OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

July 21, 2016

Mr. Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street NE.,
Washington, DC 20549-1090.

Re: Business and Financial Disclosure Required by Regulation S-K; Concept Release;
Proposed Rule
File Number S7-06-16.

Submitted via email to: *rule-comments@sec.gov*

Dear Secretary Fields,

As the chief legal officers of our respective states we are deeply concerned about the Commission's April 13, 2016 concept release, seeking "public comment on modernizing certain business and financial disclosure requirements in Regulation S-K." Specifically, we are concerned with your request for comment on the extent to which "environmental, social, and governance" (ESG) issues, should be part of the SEC's mandatory disclosure regime.

Existing law already requires disclosure of environmental issues that are material to financial performance. For example, in 2010, the Commission published interpretive guidance noting that, if financial risks could arise from the impact of climate change, and those risks are material to a company's finances, such risks should be disclosed.[1] Accordingly, it would appear that any mandatory disclosure requirement specific to climate change would be in addition to this existing requirement, mandating that companies speak to the risks of climate change in their officially-filed reports even if such risks are not material to their financial well-being. We are concerned that such a mandatory disclosure does more to serve a particular political agenda than to promote the best interests of corporations and their shareholders, and strays far from the nonpartisan mission of the SEC. Determining the specific risks to specific companies of a global phenomenon like climate change amounts to no more than speculative guess-work. This is true even for those who are ardent

[1] Securities and Exchange Commission, "Commission Guidance Regarding Disclosure Related to Climate Change," February 8, 2010 (https://www.sec.gov/rules/interp/2010/33-9106.pdf).

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believers in its danger, and requiring mandatory disclosures of such theorizing will serve only to confuse investors and dilute the importance of other more material and important disclosures in company reports.

Rather than promoting the social cause *du jour*, the standard that has long governed mandatory disclosures has been materiality. That concept has been firmly established since at least 1976, when the Supreme Court in *TSC Industries, Inc. v. Northway* held that a disclosure is only material (and thus required) "if there is a substantial likelihood that a reasonable shareholder would consider it important."[2] "Put another way," the Court said "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." So defined, the materiality requirement acts as a "filtering mechanism," excluding "[s]ome information [that] is of such dubious significance that insistence on its disclosure may accomplish more harm than good." The Supreme Court later explained that determining materiality is an "inherently fact-specific finding" and excluding non-material information benefits shareholders by sparing shareholders from an "avalanche of trivial information."[3]

By requiring mandatory climate change disclosures that do not, in all instances, meet the stringent test for materiality, the contemplated new disclosures threaten to upend the carefully balanced regime designed solely to protect investors. Such disclosures could also undermine the efficiency and orderliness of U.S. capital markets by creating a flood of irrelevant information that only serves to cause disclosure dilution and fatigue. Elevating climate-change issues above the "inherently fact-specific" regime governing other disclosures does little to help the investing public.

It is clear that such mandatory disclosure suggestions have not been the result of massive public uproar about investors being unaware that the activities of fossil-fuel producing companies might impact the environment. Nor have large swaths of investors been hoodwinked by coastal real-estate corporations whose assets have now all disappeared under the sea. Rather, the push for new mandatory disclosures is transparently a part of a no-holds-barred approach to destroy any person, institution, or company linked with greenhouse gas emission—in this instance, by attempting to politicize the U.S. securities laws. In hopes that such disclosures might confuse investors into believing that they are taking serious financial risk by investing in companies that might impact or be impacted by climate change, activists seek to promote divestment from these politically-disfavored companies and, "[a]lthough the impact of divestment on share prices may be relatively small, the reputational damage can have serious financial consequences."[4]

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[2] TSC Industries v. Northway, 426 U.S. 449 (1976).

[3] Basic, Inc. v. Levinson, 485 U.S. 224 (1988)

[4] The Guardian, "A beginner's guide to fossil fuel divestment," (https://www.theguardian.com/environment/2015/jun/23/a-beginners-guide-to-fossil-fuel-divestment).

While these activists are free to promote such divestment through their own private advocacy, the Commission should reject the invitation to allow itself to be used as a tool to promote such special interests. This rejection would serve as important precedent that the Commission is dedicated to promoting the open and efficient operation of U.S. markets from a neutral, fiscally-focused perspective, rather than to be used as an instrument to promote various social causes and passions of the moment. Were the latter to happen, the confidence the investing public places in the relevance of mandatory SEC disclosures will be greatly reduced. Moreover, such issues lie well outside the Commission's core mission and expertise.[5]

The Commission should not attempt to unnecessarily inject itself into partisan battles, including the one over climate change that has been waged by both federal and state agencies—and that has faced serious setbacks in Court. For example, we, along with a majority of the States, have sued to invalidate the Environmental Protection Agency's most significant climate change action to date—the Clean Power Plan—and obtained an almost-unprecedented pre-adjudication stay from the U.S. Supreme Court. Similarly, attempts by other state attorneys general to harass companies over climate change and silence their speech have been met with resistance and sometimes embarrassing retreat in court. The Commission should do its best to avoid lengthy court battles and legal losses over an issue that has little to do with promoting an informed investing public.

Ultimately, we ask simply that the Commission stay strictly true to its mission, and only its mission, "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." Injecting itself into the issues relating to climate change over and above the already existing requirements of disclosure of information material to investors' financial decisions will only undermine the public's confidence of the Commission's role as a fair, neutral, and dispassionate regulator of the nation's financial markets.

Sincerely,

E. SCOTT PRUITT
Attorney General of Oklahoma

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[5] Statement at Open Meeting—Interpretative Release Regarding Disclosure of Climate Change Matters, by SEC Commissioner Kathleen Casey, January 27, 2010 (https://www.sec.gov/news/speech/2010/spch012710klc-climate.htm)

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