May 24th, 2022.

Securities and Exchange Commission,

File Number S7-10-22
Proposed Rule for the Enhancement and Standardization of Climate-Related Disclosures for Investors

Thank you for the opportunity to comment on the proposed climate disclosure Rule for investors. These efforts aimed at improving climate change disclosures by public companies are highly commendable. However, kindly permit me to make a few comments which I believe the Commission may find useful as it takes steps to finalize the disclosure rules.

<u>Do the proposed rules constitute an overstep of the SEC's authority under its enabling statutes (Securities Act 1933 and the Securities Exchange Act 1934)?:</u>

There is no gainsaying the fact that the proposed rules represent a radical shift in the Commission's climate disclosure framework and that there are dissenting voices, who disagree with the SEC's statutory authority to make these draft climate disclosure rules. Consequently, and in anticipation of the legal challenges that will inevitably be made, even with the best of efforts to avoid them, I wish to respectfully draw the SEC's attention to the much anticipated decision of the U. S. Supreme Court (SCOTUS) in ***West Virginia v. E.P.A.*** [1]which was argued before the court on February 28, 2022, with a decision of the court due this summer. Putting the facts of the case aside for a moment, the critical issue in the case is whether the EPA should have power, by virtue of its statutory rule-making powers, to set national economic policy without express congressional authorization. In essence, it relates to the scope of the EPA's power to regulate carbon emissions from power plants, which is critical in addressing climate change. A decision by SCOTUS would be an important and material consideration in seeking to answer the present question as to whether the Commission has the power to make these proposed rules under its enabling statutes, in the absence of express authorization from Congress.

Opponents of these draft Rules on climate disclose posit that the SEC is exceeding its power under the enabling statutes and, in the absence of express Congressional authorization, the SEC has no authority to make these rules. This is the stance of SEC's Commissioner Peirce and a host of others who assert, amongst other assertions, that the proposal exceeds the Commission's statutory limits of authority, the proposed rules would be expensive for companies to operationalize, and the proposal would hurt investors, the economy and the reputation of the SEC; and they (the opponents) appear to be laying a foundation for First Amendment challenges to the proposed rules based on limitations on compelled speech, which, they claim, these rules are aimed at in its proposed obligation to disclose.[2]

[1] No. 20-1530 (U.S.: February 28, 2022)
[2] https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 (accessed March 22nd 2022)

Opponents also contend that the rules, as proposed, would effect a substantial change in some of the industries of registrants and impact upon third parties, business relations and policies outside the U.S. and, as such, the SEC's Rules are an overreach of its statutory rule-making power. Additionally, they contend that the wide-ranging nature of the disclosures required (including, data location and GHG emissions of third parties not subject to SEC's supervisory jurisdiction) would only serve to 'weaponize' climate disclosures made by registrants, by giving an unfair advantage to environmental and climate change activists groups with no genuine investment motives, whose sole aim is to target companies (including third parties identified pursuant to scope 3 emissions disclosures) in their strategic campaigns (including the use of litigation advocacy campaign) to cause as much reputational damage, financial expense and loss of access to capital for affected registrants and other affected third parties, in a bid to combat global warming by the reduction of anthropogenic GHG emissions as part of their climate change agenda.

Sen. Patrick Toomey (R., Pa.), the ranking member of the Senate Banking Committee described the proposed rules as follows:

> *Today's action hijacks the democratic process and disrespects the limited scope of authority that Congress gave to the SEC. This is a thinly-veiled effort to have unelected financial regulators set climate and energy policy for America. Forcing publicly-traded companies to gather and report global warming data—almost none of which is material to the business's finances—extends far beyond the SEC's mission and expertise.*
>
> *Complex political issues like global warming and energy security require tradeoffs. In a democratic society, those tradeoffs must be made by elected representatives who are accountable to the American people….*[3]

In light of these weighty (albeit unproven) allegations, the Commission may (in seeking to finalize these disclosure rules) wish to avert its mind to two simple guiding questions that it may find helpful in its reflections/deliberations when seeking to finalize the rule, namely:

> ***(i) (from the standpoint of an objective observer), Do these draft rules, if finalized and operationalized, only impact the activities of registrants for the sole purpose of giving investors, shareholders and other relevant stake holders the benefit of these disclosures to guide investment decisions regarding the registrants and nothing more?***
>
> AND
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> ***(ii) (if the rules are objectively construed) Is the Commission, irrespective of the demands of investors and stakeholders, free from all reasonable doubt that the proposed Rule, if finalized, would not have a substantial adverse impact:***

