liability under Rule 10b-5, but the courts are in agreement in their application of the *Basic v. Levinson* "probability and magnitude" test.[186]

180. Concept Release, *supra* note 1, at 23,944.

181. *Id.* at 23,943. As noted in the Concept Release, a number of provisions in Item 303 require disclosure of forward-looking information. *Id.* at note 316 (citing Item 303(a)(1) (known trends and uncertainties); Item 303(a)(2)(ii) (known material trends in capital resources and any expected material changes); Item 303(a)(3)(ii) (any known trends or uncertainties that may reasonably impact operational results); and Instruction 3 to Item 303(a)).

182. *Supra* note 88; *see also* Rule 175 of the Securities Act of 1933, 17 C.F.R. § 230.175(c)(3) (2019); Rule 3b-6 of the Securities Exchange Act of 1934, 17 C.F.R. § 240.3b-6(b)(3) (2019).

183. *See* Concept Release, *supra* note 1, at 23,943 & n.318 (citing Concept Release on Management's Discussion and Analysis of Financial Condition and Operations, Release No. 33-6711, 52 Fed. Reg. 13,715-02 (Apr. 24, 1987) (codified in 17 C.F.R. § 229 (2019))).

184. Concept Release, *supra* note 1, at 23,944.

185. Basic v. Levinson, 485 U.S. 224, 238 (quoting SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968)).

186. *See* Concept Release, *supra* note 1, at 23,944 & n.322, (citing Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 100–04 (2d Cir. 2015) (holding that Item 303 does give rise to a duty to disclose under Rule 10b–5)); In re NVIDIA Corp.

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However, the SEC does not currently require companies to assess the probability or magnitude of "known trends or uncertainties" in order to determine whether disclosure must be made in the MD&A.[187] Instead, it has adopted a two-step test.[188] Under this test, a risk is material and must be disclosed in the MD&A if management determines (i) that a "known trend, demand, commitment, event or uncertainty" is "reasonably likely" to occur; or (ii) if this cannot be done, they must disclose the risk unless they "evaluate objectively the consequences" of the event's occurrence and determine that it is not "reasonably likely" to have a material effect on the company's financial condition or operational results.[189] The SEC's two-step test potentially results in more expansive disclosure than would be the case under the *Basic v. Levinson* test.

As Table 13 of the Appendix shows, only 17 comments (6%) responded on this issue, but the majority of these supported maintaining the two-step test. Three respondents, split among the respondent groups, opposed the two-step test, and 2 issuers argued in favor of the probability/magnitude test. There was no significant difference among respondent groups with respect to this issue.

Only 11 comments in the data set responded on the second question regarding quantification of risk effects. As Table 14 of the Appendix shows, most (70%) opposed.[190] Because of the strong agreement on this question, no significant differences were identified among the three groups on this issue.

c. Key Indicators of Financial Condition & Operating Performance. Questions 103–106.[191]

In this section, the SEC asked whether Item 303 should be revised to include a principles-based or prescriptive requirement that all registrants disclose performance metrics and related analysis. Under current SEC guidance, disclosure of qualitative or quantitative measures that are necessary to enable investors to evaluate a company's performance should al-

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Sec. Lit., 768 F.3d 1046, 1054–56 (9th Cir. 2014) (holding that Item 303 does not create a duty to disclose for Rule 10b–5 purposes); Oran v. Stafford, 226 F.3d 275, 287–88 (3d Cir. 2000) (leaving open the question of Rule 10b–5 liability for Item 303 violations).

187. *See* Management's Discussion and Analysis of Financial Condition and Results of Operations, Certain Investment Company Disclosures, 54 Fed. Reg. 22,427 (May 24, 1989) (codified at 17 C.F.R. §§ 211, 231, 241, 271) (noting that the probability-magnitude test applied to securities fraud claims in *Basic v. Levinson*, 485 U.S. 224, 238–39 (1988), is not the two-step materiality test that the SEC has established for MD&A disclosure).

188. Concept Release, *supra* note 1, at 22,943 (citation omitted).

189. *Id.*

190. One investment analyst recommended that quantification continue to be encouraged but not required. Comment of Stephen P. Percoco, Lark Research, Inc. (July 24, 2016), https://www.sec.gov/comments/s7-06-16/s70616-317.pdf [https://perma.cc/JVN3-VW93].

191. Concept Release, *supra* note 1, at 23,945.

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ready be identified in the MD&A,[192] and the Concept Release also noted that many companies do include industry-specific KPIs in their public filings.[193]

As shown in Table 15 of the Appendix, these questions attracted a high number of responses relative to other Concept Release issues, other than section IV.F's questions on ESG disclosure. Many of the comments emphasized that the MD&A should already elicit ESG-related performance measures relevant to the company or its industry.

Interestingly, all three groups align in their strong support for principles-based KPI disclosure, with high support among investors. However, all issuer comments on this question opposed new prescriptive KPI mandates, while investors and other respondents were divided on this question.[194] The differences among these groups on the question of *prescriptive* KPI mandates are statistically significant at the 5% level, but insignificant with respect to *principles-based* KPIs, given the agreement among groups on their value. No comments in the study addressed the specific costs and benefits of mandating KPI disclosure for companies in certain industries.

d. Results of Operations. Item 303(a)(3). Questions 107–112.[195]

This section of the Concept Release does not address the core forward-looking disclosures of Item 303(a)(3) on "known trends or uncertainties," but instead focuses on the time periods relevant to Item 303 and the application of the rules to registrants who have not yet generated revenue or begun operations.[196] Most of these questions have already been addressed in the 2019 Final Rules under the FAST Act.[197]

192. "Where there is no commonly accepted method of calculating a particular non-financial metric, the Commission has said that the registrant should provide an explanation of the calculation of the metric to promote comparability across registrants within the industry." *Id.* at 23,944 (referencing the 2003 MD&A Interpretative Release, *supra* note 150, as well as SEC practice and industry-specific KPIs); *see also* Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, Rel. No. 33-10751 (Jan. 30, 2020) (clarifying that accompanying disclosures regarding the definition, assumptions, and utility of the metric to management and investors should generally be provided with particular KPIs or other metrics).

193. *Id.* at 23,944.

194. The same investor respondent also urged the SEC to continue to encourage KPI reporting without any new mandate. *Supra* note 17.

195. Concept Release, *supra* note 1, at 23,946–47.

196. Questions 107 and 109–111 deal with the utility of existing period-to-period comparisons. *Id.* at 23,946.

197. *See* 2019 Final Rules, *supra* note 3, at 9–10 (amending Item 303 to permit exclusion of discussion of the earliest of three years in the MD&A if already discussed in a prior filing). The 2019 Final Rules introduced no other changes to the MD&A.

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e. Other MD&A Disclosures. Item 303(a)(1)–(2), (4)–(5), (8). Questions 113–144.[198]

The remaining questions on Item 303 concern a number of required disclosures in the MD&A that pertain to financial risk and, in some cases, provide context for matters that under GAAP already appear in the financial statements or related notes. These include: management's analysis of the company's sources of liquidity and capital,[199] its reliance on short-term borrowings,[200] disclosure of off-balance sheet arrangements,[201] and a tabular presentation of certain long-term liabilities.[202] The Concept Release questions focus on the location and format of some of these elements and whether they should be retained in their current form. Also included here were several questions on whether the MD&A should be revised to require a discussion of management's judgment regarding critical accounting estimates disclosed in the financial statements, or the factors that influence management's assessment of materiality in the MD&A.[203] All of these questions attracted limited responses from commentators in this study.[204]

4. *Risk Factors. Item 105 (Formerly Item 503(c)). Questions 145–156.*[205]

Item 105 (relocated from Item 503(c) in 2019) now requires a disclosure of the "most significant risk factors" affecting the company or its securities.[206] The SEC has noted that risk factor disclosure is plagued simultaneously by under-reporting of company-specific risk factors and over-disclosure of generic or boilerplate disclosures that are similar to other companies in the same industry."[207] For this reason, the SEC's current guidance on risk factor disclosure advises that disclosure should discuss the "most significant" factors that make the company's securities

198. Concept Release, *supra* note 1, at 23,947–54.

199. *Id.* at 23,947 (Questions 113–120).

200. *Id.* at 23,948 (Questions 121–123).

201. *Id.* at 23,951 (Questions 125–130).

202. *Id.* at 23,952 (Questions 131–136). Several of these provisions may be amended or eliminated if the 2020 Proposed Rules, *supra* note 50, are adopted.

203. The 2020 Proposed Rules would require this disclosure. *Supra* note 50, at 72–82. (Questions 137–144).

204. Again, this study includes all comments responding to any question in section IV.C (Risk and Risk Management) or section IV.F (Sustainability) of the Concept Release. Item 303 (MD&A) is addressed in section IV.B of the Concept Release, so not all comments on the MD&A may be included in this study.

205. Concept Release, *supra* note 1, at 23,956.

206. The 2019 Final Rules relocated Item 503(c) disclosures to new Item 105. *Supra* note 3, at 53, codified at 17 C.F.R. § 229.105 (2019). Note that information related to material market risk exposure, however, is disclosed under Item 305, discussed *infra* at Section III.B.5. The 2019 Proposed Rules would revise Item 105 to change the disclosure standard from the "most significant" risk factors to the "material" factors. 2019 Proposed Rules, *supra* note 3, at 44,382–83.

207. Concept Release, *supra* note 1, at 23,955–56 & n.492.

speculative or risky, and should be organized and concise.[208] The SEC's 2010 guidance on climate-related risks confirms that this rule applies to material climate risks as well.[209]

The only substantive changes the SEC has made to this disclosure since 2016 are to eliminate the risk factor examples previously included in the rule in order to help companies focus their disclosure on firm-specific risk.[210] The 2019 Proposed Rules would require a summary for risk factor disclosures beyond fifteen pages, substitute the term "material" factors for the "most significant," require the use of headings, and separately identify generic risks at the end of the disclosure.[211]

Concept Release questions on Item 105 (former Item 503(c)) sought public input on amendments to improve the quality and firm-specific content of risk factor disclosure and whether to require additional disclosure on how management identifies and responds to material risks. They also asked specifically whether the length of risk factor disclosures currently obscures investor's understanding of significant risks.[212] Most, if not all, of the questions extend readily to material ESG risk factors.

Risk factor disclosures attracted a high number of comments. Issuers are generally opposed to additional or more prescriptive disclosures, while investors tend to support more expansive risk factor disclosure. As Table 16 of the Appendix shows, differences between investor and business community views are greatest with respect to questions of disclosure overload, proposals to expand disclosure of companies' risk mitigation efforts, and proposals to expand disclosure of risk probability and impact. On the latter two issues, these differences were statistically significant at the 1% level. No comments in the study addressed the specific costs and benefits of risk factor disclosure or of any of the proposed changes.[213]

On the core question of disclosure overload,[214] the majority of respondents reported that risk factor length is a concern, but investors and issuers divided sharply. Over 60% of investor comments on this question disagreed that risk factor disclosure length obscures material information, while most other respondents agreed. These differences were statistically significant at the 10% level.

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208. 17 C.F.R. § 229.105 (2019); *see also* Concept Release, *supra* note 1, at 23,955 & nn.482–84 (citations omitted).

209. 2010 Climate Guidance, *supra* note 54. On the materiality of climate-related risk factors, see generally TCFD, *supra* note 9.

210. This issue was raised in Question 151 of the Concept Release. *See id.* at 23,956; *see also* 2019 Final Rules, *supra* note 3, at 53, 156–57 (eliminating risk factor examples in Item 503(c) and relocating Item 503(c) to new Item 105 in subpart 100 of Regulation S-K). As Table 16 shows, the few responses here on this issue were mixed across respondent groups.

211. *See* 2019 Proposed Rules, *supra* note 3, at 44,382–83.

212. Concept Release, *supra* note 1, at 23,956 (Question 148).

213. *Id.* (Question 156).

214. *Id.* (Question 148).

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Comments from a number of law firms stated that over-disclosure of risk factors and generic or boilerplate disclosures are due to fear of liability,[215] and certain investors and other respondents agreed that these same concerns also lead companies to under-disclose firm-specific risks.[216] Despite a limited number of comments on the topic, a potential solution that appears to be supported by most respondents (86%), including all issuers and two-thirds of investors, is the introduction of a list of generic risks that need not be disclosed, as has been proposed in the 2019 Proposed Rules, and the creation of a safe harbor with respect to those risks.[217]

Investors and issuers also disagreed strongly on the issue of under-disclosure—whether Item 503(c) is "effective for capturing emerging risks . . . such as those associated with cybersecurity, climate change, and arctic drilling."[218] Eighty percent of the investor respondents disagreed, and a number of investors, including insurer Aflac, encouraged the SEC to specifically reference ESG factors in its future rulemaking or guidance on Item 503(c).[219] Fewer issuers responded on this issue, but nearly all disagreed with investors and stated that, in their view, Item 503(c) already elicits adequate disclosure of emerging risks. The difference in views of

215. *See, e.g.*, *id.*; *see also* Comment of Davis Polk & Wardwell, *supra* note 140 ("[N]otwithstanding the PSLRA, we think registrants generally limit their voluntary forward-looking disclosure to earnings press releases, quarterly calls or other investor presentations that are 'furnished' with the Commission under Form 8-K rather than in 'filed' periodic or current reports in response to the heightened litigation risk associated with [filed] documents . . . ."); Concept Release, *supra* note 1, at 23,955–56 (discussing prior public comments to this effect); Comment of Matthew D. Brusch, *supra* note 147, at 3 n.5 ("[M]any companies feel compelled to sacrifice usefulness and accessibility in favor of protection from legal risk through over-disclosure and standardized disclosure such as 'boilerplate' risk factors. Such over-disclosure not only burdens corporate resources—at the expense of all shareholders—but often buries shareholders in an avalanche of information that ultimately limits the practical utility of Exchange Act filings." (quoting Comment of Wachtell, Lipton, Rosen & Katz 2–3 (May 16, 2016), https://www.sec.gov/comments/s7-06-16/s70616-9.pdf [https://perma.cc/B64B-UBAX])).

216. *See* Comment of Penny Somer-Greif, Chair, & Gregory T. Lawrence, Vice Chair, Comm. on Securities Law, Md. State Bar Ass'n (May 8, 2017), https://www.sec.gov/comments/s7-06-16/s70616-257.pdf [https://perma.cc/V72T-TX9A]; *see also* Comment of Lisa French, Chief Tech. Officer, Int'l Integrated Reporting Council 1 (July 20, 2016), https://www.sec.gov/comments/s7-06-16/s70616-197.pdf [https://perma.cc/2EJM-S9YJ]; Comment of Americans for Financial Reform, *supra* note 130, at 2 ("concerns about 'excessive disclosure' or 'disclosure overload' are profoundly misplaced"—the problem is that "risk factor disclosures have become increasingly generic and non-specific in ways that do not provide actionable information to investors").

217. Concept Release, *supra* note 1, at 23,956 (Question 150).

218. *Id.* (Question 154).

