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Vanessa A. Countryman
Secretary, Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
(duplicate via e-mail to:
rule-comments@sec.gov)

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

Dear Madame Secretary:

Professor Joseph A. Grundfest[1] submits this comment in response to the above-referenced Proposing Release, "The Enhancement and Standardization of Climate Related Disclosures for Investors," 87 Fed. Reg. 21334 (Apr. 11, 2022) describing the Proposed Rules.

Introduction. The Commission's proposal is subject to various forms of litigation risk.[2] That risk can be significantly reduced by repositioning the proposed quantitative emissions disclosure rules so that they operate within the context of a larger, stratified disclosure regime composed of three sets of severable[3] requirements:

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[1] Professor Grundfest is the William A. Franke Professor of Law and Business at Stanford Law School and served as a Commissioner of the United States Securities and Exchange Commission (1985-1990). Professor Grundfest also chairs the audit committee of the board of directors of KKR, Inc., and serves on the advisory board of Millennium Management LLP. The views expressed in this letter are Professor Grundfest's alone, and do not necessarily reflect the views of Stanford University, KKR, Millennium, or of any other organization with which Professor Grundfest is affiliated. This comment is an early version of a law review article currently in preparation and tentatively titled "A Pareto-Superior SEC Emissions Disclosure Strategy."

[2] For a superb defense of the Commission's authority to adopt the proposed rules, see Jill E. Fisch, George S. Georgiev, Donna M. Nagy, and Cynthia A. Williams, *Comment Letter of Securities Law Scholars on the SEC's Authority to Pursue Climate-Related Disclosure* (June 6, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4129614; George S. Georgiev, *Comment Letter to the SEC on Climate Change and Other ESG Disclosure* (June 22, 2021), available at https://ssrn.com/abstract=3874186.

For powerful arguments to the contrary see, e.g., Andrew N. Vollmer, *Adopting the SEC's Proposed Climate-Related Disclosure Rules Would Be Unwise* (May 9, 2022), available at https://ssrn.com/abstract=4104579; Andrew N. Vollmer, *Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?* (Mercatus Policy Brief Series, Aug. 19, 2021), available at https://ssrn.com/abstract=3908560; Lawrence A. Cunningham, *Comment Letter on SEC Climate Disclosure Proposal by 22 Law and Finance Professors* (GWU Legal Studies Research & GWU Law Sch. Pub. Law Research Paper, Paper No. 2022-17, Apr. 25, 2022), available at https://ssrn.com/abstract=4109278; Sean J. Griffith, *What's "Controversial" About ESG? A Theory of Compelled Commercial Speech under the First Amendment* (May 24, 2022), available at https://ssrn.com/abstract=4118755.

[3] For a detailed analysis of severability, see Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses,* 124 YALE L.J. 2286 (2015). See also Administrative Conference, recommendation on severability at https://www.acus.gov/research-projects/severability-agency-rulemaking.

- **Mandatory Measurement and Disclosure Rules.** The first set of rules are those that the Commission will adopt at the conclusion of these proceedings. If the final rules are consistent with the disclosure strategy contemplated in the Proposed Rules, they will rest on the proposition that the Commission has authority to compel registrants to engage in novel emissions measurement activity and to report the resulting metrics. This comment suggests no amendment to or modification of those rules;

- **Information Aggregation Rules.** The second set of rules complements the first. They would mandate reporting, on a standardized form that eliminates double-counting, emissions data that registrants are required to disclose publicly pursuant to federal, state, or foreign regulations that are not imposed by the Commission. As explained in greater detail below, these disclosure requirements rest on more modest and traditional interpretations of federal securities law. They nowhere assert that the Commission has authority to compel novel forms of emission measurement. They rely instead on the Commission's authority to cause efficient aggregation and reporting of information already in the public domain. These emissions-related data are clearly valued by investors responsible for allocating tens of trillions of dollars of equity and debt capital. These investors spend millions of dollars annually to analyze climate data as part of that allocation process. Promoting informational market efficiency in this traditional form is well within the agency's statutory remit. These information aggregation rules are therefore more likely to withstand judicial scrutiny. Because of disclosure requirements already imposed and proposed by other regulators, the disclosures elicited by these information aggregation rules would also be substantial. Indeed, they would likely replicate very large parts of the disclosures otherwise mandated by the Proposed Rules. They could also cause disclosures that are, in many respects, more expansive, timely, and useful than disclosures currently contemplated by the Proposed Rules. The costs imposed on the registrant community by this second set of rules would also be *de minimis* because registrants will simply collate information already generated for other compliance purposes, and will not have to perform novel or expensive measurement activities;

- **Voluntary Disclosure Rules.** This third set of rules is designed to accommodate and encourage voluntary reporting of emissions data on the same standardized form used to report disclosures mandated by the first and second sets of rules. Registrants face significant pressure from investors, employees, customers, and policymakers to set voluntary emissions reduction targets. The Proposed Rules, however, disincentivize voluntarism by imposing additional Scope 3 reporting obligations that can be expensive and that generate potential private class action litigation exposure. To create a positive incentive for voluntary disclosure of climate data, this comment proposes a litigation safe harbor that would preclude implied private federal securities claims alleging defective voluntary emissions disclosures. The Commission and the Department of Justice would, of course, retain authority to prosecute materially false emissions disclosures, whether as greenwashing or in any other form.

Adopting these second and third sets of rules likely requires a new rulemaking and comment period. Those proceedings, however, need not interfere with or delay the current rulemaking, and can be initiated prior to, simultaneously with, or subsequent to, the conclusion of these ongoing proceedings.

This stratified approach has multiple advantages for the Commission. If the Proposed Rules are vacated in whole or in part, the remaining two sets of stratified rules are more likely to survive. They would then elicit climate disclosures sufficient not only to compensate for a very large portion of the vacated rules, but also to cause disclosures that, in several respects, could be superior to those that would have been required by the vacated rules. The stratified rules thus offer a form of litigation insurance against adverse appellate rulings.

On the other hand, if the proposed rules withstand judicial scrutiny, then the additional stratified rules would still provide aggregate, consistent information for investors that is, in many respects, more expansive, timely, and useful than the disclosures resulting from the Proposed Rules. Thus, in addition to providing downside litigation insurance, the stratified structure also offers significant upside disclosure benefits.

Stratified emissions disclosures are, therefore, a Pareto-superior[4] regulatory strategy. Regardless of whether the Proposed Rules are upheld in their entirety, or vacated in whole or in part, the Commission is not disadvantaged by these stratified disclosures. Indeed, this stratified regime can only increase the probability, magnitude, and quality of emission disclosures, all at *de minimis* cost and all in a manner consistent with the Commission's statutory mandate.

1. Mandatory Measurement and Disclosure Rules. The first set of rules would be those the Commission intends to adopt at the conclusion of this rulemaking proceeding. If the final rules are consistent with the disclosure strategy contemplated in the Proposed Rules, they will rest on the proposition that the Commission has the authority to compel registrants to engage in novel emissions measurements and to report the resulting metrics. This comment suggests no amendment to or modification of those rules and accepts them as a given.

2. Information Aggregation Rules. The second set of rules would mandate reporting, on a standardized form, of emissions data that registrants are required to disclose publicly pursuant to other federal, state, or foreign regulations. The standardized form would be designed to make disclosures currently resulting from different regulatory regimes as comparable as reasonably possible in a manner that avoids double counting.[5]

The objective of these disclosure rules is to minimize search and information costs for investors and registrants alike by providing consistent, comparable, and reliable aggregation of data already in the public domain. Significantly, these rules would not require that any registrant engages in any emissions measurement activity because of SEC mandates. All measurements reported pursuant to this second set of rules exist only because of regulatory requirements imposed by

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[4] An alternative is Pareto superior if it is "at least as effective and also provides less risk." *Ackley v. Wyeth Labs.,* 919 F.2d 397, 403 (6th Cir. 1990) citing *The New Palgrave: A Dictionary of Economics* 806-07, 811 (1987); DAVID D. FRIEDMAN, PRICE THEORY: AN INTERMEDIATE TEXT 438-42 (1990).