[3] https://www.banking.senate.gov/newsroom/minority/toomey-statement-on-sec-proposal-to-mandate-new-global-warming-disclosures (accessed March 22nd, 2022)

(a) on registrants and the industries of affected registrants;
(b) on U.S. based third parties not subject to the SEC's supervision;
(c) on foreign governments and third parties outside the U.S.;
(d) on the capital market for registrants, (for example fossil fuel companies);
(e) by being an unfair burden on companies (including those not under the SEC's jurisdiction);
(f) by impairing competition (including competition from a global perspective) and increasing costs for U.S. companies?

If the answer to any of the questions in question (ii) is 'No', then opponents to these proposed rules may well argue that the Commission had acted outside the scope of the powers granted to it by its enabling statutes, and seek an order of the court to declare the rule as being arbitrary and capricious, devoid of any legal effect. The same result would occur if the answer to question (i) is also 'No'. It is in this regard that I firmly urge the Commission to keep tabs on the ***West Virginia***[4] case to ensure that any possible gaps in authorization for making this rule are well articulated and adequately dealt with in the final rule, to overcome any legal challenges that may be made by those opposed to these proposed disclosure rules, and the extent of the disclosures required for scopes 1, 2 and 3.

This is critical because the courts, over the years, have been very restrained when called upon to adjudicate on matters relating to the establishment and enforcement of policies/rules/rights that touch upon global climate change, which these proposed rules appear to do. The courts hold the view that anthropogenic GHG emissions, which substantially contribute to climate change, due to activities taking place globally, impacts everyone worldwide (including governments, corporations and persons outside the jurisdiction of the courts) and has far reaching political, economic and social implications for industries and persons both within and outside the U.S., (including extra-territorial consequences and involves the complex balancing of several governmental policies including U.S. government policies), a task best left to the political arms of government (the executive and the legislative arms) and not to the courts. These sentiments were expressed in the decision of the 9th Circuit in ***Juliana v. U.S.***[5] and are instructive in this regard. The court stated the position as follows:

> *The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action…. We reluctantly conclude, however, that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political*

[4] Supra at footnote 1
[5] 947 F.3d 1159 (9th Circuit 2020)

> *branches through the ballot box. That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes.*[6]

The same sentiments were expressed in great detail in a set of global warming cases heard by the District court in ***California v. BP Plc.***[7]. The only comfort to be derived from the long line of judicial authorities on this issue of climate change and the regulation of GHG emissions is to be found in the 2007 SCOTUS decision in ***Massachusetts v. E.P.A***[8] but even there, the court was mindful to limit its decision to rule making that would only impact new motor vehicles or new motor vehicle engines to be manufactured in the U.S., with no extra-territorial impact on foreign governments or industries and minimally impacting the U.S. motor industry. The Commission would also recall the cases of ***Nat'l Ass'n of Mfrs., et al. v. SEC***,[9] ***Nat'l Ass'n of Mfrs., et al. v. SEC***,[10] and ***Am. Petroleum Inst. V. SEC***[11] relating to the Commission's rule making efforts regarding the Conflict Minerals Rule and the violation of the First Amendment.

In light of these judicial authorities and the nature of the legal challenge that may be made if the draft rules are finalized in their present form, I respectfully invite the SEC to meticulously consider the extent of the disclosure obligation to be imposed on registrants and the possible impact on the affected industries, to ensure that its proposed rule would stand up to scrutiny in the event a legal (or legislative) challenge by opponents of the rules, for the reasons they have adduced thus far in their respective public statements referred to in this comment. This threshold issue of the possible challenge to the Commission's authority to make these rules represents the greatest threat to the successful finalization and implementation of the rules and for which the SEC would be well advised to make its greatest strategic defence, because once this threshold issue is successfully dealt with, then progress can be made on the other issues; otherwise, in the event of a successful challenge, the SEC's efforts in seeking to make these rules would become merely an exercise in futility. A decision based on the demands of investors and stakeholders alone, may prove to be insufficient to overcome the avalanche of legal challenges anticipated in the absence of a fastidious and independent consideration of this issue of the SEC's legal authority to make these historic and detailed climate disclosure rules. In the final analysis, the Commission would agree that in the end, some rule, even if representative of the smallest of advances in climate risk disclosure to investors and stakeholders, is much to be preferred than a case of 'no rules' at all due to a successful legal challenge. In this regard, some interface with the Environmental Protection Agency (EPA) and the Federal Energy Regulatory Commission (FERC) may be prudent and useful, considering their historical and wide-ranging experience in these matters of climate change, GHG emissions disclosures and enforcement under various statutes.

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[6] *Id* at page 1175
[7] No. C17-06012 WHA (N.D. Cal June 25, 2018) at page 10 through 16.
[8] 549 U. S. 497 (2007)
[9] 800 F.3d 518, 530 (D.C. Cir 2015)
[10] No. 13-CF-000635 (D.D.C. Apr. 3, 2017)
[11] (2013) (D.D.C. July 2, 2013)

‘Disclosure of Strategies, Business Model and Outlook’: Making Allowances for Environmental Justice for Overburdened Communities in Investment Decisions

Again, I wish to respectfully draw the attention of the Commission to the Council on Environmental Quality’s (CEQ) recent rule, the National Environmental Policy Act (NEPA) Regulations 2022[12] made pursuant to NEPA - NEPA requires Federal agencies to interpret and administer Federal policies, regulations, and laws in accordance with NEPA’s policies and to give appropriate consideration to environmental values in their decision making. Although I am unable to find that environmental justice and environmental justice communities were referred to anywhere in the Commissioners’ supporting statements for the draft Rules or in the draft rules, yet these climate disclosure rules, more particularly the proposed requirement to disclose data location (assets/properties emitting GHGs) would be most helpful in giving a clear picture on the location where the GHG emissions are occurring (and for the most part, these seem to be in predominately Environmental Justice/BIPOC (Black, Indigenous and People of Color) communities, who are already overburdened by pollution and a concentration of GHG emissions due to a cluster of these GHG emitting facilities). This proposed obligation to disclose would be of considerable assistance to environmental and climate change-minded investors with a keen interest in environmental justice and climate justice for these communities. This is a most commendable and welcome introduction to the climate disclosure rules, and I urge the Commission to retain it in the final rules as it constitutes an important and material factor for ethical investors who are deeply concerned about environmental justice for these overburdened communities when contemplating their socially responsible investment (SRI) strategies. This disclosure obligation would help investors achieve environmental justice for these overburdened communities and is aligned with the climate change and environmental justice policy goals of President Biden’s Administration, as expressed in Executive Orders 13900[13] and 14008.[14]

Scope 3 GHG Emissions – Standardizing Reporting Obligations and the Safe Harbor Clause

While seeking to balance the importance of Scope 3 reporting emissions with the potential relative difficulty in data collection and measurement, the Commission has set a materiality test while at the same time including other markers that would also trigger disclosure of scope 3 GHG emissions. I respectfully urge the Commission to review these myriads of triggers that could result in a scope 3 GHG emissions disclosure, because the present proposed arrangement would not be the most suitable option if the SEC is keen on obtaining consistent, reliable and

[12] 87 FR 23453 https://www.federalregister.gov/documents/2022/04/20/2022-08288/national-environmental-policy-act-implementing-regulations-revisions (last accessed May 20, 2022). See also §101, and §102(1)(2)(c) of the NEPA P.L. 91-190, 42 U.S.C. 4321 et seq. See also ENVIRONMENTAL JUSTICE Guidance Under the National Environmental Policy Act https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf (last accessed May 23, 2022).

[13] E.O. 13990 of Jan 20, 2021; 86 FR 7037 https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis (last accessed May 20, 2022)

[14] E.O. 14008 of Jan 27, 2021; 86 FR 7619 https://www.federalregister.gov/documents/2021/02/01/2021-02177/tackling-the-climate-crisis-at-home-and-abroad (last accessed May 20, 2022)

comparable information for investors and relevant stakeholders - one of its principal objectives for making the rules. Under the draft rules, the actions of a company can trigger the obligation to disclose scope 3 GHG emissions, for instance if a company has adopted a transition plan or has set emissions targets/goals. These proposed disclosure triggers may give room for rule -bending activities by companies (not just by registrants, but for third parties in the value chain of registrants) by choosing not to create or adopt emissions targets/goals or a transition plan or refusing to undertake or report on these 'scope 3 disclosure-triggering' events.

In addition, leaving matters to what registrants believe is 'material' would not be the better choice if the SEC wishes to attain its goal of securing consistent, reliable and comparable information/reporting from registrants for investors and relevant stakeholders. To avoid the tempting prospect of rule-bending by registrants, It is vital that the requirement to provide scope 3 emissions information should not be constrained or limited by what the registrant deems to be material, rather the SEC should adopt a quantitative threshold for triggering a mandatory disclosure of scope 3 emissions; for example imposing a mandatory disclosure obligation if the registrant's scope 3 GHG emissions constitutes 40% of its total GHG emission.

With the adoption of a quantitative threshold investors and stakeholders can be rest assured that they have been given appropriate, relevant, consistent, reliable and comparable information to aid their investment and voting decisions. This quantitative threshold reporting trigger would also ensure that such reporting of scope 3 emissions does not become a self-serving process without adequate oversight or set standards by the SEC. Furthermore, considering the practical difficulties and costs of collecting data for scope 3 GHG emissions reporting, this quantitative approach would mean that a fair and consistent standard is being applied industry-wide, reliable information will be obtained by investors and relevant stakeholders and market transparency will be achieved, in line with the goals of the Task Force on Climate-Related Financial Disclosure's (TCFD) recommendations/guidelines for voluntary climate-centered financial disclosures across industries.[15]Regarding scope 3 GHG emissions below the suggested 40% threshold, the SEC may require that these be dealt with by registrants having an unfettered discretion to report them, if they consider them material under the statutory and SCOTUS definitions[16]. This would be beneficial and cost effective for registrants and would not constitute an undue reporting burden for registrants reporting scope 3 emissions. In summary, introducing a quantitative threshold of 40% GHG emissions for triggering scope 3 reporting obligation would be most appropriate and less burdensome on registrants' resources and result in consistent, reliable and comparable information for investors and relevant stakeholders. This suggested quantitative threshold trigger for disclosure of scope 3 emissions is all the more important because, for some registrants, scope 3 GHG emission forms the bulk of GHG emissions in their value chain as was disclosed in the landmark case on global climate change and scope 3 GHG emissions: ***Milieudefensie v. Royal Dutch Shell***[17]. This case is instructive on the issue of Scope 3 GHG emissions disclosure, suggested

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[15] https://www.fsb-tcfd.org/recommendations/ (last accessed May 23rd, 2022)

[16] See 17 CFR §230.405 and 17 CFR §240.12b-2 and TSC Industries, Inc. v. Northway Inc., 426 U.S. 438 (1976) at 449; Basic Inc. vs. Levinson, 485 U.S. 224 (1988) at 231-32, 238.

[17] Case number/cause list number: C/09/571932 / HA ZA 19-379 (engelse versie), the English version of the Hague District Court's judgement at: https://uitspraken.rechtspraak.nl/inziendocument?Id=ECLI:NL:RBDHA:2021:5339

pathways for reporting companies to reduce their scope 3 emissions including using its best efforts to reduce the GHG emissions of its business partners falling under scope 3 of the reporting party's value chain, companies' GHG emissions reporting under the GHG Protocols, setting GHG emissions targets and simultaneously implementing conflicting investment plans, corporate entities taking steps to meet the emissions reduction targets of the Paris Climate Agreement. The issues dealt with in the said case would appear to give further impetus on the need for these climate disclosure rules proposed by the Commission. I therefore highly recommend this case to the Commission as a good background research resource which can serve as a rear view mirror glance at why these proposed rules are vital and necessary, and how the rules could operate in practice, dispelling some of the fears of those opposed to them.

Finally, the insertion of a safe harbor clause would not appear to be necessary because affected registrants may already have this aspect of risk covered by their corporate business liability insurance - covering possible litigation claims by third parties arising from errors in the registrants scope 3 GHG emission disclosures or errors in its corporate filings.

Thank you again for your laudable efforts in taking this bold and long overdue step on detailed climate change disclosure, arguably climate change represents the most challenging threat of our time.

Respectfully,

Teraine Okpoko, Esq.
Attorney-at-Law (New York State)
[redacted]

(last accessed May 20, 2022). Using the World Resources Institute Greenhouse Gas Protocol (GHG Protocol), Royal Dutch Shell (now known as Shell Plc) had reported in 2018 that 85% of the Shell group's global emissions were Scope 3 emissions. See paragraph 2.5.4. and 2.5.5. of the judgement.