219. Comment of Frederick Crawford, Executive Vice President & Chief Fin. Officer, Audit & Risk Comm., Aflac, Inc. (July 7, 2019), https://www.sec.gov/comments/s7-06-16/s70616-166.pdf [https://perma.cc/K6VT-BT9U]; *see also* Comment of Lisa N. Woll, Chief Executive Officer, U.S. SIF & U.S. SIF Found. (July 16, 2016) [hereinafter Comment of Woll (U.S. SIF)], https://www.sec.gov/comments/s7-06-16/s70616-107.pdf [https://perma.cc/9ZK4-3MYF].

investors and business advocates on this question was statistically significant at the 1% level.

Investors were strongly supportive of new rules to require a discussion of risk mitigation, that is, how companies are addressing the identified risks,[220] with 70% in favor. An even higher percentage of issuers (76%), however, opposed such a change. As with the MD&A in Item 303, mandatory disclosure of the probability of occurrence and the effect on performance for each risk factor was favored by 75% of investor comments on the question, while all responding investors and most other respondents opposed.[221] Again, both of these differences were statistically significant at the 1% level. Investors and other non-issuers were divided on the question of whether companies should be required to rank risk factors in order of magnitude (Question 147),[222] while nearly all issuer responses opposed.

The results also identify areas of relative agreement among investors and business advocates. For example, most responses reflected shared concern about the need to reduce generic or boilerplate disclosures,[223] and about the challenges of requiring companies to identify certain risks as more "risky" than others. For example, in contrast to Question 147, investors almost unanimously agreed with other respondents in opposing a proposal that would require companies to "identify and disclose in order their ten most significant risk factors."[224] Some investors also joined other respondents in opposing requirements to provide a risk factor summary in addition to a disclosure of self-identified "significant risks." These results suggest that both investor and corporate perspectives emphasize the importance of firm-specific risk disclosure, and that investors do not necessarily advocate any and all expansions of mandatory reporting.[225]

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220. Concept Release, *supra* note 1, at 23,956 (Question 145).

221. *Id.* (Question 146).

222. *Id.* (Question 147).

223. *Id.* (Question 150).

224. Compare to responses on Question 147, where some investors would support ranking risk by probability or magnitude. *See, e.g.*, Comment of Fenwick West LLP 18 (Aug. 1, 2016), https://www.sec.gov/comments/s7-06-16/s70616-349.pdf [https://perma.cc/HX3A-XP52] (expressing concern that such disclosures might offer investors a false sense of security and lead to higher litigation risk for companies for a "mis-predicted outcome"). Concern with boilerplate risk factor disclosures is a focus of the 2019 Proposed Rules, *supra* note 3.

225. *See, e.g.*, Comment of Jean A. Rogers, Chief Executive Officer, Sustainability Accounting Standards Bd. 8 (July 1, 2016) [hereinafter Comment of SASB], https://www.sec.gov/comments/s7-06-16/s70616-25.pdf [https://perma.cc/WW6N-DAFQ] (stating that "more than 40 percent of all 10-K disclosure on sustainability topics consists of boilerplate language. This preponderance of vague language does not help investors to evaluate performance.").

5. *Quantitative and Qualitative Disclosures About Market Risk. Item 305. Questions 157–179.*[226]

Item 305 requires quantitative and qualitative disclosure of "market risk-sensitive instruments," such as derivatives, that affect the company's financial condition. Item 305 uses both qualitative and quantitative disclosure approaches because of the need to balance comparability for investors and flexibility for issuers.[227] Item 305(b) also requires disclosure of forward-looking information on the company's primary market risks and a description of how those risks are managed.[228] Because Item 305 is intended to elicit forward-looking information on risk,[229] it also provides a safe harbor.[230]

In this section of the Concept Release, the SEC sought to assess the effectiveness of the current rule's balance of quantitative and qualitative disclosure, its relevance to companies outside the financial sector, the extent of any overlap with similar disclosures required by GAAP or Regulation S-X, and whether any changes are needed to improve the comparability of market risk disclosure. These questions attracted fewer responses than other parts of the Concept Release. Table 17 of the Appendix presents the results of the questions that were most important to respondents in this study.

a. Market Risk Disclosure Effectiveness & Under-Disclosure. Questions 157–168.

Similar to responses on the adequacy of Item 105's risk factor disclosures,[231] few issuers commented on these questions; those that did stated their belief that Item 305 is not effective at eliciting market risk disclosure.[232] As shown on Table 17, differences among respondent groups are not significant on this question.

The SEC also asked whether it should limit the quantitative disclosure requirement to financial institutions or companies engaged in financial services (Question 161). Of the few respondents who considered the question, most (80%) agreed that these disclosures were less relevant to other

226. Concept Release, *supra* note 1, at 23,958–59.

227. *Id.* at 23,959 ("In adopting Item 305, the [SEC] acknowledged the tension between approaches to market risk disclosure that favor comparability and approaches that favor flexibility.").

228. As the Concept Release explains, "Item 305(a) requires registrants to provide quantitative disclosure about market risk sensitive instruments using one or more of three disclosure alternatives," while Item 305(b) "requires qualitative information about market risk," as well as a description of how material risk exposures are managed and any change in such processes. *Id.* at 23,956.

229. *Id.* at 23,957.

230. 17 C.F.R. § 229.305(d) (2019).

231. Concept Release, *supra* note 1, at 23,956 (Question 154).

232. *Id.* at 23,958 (Question 158).

sectors.[233] Due to greater investor opposition and the limited number of responses, differences among groups are significant at the 10% level.

b. Disclosure of Approach to Risk Management & Risk Management Process. Item 305(b). Questions 169–182.[234]

Because this section of the Concept Release proposes potential expansions of risk management disclosure, the comments here offer some indication of respondents' views on under-reporting. These questions are particularly interesting because, in contrast to Item 503 risk factor disclosures, Item 305(b) already requires reporting companies to disclose both material market risks and how those risks are managed.[235]

As Table 17 shows, these topics attracted a moderate number of responses across Item 305(b), although investor responses were quite limited. Issuers generally responded to oppose any new risk management disclosures, while "other" respondents held more mixed views.

Although some issuers urged the SEC to eliminate the current rules requiring a description of companies' risk management processes for material market risk exposures, 75% of all comments on this core aspect of Item 305(b) favored the current requirements.[236] These differences are significant at the 5% level. Few comments expressed a view on whether the SEC should also require companies *to assess* their risk management processes,[237] or to disclose waivers or changes to fundamental parameters of risk management approaches or policies.[238] Issuers universally opposed both proposals, while other responses were mixed. Differences among groups were significant at the 10% level for Question 170 and insignificant for Question 172, given respondents' shared opposition on this issue. Comments from all respondent groups, however, were nearly all in agreement that a reform to consolidate all risk-related disclosure in a single section of a filing would be beneficial.[239]

233. Note, however, that two of the three investor comments disagreed. *See infra* Appendix, at Table 16.

234. Concept Release, *supra* note 1, at 23,960.

235. 17 C.F.R § 229.305(b) (2019). The SEC has previously rejected a "management approach" to disclosure of market risk that would require disclosure of the information methods management uses to "evaluate, monitor, and manage market risk" because such an approach could reduce the comparability of disclosure across registrants. Concept Release, *supra* note 1, at 23,958. Instead, Item 305(a) requires registrants to use one or more of three (3) alternatives to disclose market risk. *Id.* at 23,958 & n.524. Although its purpose was to enable greater standardization and comparability of disclosures, this approach may fail to capture the diverse risk management "methods and assumptions" that companies use (Question 168). *Id.* at 23,959.

236. Concept Release, *supra* note 1, at 23,960 (Question 169).

237. *Id.* (Question 170).

238. *Id.* (Question 172).

239. *Id.* at 23,961 (Questions 180–182).

More comments responded to several questions on the need for disclosure risk factor mitigation, a question that is also relevant to Item 503 risk factor disclosure and potential ESG disclosure.[240] Disclosure overload concerns have led the SEC to discourage discussion of risk mitigation efforts under Item 305(b), fearing that inclusion of mitigating language might mislead investors by diluting their perception of the magnitude of the risk.[241] The few investor respondents were less strongly opposed to market risk mitigation disclosures than issuers. These differences were significant at the 1% level, although the limited number of comments makes interpreting the results difficult. Overall, support for risk mitigation reforms was decidedly mixed, and no other significant differences among respondents were observed.

6. *Use of Industry Guides. Questions 205–215.*[242]

The five Industry Guides currently issued by the Division of Corporation Finance offer a partial solution to both over-reporting and under-reporting concerns and are the subject of section IV.E of the Concept Release. The SEC has historically used Industry Guides to address sector-specific issues and facilitate greater comparability among disclosures for the benefit of investors. Because the Industry Guides are not rules, but represent staff policy that is directed to specific programs and sectors,[243] addressing sector-specific disclosure issues in the Industry Guides may also be preferable for companies concerned about the compliance burdens of new disclosures. Since the materiality of many ESG risks is often sector-specific, as discussed below, the Industry Guides could also be a vehicle for providing tailored guidance on ESG materiality and disclosure practice to companies in specific sectors and to improve the quality and comparability of ESG disclosure.

In the Concept Release, the SEC sought input on whether the Industry Guides facilitate disclosure that is useful to investors, whether they are useful to companies in the relevant sectors, whether any updates are needed, and whether any of the industry-specific disclosures should be codified within Regulation S-K.

These questions attracted a fairly strong response, accounting for over 10% of all comments in this study. As Table 18 of the Appendix shows, all respondents agreed that the Industry Guides are useful and should be retained.[244] Fourteen comments (half of all those addressing Industry Guide questions) urged the SEC to address sector-specific ESG disclosure matters within the Industry Guides; the only issuer response raising ESG issues did so to oppose the use of Industry Guides for ESG

240. *Id.* at 23,960 (Questions 176–178).

241. *Id.*

242. *Id.* at 23,969.

243. *Id.* at 23,967 & n.626.

244. *Id.* at 23,969 (Question 205).

disclosure.[245] Very few comments addressed the need for codification of the Industry Guides,[246] and most of these, including the majority of investor responses, opposed. No significant differences among groups were observed, and comments on these questions provided few specific recommendations.

7. *Disclosure of Information Related to Public Policy & Sustainability Matters. Questions 216–233.*[247]

The Concept Release questions on "public policy and sustainability matters" attracted the most attention from respondents and are the subject of the two form letters that were submitted by over 25,000 signatories. As Table 19 shows, over 98% of the comments in this study address ESG disclosure. Despite the high response rate and the comments' overall strong support for ESG disclosure reform, none of the SEC amendments to Regulation S-K to date address these issues.

One reason may be the sharp divergence between investors and issuers on whether the problem ESG reform must solve is a question of underreporting or disclosure overload. Eighty-three percent of all respondents in this study support expanding ESG disclosure in some form, with 13% opposed. As Figure 2 shows, 96% of investor comments and 78% of "other" respondents on this issue supported expanded ESG disclosure, compared with only 15% of issuers. Surveys of institutional investors and corporate boards since 2016 indicate that recognition of ESG materiality has grown stronger among both groups since then, suggesting that support for ESG disclosure would be stronger if the SEC were to pose the same questions today.[248] Interestingly, of the 17 law firm comments included in this study, only 7 (41%) supported ESG disclosure reform.[249] Table 19 presents a summary of respondent views and shows that for most questions, differences among investors and issuers are highly statistically significant.

245. Comment of Corporate Governance Coalition for Investor Value, *supra* note 146.

246. Concept Release, *supra* note 1, at 23,969 (Questions 208, 213).

247. *Id.* at 23,969–73.

248. *See, e.g.*, Council of Institutional Investors, *supra* note 7, at 2 (observing these trends); VASANTHAM ET AL., *supra* note 8 (same).

249. *See, e.g.*, Comment of Sullivan & Cromwell, LLP (Aug. 9, 2016), https://www.sec.gov/comments/s7-06-16/s70616-354.pdf [https://perma.cc/2EXJ-B8HD] (urging the SEC to focus on how to address sustainability disclosure). *But see* Comment of Shearman & Sterling, LLP, *supra* note 130 (arguing that ESG disclosure is generally immaterial and therefore mandating ESG disclosure rulemaking "moves the SEC away from its core mission").

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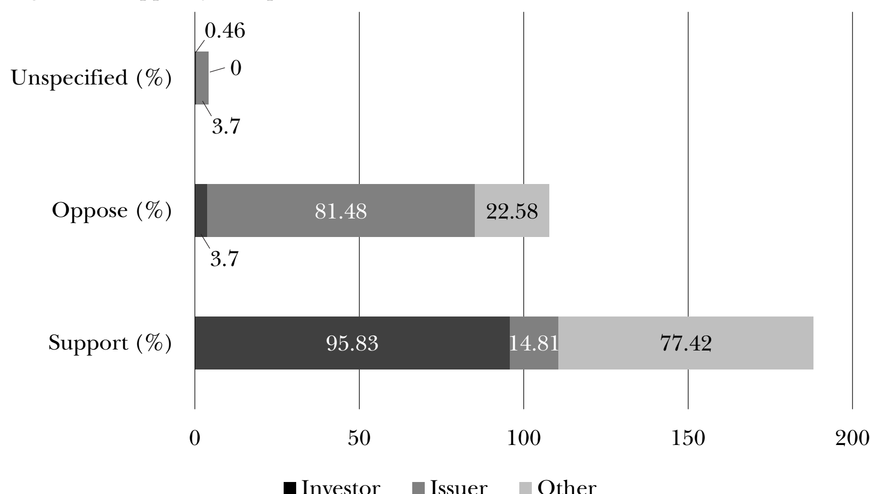
Figure 2. Support for Expanded ESG Disclosure.



a. ESG Materiality. Questions 216 & 220.[250]

These two questions focus on ESG materiality, which is at the core of the over-disclosure debate. If ESG information is material, companies must also consider which ESG matters fall within the scope of current disclosure rules and whether their omission will render any required disclosures misleading. If, on the other hand, ESG information is categorically *immaterial,* then any rules expanding ESG disclosure will inevitably increase issuer costs without improving the informational content of disclosure for investors.

As it has noted in the Concept Release, the SEC determined in 1975 that "disclosure relating to environmental and other matters of social concern should not be required of all registrants unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material."[251] In the Concept Release, the SEC for the first time sought comment on precisely this issue—the extent to which "public policy and sustainability matters" are now considered to be material in terms of their "importance . . . to informed investment and voting decisions,"[252] and to identify such issues specifically.[253] In a similar vein, the SEC asked whether there are any ESG issues "for which line-item disclosure requirements would be consistent with the Commission's

250. Concept Release, *supra* note 1, at 23,972.

251. *Id.* at 23,970 & n.663 (citing the 1975 Environmental and Social Disclosure Release, Rel. No.33-5627, 40 Fed. Reg. 51,656-02 (Nov. 6, 1975), which concluded that these matters were "social goals unrelated to the objectives of the federal securities laws" that would be beyond the SEC's regulatory authority but for separate congressional authorization).

252. *Id.* at 23,970 (quoting the *TSC Industries* standard).

253. *Id.* at 23,972 (Question 216).

rulemaking authority and [its] mission to protect investors, maintain fair, orderly and efficient markets and facilitate capital formation."[254] It also asked respondents to suggest flexible frameworks to "address such issues as they evolve over time," recognizing that materiality may be dynamic.[255]

A surprising finding here is that although issuers were divided on the materiality of ESG issues, a majority agreed that certain ESG factors are material.[256] Investors and other respondents more uniformly affirm ESG materiality, and the resulting differences between these two groups and investors are significant at the less than 1% level. A high percentage of comments also addressed the SEC's authority to adopt ESG disclosure rules, although those identifying ESG information as material were more likely to find it within the SEC's authority. Tracking responses on materiality quite closely, investors uniformly affirm the SEC's authority in this area,[257] while most issuers dispute it.[258] These differences are also significant at the 1% level.