[5] The first and second set of rules would thus share a common disclosure form designed to eliminate the risk that emissions are reported once pursuant to the first set of rules and again pursuant to the second set. The voluntary disclosures contemplated by the third set of rules would also be provided on the same form in compliance with instructions designed to prevent double counting.

authorities other than the Commission. All data to be compiled in these reports are already in the public domain but spread across multiple sources and presented in inconsistent formats that can be difficult and expensive for investors to process and compare.

This second set of rules would also clearly state that they are severable from the first. Thus, if the information is not required to be provided pursuant to the first set because some or all of those rules have been vacated, then that information must still be provided pursuant to this second set of rules, if the information is covered. Put another way, the second set of rules imposes independent, severable disclosure requirements. Indeed, it is hardly rare for registrants to provide a single piece of information because it is responsive to multiple disclosure requirements. For example, a single fact might lead to the inclusion of a novel risk factor, a mention in the MD&A, and footnotes to the financial statements all because of the existence of multiple, independent, severable disclosure requirements. The interaction of these two sets of climate disclosure rules is no different. Thus, if the courts vacate the first set of rules, this second set of rules, which rely on more modest assertions of Commission authority, can still survive and can promote substantial climate disclosure.

This second set of rules relies on a modest, traditional interpretation of the scope of the federal securities laws and avoids much of the legal controversy that arises when the Commission itself asserts that it has authority to compel the novel measurement and reporting of emission data that are not required pursuant to any other regime. In particular, it is well established that the purposes of the Commission's disclosure regime include: standardizing disclosures, reducing search costs, eliminating duplicative research, eliminating coordination problems, and providing information that is useful in proxy voting and securities pricing.[6] By aggregating and standardizing disclosures that are already in the public domain the Commission promotes all of these traditional securities law objectives and does so without requiring novel forms of emissions measurement.

The relevance of these data to investors should be beyond dispute. Globally, investors already allocate tens of trillions of dollars in assets with sensitivity to climate factors.[7] They spend many millions of dollars in efforts to gather and analyze climate data in a consistent format.[8] "Investing within an ESG framework is now the fastest-growing segment of the asset management industry. Assets in ESG funds grew 53 percent year on year to $2.7tn in 2021, according to data provider

[6] JOHN COFFEE JR., HILLARY SALE, AND CHARLES WHITEHEAD, SECURITIES REGULATION: CASES AND MATERIALS 6-11 (14th ed. 2021); STEPHEN A. CHOI & ADAM C. PRITCHARD, SECURITIES REGULATION: CASES and Analysis 25-28 (4th ed. 2015).

[7] "Global *ESG assets may surpass $41 trillion by 2022 and $50 trillion by 2025, one-third of the projected total assets un*der management globally, according to a new report by Bloomberg Intelligence (BI). This trend continues the rise of *ESG* assets after they surpassed $35 trillion in 2020." Bloomberg Press Release, *ESG May Surpass $41 Trillion Assets in 2022, But Not Without Challenges, Finds Bloomberg Intelligence,* BLOOMBERG, Jan. 24, 2022.

[8] Jean Eaglesham & Paul Kiernan, *Fight Brews Over Cost of SEC Climate-Change Rules,* WALL ST. J., May 17, 2022 ("A survey earlier this year of 35 big investors found they spent an average of $1.4 million a year each on collecting, analyzing and reporting climate data. The most expensive item was $487,000 on ratings firms, consultants and data providers—many selling information that would become more readily available under the SEC rule.")

Morningstar."[9] ESG has been "a rapidly growing topic in earnings calls since 2019," with approximately 20% of all such calls now addressing the subject.[10] Investors also cite to climate factors in deciding whether to support or oppose the election of directors[11] and whether to support or oppose various shareholder proposals.[12]

Rules that efficiently aggregate such investor-relevant information help investors save money as they allocate capital and exercise voting rights are well within the traditional scope of the statutory delegation. They raise no concern under the major questions doctrine because the SEC would not be exercising powers of "vast economic and political significance."[13] They raise no meaningful constitutional concerns regarding compelled speech, because the speech to be disclosed is already compelled by other regulatory bodies, not by the Commission. Nor do they intrude on the EPA's authority to regulate the measurement of greenhouse gas emissions,[14] because the EPA's authority remains untouched. To the contrary, by building on and disseminating EPA mandated data, the SEC would be amplifying the EPA's disclosures. Further, the additional burden on registrants imposed by this second set of rules is *de minimis* because registrants already gather and report those data for reasons unrelated to Commission mandates.

