Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F. Street NE
Washington, DC 20549

June 17, 2022

Re: The Enhancement and Standardization of Climate-Related Disclosures for investors, Release Nos. 33-11042, 34-94478; File No. S7-10-22

Thank you for the opportunity to comment on the Securities and Exchange Commission's proposed rules mandating climate-change disclosures for publicly traded companies. The American Legislative Exchange Council (ALEC) encourages you to withdraw the Proposal, or otherwise reject it. The Proposal lacks any foundation in the SEC's authorizing legislation and fails to acknowledge the work that companies are already doing to disclose climate-related actions through sustainability reports. Furthermore, the impact of the Proposal would fall primarily on new, innovative businesses.

ALEC is the nation's largest, non-partisan voluntary membership organization of state legislators.[1] ALEC and its legislative members are dedicated to advancing the principles of limited government, free markets, and federalism. As an organization, ALEC functions as "a forum for stakeholders to exchange ideas and develop real, state-based policy solutions to encourage growth, preserve economic security and protecting hardworking taxpayers."[2]

ALEC is dedicated to researching and promoting sound policy aimed at creating a pro-growth, pro-employment, and pro-innovation atmosphere in state economies.[3] Policies that promote economic and technological growth and increase state competitiveness are achieved by reducing excessive government regulations, ensuring that policymakers and regulators alike are focused on figuring out the best information to help investors and other private individuals determine whether companies promote market efficiency, competition, liquidity, and are otherwise financially sound investments. Similarly, addressing climate concerns requires a free-market approach to environmentalism, promoting "the mutually beneficial link between a robust economy and healthy environment."[4] ALEC members believe in responsible stewardship of our planet, including its preservation and the wise use of its resources.

ALEC members are at the forefront of developing sound, fiscally responsible, and free market policies to address the issues that states now face. The adopted policies include the *Resolution on Environmental*

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[1] American Legislative Exchange Council, "About," https://alec.org/about/.
[2] Ibid.
[3] *E.g.*, American Legislative Exchange Council, Tax and Fiscal Policy Task Force, "Task Force Description," https://alec.org/task-force/tax-and-fiscal-policy/.
[4] American Legislative Exchange Council, Energy, Environment and Agriculture Task Force, "Task Force Description," https://alec.org/task-force/energy-environment-and-agriculture/.

and Economic Stewardship,[5] which recognizes the need for states to protect, conserve, and reasonably manage the natural environment -- and the impact of a changing climate. More specifically, the Resolution acknowledges the need to support innovation and prioritize environmental stewardship, encouraging corporations and state agencies to develop technologies that will help reduce emissions while ensuring energy reliability.

Similarly, ALEC adopted a *Resolution Opposing Securities and Exchange Commission and White House Mandates and Other Forms of Coercion on Climate-Related Financial Matters*.[6] This Resolution, while criticizing the SEC's Proposal and White House mandates, recognizes the leading role of the American private sector in adopting sustainability reporting practices independent of government requirements or outside pressure. It cautions, though, that the forced imposition of environmental, social, and governance (ESG) criteria will have negative consequences for the American economy that include increased energy costs and inflation, reduced job creation, unfunded pension liabilities, and more.

ALEC opposes the Proposal because it would substitute government mandates – and various liabilities with those mandates – where the private sector is already voluntarily providing much of the information the SEC would require. