COMMISSIONER OF SECURITIES AND INSURANCE

Troy Downing
Commissioner

Office of the
Montana State Auditor

June 3, 2022

Honorable Gary Gensler, Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File number S7 – 10 – 22: The Enhancement and Standardization of Climate Related Disclosures for Investors

Dear Chair Gensler:

I am writing today to express my concerns regarding the scope, reach, and impact of the above-referenced proposed rules. As the Commissioner of Securities for the State of Montana, my primary job is aligned with the charge of the Securities and Exchange Commission (SEC) to protect investors. In my case, my duties are specific to Montana investors, but my concerns have implications nationwide. An equal priority for my office is to ensure the viability of Montana industries, businesses and workers' jobs by protecting them from unnecessary, costly, and harmful regulations.

In your press release you state, "[o]ur core bargain from the 1930s is that investors get to decide which risk to take, as long as public companies provide full and fair disclosure and are truthful in those disclosures." Respectfully, I do not believe the proposed disclosures will provide reliable or accurate information, as many will be based on speculative judgments and assumptions and will ultimately harm the very investors and issuers the SEC purports to protect.

As a threshold legal matter, I question whether the SEC, in its role as securities regulator, has the jurisdiction or authority to mandate climate disclosures or whether the cost-benefit analyses in the proposed rules meet the requirements of the Administrative Procedure Act.

Aside from the numerous legal issues, here are just a few of the practical problems and issues raised by the proposed rules:

- **Disclosure of Climate Related Risks**

  On page 55, the proposed rules state, "[p]hysical risks may include harm to business and their assets arising from acute climate-related disasters such as wildfire, hurricanes, tornadoes, floods and heatwaves." If a company is situated against an urban wildland interface which has no apparent wild-

840 Helena Avenue, Helena, Montana 59601
(main fax) 406.444.3497 | (securities fax) 406.444.5558
(policyholder services fax) 406.444.1980 | (legal fax) 406.444.3499
(phone) 800.332.6148 *or* 406.444.2040 | (email) csi@mt.gov | (web) www.csimt.gov

fire risk from climate change, but may be subject to risk because of lawsuits preventing proper forest management, how should that be quantified and disclosed, if at all? If the registrant has insurance to cover the loss from these physical risks, should the registrant also be required to disclose the risks?

- **Transition Risks**

On page 62, it states "the proposed rules would require a registrant to describe the nature of transition risks, including whether they relate to regulatory, technological, market (including changing consumer, business counterparty, and investor preferences), liability, reputational, or other transition--related factors and how those factors impact the registrant." Without a time-machine, it is simply not possible for a registrant to be able to predict reasonably and accurately changing regulatory, technological, and market factors. A registrant, in most cases, can only provide a "best guess."

How will a registrant be able to foresee the outcome of elections, judicial rulings, technological changes, and changing consumer demands? Forty years ago, the Internet didn't exist. Twenty years ago, Amazon had yet to make a profit. Fifteen years ago, no one owned an iPhone. Within the past 20 years, Facebook, Twitter, Tesla, and Bitcoin all began. Apple, Amazon, Facebook, Twitter, Tesla and Bitcoin, to name a few, have had a dramatic impact upon consumer, business, regulatory, and market preference. How will it be possible for a registrant to accurately predict the consumer, business, regulatory, and market preference in the next two, five, or 20 years? If the "best guess" of the registrant is ultimately determined to be inaccurate, the investor very well could be harmed financially and the registrant could be exposed to additional liability which, in theory, the proposed rules are attempting to mitigate. These proposed rules will most likely be a "defense and trial attorneys' full employment" act. If the SEC adopts any final rules on climate-change disclosures, it should limit such disclosures to the applicable reporting period underlying the financial statement(s).