The disclosures that would result from this second set of rules, independent of the first set, are substantial and growing.[15] The Environmental Protection Agency's Greenhouse Gas Reporting

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[9] Herbert Agnew, Adrienne Klasa, and Simon Mundy, How ESG Investing Came to a Reckoning, Financial TIMES, June 5, 2022, available at https://www.ft.com/content/5ec1dfcf-eea3-42af-aea2-19d739ef8a55.

[10] *Id.*

[11] See, e.g., Hannah Orowitz & Rajeev Kumar, *How Investors are Assessing Directors on ESG Matters*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Apr. 11, 2022); Rob Berridge, *Guidance for Engaging on Climate Risk Governance and Voting on Directors*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Feb. 22, 2022); Saijel Kishan, *BlackRock Voted Against 255 Directors for Climate Issues*, BLOOMBERG NEWS, July 20, 2021; Steven Mufson, *A Bad Day for Big Oil,* WASH. POST, May 26, 2021 (which also discusses shareholder initiatives related to climate); Natasha Landell-Mills, *Opinion: Asset managers must use their votes to tackle climate change*, FINANCIAL TIMES, Oct. 14, 2019; Natasha Landell-Mills, *Opinion: Investors should fire directors who fail to act on climate change*, FINANCIAL TIMES, Jan. 28, 2019.

[12] See, e.g., Hannah Palmer, Sidley Austin, *Governance Challenges 2022: Climate Governance: Legal Considerations For Oversight of Climate-Related Risks* (2022) (also briefly mentions director voting, too); Shai Ganu & Hannah Summers, WTW, *Upset over climate inaction, investors look to use all tools to drive change* (May 17, 2022); Sam Meredith, *Big Oil braces for shareholder revolt over climate plans in proxy voting season*, CNBC (May 11, 2022); Farzad F. Damania & Ryan A. Lilley, Katten, *ESG Shareholder Proposals: Practical Guidance from Proxy, Legal, IR and Consulting Perspectives* (May 3, 2022); Kramer Levin, Client Alert, *ESG Voting Policy Updates for the 2022 Proxy Season* (Jan. 28, 2022); Attracta Mooney, *Big investors demand annual vote on companies' net zero plans*, FINANCIAL TIMES, July 30, 2021; Attracta Mooney & Billy Nauman, '*Say on Climate' campaign faces first big test at investor meetings*, FINANCIAL TIMES, May 18, 2021; Attracta Mooney, *BlackRock vows to back more shareholder votes on climate change*, FINANCIAL TIMES, Dec. 10, 2020; But then: Brooke Masters, *BlackRock warns it will vote against more climate resolutions this year*, FINANCIAL TIMES, May 10, 2022.

[13] *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs*., 594 U.S. __, 141 S. Ct. 2485, 210 L. Ed. 2d 856 (2021).

[14] THE CLEAN AIR ACT (CAA) SECTION 114, 42 U.S.C. § 7414.

[15] See, e.g., Frederic Louis, Hans-Gorg Kamann, Geoffroy Barthet, and Su Simsek, *ESG: The EU's Agenda for 2022 – What You Need to Know*, WILMERHALE, (Feb. 10, 2022) (summarizing existing and forthcoming EU

Program, for example, measures and discloses, with attribution to controlling U.S. parent entities, "85%-90% of annual man-made U.S. GHG emissions."[16] This second set of rules would, in effect, integrate the existing EPA reporting regime with the SEC's disclosure system in a manner that would be easier for investors and registrants to access and analyze. Moreover, approximately 40 foreign countries already require various forms of emissions disclosures.[17] The State of California and other states and local jurisdictions are considering the adoption of their own mandatory emissions reporting regimes.[18] The proposed second set of rules would efficiently integrate, aggregate, and collate those disclosures on a single form available to all investors through documents provided to the Commission.

