United States Senate

June 17, 2022

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: File Number S7-10-22

Dear Chair Gensler:

We write to express our strong support for the Securities and Exchange Commission's (SEC, the Commission) proposed amendments to its rules under the Securities Act of 1933 and the Securities Exchange Act of 1934, which would require registrants to provide climate-related information in their registration statements and annual reports. We thank you for your leadership in ensuring investors have the detailed, consistent, comparable, and reliable information they need to make informed capital allocation decisions.

This comment specifically addresses the Commission's proposed new subpart to Regulation S-K, which would require disclosure of a registrant's: 1) governance of climate-related risks; 2) material climate-related impacts on its strategy, business model, and outlook; 3) climate-related risk management; 4) greenhouse gas (GHG) emissions metrics; and 5) climate-related targets and goals. As the Commission notes, these disclosures are "fundamental to investors' understanding the nature of a registrant's business and its operating prospects and financial performance."[1] It is therefore imperative that they be filed rather than furnished, and presented alongside other key information about a registrant's business and financial condition.

We also strongly support the Commission's proposed provisions under Regulation S-X that would require disclosure of climate-related financial metrics in a note to a registrant's financial statements. Senator Reed is leading several of our colleagues in submitting a separate comment related to the proposed Article 14 of Regulation S-X, and we point your attention to that parallel effort as we focus on the provisions under Regulation S-K.

Below, we highlight areas for improvement that would strengthen the final rule, as well as several key elements of the proposed rule that we hope the Commission will preserve in their entirety in the final rule. We appreciate your consideration of these priorities, and we thank the Commission and its dedicated staff for designing a robust climate-related disclosure framework that will protect shareholders and provide the market with badly needed transparency.

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[1] Proposed rule, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," RIN 3235-AM87, p. 51. https://www.sec.gov/rules/proposed/2022/33-11042.pdf

Areas for improvement

1) Political influencing activities

We were disappointed to see no mention of lobbying or other influencing activities in the Commission's proposed rule. As we wrote to you on March 16, 2022,[2] registrants' anti-climate lobbying efforts—both directly and via their membership in trade associations and other dark money groups—have been some of the most damaging impediments to federal climate action. This lobbying has directly undermined climate action in the Congress and at executive agencies. And in many cases, these anti-climate lobbying efforts are abetted by individual companies that purport to have lofty climate commitments. That is why, in addition to mandating disclosure of progress towards climate-related goals, the SEC should require registrants to disclose political influencing activities. The basis for this requirement can be found throughout the proposed rule.

First, the proposed rule would require a registrant to disclose its processes for identifying, assessing, and managing climate-related risks ("risk management disclosure"). When describing the process of *identifying and assessing* climate risks, a registrant would be required to disclose, "How it considers existing or likely regulatory requirements or policies, such as GHG emissions limits." When describing the process of *managing* climate risks, a registrant would be required to disclose, "How it decides whether to mitigate, accept, or adapt to a particular risk."[3]

It is critical that the Commission understand that for emissions-intensive registrants, transition risk is policy risk. Such registrants can manage that risk in one of two ways. They can seek to transition their production processes and products to lower carbon alternatives. Or, they can seek to use their political influence *to prevent the climate transition entirely*. If a registrant is using its political influence to prevent the adoption of policies or regulatory requirements that would address the climate crisis, particularly when such an effort is at odds with the registrant's public-facing goals on climate, that political effort is a risk management strategy in itself, and it must be disclosed. It is also, we would note, a particularly risky risk management strategy, as numerous experts have warned that the longer it takes to implement climate policy measures, the greater the chances that carbon intensive firms will end up with significant stranded assets.[4]

Second, the rule would require a registrant to disclose whether and how its board sets climate-related targets or goals, and how the board oversees progress against those targets or goals ("governance disclosure: board oversight").[5] Political influencing disclosure could certainly "provide investors with insight into how a registrant's board considers climate-related risks."[6] The board oversees climate risk management, progress towards climate goals, *and* political influencing activities. The latter is part and parcel of the first two, and the Commission should require relevant disclosure in its final rule.

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[2] https://www.whitehouse.senate.gov/news/release/ahead-of-expected-sec-climate-rule-whitehouse-calls-for-increased-climate-lobbying-disclosure-requirements

[3] Proposed rule, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," p. 101.

[4] *See*, *e.g.*, Jean-François Mercure, *et al*., "Macroeconomic impact of stranded fossil fuel assets," *Nature Climate Change*, Vol. 8, pgs. 588 – 593 (2018), https://www.nature.com/articles/s41558-018-0182-1

[5] Proposed rule, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," p. 94.

[6] Ibid., p. 95.