The language used in the comments is also a strong indicator of respondents' views on materiality. For example, companies and trade associations tended to avoid the term "ESG" or even "sustainability" and to refer in their responses to "public policy" and "special interest" concerns. For example, the U.S. Chamber of Commerce stressed that any matters to which the SEC might be referring in these questions are categorically immaterial from the perspective of a "reasonable investor," such that any investor who might advocate in favor of their disclosure should not be viewed as "reasonable."[259] However, some investor advocates strongly ob-

254. *Id.* at 23,973 (Question 220).

255. *Id.* (Questions 216, 220).

256. Responses here were coded as recognizing ESG materiality if they stated so generally or identified any specific ESG factor(s) as material.

257. *See, e.g.*, Comment of Woll (U.S. SIF), *supra* note 219, at 3, 12; Comment of SASB, *supra* note 225; Comment of Ceres on Behalf of 45 Asset Owners & Asset Mgrs. (July 20, 2016), https://www.sec.gov/comments/s7-06-16/s70616-174.pdf [https://perma.cc/R6RK-8AT9]; Comment of PRI, *supra* note 146; Comment of Josh Zinner, Chief Executive Officer, and Sarah Margolis, Assoc. Program Dir., Interfaith Center on Corp. Responsibility (ICCR) (July 14, 2016), https://www.sec.gov/comments/s7-06-16/s70616-103.pdf [https://perma.cc/6J4E-9SGQ].

258. *See, e.g.*, Comment of Penny Somer-Greif, *supra* note 216, at 15 (arguing that rulemaking on ESG issues would be a "perversion of the federal securities laws"); Comment of Karen Kerrigan, President & Chief Executive Officer, Small Bus. & Entrepreneurship Council 2 (July 20, 2016), https://www.sec.gov/comments/s7-06-16/s70616-217.pdf [https://perma.cc/8KQQ-QVCR] (stating that mandating ESG disclosure would be "inappropriate, and probably unlawful").

259. Comment of Tom Quaadman, Senior Vice President, U.S. Chamber of Commerce CCMC 2, 17–19 (July 20, 2016), https://www.sec.gov/comments/s7-06-16/s70616-173.pdf [https://perma.cc/GHY9-ML3N] (describing ESG disclosure as "special interest disclosure, which threatens to politicize the disclosure regime to the detriment of the reasonable investor"); *see also* Comment of Bruce Watzman, Senior Vice President, Regulatory Affairs, Nat'l Mining Ass'n (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-260.pdf [https://perma.cc/B4LN-V4QN] (charging support for ESG disclosure reform as a "politicization" of the SEC to achieve social or political goals); Comment of Shearman and Sterling

jected to the SEC's use of the term "public policy" in the Concept Release itself, arguing that the use of this term "marginalizes" ESG information as immaterial.[260] If the comments of business advocates and companies here are representative, then their strong opposition to the possibility of ESG materiality may support investor claims that ESG under-disclosure is in fact occurring.[261]

The comments also reveal interesting similarities and differences among issuers and investors for those who otherwise agreed on the materiality of at least some ESG issues. Thirty-three percent of all comments on section IV.F agreed that ESG materiality is sector-specific. In addition, nearly 20% of the 219 investors who responded to questions in this part of the Concept Release identified ESG factors as material to systemic, market, or portfolio-wide risk, while no issuer responses did so.[262] Comments identified a wide range of material ESG issues; those raised most frequently included climate risk and environmental matters, political contributions, human rights, and international tax strategies. The potentially broad scope of circumstances that may render specific ESG information material is a concern of some companies and counsel with respect to potential ESG disclosure.[263] Several investors, however, emphasized that under the SEC's materiality standard, information is material based on its importance to the "total mix" of information rather than because of its significance in isolation.[264]

LLP, *supra* note 130 (arguing that ESG information is generally immaterial from a financial perspective).

260. *See* Comment of Lisa French, Chief Tech. Officer, Int'l Integrated Reporting Council 11 (July 20, 2016), https://www.sec.gov/comments/s7-06-16/s70616-197.pdf [https://perma.cc/SH88-SVK9].

261. *See, e.g.*, Comment of Michelle de Cordova, Director of Corp. Engagement & Pub. Policy, NEI Invs. (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-229.pdf [https://perma.cc/G4DA-6PYS] ("In our experience of examining disclosure [for] ESG evaluations, it is more often the case that issuers omit important information when they are unsure if it is material . . . .").

262. *See, e.g.*, Comment of Petter Johnsen, CIO Equity Strategies & Basak Yeltekin, Senior Analyst Ownership Strategies, Norges Bank Inv. Mgmt. 3 (July 15, 2016), https://www.sec.gov/comments/s7-06-16/s70616-129.pdf [https://perma.cc/9W5Y-WJ3R] (urging the need to use prescriptive disclosures for information "such as climate emissions data" that are relevant to maintaining "fair, orderly, and efficient markets"); *see also* Comment of Mardi McBrien, Managing Dir. Climate Disclosure Standards Bd., at app. I (CDSB), https://www.sec.gov/comments/s7-06-16/s70616-211.pdf [https://perma.cc/JMB3-N4HP] (arguing that climate risk presents systemic risk implications); Comment of Timothy Smith & Heidi Soumeri, Walden Asset Mgmt., Boston Tr. Inv. & Inv. Mgmt. Co. 2 (July 19, 2016), https://www.sec.gov/comments/s7-06-16/s70616-151.pdf [https://perma.cc/4TCG-U2CP] (same). On the relationship between ESG information asymmetries and systemic risk, see Harper Ho, *supra* note 21, at 445–46.

263. *See, e.g.*, Comment of Sullivan & Cromwell, *supra* note 249.

264. Comment of Lisa N. Woll (U.S. SIF), *supra* note 219, at 12.

b. Concerns About ESG Disclosure Overload. Question 217.[265]

In section IV.F of the Concept Release, the SEC also raised a specific question about potential disclosure overload if new ESG disclosure mandates were to be introduced. Specifically, it asked whether "line-item requirements for disclosure about sustainability or public policy issues [would] cause registrants to disclose information that is not material to investors" or would "obscure information that is important to an understanding of a registrant's business and financial condition."

This question generated a high number of responses, with 96% of *issuers* arguing that ESG disclosure would overwhelm investors with immaterial information, while 63% of *investors* disagreed. In short, companies and business groups were more likely to express concerns about investors' information overload than investors themselves.

Many investors noted that advances in technology permitting machine reading and automated analytics enable efficient analysis of more extensive disclosures, provided that the information is presented in a comparable format, and that over-disclosure concerns are therefore outdated.[266] These comments emphasize the importance of consistency and comparability, which is difficult to achieve solely through principles-based disclosure.

c. Adequacy of Voluntary Sustainability Reporting, Website-Based ESG Disclosure, & the SEC's 2010 Climate Guidance. Questions 218, 223.[267]

Here, the SEC sought input on the benefits of private ordering as a driver of voluntary disclosure and referenced several potential sources of ESG information that are currently available to investors and might alleviate the need for SEC rulemaking. The SEC asked first whether the sustainability or corporate social responsibility reports some companies already produce are adequate to "satisfy investor needs" with respect to ESG disclosure. The SEC also asked for comment on the "advantages and disadvantages" of investors relying on sustainability reports or on other information companies provide on corporate websites, particularly with respect to its comparability and consistency.[268] It then asked for comment

265. Concept Release, *supra* note 1, at 23,972.

266. *See, e.g.*, Comment of Americans for Financial Reform, *supra* note 130, at 2 ("A concern that an increase in disclosure may 'bury shareholders' in 'an avalanche of trivial information' is only relevant in a world of paper-based disclosures that has long since disappeared. . . . The proper emphasis is not on the questionable and unproven hypothesis of so-called 'disclosure overload,' but on the format, utility, and availability of disclosure."); *see also* Comment of CFA Institute, *supra* note 119 ("[I]nvestors have not indicated . . . that they are overwhelmed by the volume and complexity of existing disclosure.").

267. Concept Release, *supra* note 1, at 23,973.

268. Current rules permit registrants to comply with certain disclosure requirements by providing information on their website in lieu of a filing; for exam-

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on the importance to investors of "integrated reporting,[269] as opposed to separate financial and sustainability reporting, and for comments on the effectiveness of its 2010 Climate Guidance in eliciting adequate disclosure of climate-related risks.[270]

As Table 19 shows, all of these questions attracted a high volume of responses, and the results indicate that investors are more concerned about under-reporting than other respondents. These results are further confirmed in Part IV below. Differences among respondents on these questions are also highly statistically significant, as shown on Table 19.

Although 46% of all comments by companies and business organizations argued that voluntary sustainability reporting outside the federal disclosure regime adequately meets investor needs,[271] less than 1% of investors thought so.[272] In fact, 96% of investors asserted, often strongly, that ESG information contained in these reports is inadequate for investment purposes and costly to analyze. They stress that in the absence of a standardized ESG reporting framework, investors must glean material information from among immaterial information in voluntary sustainability reports that is directed at other stakeholders and often available only from individual company websites that investors must scour at their own cost.[273] For these reasons, the SEC's own Investor Advisory Commission was among those urging the SEC to consider the need to develop a framework for ESG risk disclosure.[274]

The majority of investors cited two primary reasons why voluntary sustainability reporting is inadequate.[275] The first is that the broader stake-

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ple, corporate codes of ethics may be posted to the registrant's website under Item 406(c). *Id.* at 24,000.

269. *Id.* at 23,973 & n.702 (citing INTERNATIONAL INTEGRATED REPORTING COUNCIL (IIRC), THE INTERNATIONAL IR FRAMEWORK (2013), http://integratedreporting.org/wp-content/uploads/2015/03/13-12-08-THE-INTERNATIONAL-IR-FRAMEWORK-2-1.pdf [https://perma.cc/PN99-YYNG]).

270. 2010 Climate Guidance, *supra* note 54.

271. *See, e.g.*, Comment of Michael P. Walls, Vice President, Regulatory & Tech. Affairs, Am. Chem. Council (July 19, 2016), https://www.sec.gov/comments/s7-06-16/s70616-225.pdf [https://perma.cc/PL6W-M4TC]; Comment of Thomas S. Timko, Vice President, Controller & Chief Accounting Officer, Gen. Motors Co. 4 (July 6, 2016), https://www.sec.gov/comments/s7-06-16/s70616-373.pdf [https://perma.cc/LY3H-5UFU].

272. *See, e.g.*, Comment of Members of Congress 1 (July 20, 2016), https://www.sec.gov/comments/s7-06-16/s70616-175.pdf [https://perma.cc/DLT8-VLYB] (representing the views of six members of Congress that the SEC's 2010 Climate Guidance is inadequate "to ensure meaningful disclosure practices and polic[ies]" on climate risk).

273. On investor costs, see *infra* Section III.B.7.e.

274. Comment of SEC Inv. Advisory Comm. 7–8 (June 15, 2016), https://www.sec.gov/comments/s7-06-16/s70616-22.pdf [https://perma.cc/826E-BQNH] (noting that ESG issues may be financially material, supporting a mixed approach to disclosure, and urging the SEC to develop an "analytical framework" for ESG reporting).

275. These two disadvantages are neither exhaustive nor mutually exclusive but were widely cited by investors.

holder-orientation of most voluntary reports means they are not subject to the same investor-oriented materiality standards that apply to public filings.[276] The second is that the plethora of reporting frameworks and standards reduce the comparability of any resulting data.[277] Comments from the American Institute of Certified Public Accountants also noted that the majority of public companies do not connect the personnel and processes associated with sustainability reporting to those responsible for financial reporting.[278]

Over 80% of all respondents on this question also disagree that ESG information provided on company websites is adequate for investment purposes, both for the reasons set forth above and because such information is difficult to locate and analyze at present.[279] As Table 19 shows, less than 10% of all respondents identified integrated reporting as important.

Issuers' views also differed widely from those of other respondents with regard to the adequacy of existing disclosure rules and the SEC's 2010 materiality guidance on climate change disclosure in particular.[280] All issuers argued that the current mix of guidance and existing rules is adequate, while 96% of investors and 86% of all other respondents disagreed.[281] These differences were statistically significant at the 1% level.

276. AICPA Comment Letter, *supra* note 81, at 4.

277. *See, e.g.*, Comment of Pricewaterhouse Coopers LLP 6 (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-258.pdf [https://perma.cc/LQ4K-SC37] (emphasizing the lack of comparability of voluntary reports); Comment of Lisa Jankoy, Chair, Pension Inv. Ass'n of Canada 2 (PIAC) (July 17, 2016), https://www.sec.gov/comments/s7-06-16/s70616-206.pdf [https://perma.cc/U3SJ-KR5B] ("[Investors require data that is clear, comprehensive, and comparable across industries"); Comment of Robert Fohr, Ass'n for Mission Responsibility Through Invest., Presbyterian Church U.S.A. 4 (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-290.pdf [https://perma.cc/R5HM-EPV2] (same).

278. AICPA Comment Letter, *supra* note 81; *see also* COSO & WBSCD, *supra* note 85, at 6 (noting these challenges).

279. *See, e.g.*, Comment of Emil D. Efthimides, Glob. Regulatory Monitor, Equities, and Lenora Suki, Head of Sustainable Fin. Prod. Strategy, Bloomberg LP 9 (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-264.pdf [https://perma.cc/MRX3-2W8T] (detailing the limitations).

280. Concept Release, *supra* note 1, at 23,973 (Question 223).

281. *See* Comment of Members of Congress, *supra* note 119 (representing the views of six members of Congress that the SEC's 2010 Climate Guidance is inadequate "to ensure meaningful disclosure practices and policy" on climate risk); *see also* Comment of Ceres, *supra* note 257, at 2 ("[D]isclosures provided by companies in SEC filings regarding material effects that sustainability issues may have 'upon the capital expenditures, earnings and competitive positions' of registrants are still confined largely to large cap companies—and not even all of those—and many of the disclosures that are there have remained vague."). Those urging the SEC to develop "mandatory and meaningful disclosures of the material effects of climate change on issuers" include three former Secretaries of the Treasury. *See* Comment of Henry M. Paulson, Robert E. Rubin, and George P. Shultz, Co-Chair & Member of the Risky Bus. Project (July 20, 2016), https://www.sec.gov/comments/s7-06-16/s70616-202.pdf [https://perma.cc/YH9R-4A95].