Leading ESG researchers recognize that much of the information that would be required pursuant to the first set of rules is already in the market and could also be provided pursuant to the second set of rules. "Linda-Eling Lee, global head of ESG and climate research at index provider MSCI, Inc., said regulators in other countries are already asking companies for much of the information that the SEC plans to require."[19]

The Commission also recognizes this fact. While emphasizing the need for independent Commission action, the Commission's chair has explained that many U.S. issuers "have or are facing

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climate and other disclosure requirements), available at https://www.wilmerhale.com/en/insights/client-alerts/02102022-esg-the-eu-agenda-for-2022-what-you-need-to-know; Joanna Treacy, Yuki Sako, and Sook Young Yeu, *ESG Regulatory Developments in the UK, Japan, and Hong Kong,* K&L GATES (Jan. 14, 2022) ("Regulators in the United Kingdom and Hong Kong are sending a clear message that compliance with ESG disclosure requirements is important, and that greenwashing will not be tolerated. Asset managers have been warned and now need to take action. The Japanese regulator also seems not far behind."), available at https://www.klgates.com/ESG-Regulatory-Developments-in-the-UK-Japan-and-Hong-Kong-1-14-2022. For a now-dated but excellent overview of non-Commission reporting requirements see Cynthia A. Williams, *The Global Reporting Initiative, Transnational Corporate Accountability, and Global Regulatory Counter-Currents*, 1 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. 67, 72-74 (2016), specifically lists and cites several reporting requirements from both governments.

[16] Angela Jones, *EPA's Greenhouse Gas Reporting Program,* CONG. RES. SERV., Feb. 4, 2021, available at https://crsreports.congress.gov/product/pdf/IF/IF11754/1.

[17] See, *Mandatory Emissions Reporting Around the Globe,* UL, available at https://www.ul.com/news/mandatory-emissions-reporting-around-globe.

[18] See, e.g., *The Future of Climate-Related Disclosures in California*, SIDLEY AUSTIN LLP (Apr. 27, 2022); Erin Grubbs, Sarah Grey, and Brian D. Israel, *ESG Climate Disclosures: Will States Be the First to Act?* ARNOLD & PORTER (Feb. 15, 2022); Shellka Arora-Cox, *Alert: California Senate Passes the Climate Corporate Accountability Act,* PILLSBURY WINTHROP SHAW PITTMAN LLP (Feb. 14, 2022); Robert M. Smith, Buck B. Endemann, Ankur K. Tohan, and Matthew P. Clark, *California Bill Seeks Additional Greenhouse Gas Disclosures from Major Public Corporations,* K&L GATES (Feb. 2, 2021); Melissa Horne & Angela Levin, *Mandatory GHG Corporate Disclosure Bill Introduced in California,* TROUTMAN PEPPER (Feb. 1, 2021).

[19] Jean Eaglesham & Paul Kiernan, *Fight Brews Over Cost of SEC Climate-Change Rules,* WALL ST. J., May 17, 2022. See also Louis, Kamann, Barthet, and Simsek, *ESG: The EU's Agenda for 2022 – What You Need to Know* (summarizing existing and forthcoming EU climate and other disclosure requirements); Treacy, Sako, and Yeu, *ESG Regulatory Developments in the UK, Japan, and Hong Kong* ("Regulators in the United Kingdom and Hong Kong are sending a clear message that compliance with ESG disclosure requirements is important, and that greenwashing will not be tolerated. Asset managers have been warned and now need to take action. The Japanese regulator also seems not far behind.").

climate disclosure regulations in European Union countries, Japan, and other nations."[20] Consistent with this perspective, "European lawmakers have agreed to force roughly 28,000 foreign subsidiaries to comply with the Bloc's ESG rules," including emissions disclosure requirements.[21] Europe is strongly committed to imposing emission disclosure requirements on U.S. based entities because "[a]llowing foreign companies to apply potential laxer ESG standards was "politically impossible.""[22] Similar pressures are at work on a global basis.