With respect to what should be disclosed, we believe that the Commission should require registrants to disclose the percentage (by time or dollars spent) of lobbying (both direct and indirect through trade associations and other groups of which a registrant is a member) devoted to both pro- and anti-climate legislation and regulations; the specific legislation or regulations on which companies lobbied for or against; and the specific individuals lobbied. Current lobbying disclosure rules are inadequate, and do not provide investors with the level of granularity necessary to carefully assess a registrant's climate-related political influencing activities.

2) Quantitative threshold for Scope 3 disclosure

As the Commission notes,[7] capital markets are now assigning financial value to Scope 3 emissions: indirect emissions that result from a company's activities, but are generated from sources that are not owned or controlled by the company. Although registrants would be required to assess the qualitative factors that might make Scope 3 emissions material, this is an inherently subjective measure. The rule does not currently propose a firm quantitative threshold for determining materiality of Scope 3 emissions, but it notes that some companies already rely on a quantitative measure for their voluntary disclosures. For example, the Science Based Targets Initiative establishes that if a company's relevant Scope 3 emissions are 40 percent or more of its total emissions, a Scope 3 target is required.[8]

Although we support the Commission's explanation of materiality throughout the proposed rule, in the absence of guardrails, allowing registrants to determine the materiality of their Scope 3 emissions may lead to underreporting. We feel the Commission should establish a quantitative threshold for mandatory disclosure of Scope 3 emissions.[9] For instance, a study by Ceres found that few of the highest-emitting companies in the North American food and agriculture sector are voluntarily disclosing Scope 3 emissions. This is despite the fact that Scope 3 emissions from supply chains represent 80 percent or more of many food companies' total emissions, including from agriculture and land-use change (more on that point below).[10]

3) Sector-specific disclosures

The proposed rule states that for registrants in the financial sector, Scope 3 emissions disclosures "would likely include the emissions from companies that the registrant provides debt or equity financing to ('financed emissions')."[11] We strongly urge the Commission to consider strengthening this provision to explicitly require financed emissions disclosure from all reporting financial institutions.

This should include mandatory disclosure of so-called "facilitated emissions" from off-balance sheet activities, like underwriting, that constitute services rather than direct financing. The proposed rule repeatedly references the Partnership for Carbon Accounting Financials (PCAF), a group that has already explored a framework for facilitated emissions disclosure.[12] Capital

[7] Ibid., p. 173.
[8] Ibid., p. 165.
[9] The Commission poses this question on p. 176 of the proposed rule.
[10] https://www.ceres.org/climate/ambition2030/food#company-benchmark
[11] Proposed rule, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," p. 196.
[12] https://carbonaccountingfinancials.com/files/consultation-2021/pcaf-capital-market-instruments-paper.pdf

markets transactions are key products that banks sell to their corporate clients; as such, any emissions enabled by these transactions result from "use of the registrant's products by third parties" and are Scope 3 emissions. And although investors ultimately hold these capital markets instruments for the long term, banks should still disclose their facilitated emissions. As PCAF notes: "Double counting is common when it comes to Scope 3 GHG accounting, and it should not necessarily mean that banks should avoid accounting for or reporting facilitated financing activities."[13]

Finally, the Commission should make clear that Scope 3 emissions from the forest, food, and land sectors are material. These land-intensive industries make significant contributions to global emissions, particularly from land-use change and deforestation driven by tropical commodities. Downstream registrants contributing to tropical commodity-driven deforestation include major food, beverage, and retail companies, and their forest and land-use emissions are currently underreported.[14] The Commission should explicitly require companies in the forest, food, and land-use sectors, and other companies with high natural resource dependencies in tropical commodity supply chains, to disclose these Scope 3 emissions. Registrants could rely on guidance from the Task Force on Nature-Related Financial Disclosures, which is closely aligned with the guidance from the Task Force on Climate-Related Financial Disclosures that underpins the SEC's proposed rule.

Key elements of the rule to preserve

1) Scope 3 disclosure

Disclosure of Scope 1 and 2 emissions alone conveys a very incomplete picture of the climate-related risks to which companies are exposed. Indeed, many companies that are *most exposed* to climate transition risks are also the ones for whom Scope 3 emissions comprise the largest share of total emissions—for example, fossil fuel producers.