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Investors' comments suggest, ironically, that the problems of disclosure overload are most acute with respect to voluntary sustainability reporting. On the whole, the responses on Questions 218 and 223 from corporations and business advocates about the kind of information that meets *investor* needs are directly at odds with the views of investors themselves.

d. Cost-Benefit Analysis of Potential ESG Disclosure Reform. Question 221.[282]

As in other sections of the Concept Release, the SEC also invited comment on the "additional costs of complying with sustainability or public policy line-item disclosure requirements, including the administrative and compliance costs of preparing and disseminating disclosures, beyond the costs associated with current levels of disclosure."[283] This question is also central to concerns about over-disclosure and attracted a high number of responses.[284]

As Table 20 of the Appendix shows, all issuers responding, and one-third of investor respondents expect costs to rise if ESG disclosure reforms are introduced.[285] These issuer responses represent 65% of all issuer comments on section IV.F of the Concept Release. However, 25% of investor comments stated that costs will not increase, largely because companies already have reporting systems in place to produce voluntary sustainability reports, and so new reporting requirements would only require companies to disclose in their public filings material information they have already obtained.[286] Of investor respondents who indicated that costs may rise, nearly half expect any increase to be reasonable and for these same reasons.[287] Thirty-one respondents (11.2%), none of them issuers, indicated they would expect investor costs to decrease in the event the SEC moved to standardize ESG disclosure. These comments emphasized the high costs to investors of obtaining disclosure through direct engagement with companies, filing shareholder proposals, and searching for

282. Concept Release, *supra* note 1, at 23,973.

283. *Id.*

284. For one response offering specific guidance on the costs and benefits of sustainability disclosure reform, see Comment of CDSB, *supra* note 262, at app. (referring the SEC to cost-benefits studies in the European Union on non-financial reporting).

285. *See, e.g.*, Comment of John Hayes, Chair, Corp. Governance Comm., Bus. Roundtable (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-208.pdf [https://perma.cc/3G3B-CKAA].

286. *See, e.g.*, Comment of eRevalue (Aug. 19, 2016), https://www.sec.gov/comments/s7-06-16/s70616-363.pdf [https://perma.cc/VJ9Z-8ATS].

287. *See, e.g.*, Comment of J. Robert Brown, Jr., Professor of Law, Univ. of Denver Sturm Coll. of Law 9 & n.47 (Oct. 3, 2016), https://www.sec.gov/comments/s7-06-16/s70616-374.pdf [https://perma.cc/RH49-WKNS] (detailing the ESG information companies already produce for other regulators, in addition to sustainability reports).

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material ESG information on corporate websites and in other public sources.[288]

e. Recommended Reporting Frameworks. Question 219.[289]

The SEC received a high number of comments suggesting sustainability reporting frameworks that it should consider if it decides to develop ESG line-item disclosures. As Figure 3 shows, the most widely used voluntary reporting frameworks—the SASB and GRI standards—received the strongest endorsements. When the Concept Release was issued in 2016, the final TCFD reports and framework for climate-related financial disclosure were still under development, which may explain why fewer comments referenced what is now a widely endorsed and highly influential climate disclosure framework.[290]

288. Selected comments detailing these costs include: Comment of Jonathan E. Feigelson, Teacher's Ins. & Annuity Ass'n of Am. (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-265.pdf [https://perma.cc/8QA7-U7EG]; Comment of Ceres, *supra* note 257, at 2 ("[Relying on voluntary disclosure] imposes a significant burden on investors who conduct engagements to persuade companies to disclose material ESG issues."); Comment of Joseph F. Keefe, President & CEO, and Julie F. Gorte, Senior Vice President Sustainable Inv., Pax World Mgmt. LLC 1 (July 19, 2016), https://www.sec.gov/comments/s7-06-16/s70616-152.pdf [https://perma.cc/9Z8U-6AZ2] ("Investors should not have to rely on litigation to compel enforcement of current regulations."); Comment of Jonas Kron, Senior Vice President, Trillium Asset Mgmt., LLC (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-276.pdf [https://perma.cc/7H2M-SRL5]; Comment of CalPERS, *supra* note 119; Comment of Robert M. Wilson, Jr., MFS Inv. Mgmt., Bos., Mass. 1–2 (July 20, 2016), https://www.sec.gov/comments/s7-06-16/s70616-193.pdf [https://perma.cc/846X-MK6G] (noting that shareholder engagement to obtain information "can be both costly and inefficient and often results in insufficient information being provided to permit a quantification of . . . risk. Improved and quantified disclosures will streamline investor engagement, making the process more efficient for companies"); Comment of Lisa N. Woll (U.S. SIF), *supra* note 219, at 17 ("[B]rowsing through websites to find ESG data, company-by-company, in order to compare registrants and make investment decisions is a time-wasting, onerous and arduous process.").

289. Concept Release, *supra* note 1, at 23,973.

290. On the current level of implementation of the TCFD's recommendations, see TCFD, 2019 STATUS REPORT (June 2019), https://www.fsb-tcfd.org/publications/tcfd-2019-status-report/ [https://perma.cc/FB3Z-RV8X]. The TCFD recommendations, SASB materiality guidelines, and the CDB standards are all based on the materiality standards established under the securities laws.

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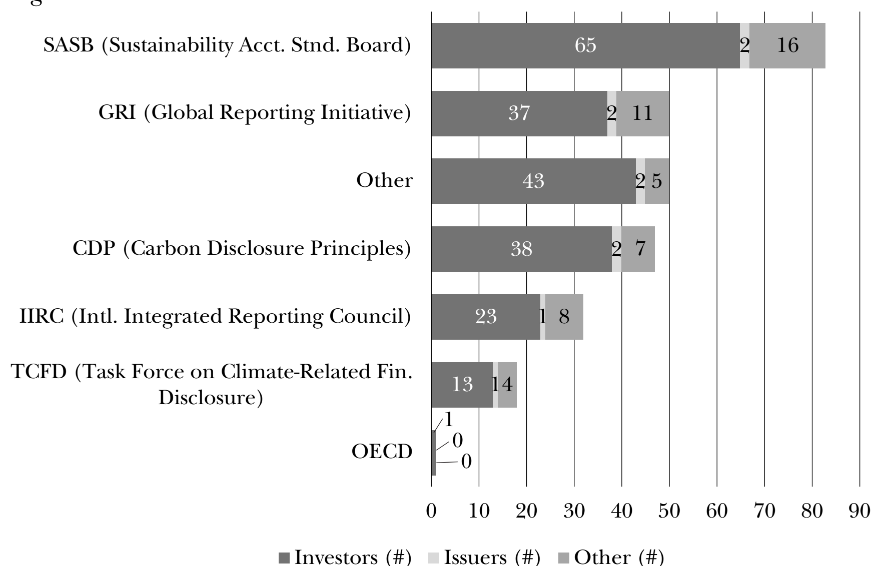
Figure 3. Recommended ESG Disclosure Frameworks.



f. Scaled Requirements for Smaller Reporting Companies (SRCs) & Emerging Growth Companies (EGCs). Questions 264–285.[291]

Of particular relevance to the question of disclosure overload, the SEC's Disclosure Effectiveness mandate obligates it to consider how to further reduce the regulatory burden on smaller companies, including smaller reporting companies (SRCs) and emerging growth companies (EGCs).[292] Other jurisdictions with mandatory ESG disclosure have limited mandatory disclosure to large firms[293] because those firms have the greatest impact on shareholders and other stakeholders and a greater economic capacity to bear the costs of complying with these disclosure mandates. However, as the SEC notes elsewhere in the Concept Release, "the benefits of disclosure may be greater for smaller registrants because information symmetries between investors and managers of smaller companies are typically higher than for larger, more seasoned companies with a large following."[294]

In section IV.F of the Concept Release, the SEC explicitly sought comment on the benefits of scaling any future line-item ESG disclosures, or of

291. Concept Release, *supra* note 1, at 23,973.

292. *See* FAST Act, Pub. L. No. 114-94, 72002(1), 129 Stat. 1312 (2015); *see also* Concept Release, *supra* note 1, at 23,920–21 (discussing current requirements and the Disclosure Effectiveness mandate).

293. *See, e.g.*, Council Directive 2014/95, of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information By Certain Large Undertakings and Groups, 2014 O.J. (L 330) 4 (limiting non-financial disclosure requirements to corporate groups with more than 500 employees).

294. Concept Release, *supra* note 1, at 23,897.

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exempting SRCs or other categories of registrants from such requirements.[295] Due to weak support for ESG disclosure reform from the business community, most responses here came from investors. Differences among respondent groups are significant at the 10% level. As Table 21 of the Appendix shows, roughly 75% of all respondents on this question opposed scaling or exemptions. Common reasons offered by investors were that smaller publicly traded firms currently produce less ESG information than large firms and have less-developed policies and procedures for managing ESG risks. Some investors recommended instead that any new line-item ESG rules be phased in gradually for SRCs.[296]

8. *Other Topics: Exhibits; Subsidiaries; Scaled Requirements; Disclosure Presentation & Delivery. Questions 224–340.*

As discussed earlier, the final sections of the Concept Release address aspects of the format, presentation, and delivery of disclosure that could facilitate more efficient access to material information and alleviate over-disclosure concerns.[297] As indicated on Table 1 of the Appendix, some of these topics, such as disclosure of material contracts and the rules governing exhibits, are beyond the scope of this study; other issues from these sections, such as scaling expectations for smaller issuers, relate more directly to the over-disclosure debate and so have already been incorporated elsewhere in the preceding analysis. As indicated on the Appendix, some of these issues have been addressed in part by the 2018 and 2019 amendments to Regulation S-K and related disclosure rules.[298]

295. Comments on scaling or exemptions, for example, in response to section IV.H of the Concept Release (Scaled Requirements) are incorporated into the responses on Section III.B.7, *supra.*

296. *See, e.g.*, Comment of Nancy J. Schroeder, Chair, Fin. Reporting Comm., Inst. Mgmt. Accountants (July 29, 2016), https://www.sec.gov/comments/s7-06-16/s70616-341.pdf [https://perma.cc/FQR2-YMYS]; *see also* Comment of Stud Dalheim, Vice President Shareholder Advocacy, Calvert Invs. (July 21, 2016), https://www.sec.gov/comments/s7-06-16/s70616-245.pdf [https://perma.cc/C6LY-23YA] (supporting phased requirements for SRCs).

297. These include internal cross-referencing (section A, Questions 286 to 295), incorporation by reference (section B, Questions 296 to 302), hyperlinks (section C, Questions 303 to 306), company websites (section D, Questions 307 to 318), specific formatting requirements (section E, Questions 319 to 328), layered disclosure (section F, Question 329), and structured disclosure (section G, Questions 330 to 340).

298. *See generally* 2018 Final Rules, *supra* note 3; 2019 Final Rules, *supra* note 3. *See also infra* Appendix, at Table 1 (identifying select reforms with reference to Concept Release topics). Most notable among these is the SEC's decision in its 2019 Final Rules not to require the use of "legal entity identifiers" (LEIs) that some investors had urged could better enable them to identify geographic factors and risks associated with a company's foreign operations. *See* Concept Release, *supra* note 1, at 23,985. The SEC cited concerns about the cost to registrants of obtaining and maintaining LEIs, and its conclusion that they conferred a limited benefit to investors and regulators. 2019 Final Rules, *supra* note 3, at 89, 110. The SEC's decision may also have been informed by the fact that its 2018 rulemaking on Regulation S-K had amended Items 303(a) and 503(c) to add references to

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C. *Risk & ESG: Over-Disclosure Overblown?*

Since the SEC began its review of the federal disclosure regime in 2012, competing concerns about the costs to companies as producers of disclosure, and demand for better information from investors and other consumers of disclosure have not abated. Thus far, this Part has presented a descriptive account of what comments to the Concept Release can tell us about the current framework and about potential areas for further reform.

This Section brings these findings together to clarify where respondents' views differ and where they align with respect to the core questions about over-disclosure, under-disclosure, and potential reform paths that are captured in Hypothesis 1 through 4. Following that discussion are the results of a logistic regression analysis testing the factors that may influence respondents' views on ESG disclosure reform (Hypothesis 5). It confirms that respondents' support or opposition to ESG disclosure is in fact correlated with their views on ESG materiality, the value of prescriptive disclosure, and other more fundamental aspects of the reporting framework. All of these findings have direct implications for future disclosure reform efforts Congress or the SEC may pursue.

1. *Part I: Information Overload & Information Asymmetries: Who Cares & Why It Matters*

Research Questions 1 through 4 ask whether investors and investor advocates, on the one hand, and issuers, trade associations, and their advisors, on the other, have signficantly different views on: (1) whether *over*-disclosure is a critical problem; (2) whether *under*-disclosure of ESG information is a critical problem; (3) whether risk-related disclosure reform should promote over- or under-disclosure problems; and (4) whether prescriptive, principles-based, or mixed disclosure approaches are optimal. The following findings are based on an analysis of the specific variables that align with each of these hypotheses. The results of the Fisher exact tests of independence among respondent group responses for each of the variables that are the relevant indicators for these hypotheses are provided in Table 3 of the Appendix.[299] Significant results indicate nonrandom differences among the three groups, while the responses summarized in Table 3 indicate where issuer or investor support for each indicator was higher.

"geographic factors" in the discussions of business risk factors and trends. 2018 Final Rules, *supra* note 3, at 50,168–69 (deleting references to segment financial performance in Item 101(b) and risks from foreign operations in Items 101(a)(3), 101(d)(1) and 101(d)(3) in light of these changes).

299. A tetrachoric correlation analysis was also used to confirm the binary correlations between the variables associated with Hypothesis 2 and support for ESG (pro_ESG). *See supra* Section II.C (describing this methodology). A similar analysis was done to confirm the correlations associated with Hypothesis 4, support for prescriptive disclosure (prescriptive). These results are on file with the author.

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These results generally confirm Hypothesis 1. As Table 3 of the Appendix shows, out of 11 indicators for this hypothesis, 10 show that investors are less concerned about over-disclosure than issuers. These differences are significant at a 10% level or less for 5 of the indicators. It is noteworthy that nearly all comments in the dataset raising concerns about the potential for "immaterial" disclosure to overload investors and obscure material information were raised by companies and business advocates, not by investors themselves.[300]

In general, investors do not believe themselves to be burdened by the costs of immaterial information generated by current risk disclosure requirements in the MD&A and elsewhere.[301] These results indicate that the costs of disclosure overload *to investors* should not impact the SEC's consideration of future rulemaking. As the comments themselves make clear, corporations' real overload concerns are the compliance burdens companies face when any new rules are introduced, and the related potential for securities fraud litigation. These are important concerns, but they are offset to some extent by the current litigation safe-harbors for forward-looking information that apply to the most challenging forms of risk disclosure.

Hypothesis 2—that investors are more concerned than issuers about under-disclosure of ESG information—is also confirmed. As Table 3 shows, among the 11 variables associated with this hypothesis, 9 show that investors are more concerned about over-disclosure, and 6 of these differences are significant at the 1% level. This is consistent with the evidence of strong investor agreement on ESG materiality, and with investor comments expressing dissatisfaction with Regulation S-K's deference to issuer judgments of ESG materiality and with the deficiencies of voluntary reporting.

Indeed, as indicated in Section III.B above, investor responses stress that reliance on voluntary sustainability reporting is in fact a source of disclosure overload given the volume of immaterial information in these

300. *See supra* Section III.B (reporting results on disclosure overload for various questions); *see, e.g.*, Comment of Matthew D. Brusch, *supra* note 147 (expressing concern about disclosure accretion); *see also* Comment of Exxon Mobil, *supra* note 1 (same); Comment of Davis Polk & Wardwell, *supra* note 140 (noting that over-disclosure burdens issuers, while investors can ignore immaterial information). Some public financial services firms concur. *See, e.g.*, Comment of John Matthews, *supra* note 125 (reporting that disclosure overload is due to expanding disclosure rules and SEC guidance, analyst demand, Regulation FD, and litigation risk).