Because the disclosures contemplated by this second set of rules are contingent on policies adopted by regulators other than the Commission, the possibility also emerges that these disclosures will be more expansive than those defined by the Proposed Rules. Legislation pending in California would, for example, mandate disclosure of Scope 3 emissions without exception.[23] Significant additional disclosure requirements will also likely be imposed by foreign regulators.[24] Regulators could also mandate disclosure of life-cycle emissions data and other more sophisticated and arguably informative metrics in addition to, or in lieu of, Scope 3 reporting requirements.[25] These disclosures, adopted by regulators other than the Commission, can also be informed by scientific expertise the Commission lacks.

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[20] Andrew Ramonas, *US Needs Climate Reporting as Foreign Rules Come, Gensler Says,* BLOOMBERG LAW, June 14, 2022 (quoting SEC Chairman Gary Gensler).

[21] Frances Schwartzkopff & John Ainger, *Europe Moves Closer to Enforcing ESG Rules on Foreign Firms,* BLOOMBERG LAW, Mar. 23, 2022.

[22] *Id.* (Quoting Pascal Durand, "the lawmaker overseeing the introduction of the EU's Corporate Sustainability Reporting Directive.")

[23] CLIMATE CORPORATE ACCOUNTABILITY ACT, SENATE BILL NO. 260 (2021-2022 REG. SESS.). For discussion and analysis of this pending legislation, see, e.g., *The Future of Climate-Related Disclosures in California*; Grubbs, Grey, and Israel, *ESG Climate Disclosures: Will States Be the First to Act?*; Arora-Cox, *Alert: California Senate Passes the Climate Corporate Accountability Act*; Smith, Endemann, Tohan, and Clark, *California Bill Seeks Additional Greenhouse Gas Disclosures from Major Public Corporations*; Horn & Levin, *Mandatory GHG Corporate Disclosure Bill Introduced in California*.

[24] Nigel Howarth, Clifford Chance, *UK Government Imposes Mandatory Climate-Related Financial Disclosure on Large UK Businesses* (Nov. 3, 2021); Patrick Bolton, Stefan Reichelstein, Marcin Kacperczyk, Christian Leuz, Gaizka Ormazabal, and Dirk Schoenmaker, *Mandatory corporate carbon disclosures and the path to net zero,* CENTRE FOR ECON. POL'Y RES. (Oct. 2021) (specifically, on page 3-4, discussing the current regulatory scheme in the UK, EU, and US); *Mandatory Emissions Reporting Around the Globe, UL* (Aug. 25, 2020).

[25] Robert S. Kaplan & Karthik Ramanna, *Accounting for Climate Change,* HARV. BUS. REV. (Nov. – Dec. 2021), available at https://hbr.org/2021/11/accounting-for-climate-change ("Scope 3 emissions are the fatal flaw in GHG reporting. The protocol's creators included them to encourage companies to exert influence over emissions that they don't control directly. For example, they could buy from or sell to companies with lower Scope 1 emissions, and collaborate with their suppliers and customers to reduce GHG emissions along their value chains. But the difficulty of tracking emissions from multiple suppliers and customers across multitier value chains makes it virtually impossible for a company to reliably estimate its Scope 3 numbers."); Robert S. Kaplan & Karthik Ramanna, *We Need Better Carbon Accounting. Here's How to Get There,* HARV. BUS. REV. (April 12, 2022), available at https://hbr.org/2022/04/we-need-better-carbon-accounting-heres-how-to-get-there **(**"The current GHG-accounting standard discourages supply-chain decarbonization."); See SEC comment letter from Alicia Seiger, et al., in reference to File Number S-7-10-22, THE SUSTAINABLE FINANCE INITIATIVE AT STANFORD UNIVERSITY (June 2022) (expressing concern that Scope 3 data are susceptible of double counting, and worse; can be materially influenced by boundary definitions; are easily structured to generate a false impression of progress toward climate objectives; and are likely inferior to other climate metrics).