- **Green House Gas Reporting**

On page 150, Scope 3 is defined as:

> *Scope 3 emissions as all indirect GHG emissions not otherwise included in registrant's Scope 2 emissions, which occur in the upstream and downstream activities of a registrant's value chain. Upstream emissions include emissions attributable to goods and services that the registrant acquires, the transportation of goods (for example, to the registrant), and employee business travel and commuting. Downstream emissions include the use of the registrant's products, transportation of products (for example, to the registrant's customers), end of life treatment of sold products, and investments made by the registrant.*

To illustrate the complexity and difficulty inherent in reporting climate-related disclosures under Scope 3, let's focus on a power company that produces energy from hydro, battery storage, natural gas, and coal for industrial and homeowner consumers. The company purchases wind and solar power for resale. If the company purchases coal from a mine to fuel its coal-fired generators, Scope 3 appears to require the company to understand and report the coal mines' greenhouse gases.

If the mine uses electric shovels and trucks – does the company report zero greenhouse gases? Is the company compelled to research, understand, and report where the electricity for the mine equipment came from along with its resulting greenhouse gases? Does the company need to understand and measure the efficiency of each of its customers' appliances in order to understand and accurately report how much greenhouse gas the customers release?

Under scope 3, a meat packer could conceivably be required to ascertain and report the amount of methane gas expelled by cattle.

Reporting Scope 3 emissions will be a difficult, inexact, expensive, and time-consuming process. You state as much on page 160, "... and thus collecting the appropriate data and calculating these emissions would potentially be more difficult than for scopes one and two emissions." The effort and expense to collect data of little, unreliable, or dubious value is not in the interest of protecting investors and may have measurable negative effects on industry required to produce the data, and unintended consequences of greenwashing some and blacklisting others.

Ultimately this reporting will provide speculative information with questionable comparative value for investors. Unscrupulous actors can use the broadness, vagueness, and speculative nature of Scope 3 and the other scopes in such a way as to present a misleading view of a company to their benefit and to the detriment of an investor.

To the extent that additional greenhouse gas reporting is necessary, that reporting should be under the purview of the EPA as they are the experts in environmental matters. In fact, the EPA already has a public reporting program that covers GHG emissions disclosures. The SEC should focus on its core mission empowering investors to make their own risk decisions if public companies provide full and fair disclosure and are truthful in those disclosures. If an investor decides not to invest because, in the investor's mind, a company does not give enough focus to climate change by voluntarily reporting, that is how a market is supposed to work.

These are just a few examples of many that could be provided to illustrate the challenges of complying with the proposed rules. In summary, the proposed rules will create a process that is formidable, costly, and speculative, and in the end, will not produce consistent, reliable decision-making information. They will not, "... give rise to several benefits by strengthening investor protection, improving market efficiency, and facilitating capital formation." Rather, they will unnecessarily regulate areas traditionally reserved for decisions by corporate boards and senior management, weaken investor protection by providing inaccurate and potentially misleading information and projections, and discourage capital formation.

As you mentioned on page 302, "... 33% of all annual reports contain some disclosure related to climate change, ...". I would recommend the SEC continue to allow these filings to be voluntary disclosures but treat them as "filed" and therefore subject to potential liability under Exchange Act 18. Using this approach would allow investors to review companies that voluntarily disclose this information while allowing the SEC to regulate the accuracy of the disclosures to the extent they are filed.

As noted previously in this letter, my primary concern is how these rules have the potential to harm Montana investors, along with the primary industries and the economies of energy production and agriculture in which they invest. These proposed rules have potentially devastating impacts on natural resource development, energy production, agriculture, and the jobs of thousands of Montana workers who depend on these industries. For these reasons, along with the potential economic harm to the energy, natural resource, and agriculture industries in my state, I strongly oppose these rules.

Thank you for your time and attention.

Sincerely,

Troy Downing
Montana State Auditor
Commissioner of Securities and Insurance

CC: Vanessa Countryman, Secretary, Securities and Exchange Commission
The Honorable Jon Tester, U.S. Senator for Montana
The Honorable Steve Daines, U.S. Senator for Montana
The Honorable Matthew Rosendale, U.S. Representative for Montana