A study of 25 major multinational corporations found that Scope 3 emissions accounted for 87 percent of a particular company's total emissions on average, but only 8 of 25 companies voluntarily disclosed even a moderate level of detail on their plans to address those emissions.[15] If registrants are not required to report their Scope 3 emissions, the most carbon-intensive companies that are least prepared for a low-carbon transition will give investors a misleading picture of their portfolio risk exposure. And, as investors have noted, requiring only Scope 1 and 2 disclosure can incentivize polluting companies to merely outsource their emissions to other partners in their supply chains, shuffling around their transition risks but not actually addressing them.[16]

[13] Ibid.
[14] https://www.sec.gov/comments/climate-disclosure/cll12-8915614-244869.pdf
[15] https://newclimate.org/2022/02/07/corporate-climate-responsibility-monitor-2022/
[16] https://www.sec.gov/comments/climate-disclosure/cll12-20118792-271629.pdf

The technical work of calculating Scope 3 emissions is well underway.[17] The Commission's rule is thoughtfully crafted and not overly burdensome, requiring disclosure of Scope 3 emissions only if particular circumstances are met; as currently written, the proposed rule only mandates disclosure if Scope 3 emissions are material or if the registrant has set a GHG emissions reduction target that includes Scope 3. The Commission has proposed a targeted safe harbor for Scope 3 emissions data as long as they are disclosed in good faith. Furthermore, if no granular activity data are available to a registrant, the registrant is permitted to use an emission factor based on economic data, which the Environmental Protection Agency publishes. This flexibility may be important for some privately held companies with data collection challenges, like small family farm operations, that supply registrants responsible for Scope 3 disclosures. Finally, once all registrants are disclosing Scope 1 and 2 emissions, information on Scope 3 will be much more accessible—and all registrants have an additional year to begin complying with the Scope 3 disclosure requirement beyond the compliance date for Scope 1 and 2 disclosure. As the proposed rule notes, "because a registrant's Scope 3 emissions consist of the Scopes 1 and 2 emissions of its suppliers, distributors, and other third parties in the registrant's value chain, to the extent those parties become subject to the proposed rules, the increased availability of Scopes 1 and 2 emissions data…should help ease the burden of complying with the Scope 3 emissions disclosure requirement."[18]

2) Targets and goals disclosure

The proposed rule would require a registrant to disclose data on whether it is making progress toward achieving climate-related targets or goals, and how such progress has been achieved. A registrant would be required to update this disclosure each fiscal year by describing the actions taken during the year to achieve its targets or goals, such as increasing energy efficiency, transitioning to lower carbon products, or engaging in carbon removal.[19]

This is a crucial element of the Commission's proposal. Corporate greenwashing and toothless emission reduction commitments have proliferated in recent years, and the Commission is right to require companies to disclose their progress to investors. Sustainability pledges are meaningless if investors cannot see how companies are performing against their self-declared goals. And there is absolutely no reason not to mandate this sort of disclosure, since the registrants themselves are the ones setting the targets.

3) Materiality threshold

The proposed rule would require a registrant to disclose any climate-related risks that are reasonably likely to have a *material impact* on the registrant if they manifest over the short, medium, or long term. As discussed above, whether or not a registrant discloses its Scope 3 emissions is also determined, in part, by whether such emissions are material.

Because this proposed disclosure framework relies so heavily on materiality determinations, we were pleased to see the Commission articulate a threshold for materiality that is consistent with

[17] *See*, *e.g.*, https://www.persefoni.com/newsroom/persefoni-public-comment-on-sec-proposed-rule-enhancement-and

[18] Proposed rule, "The Enhancement and Standardization of Climate-Related Disclosures for Investors," p. 213.

[19] Ibid., p. 269.

precedent and relies on both quantitative and qualitative considerations. As the proposed rule reiterates, a matter is material "if there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote."[20] This comports with the longstanding definition established by the Commission in 17 CFR 240.12b-2 and affirmed by the Supreme Court.

There is little doubt that a *reasonable investor* would consider these disclosures important. Indeed, the market is well ahead of the Commission on this issue. Investors have been saying for years that the status quo of voluntary, piecemeal climate risk disclosure is insufficient. An analysis of hundreds of comments submitted in response to the SEC's 2016 Regulation S-K Concept Release found that more than 90 percent of investors felt voluntary reporting was inadequate to meet their demand for climate-related information. In these comments, investor respondents stressed "the costs to investors of having to rely on less reliable stakeholder-oriented ESG information outside the public filings." Comments from registrants and trade associations, meanwhile, said exactly the opposite, claiming that voluntary sustainability reporting adequately met investor demand for information.[21] The SEC's mandate is investor protection, not issuer protection, and it is clear where the vast majority of investors land on this issue. The market demands this information, and it is the Commission's job to provide it.

Thank you again for your hard work on this rule, and for considering our recommendations.

Sincerely,

Brian Schatz
United States Senator

Sheldon Whitehouse
United States Senator

Elizabeth Warren
United States Senator

Sherrod Brown
United States Senator

[20] Ibid., p. 64.
[21] https://clsbluesky.law.columbia.edu/2019/11/05/is-there-too-much-disclosure/

Martin Heinrich
United States Senator

Alex Padilla
United States Senator

Tammy Baldwin
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