301. These findings confirm earlier surveys of institutional investor views. *See, e.g.*, ERNST & YOUNG, DISCLOSURE EFFECTIVENESS: WHAT INVESTORS, COMPANY EXECUTIVES AND OTHER STAKEHOLDERS ARE SAYING 2 (Nov. 2014) https://www.eyjapan.jp/library/issue/us/gaap-weekly-update/pdf/GAAP-2014-11-25-03.pdf [https://perma.cc/HM64-ACQ3] (reporting from investor roundtables that "investors . . . are less concerned about reducing the volume of disclosures than they are in obtaining more meaningful information").

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sources.[302] At the same time, as the descriptive data in Section III.B make clear, ESG under-reporting in public filings imposes on investors the added costs of accessing and analyzing this incompatible and unstandardized information, which mandatory disclosure is intended to alleviate. The statistically significant differences and strong difference in tone among investor and issuer views on ESG materiality support investors' claims that ESG information is under-reported—if companies insist that ESG information is not material, they are unlikely to disclose it to investors and ESG risk will not be efficiently incorporated into market prices. These results highlight the need for the SEC to consider the costs *to investors* of ESG overload outside the public filings and of ESG under-reporting within the current framework.

Hypothesis 3 is also generally confirmed. Among the 16 variables associated with this hypothesis, 13 show that investors are in fact more concerned than issuers about under-disclosure of material risk information generally; 10 of these differences are significant at the 1% level and two at a 10% level. As discussed above with respect to the MD&A and Item 503, respondents also differ in their level of satisfaction with the current reporting framework. Investor comments indicate they want more precise assessments of risk and more detail on risk management.[303]

Interestingly, the question of *what* is under-disclosed is an area of strong agreement among the SEC, investors, and the business community: all three groups agree that risk disclosures are extensive, but are often generic and boilerplate. There is therefore a shared interest in making current risk disclosures more firm-specific and more meaningful. Because of the more limited comments on risk disclosures in Regulation S-K (Items 101, 303, 503 & 305) than on ESG disclosure reform, these conclusions should be confirmed in the course of future reform proposals.

Hypothesis 4—that investors are more supportive of prescriptive or line-item disclosures than issuer respondents—is also confirmed. Among the 10 indicators associated with support for prescriptive disclosure, 9 support Hypothesis 4; 4 of these differences are significant at the 1% level, 2 at the 5% level and 1 at the 10% level. This supports the findings discussed in Section III.B that investors largely support prescriptive or mixed disclosure approaches, while issuers largely oppose new line-item rules and urge the SEC to rely on issuer materiality judgments. There is substantial agreement among all respondents about the value of principles-based disclosure even though investors would prefer more limited deference to issuer materiality judgments.

These results show that both issuers and investors understand the difficulties of risk disclosure, and that ESG issues are directly connected to the broader risk disclosure framework of Regulation S-K. They also con-

302. *Supra* notes 265–272 and accompanying text.

303. *See, e.g.*, Comment of CalPERS, *supra* note 119; Appendix, *infra*, at Table 15 (indicating greater investor support for MD&A KPI disclosures).

firm that investors and the business community define the over-disclosure problem differently. The observed divides on the questions of prescriptive disclosure and ESG materiality may also drive how strongly these groups support or oppose proposals to clarify or standardize ESG disclosure through regulatory intervention. These conclusions are tested more rigorously below.

2. *Part II: Understanding Support for (and Opposition to) ESG Disclosure Reform*

The results here confirm the observations of prior studies of the Concept Release comments, which have found strong support for ESG disclosure among investors, who are the primary consumers of disclosure, as well as equally strong opposition from those representing public companies, the producers of disclosure.[304] However, it is important to isolate, if possible, the reasons why respondents' views on ESG disclosure vary. The analysis above suggests that support for ESG disclosure reform is positively related to (w) identity as investors and other consumers of disclosure; (x) support for prescriptive disclosure; (y) acceptance of ESG materiality; and (z) dissatisfaction with the current reporting framework (Hypothesis 5). Because the Fisher exact test cannot measure the independent effects of these factors, this study used two sets of logistic regression models to test these relationships. Table 22 of the Appendix presents the results.

The first set of models (Model 1) in Table 22 of the Appendix tests this hypothesis using respondent support for ESG reform (proESG = yes) as the dependent variable, and the second set of models (Model 2) uses respondent opposition to ESG reform (proESG = no) as the dependent variable. The independent variables include several variables related to the respondent's status as an issuer or investor, or an institutional or individual respondent, as well as a variable representing support for or opposition to prescriptive disclosure. Respondents' satisfaction with the status quo is represented in both models by their response to Question 218 on the adequacy of corporate sustainability reporting for investment purposes. Several independent variables representing respondents' views on ESG materiality are included in the models: (i) expressed support for or opposition to ESG materiality in Question 216 are included in alteration in the models due to multicollinearity concerns; (ii) identification of ESG issues as material to certain sectors, which is expected to have a positive effect on support for ESG reform; and (ii) agreement with the statement in Question 217 that the inclusion of ESG information in public filings will obscure material information, a response which should negatively affect their support for ESG reform. Acknowledging the sectoral nature of ESG materiality is a relatively weaker statement on materiality; holding the view that ESG obscures material information is a strong rejection of ESG materiality.

304. *See generally* sources cited at *supra* note 26.

Both sets of models confirm Hypothesis 5 and the results are robust across the models. Respondents' support for prescriptive disclosure is the factor that has the strongest positive effect on support for ESG reform in Model 1 and this effect is significant at the 1% level across all Model 1 tests. As expected, Model 2 confirms that support for prescriptive disclosure has an equally significant negative correlation with opposition to ESG reform.

Whether respondents accept the materiality of at least some ESG factors is also highly predictive of their support for ESG reform; as expected, it is negatively correlated with opposition to ESG reform in the second set of models. These results are robust across models and are significant at the 1%–5% levels, depending on the model.[305] Also as expected, those who identify ESG as material on a sector-specific basis are less likely to oppose ESG disclosure reform, holding all other factors constant, but this effect is not significant in the second set of models. The directionality of this relationship is more ambiguous in the first set of models where the dependent variable is support for ESG; the effects in Model 1 tests are also not significant. This is likely due to the fact that some comments opposed ESG reform *because* of the complexity they foresee given their understanding that ESG materiality is sector-specific. Holding the view that ESG information will obscure material information has, as expected, a strong negative effect on support for ESG disclosure in the first set of models and an equally strong positive effect on opposition to ESG disclosure in the second set of models. These results are significant at the 1% level. Greater consensus on ESG materiality would therefore be expected to strengthen support for ESG reform.

One of the most surprising results of this analysis is that respondent identity is not predictive of either support for or opposition to ESG reform, as shown in Table 22,[306] suggesting that the other factors, such as one's views on ESG materiality and the value of prescriptive rules are the more important. The effects of a respondent's status as an investor, issuer, or "other" respondent are not significant in any of the models. In addition, whether a respondent is an organization or an individual has ambiguous effects. Institutional status is negatively associated with support for ESG in Models 1b-d and the results are highly significant. However, it is positively but not significantly related to opposition to ESG reform in Model 2a. This is likely due to the higher participation rate of institutional actors who explicitly indicate their support of ESG but few of whom

305. Opposition to ESG materiality was not significant in any of the models, possibly because only 9 respondents expressed this view affirmatively, as compared to over 240 positive responses.

306. To address multicollinearity issues, these variables were tested separately in different models. *See infra* Appendix, at Table 22, Models 1b to 1d and Models 2c and 2d. In the first set of models (Model 1), the dependent variable is support for ESG, while in the second set of models (Model 2), it is opposition to ESG.

explicitly indicated opposition to ESG. The effect of individual status is also not significant in any of the models.

Finally, respondents' level of dissatisfaction with voluntary disclosure has a strong and significant independent effect on their support for or opposition to ESG reform. As the regression results for Model 1 in Table 22 show, dissatisfaction with voluntary ESG disclosure is strongly and positively correlated with support for ESG reform and is significant at the 1% level Similar results obtain in Model 2, though with opposition to ESG as the independent variable; the results therefore show that satisfaction (i.e., low dissatisfaction) with voluntary reporting is highly predictive of opposition to ESG reform. These results are significant at the 1%–5% level, depending on the model. These results support the earlier descriptive findings that issuers believe no reforms are necessary when investors are awash in ESG information outside public filings, while investors urge the need for ESG disclosure reform to fill the gaps because they find this information not suitable for investment analysis.

On the broader question of whether ESG reform is necessary or would be counter-productive, these empirical tests show that the apparent divide between investors and issuers identified throughout the descriptive analysis is in fact driven more by underlying views on the appropriate approach to risk disclosure and by somewhat categorical positions on ESG materiality. These results confirm that those who oppose any expansion of prescriptive rules are equally likely to oppose prescriptive ESG rules because they are prescriptive and because new regulation may increase compliance costs, regardless of investors' demand for that information. Those who strongly reject ESG materiality will of course strongly resist efforts to incorporate it into public filings or to engage the SEC in ESG disclosure reform. Those who support the status quo—voluntary disclosure and broad discretion to companies' materiality judgments—not surprisingly see little need for ESG reform. But, as Section III.B above also shows, those who hold these views are not investors.

CONCLUSION

As the SEC considers how to streamline the existing reporting framework and whether ESG risks warrant new disclosure reforms, the Concept Release data offer a unique opportunity to clarify where the battle lines lie, to find areas of common ground, to hone in on the places where reporting requirements leave gaps, and to see where over-disclosure is a problem. Doing so reveals that for investors, worries about disclosure overload are largely irrelevant, and that the disclosure overload claims raised by many public companies and business advocates who responded to the Concept Release are largely a false front for predictable concerns about the regulatory burdens of mandatory disclosure. This analysis also shows that for investors, the far bigger concern is the under-reporting of material

ESG risks under the current disclosure framework and the inadequacy of both voluntary disclosure and current SEC guidance.

The SEC's core mission to protect investors, facilitate fair, orderly, and efficient market efficiency, and promote capital formation means that these claims must be taken seriously. This is particularly imperative in the case of climate-related risk, which has been identified as a potential contributor to systemic risk[307] and which the SEC has already identified as necessary to companies' materiality determinations.[308] The vast majority of the respondents in this study agree. Congress's mandate under the FAST Act already directs the SEC to ensure that this material information reaches investors while also considering how best to reduce the "costs and burdens" on reporting companies.[309] Therefore, the critical question for the SEC and also for Congress should not be whether to respond to the information gaps investors have identified, which are real and costly. Nor should the SEC shy away from ESG reform because of opposition from those who would oppose any disclosure expansion.

The question instead is how to standardize ESG risk disclosure as part of broader risk disclosure reform. The hardest part of this effort will be for the SEC to establish a workable framework that helps overcome management bias against ESG materiality and encourages greater agreement within sectors regarding which ESG risks are material, particularly with respect to longer-term and emerging risks. Many useful proposals were raised in the Concept Release,[310] and a full treatment of how ESG disclosure reform should proceed is beyond the scope of this paper. However, this study has identified some areas of agreement among respondents that give Congress, the SEC, and the public useful starting points for undertaking risk disclosure reform. The results here also suggest that beyond considering the compliance costs to public companies, it is time for Congress and the SEC to take into account the costs to investors and the capital markets of *under-disclosing* material ESG information.

307. *See* TCFD, *supra* note 99, at iii, 1–22 (discussing the potential systemic effects of inadequate climate responses on the global financial system); *see also supra* note 18 and sources cited therein.

308. *See generally* 2010 Climate Guidance, *supra* note 54.

309. FAST Act, *supra* note 40, at 72,002; Concept Release, *supra* note 1, at 23,921.

310. *See generally supra* Section III.B.7 and sources cited therein.

APPENDIX

Table 1: Scope of Analysis.

Regulation S-K Item No.	Concept Release Section	Question No.	Description	Inclusion in Analysis	Related SEC Rulemaking
GENERAL DISCLOSURE REQUIREMENTS	III.A Basis of Disclosure Requirements	1–5	Sunsetting of new provisions	Included	
GENERAL DISCLOSURE REQUIREMENTS	III.B Nature of Disclosure Requirements	6–13	Principles-based and prescriptive disclosure	Included	
GENERAL DISCLOSURE REQUIREMENTS	III.B Nature of Disclosure Requirements	14–20	Audience for disclosure	Included	
GENERAL DISCLOSURE REQUIREMENTS	III.B Nature of Disclosure Requirements	21–23	Compliance & disclosure costs	Included	
ITEM 101(a)(1)	IV.A.1 Core Company Business Information	24–30	General development of the business	Included	101(b) disclosure of segment financial performance deleted (2018 Final Rules).
ITEM 101(c)	IV.A.2 Core Company Business Information	31–41	Narrative description of the business	Included	
ITEM 101(c)(1)(iv)	IV.A.3. Core Company Business Information	42–46	Technology & Intellectual property rights	Excluded	
ITEMS 101(c)(1)(ix)	IV.A.4.b Core Company Business Information	47-48	Government contracts and regulation	Excluded	
ITEMS 101(c)(1)(xii)	IV.A.4.c Core Company Business Information	49–51	Compliance with environmental laws	Included	
ITEMS 101(c)	IV.A.4.d Core Company Business Information	52–53	Government regulation	Included	
ITEMS 101(c)(1)(xiii)	IV.A.5 Core Company Business Information	54–59	Number of employees; employment practices	Included	Disclosure of foreign operating risks deleted (2018 Final Rules).