The pace at which these exogenous disclosure requirements are adopted or amended could also be more rapid than the pace at which Commission might be able to operate. The lengthy rulemaking process required by the Administrative Procedures Act, combined with the possibility that rule proposals are stayed on appeal, suggests that reliance on exogenously defined disclosure requirements could generate a disclosure regime that adapts more rapidly to evolving circumstances than a disclosure regime maintained exclusively by the Commission. Timing considerations can be non-trivial given the rapid pace at which climate concerns evolve.

3. Voluntary Disclosure Rules. The third set of rules would accommodate and encourage voluntary reporting of emissions data on the same standardized form used to report disclosures mandated by other regulatory bodies and by the Commission's mandatory rules.

Voluntary reporting is already substantial. "Four out of five S&P 500 companies reported (Scope 1 and 2) emissions for 2020."[26] A recent survey of S&P500 firms confirm that 81% of a sample of the S&P 500 report Scope 1 and 2 emissions data, although with variation in the form of reporting.[27] The incentive for registered entities to engage in voluntary reporting will likely grow as an investor, customer, and employee concern over climate matters increases.

To encourage voluntary reporting, this third set of rules should contain a deep litigation safe harbor that would preclude all implied private rights of actions alleging defects in voluntarily disclosed information provided on the Commission's prescribed form.[28] The Commission and the Department of Justice would, of course, retain civil and criminal enforcement authority over those disclosures, and would therefore be able to prosecute false claims indicating greenwashing. The Commission's authority to accommodate voluntarily disclosed information is also far more easily defended under the federal securities laws than its authority to compel the novel measurement and reporting of greenhouse gas emissions.

The consistent, comparable, and efficient disclosures elicited by the second and third set of disclosure rules could capture a significant percentage of the disclosures that would otherwise be mandated by the Commission's current proposal. Put another way, the Commission's mandatory approach, as reflected in the currently pending rule proposal, is not the only strategy pursuant to which registrants can provide significant, consistent, and valuable climate emissions data. Voluntarism has a role to play as well.

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[26] Eaglesham & Kiernan, *Fight Brews Over Cost of SEC Climate-Change Rules* (citing data provider Refinitiv).

[27] Lynn M. LoPucki, *Corporate Greenhouse Gas Disclosures,* 56 U.C. DAVIS L. REV. 4 (forthcoming Nov. 2022) (Sample of 200).

[28] Support for rules that limit the implied private right of action can be found in Joseph A. Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority,* 107 HARV. L. REV. 961 (1994). Supreme Court opinions issued subsequent to the publication of that article hold that implied private rights of action should be narrowly construed and support the disimplication of private rights of action otherwise arising under the federal securities laws. See, e.g., *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc*., 552 U.S. 148 (2008). Litigation related factors also suggest that quantitative emissions dislsoures be furnished to, not filed with, the Commission.

4. Litigation Risk Calculus. The stratified rulemaking approach suggested in this comment letter offers a strategy that is Pareto-superior to the Proposed Rules.

If the Commission is correct that it possesses the authority to adopt rules that compel novel and potentially expensive emissions measurements, then the second and third sets of rules that rely on substantially more modest, traditional interpretations of Commission authority will also likely withstand appellate scrutiny. The Commission will then be able to elicit even more climate disclosure than it currently proposes by integrating disclosures compelled by authorities other than the Commission. These disclosures will also likely be updated more rapidly and will be able to induce more expansive voluntary reporting supported by a deeper litigation safe harbor.

If the Commission is incorrect as to its statutory authority, then, in the worst-case scenario, the entire first set of rules will be vacated. But even so, the second and third sets of rules could well survive appellate challenges because they rely on fundamentally more modest and traditional interpretations of Commission authority. And, even if the second and third sets of rules are also vacated, the Commission is no worse off for having adopted them. In the intermediate case, in which some but not all of the first set of rules are vacated, the Commission is again no worse off by having adopted the second and third set.

In sum, there is no credible state of nature in which the stratified rule structure described in this comment disadvantages the Commission. There are, instead, several credible scenarios in which the Commission clearly benefits by adopting the proposed stratified rules.

5. Conclusion. For the reasons stated above, the Commission should consider additional proceedings designed to implement the stratified disclosure design suggested in this comment.

Sincerely,

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