Regulation S-K Item No.	Concept Release Section	Question No.	Description	Inclusion in Analysis	Related SEC Rulemaking
ITEM 102	IV.A.6 Core Company Business Information	60–66	Description of property	Excluded	Amended to require disclosure of location only for physical property that is material (2019 Final Rules).
ITEM 103		Not included in Concept Release	Legal proceedings	Included in analysis of Item 101(c)	2018 Final Rules decline to amend. 2019 Proposed Rules would raise materiality threshold.
ITEM 301	IV.B.1 Selected Financial Data	67–78	Significant trends in financial conditions, operational results	Excluded	2020 Proposed Rules would eliminate Item 301 and no longer require 5 years of certain financial data.
ITEM 302	IV.B.2 Supplementary Financial Information	79–87	Selected quarterly financial data	Excluded	2020 Proposed Rules would eliminate Item 302 and no longer require 2 years of certain quarterly data.
ITEM 303	IV.B.3 MD&A Item 303	88–106	Content & focus of MD&A	Included	2020 Proposed Rules would add new Item 303(a) on the purpose of MD&A.
ITEM 303(a)-(b)	IV.B.3.a MD&A Item 303	88–98	Quality & focus of MD&A	Included	Amended to allow exclusion of discussion of earliest of the 3 years of the financials if discussed in prior year MD&A (2019 Final Rules).
ITEM 303(a)(1); ITEM 303(a)(2)(ii); ITEM 303(a)(3)(ii)	IV.B.3.b MD&A Item 303	99–102	Forward-looking statements	Included	

Regulation S-K Item No.	Concept Release Section	Question No.	Description	Inclusion in Analysis	Related SEC Rulemaking
ITEM 303	IV.B.3.c MD&A Item 303	103–106	Key indicators of financial condition & operating performance	Included	2020 Proposed Rules would amend certain disclosures regarding capital resources and results of operations.
ITEM 303(a)(3)	IV.B.4 MD&A Item 303	107–112	Results of operations	Included*	
ITEM 303(a)(1)–(2)	IV.B.5 MD&A Item 303	113–124	Liquidity & capital resources	Included*	
ITEM 303(a)(4)	IV.B.6 MD&A Item 303	125–130	Off-balance sheet arrangements	Included*	2020 Proposed Rules would eliminate this rule, encouraging disclosure integrated within the MD&A.
ITEM 303(a)(5)	IV.B.7 MD&A Item 303	131–136	Contractual obligations	Included*	2020 Proposed Rules would eliminate tabular disclosure of contractual obligations.
ITEM 303	IV.B.8 MD&A Item 303	137–144	Critical accounting estimates	Included*	
ITEM 503(c)	IV.C.1 Risk & Risk Management	145–156	Risk factors	Included	Risk factor disclosure moved to new Item 105; risk factor examples eliminated (2019 Final Rules); adds reference to risk associated with “geographic areas” (2018 Final Rules); selection to be based on materiality (2019 Proposed Rules).
ITEM 305	IV.C.2 Risk & Risk Management	157–168	Quantitative & qualitative disclosures	Included	

Regulation S-K Item No.	Concept Release Section	Question No.	Description	Inclusion in Analysis	Related SEC Rulemaking
ITEM 305(b)	IV.C.3 Risk & Risk Management	169–179	Disclosure of approach to risk management & risk management process	Included	
GENERAL APPROACH TO RISK DISCLOSURE	IV.C.4 Risk & Risk Management	180–182	Consolidating risk disclosure	Included	
ITEM 201(b); ITEM 202; ITEM 701; ITEM 703	IV.D Securities of the Registrant	183–204	Disclosures related to equity holders; capital stock; sales of unregistered securities; use of proceeds from registered securities; share repurchases	Excluded	
INDUSTRY GUIDES	IV.E Industry Guides	205–215	Utility of industry guides; codification of guide content	Included	
SUSTAINABILITY	IV.F Sustainability	216–223	Disclosure of Information relating to public policy & sustainability matters	Included	
ITEM 601; SUBSIDIARIES & LEGAL IDENTIFIERS	IV.G Exhibits	224–256	Material contracts; preferability letter	Excluded	Amended to allow omission of certain schedules/ attachments to exhibits, confidential information; revising material contract disclosure (2019 Final Rules).
ITEM 601; SUBSIDIARIES & LEGAL IDENTIFIERS	IV.G Exhibits cont.	257–263	Subsidiaries & legal entity identifiers (LEIs)	Included	Declined to require LEIs (2019 Final Rules).
SCALED REQUIREMENTS	IV.H Scaled Requirements	264–285	Scaled disclosure; frequency of interim reporting	Included in analysis of IV.F	

Regulation S-K Item No.	Concept Release Section	Question No.	Description	Inclusion in Analysis	Related SEC Rulemaking
GENERAL DISCLOSURE FORMAT, PRESENTATION & DELIVERY	V.A–G Presentation	286–340	Cross-referencing; incorporation by reference; hyperlinks; websites; layered/ structured disclosure	Included in analysis of IV.F	Expanded use of hyperlinks and internal cross-references (2019 Final Rules).

* Narrative discussion included; not included in quantitative analysis.

Table 2: Identity of Respondents.

Sector/Category	Classification	Total	Sector/ Category	Classification	Total
Investor: Asset owner/manager	Investor	172	Academic	Other	10
Individual		100 (58.1%)	Accounting	Other	17
Investment adviser		27 (15.7%)	Legal	Issuer	18
Religious fund		18 (10.5%)	Financial services	N/A*	69
Foundation		10 (5.8%)	Investment managers		42 (60.9%)
Public pension fund		7 (4.1%)	Other		27 (39.1%)
Mutual fund		5 (2.9%)	Environmental	N/A*	12
Union fund		3 (1.7%)	Other	Other	5
Other		2 (1.2%)	Government	Other	17
Standard setter	Other	12	State government		8 (47.1%)
Stock exchange	Other	2	Federal legislative		4 (23.5%)
Issuer	Issuer	11	Federal executive		4 (23.5%)
Trade association	Issuer	22	Other government		1 (5.9%)
NGO		72			
Business advocacy	Issuer	15 (20.8%)			
Investor advocacy	Investor	41 (56.9%)			
Neutral/other	Other	16 (22.2%)			

* Note: Because these categories are not mutually exclusive, they sum to more than the 282 total discrete comments included in this study. For example, asset managers are included in financial services, and so appear in both totals. They are categorized only as "investors" in this study for ease of reference. Other financial services institutions were categorized as an "issuer" if the comment identified the organization as a listed company or business advocate.

Table 3: Significant Differences Among Respondent Groups on Risk-Related & ESG Disclosure (Hypotheses 1–4).

Hypothesis/ Variable Definition	Variable	Investor-Issuer Responses[1]	Fisher's Exact Test[2]	Regulation S-K Reference	Concept Release Question(s)
H1: Concern about over-disclosure					
-Expected positive correlation-					
Supports automatic sunsetting of any new disclosure rule	1_5support_sunset (Tbl. 7)	Investor (n=6): 33.33% Issuer (n=5): 80.0%		N/A	1–3
Supports reducing Item 101 environmental disclosure	envtl_reduce (Tbl 9)	Investor (n=2): 50.0% Issuer: (n=8): 100.0%	*	Item 101	49
Believes Item 303 elicits immaterial disclosure	IVB89immat_303 (Tbl 12)	Investor (n=1): 100.0% Issuer (n=1): 100.0%		Item 303	89
Supports adding materiality thresholds to Item 303 (MD&A)	IVB89mat_thresh (Tbl 12)	Investor (n=4): 0.0% Issuer (n=2): 100.0%		Item 303 (MD&A)	89
Is concerned about length of risk factor disclosures	148length_issue503c (Tbl 16)	Investor (n=17): 35.3% Issuer (n=16): 75.0%	*	Item 503(c)	148
Supports new safe harbors for Item 503 risk factors	150generic_safeh503c (Tbl 16)	Investor (n=3): 66.63% Issuer (n=8): 100.0%		Item 503(c)	150
Believes ESG disclosure reform will obscure material information	F217_ESGobscure (Tbl 19)	Investor (n=46): 37.0% Issuer (n=23): 95.7.0%	***	N/A	217
Supports lower ESG requirements for smaller issuers	222ESGscale (Tbl 21)	Investor (n=21): 23.8% Issuer (n=2): 100.0%	*	N/A	222
Supports exempting certain issuers from any new ESG requirements	222ESGexempt (Tbl 21)	Investor (n=19): 21.0% Issuer (n=2): 50.0%		N/A	222

[1] Percentages shown are of the total number of responses from that respondent group.
[2] A "N/A" means the Fisher's exact test of independence is not meaningful.

Hypothesis/ Variable Definition	Variable	Investor-Issuer Responses	Fisher's Exact Test	Regulation S-K Reference	Concept Release Question(s)
-Expected negative correlation-					
Supports increased Item 101 environmental disclosure	envtl_increase (Tbl 9)	Investor (n=10): 80.0% Issuer (n=4): 0.0%	**	Item 101	49
Mentions cost savings associated with ESG disclosure reform	F221_savecost (Tbl 20)	Investor (n=26): 100.0% Issuer (n=0): 0.0%	N/A	N/A	221
H2: Concern about ESG under-disclosure					
-Expected positive correlation-					
Supports ESG disclosure reform in some form	pro_ESG	Investor (n=219): 94.5% Issuer (n=28): 14.3%	***	N/A	Any response
Identifies ESG as relevant to Item 101a	IVA_101a_ESG (Tbl 8)	Investor (n=219): 1.4% Issuer (n=28): 0.0%		Item 101(a)	24–30
Identifies ESG as relevant to 101c	IVA_101c_ESG (Tbl 8)	Investor (n=219): 1.8% Issuer (n=28): 10.7%		Item 101(c)	31–41, 49–51
Believes Item 101(c)(i)(xii) elicits material envtl. disclosure	envtl_material (Tbl 9)	Investor (n=9): 100.0% Issuer (n=0): 0.0%		Item 101(c)(i)(xii)	49–51
Supports expanding employee-related disclosure	QIVA_54_59 (Tbl 10)	Investor (n=33): 97.0% Issuer (n=8): 25.0%	***	Item 101(c)(i)(xiii)	54–59
Identifies ESG topics as relevant to Item 303 (MD&A)	IVB_ESG_MDA (Tbl 11)	Investor (n=219): 9.6% Issuer (n=28): 17.9%		Item 303 (MD&A)	88–144
Believes ESG information may be or is material	F216_ESGmateriality (Tbl 19)	Investor (n=205): 98.5% Issuer (n=28): 63.1%	***	N/A	216
Identifies ESG information as related to systemic risk	ESG_systemic (Tbl 19)	Investor (n=32): 100% Issuer (n=0): 0.0%	N/A	N/A	216
Believes voluntary ESG disclosure is ineffective	F218vol_OK (Tbl 19)	Investor (n=97): 99.0% Issuer (n=13): 0.0%	***	N/A	218
Believes SEC climate guidance is ineffective	223_climateok (Tbl 19)	Investor (n=80): 96.2% Issuer (n=12): 0.0%	***	Various	223
-Expected negative correlation-					
Believes ESG disclosure reform will obscure material information	F217_ESGobscure (Tbl 19)	Investor (n=46): 37.0% Issuer (n=23): 95.7.0%	***	N/A	217

Hypothesis/ Variable Definition	Variable	Investor-Issuer Responses	Fisher's Exact Test	Regulation S-K Reference	Concept Release Question(s)
H3: Concern about under-disclosure of risk-related information					
-Expected positive correlation-					
Supports expanding employee-related (i.e., social) disclosure	QIVA_54_59 (Tbl 10)	Investor (n=33): 97.0% Issuer (n=8): 25.0%	***	Item 101(c)(i)(xiii)	54–59
Supports requiring disclosure of how risk is addressed	145risk_mitig_503c (Tbl 16)	Investor (n=13): 69.2% Issuer (n=12): 0.0%	***	Item 503(c)	145
Supports requiring disclosure of risk probability	146risk_prob503c (Tbl 16)	Investor (n=15): 73.3% Issuer (n=18): 0.0%	***	Item 503(c)	146
Supports requiring ranking of risk magnitude or importance	147risk_order503c (Tbl 16)	Investor (n=12): 58.3% Issuer (n=12): 8.3%	***	Item 503(c)	147
Supports new safe harbors for Item 503 risk factors	150generic_safeh503c (Tbl 16)	Investor (n=3): 66.63% Issuer (n=8): 100.0%		Item 503(c)	150
Supports requiring ranking of top 10 risk factors	152risk_top10503c (Tbl 16)	Investor (n=9): 22.2% Issuer (n=17): 0.0%	*	Item 503(c)	152
Supports requiring a risk factor summary	152risk_sum503c (Tbl 16)	Investor (n=5): 60.0% Issuer (n=5): 0.0%		Item 503(c)	152
Supports requiring a description of risk management processes	169riskmgmtdescribe (Tbl 17)	Investor (n=5): 100.0% Issuer (n=5): 40.0%	**	Item 503(c)	169
Supports requiring an assessment of the company's risk management process	170riskassess (Tbl 17)	Investor (n=2): 50.0% Issuer (n=3): 0.0%	*	Item 503(c)	170
Supports requiring disclosure of changes to/ waivers of risk management processes	172riskmgmtchange (Tbl 17)	Investor (n=1): 0.0% Issuer (n=3): 0.0%		Item 503(c)	172
Supports requiring disclosure of risk management or mitigation	176disclmitigate (Tbl 17)	Investor (n=2): 50.0% Issuer (n=6): 0.0%	***	Item 503(c)	176
Believes voluntary ESG disclosure is ineffective	F218vol_OK (Tbl 19)	Investor (n=97): 99.0% Issuer (n=13): 0.0%	***	N/A	218

Hypothesis/ Variable Definition	Variable	Investor-Issuer Responses	Fisher's Exact Test	Regulation S-K Reference	Concept Release Question(s)
Believes SEC climate guidance is ineffective	223_climateok (Tbl 19)	Investor (n=80): 96.2% Issuer (n=12): 0.0%	***	Various	223
-Expected negative correlation-					
Supports reducing Item 101 environmental disclosure	envtl_reduce (Tbl 9)	Investor (n=2): 50.0% Issuer (n=8): 100.0%	*	Item 101	49
Believes that Item 503(c) effectively captures emerging risk	154emergrisk_eff503c (Tbl 16)	Investor (n=20): 15.0% Issuer (n=11): 81.8%	***	Item 503(c)	154
Believes risk mitigation disclosure would be misleading	177nomitigatediscl (Tbl 17)	Investor (n=2): 100.0% Issuer (n=5): 6.0%		Item 503(c)	177
H4: Supports prescriptive or mixed disclosure in some form					
-Expected positive correlation-					
Supports prescriptive rules generally or in response to any Concept Release question	6_3prescriptive	Investor (n=219): 87.7% Issuer (n=28): 10.7%	***	N/A	6–9
Supports increased Item 101 environmental disclosure	envtl_increase (Tbl 9)	Investor (n=10): 80.0% Issuer (n=4): 0.0%	**	Item 101	49
Supports new employee-related prescriptive disclosures	QIVA_54_59 (Tbl 10)	Investor (n=33): 97.0% Issuer (n=8): 25.0%	***	Item 101(c)(i)(xiii)	54–59
Supports requiring quantification of material effects of known trends & uncertainties	IVB102_pro_uncert_quant (Tbl 14)	Investor (n=3): 0.0% Issuer (n=4): 0.0%		Item 303(a)(1)	102
Supports requiring ranking of risk magnitude or importance	147risk_order503c (Tbl 16)	Investor (n=12): 58.3% Issuer (n=12): 8.3%	***	Item 503(c)	147
Supports principles-based disclosure of KPIs	IVB103_mdakpi_princ (Tbl 15)	Investor (n=11): 81.8% Issuer (n=3): 66.7%		Item 303	103
Supports new prescriptive rules on disclosure of KPIs	IVB103_mdakpi_presc (Tbl 15)	Investor (n=10): 50.0% Issuer (n=9): 0.0%	**	Item 303	103
Supports requiring use of LEIs	257_263LEI	Investor (n=12): 58.3% Issuer (n=12): 8.3%	*	N/A	257–263

Hypothesis/ Variable Definition	Variable	Investor-Issuer Responses	Fisher's Exact Test	Regulation S-K Reference	Concept Release Question(s)
-Expected negative correlation-					
Supports automatic sunsetting of any new disclosure rule	1_5support_sunset (Tbl. 7)	Investor (n=6): 33.33% Issuer (n=5): 80.0%		N/A	1–3
Opposes quantified materiality thresholds in Item 103	envtl_noquant	Investor (n=9): 22.2% Issuer (n=7): 100.0%	***	Item 101(c)(i)(xii); Item 103	49

Note: *** significant at the 1% level; ** significant at the 5% level; * significant at the 10% level. An insignificant result indicates no statistically significant difference among respondent groups on this question.

Table 4: Responses on Risk-Related & Sustainability Topics.

	Investors (%) (n=219)	Issuers (%) (n=28)	Other (%) (n=35)	Total (%) (n=282)
Risk-related disclosure (section C) (n=116)	94 (43.32)	6 (21.43)	16 (45.71)	116 (41.13)
ESG & sustainability (section F) (n=277)	216 (99.08)	28 (100)	33 (94.29)	277 (98.23)

Table 5: Support for & Opposition to Prescriptive Disclosure; Support for Mixed Disclosure.

	Investors (%) (n=219)	Issuers (%) (n=28)	Other (%) (n=35)	Total (%) (n=282)
Support	192 (87.67)	3(10.71)	17 (48.57)	212 (75.18)
Oppose	12 (5.47)	21 (75)	7 (20)	40 (14.18)
Unspecified	14 (6.39)	4 (14.29)	11 (31.43)	29 (10.28)
Fisher's Exact Test: Significant at the less than 1% level.				
Mixed	Investors (%) (n=34)	Issuers (%) (n=4)	Other (%) (n=7)	Total (%) (n=45)
Support	33 (97.06)	4 (100)	7 (100)	44 (97.78)
	n=219	n=28	n=35	n=282
% of subgroup	33 (15.0)	4 (14.3)	7 (20.0)	44 (15.6)
Fisher's Exact Test: Insignificant.				

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Table 6: Audience for Disclosure.

	Investors (%) (n=37)	Issuers (%) (n=20)	Other (%) (n=5)	Total (%) (n=62)
Sophisticated	7 (18.92)	4 (20.0)	2 (40.0)	13 (20.97)
Status Quo (All)	25 (67.57)	13 (65.0)	5 (100.0)	43 (69.35)
Rational	0 (0.0)	3 (15.0)	0 (0.0)	3 (4.84)
Retail	5 (13.51)	0 (0.0)	1 (20.0)	6 (9.68)

Table 7: Support for and Opposition to Rule Sunsets.

	Investors (%) (n=6)	Issuers % (n=5)	Other (%) (n=4)	Total (%) (n=15)
Support	2 (33.33)	4 (80.0)	3 (75.0)	9 (60.0)
Oppose	4 (66.67)	1 (20.0)	1 (25.0)	6 (40.0)
Fisher's Exact Test: Insignificant.				

Table 8: Reference to ESG Issues Within Responses on Development of Business (Item 101(a)), Description of the Business (Item 101(c)).

	Investors (%) (n=219)	Issuers (%) (n=28)	Other (%) (n=35)	Total (%) (n=282)	Fisher's Exact Test
Mentions ESG under Item 101(a) (IVA_101a_ESG_yes)	3 (1.37)	0 (0.00)	1 (2.86)	4 (1.41)	
Mentions ESG under Item 101(c) (IVA_101c_ESG_yes)	4 (1.83)	3 (10.71)	3 (8.57)	10 (3.55)	

Note: An insignificant result indicates no statistically significant difference among respondent groups on this question.

Table 9: Environmental & Regulatory Disclosure (Item 101(c)(1)(xii)).

	Investors %	Issuers %	Other %	Total %	Fisher's Exact Test
Expanding environmental disclosure	n=10	n=4	n=5	n=19	**
Support	8 (80.0)	0 (0.0)	3 (60.0)	11 (57.89)	
Oppose	2 (20.0)	4 (100.0)	2 (40.0)	8 (42.11)	
Reducing environmental disclosure	n=2	n=8	n=2	n=12	*
Support	1 (50.0)	8 (100.0)	1 (50.0)	10 (83.33)	
Oppose	1 (50.0)	0 (0.0)	1 (50.0)	2 (16.67)	
Materiality of environmental compliance	n=9	—	n=5	n=14	N/A
Agree	9 (100.0)	—	5 (100.0)	14 (100.0)	
Retaining Item 103 quantified materiality threshold	n=9	n=7	n=3	n=9	***
Support	7 (77.78)	0 (0.0)	2 (66.67)	9 (47.37)	
Oppose	2 (22.22)	7 (100.0)	1 (33.33)	10 (52.63)	

Note: *** significant at the 1% level; ** significant at the 5% level; * significant at the 10% level. An insignificant result indicates no statistically significant difference among respondent groups on this question.

Table 10: Employment-Related Disclosure (Item 101(c)(i)(xiii)).

	Investors (%)	Issuers (%)	Other (%)	Total (%)	Fisher's Exact Test
More detailed employment-related disclosure should be required (QIVA_54_59)	n=33	n=8	n=4	n=45	***
Agree	32 (96.97)	2 (25.0)	3 (75.0)	37 (82.22)	
Disagree	1 (3.03)	6 (75.0)	1 (25.0)	8 (17.78)	
Disclosure of the total number of employees is important to investors (IVAempl_total)	n=29	n=3	n=3	n=35	***
Support	29 (100.0)	2 (66.67)	1 (33.33)	32 (91.43)	
Oppose	0 (0.0)	1 (33.33)	1 (33.33)	2 (5.71)	
Unspecified	0 (0.0)	0 (0.0)	1 (33.33)	1 (2.86)	
Further distinctions among total employees are important (IVAee_distinct)	n=23	n=3	n=4	n=30	***
Agree	22 (95.65)	1 (33.33)	3 (75.0)	26 (86.67)	
Disagree	1 (4.35)	2 (66.67)	0 (0.0)	3 (10.00)	
Unspecified	0 (0.0)	0 (0.0)	1 (25.0)	1 (3.33)	
Information on the use of outsourcing is important to investors (IVAee_outsource)	n=18	n=2	n=3	n=23	***
Support	17 (94.44)	0 (0.0)	2 (66.67)	19 (82.61)	
Oppose	1 (5.56)	2 (100)	0 (0.0)	3 (13.04)	
Unspecified	0 (0.0)	0 (0.0)	1 (33.33)	1 (4.35)	

Note: *** significant at the 1% level; ** significant at the 5% level; * significant at the 10% level.

Table 11: ESG Relevance to the MD&A; Consolidation of MD&A Guidance.

	Investors (%)	Issuers (%)	Other (%)	Total (%)	Fisher's Exact Test
Mentions ESG in the MD&A (IVB_ESG_MDA)	n=219	n=28	n=35	n=282	N/A
	21 (9.59)	5 (17.86)	4 (11.43)	30 (10.64)	
The SEC should consolidate MD&A-related guidance (IVB90consol_ guidance)	n=8	n=5	n=6	n=19	N/A (100% agreement)
Support	16 (100.0)	6 (100.0)	8 (100.0)	30 (100.0)	
Oppose	0 (0.0)	0 (0.0)	0 (0.0)	0 (0.0)	

Note: An insignificant result indicates no statistically significant difference among respondent groups on this question.

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Table 12: Over-Disclosure in the MD&A; Need for Materiality Thresholds.

	Investors (%)	Issuers (%)	Other (%)	Total (%)	Fisher's Exact Test
Some requirements of Item 303 (MD&A) result in immaterial disclosures (IVB89immat_303)	n=1	n=1	n=3	n=5	
Agree	1 (100.0)	1 (100.0)	2 (66.67)	4 (80.0)	
Disagree	0 (0.0)	0 (0.0)	1 (33.33)	1 (20.0)	
Item 303 should be subject to a materiality threshold (IVB89mat_threshold)	n=4	n=2	n=2	n=8	
Agree	0 (0.0)	0 (0.0)	2 (100.0)	2 (25.0)	
Disagree	3 (75.0)	2 (100.0)	0 (0.0)	5 (62.5)	
Unspecified	1 (25.0)	0 (0.0)	0 (0.0)	1 (12.5)	
An executive overview should be required in the MD&A (IVB91exec_overview)	n=7	n=5	n=2	n=14	
Agree	5 (71.43)	3 (60.0)	1 (50.0)	9 (64.29)	
Disagree	1 (14.29)	1 (7.14)	1 (50.0)	3 (21.43)	
Encourage, but not mandate	1 (14.29)	1 (7.14)	0 (0.0)	2 (14.28)	
Layered disclosure is recommended (IVB94layereddiscl)	n=4	n=3	n=3	n=11	*
Agree	2 (50.0)	0 (0.0)	3 (75.0)	5 (45.5)	
Disagree	2 (50.0)	3 (100.0)	1 (25.0)	5 (45.5)	

Note: * significant at the 10% level. An insignificant result indicates no statistically significant difference among respondent groups on this question.

Table 13: Test for Disclosure of Forward-Looking Information in the MD&A.

	Investors (%)	Issuers (%)	Other (%)	Total (%)	Fisher's Exact Test
The SEC's two-step test should be retained (IVB99_102_two_step_FLS)	n=8	n=5	n=4	n=17	
Support	6 (75.0)	2 (0.0)	3 (75.0)	11 (64.71)	
Oppose & the SEC should adopt the probability/ magnitude test	1 (12.50)	2 (40.0)	0 (0.0)	3 (17.64)	

Note: An insignificant result indicates no statistically significant difference among respondent groups on this question.

Table 14: Mandatory Quantification of Risk Effects in the MD&A.

	Investors %	Issuers %	Other %	Total %	Fisher's Exact Test
Uncertainty should be quantified (IVB102_pro_uncert_quant)	n=3	n=4	n=4	n=11	
Support	0 (0.0)	0 (0.0)	1 (25)	1 (9.09)	
Oppose	1 (33.33)	4 (100.0)	2 (50)	7 (63.64)	
Encourage, but not mandate	1 (33.33)	0 (0.0)	0 (0.0)	1 (9.09)	
Materiality qualifier	1 (33.33)	0 (0.0)	0 (0.0)	1 (9.09)	
Unspecified	0 (0.0)	0 (0.0)	1 (25.0)	1 (9.09)	

Note: An insignificant result indicates no statistically significant difference among respondent groups on this question.

Table 15: Forward-Looking Information & KPIs in the MD&A.

	Investors %	Issuers %	Other %	Total %	Fisher's Exact Test
Principles-based KPI disclosure (IVB103mdakpi_princ)	n=11	n=3	n=5	n=19	
Support	9 (81.82)	2 (66.67)	5 (100)	16 (84.21)	
Oppose	1 (9.09)	1 (33.33)	0 (0.0)	2 (10.53)	
Encourage, but not mandate	1 (9.09)	0 (0.0)	0 (0.0)	1 (5.26)	
Prescriptive KPI disclosure (IVB103mdakpi_presc)	n=10	n=9	n=7	n=26	**
Support	5 (50)	0 (0.0)	4 (57.14)	9 (34.62)	
Oppose	4 (40)	9 (100)	3 (42.86)	16 (61.54)	
Encourage, but not mandate	1(10)	0 (0.0)	0 (0.0)	1 (3.85)	

Note: ** significant at the 5% level. An insignificant result indicates no statistically significant difference among respondent groups on this question.

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Table 16: Risk Factor Disclosures (Item 503(c) (Current Item 105)).

	Investors (%)	Issuers (%)	Other (%)	Total (%)	Fisher's Exact Test
Mitigation efforts should be disclosed (QC145risk_mitig_503c)	n=13	n=12	n=8	n=33	***
Support	9 (69.23)	0 (0.0)	5 (62.5)	14 (42.42)	
Oppose	1 (15.38)	8 (66.67)	2 (25)	12 (36.36)	
Allow	1 (7.69)	4 (33.33)	0 (0.0)	5 (15.15)	
Encourage, but not mandate	1 (7.69)	0 (0.0)	1 (12.5)	2 (6.06)	
Risk factor probability and effect should be disclosed (QC146risk_prob503c)	n=15	n=18	n=6	n=39	***
Support	11 (73.33)	0 (0.0)	2 (33.33)	13 (33.33)	
Oppose	4 (26.67)	18 (100)	4 (66.67)	26 (66.67)	
Risk factors should be ordered by importance or magnitude (QC147risk_order503c)	n=12	n=12	n=6	n=30	***
Support	7 (58.33)	1 (8.33)	4 (66.67)	12 (40.0)	
Oppose	5 (41.67)	11 (91.67)	2 (33.33)	18 (60.0)	
Risk factor disclosure length obscures information (QC148length_issue503c)	n=17	n=16	n=8	n=41	*
Support	6 (35.29)	12 (75)	5 (62.5)	23 (56.1)	
Oppose	11 (64.71)	4 (25)	3 (37.5)	18 (43.9)	
Generic risks could be omitted, subject to safe harbor (QC150generic_safeh503c)	n=3	n=8	n=3	n=14	
Support	2 (66.67)	8 (100)	2 (66.67)	12 (85.71)	
Oppose	1 (33.33)	0 (0.0)	1 (33.33)	2 (14.29)	
Risk factor examples should be retained (QC151retain_ex503c)	n=2	n=2	n=3	n=7	
Support	1 (50.0)	1 (50.0)	2 (66.67)	4 (57.14)	
Oppose	1 (50.0)	1 (50.0)	1 (33.33)	3 (42.85)	
Top 10 risk factors should be disclosed, ranked (QC152risk_top10503c)	n=9	n=17	n=6	n=32	*
Support	2 (22.22)	0 (0.0)	0 (0.0)	2 (6.25)	
Oppose	7 (77.78)	17 (100)	6 (100)	30 (93.75)	
Risk factor summary should be provided (QC152risk_sum503c)	n=5	n=5	n=3	n=13	
Support	3 (60.0)	0 (0.0)	1 (33.33)	4 (30.77)	
Oppose	2 (40.0)	5 (100)	2 (66.67)	9 (69.23)	
Item 503(c) effectively captures emerging risks (QC154emergrisk_eff503c)	n=20	n=11	n=11	n=42	***
Agree	3 (15.0)	9 (81.82)	1 (9.09)	13 (30.95)	
Disagree	16 (80.0)	2 (18.18)	10 (90.91)	28 (66.67)	
Other	1 (5.0)	0 (0.0)	0 (0.0)	1 (2.38)	

Note: *** significant at the 1% level; ** significant at the 5% level; * significant at the 10% level. An insignificant result indicates no statistically significant difference among respondent groups on this question.

Table 17: Market Risk Management (Item 305(b)).

	Investors (%)	Issuers (%)	Other (%)	Total	Fisher's Exact Test
Item 305 is effective (QC158mktriskeffect)	n=4	n=2	n=6	n=12	
Agree	1 (25.0)	1 (50.0)	2 (33.3)	4 (33.3)	
Disagree	3 (75.0)	1 (50.0)	4 (66.7)	8 (66.7)	
Item 305's quantitative disclosure requirement should be limited to financial services registrants (QC161quantsector)	n=3	n=3	n=4	n=10	**
Support	1 (33.3)	3 (100.0)	4 (100.0)	2 (20.0)	
Oppose	2 (66.7)	0 (0.0)	0 (0.0)	8 (80.0)	
Market risk management processes should be described (IVC3_169riskmgmtdescribe)	n=5	n=5	n=6	n=16	**
Support	5 (100.0)	2 (40.0)	5 (83.33)	12 (75.0)	
Oppose	0 (0.0)	3 (60.0)	0 (0.0)	3 (18.75)	
Unspecified	0 (0.0)	0 (0.0)	1 (16.67)	1 (6.25)	
Assessment of risk management processes should be disclosed (IVC3_170riskassess)	n=2	n=3	n=3	n=8	*
Support	1 (50.0)	0 (0.0)	3 (100.0)	4 (50.0)	
Oppose	1 (50.0)	3 (100.0)	0 (0.0)	4 (50.0)	
Waivers or changes to risk management approach should be disclosed (IVC3_172riskmgmtchange)	n=1	n=3	n=3	n=7	
Support	0 (0.0)	0 (0.0)	2 (66.67)	2 (28.57)	
Oppose	1 (100.0)	3 (100.0)	1 (33.33)	5 (71.42)	
Risk factor mitigation should be disclosed (IVC_176_disclmitigate)	n=2	n=6	n=5	n=13	***
Support	1 (50.0)	0 (0.0)	5 (100.0)	6 (46.15)	
Oppose	1 (50.0)	5 (83.33)	0 (0.0)	6 (46.15)	
Unspecified	0 (0.0)	1 (16.67)	0 (0.0)	1 (7.7)	
Requiring risk factor mitigation disclosure would reduce informativeness (IVC3_177nomitigatediscl)	n=2	n=5	n=2	n=9	
Agree	2 (100.0)	3 (60.0)	0 (0.0)	5 (55.56)	
Disagree	0 (0.0)	2 (40.0)	2 (100.0)	4 (44.44)	
Risk factor mitigation should be disclosed by risk factor (IVC3_178_support_requiring)	n=2	n=3	n=2	n=7	
Support	1 (50.0)	0 (0.0)	2 (100.0)	3 (42.86)	
Oppose	1 (50.0)	2 (66.67)	0 (0.0)	3 (42.86)	
Unspecified	0 (0.0)	1 (33.33)	0 (0.0)	1 (14.29)	
Consolidation of risk-related disclosure should be required (IVC3_180_182)	n=7	n=7	n=7	n=21	
Support	6 (85.71)	7 (100.0)	7 (100.0)	20 (95.24)	
Oppose	1 (14.29)	0 (0.0)	0 (0.0)	1 (4.76)	

Note: *** significant at the 1% level; ** significant at the 5% level; * significant at the 10% level. An insignificant result indicates no statistically significant difference among respondent groups on this question.

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Table 18: Industry Guides.

	Investors (%)	Issuers (%)	Other (%)	Total	Fisher's Exact Test
Industry Guides are useful, should be retained (IVE_205_215_keepIG)	n=16	n=6	n=8	n=30	N/A (100% agreement)
Agree	16 (100.0)	6 (100.0)	8 (100.0)	30 (100.0)	
Industry Guides are useful for aiding ESG disclosure (IVE_205_215indguideESG)	n=12	n=1	n=2	n=15	
Agree	11 (91.67)	0 (0.0)	2 (100.0)	13 (86.67)	
Disagree	1 (8.33)	1 (100.0)	0 (0.0)	2 (13.33)	
(Certain) Industry Guides should be codified (IVE_213indguidecodify)	n=4	n=2	n=2	n=8	
Support	1 (25.0)	1 (50.0)	1 (50.0)	3 (37.5)	
Oppose	3 (75.0)	1 (50.0)	1 (50.0)	5 (62.5)	

Table 19: Section IV.F. Views on ESG Disclosure Reform.

	Investors (%) n=216	Issuers (%) n=28	Other (%) n=33	Total n=277	Fisher's Exact Test
NATURE OF ESG INFORMATION					
ESG factors are material, in whole or in part (F216_ESGmateriality)	n=205	n=19	n=27	n=251	***
Agree	202 (98.54)	12 (63.16)	27 (100.0)	241 (96.02)	
Disagree	2 (0.98)	7 (36.84)	0 (0.0)	9 (3.59)	
Unspecified	1 (0.49)	0 (0.0)	0 (0.0)	1 (0.40)	
Establishing ESG disclosure rules is within the SEC's authority (F220_mission)	n=173	n=12	n=19	n=204	***
Agree	170 (98.27)	4 (33.33)	18 (94.74)	192 (94.12)	
Disagree	3 (1.73)	8 (66.67)	1 (5.26)	12 (5.58)	
Some ESG Factors reflect systemic risks (ESG_systemic)	n=32	n=0	n=4	n=36	N/A (100% agreement)
Agree	32 (100.0)	0 (0.0)	4 (100.0)	36 (100.0)	
% of Section F respondents	14.81% of 216	0.00% of 28	12.12% of 33	13.00% of 277	
ESG factors are sector-specific (F216_ESGsector)	n=69	n=5	n=18	n=92	
Agree	68 (98.55)	5 (100.0)	18 (100.0)	91 (98.91)	N/A (100% agreement)
% of Section F respondents	31.94% of 216	17.86% of 28	54.55% of 33	32.85% of 277	
Disagree	1 (1.45)	0 (0.0)	0 (0.0)	0 (0.0)	
% of Section F respondents	0.46% of 216	0.00% of 28	0.00% of 33	0.00% of 277	
NEED FOR ENHANCED OR EXPANDED ESG DISCLOSURE					
Enhancing ESG disclosure will elicit immaterial information and obscure material information (F217_ESGobscure)	n=46	n=23	n=12	n=81	***
Agree	17 (36.96)	22 (95.65)	6 (50)	45 (55.56)	
Disagree	29 (63.04)	1 (4.35)	6 (50)	36 (44.44)	
Voluntary sustainability disclosure is sufficient to meet investors' needs (F218vol_OK)	n=97	n=13	n=16	n=126	***
Agree	1 (1.03)	13 (100.0)	2 (12.5)	16 (12.7)	
% of Section F respondents	0.46% of 216	46.43% of 28	6.06% of 33	5.78% of 277	
Disagree	96 (98.97)	0 (0.0)	14 (87.5)	110 (87.3)	
% of Section F respondents	44.44% of 216	0.00% of 28	42.42% of 33	5.78% of 277	
ESG information provided on company websites is sufficient to meet investors' needs (F218weblink_OK)	n=38	n=4	n=10	n=52	***
Agree	3 (7.89)	3 (75.0)	3 (30.0)	9 (17.31)	
% of Section F respondents	1.39% of 216	10.71% of 28	9.09% of 33	3.25% of 277	
Disagree	35 (92.11)	1 (25.0)	7 (70.0)	43 (82.69)	
% of Section F respondents	16.20% of 216	3.57% of 28	21.21% of 33	15.52% of 277	

	Investors (%) n=216	Issuers (%) n=28	Other (%) n=33	Total n=277	Fisher's Exact Test
Climate-related disclosure is adequate under current framework (F223_climateOK)	n=80	n=12	n=14	n=106	***
Agree	3 (3.75)	12 (100.0)	5 (35.71)	20 (18.87)	
% of Section F respondents	1.39% of 216	42.86% of 28	42.42% of 33	38.27% of 277	
Disagree	77 (96.25)	0 (0.0)	9 (64.29)	86 (81.13)	
% of Section F respondents	35.65% of 216	0.00% of 28	27.27% of 33	31.05% of 277	
WHY VOLUNTARY ESG REPORTING IS INADEQUATE					
Its lack of comparability (F218vol_comparability)	n=96	n=1	n=14	n=110	N/A
Agree	74 (77.08)	0 (0.0)	8 (57.14)	82 (74.55)	
Disagree	15 (16.85)	0 (0.0)	4 (33.33)	19 (18.81)	
It is directed at a wide range of stakeholders (F218vol_stakeholder)	25 (26.04)	1 (100.0)	3 (21.43)	29 (26.36)	N/A

Note: *** significant at the 1% level; ** significant at the 5% level; * significant at the 10% level. An insignificant result indicates no statistically significant difference among respondent groups on this question.

Table 20: Costs & Benefits of New Line-Item ESG Disclosures.

	Investors (%) n=216	Issuers (%) n=28	Other (%) n=33	Total n=277	Fisher's Exact Test
Costs of new ESG disclosure would exceed current compliance costs (F221_disclcost)	n=23	n=18	n=8	n=49	***
Agree	8 (34.78)	18 (100.0)	3 (37.5)	29 (58.18)	
Agree, but costs would be reasonable	9 (39.13)	0 (0.0)	3 (37.5)	12 (24.49)	
% who agree of Section F respondents	10.65% of 216	64.29% of 28	9.09% of 33	10.47% of 277	
Disagree	6 (26.09)	0 (0.0)	2 (25)	8 (16.33)	
Investors would experience cost savings if new line-item ESG rules were introduced (F221_savecost)	n=26	n=0	n=5	n=31	N/A
% of Section F respondents	12.04% of 216	0.00% of 28	15.15% of 33	11.19% of 277	
Integrated reporting is important (F218_IR)	n=17	n=1	n=4	n=22	
% of Section F respondents	7.87% of 216	3.57% of 28	12.12% of 33	7.94% of 277	

Note: *** significant at the 1% level; ** significant at the 5% level; * significant at the 10% level.

Table 21: Exemptions & Scaled ESG Requirements.

	Investors (%)	Issuers (%)	Other (%)	Total	Fisher's Exact Test
Any new line-item ESG rules should be scaled for SRCs or certain other issuers (F222_ESGscale)	n=21	n=2	n=11	n=34	*
Agree	5 (23.81)	2 (100.0)	2 (5.88)	9 (26.47)	
Disagree	16 (76.19)	0 (0.0)	9 (81.82)	25 (75.53)	
SRCs or certain other issuers should be exempt from any new line-item ESG rules (F222_ESGexempt)	n=19	n=2	n=11	n=32	
Agree	4 (21.05)	1 (50.0)	2 (18.18)	7 (21.88)	
Disagree	15 (78.95)	1 (50.0)	9 (81.82)	25 (78.13)	
Any new line-item ESG rules should be delayed for SRCs or certain other issuers to allow transition (F222_ESGdelay)	n=18	n=2	n=11	n=31	
Agree	4 (22.22)	0 (0.0)	5 (45.45)	9 (29.03)	
Disagree	14 (77.78)	2 (100.0)	6 (54.55)	22 (70.97)	

Note: *** significant at the 1% level; ** significant at the 5% level; * significant at the 10% level.

Table 22: Factors Contributing to Support for (Opposition to) ESG Disclosure Reform (Hypothesis 5).

Model 1: Probability modeled is support for ESG reform (pro_ESG_yes=1).									
	Model 1a			Model 1b			Model 1c		
	Parameter	Odds Ratio Estimate	Sig.	Parameter	Odds Ratio Estimate	Sig.	Parameter	Odds Ratio Estimate	Sig.
IIIA_6_13prescriptive_yes	2.693	14.781	***	2.682	14.617	***	2.656	14.235	***
F216_ESGsector_yes	-0.943	0.390		0.539	1.714		0.538	1.712	
F217_ESGobscure_yes	-3.696	0.025	***	-2.606	0.074	***	-2.591	0.075	***
F218vol_OK_no	3.807	45.027	***	3.340	28.231	***	3.305	27.236	***
F216_ESGmateriality_yes	2.191	8.946	***	2.613	13.644	***	2.599	13.449	***
F216_ESGmateriality_no									
individual_yes	-0.813	0.444							
institution_yes				-2.203	0.110	***	-2.212	0.109	***
ID_investor_yes							0.057	1.059	
ID_issuer_yes									
Model Fit Statistics									
Likelihood Ratio	312.694			324.489			324.496		
Score	225.310			231.625			232.118		
Wald	54.233			47.699			47.774		
Nagelkerke's R-Square	0.893			0.911			0.911		

Note: *** significant at the 1% level; ** significant at the 5%level; * significant at the 10% level.

Model 1 cont.: Probability modeled is support for ESG reform (pro_ESG_yes=1).						
	Model 1d			Model 1e		
	Parameter	Odds Ratio Estimate	Sig.	Parameter	Odds Ratio Estimate	Sig.
IIIA_6_13prescriptive_yes	2.573	13.109	***	3.531	34.163	***
F216_ESGsector_yes	0.456	1.578		0.911	2.487	
F217_ESGobscure_yes	-2.202	0.111	**	-2.323	0.098	***
F218vol_OK_no	2.864	17.537	**	4.147	63.241	***
F216_ESGmateriality_yes	2.723	15.221	***			
F216_ESGmateriality_no				-13.770	0.000	
individual_yes						
institution_yes	-2.002	0.135	***	-0.939	0.391	*
ID_investor_yes						
ID_issuer_yes	-1.022	0.360				
Model Fit Statistics						
Likelihood Ratio	325.827			The maximum likelihood estimate is questionable.		
Score	235.431					
Wald	49.206					
Nagelkerke's R-Square	0.913					

Note: *** significant at the 1% level; ** significant at the 5% level; * significant at the 10% level.

Model 2: Probability modeled is opposition to ESG reform (pro_ESG_no=1).									
	Model 2a			Model 2b			Model 2c		
	Parameter	Odds Ratio Estimate	Sig.	Parameter	Odds Ratio Estimate	Sig.	Parameter	Odds Ratio Estimate	Sig.
IIIA_6_13prescriptive_yes	-2.940	0.053	***	-2.730	0.065	***	-2.564	0.077	***
F216_ESGsector_yes	-0.080	0.923		-0.087	0.917		-0.007	0.993	
F217_ESGobscure_yes	3.731	41.698	***	3.762	43.041	***	3.707	40.712	***
F218vol_OK_no	-3.242	0.039	***	-3.208	0.040	***	-2.879	0.056	**
F216_ESGmateriality_yes	-2.023	0.132	***	-1.708	0.181	**	-1.594	0.203	**
F216_ESGmateriality_no									
institution_yes	0.298	1.347							
individual_yes				-0.669	0.512		-0.509	0.601	
ID_investor_yes							-0.510	0.601	
ID_issuer_yes									
ID_other_yes									
Model Fit Statistics									
Likelihood Ratio	328.425			328.754			329.220		
Score	233.876			234.582			235.814		
Wald	46.401			46.688			47.292		
Nagelkerke's R-Square	0.917			0.918			0.919		

Note: *** significant at the one-percent level; ** significant at the 5 percent level; * significant at the 10 percent level.

Model 2 cont.: Probability modeled is opposition to ESG reform (pro_ESG_no=1)						
	Model 2d			Model 2e		
	Parameter	Odds Ratio Estimate	Sig.	Parameter	Odds Ratio Estimate	Sig.
IIIA_6_13prescriptive_yes	-2.656	0.070	***	-4.069	0.017	***
F216_ESGsector_yes	-0.170	0.844				
F217_ESGobscure_yes	3.441	31.229	***	3.002	20.131	***
F218vol_OK_no	-2.824	0.059	**	-4.592	0.010	***
F216_ESGmateriality_yes	-1.760	0.172	***			
F216_ESGmateriality_no				14.311	556.400	
institution_yes						
individual_yes	-0.725	0.484				
ID_investor_yes						
ID_issuer_yes	0.582	1.790				
ID_other_yes						
Model Fit Statistics						
Likelihood Ratio	329.220			The maximum likelihood estimate is questionable.		
Score	237.237					
Wald	47.347					
Nagelkerke's R-Square	0.919					

Note: *** significant at the 1% level; ** significant at the 5% level; * significant at the 10% level.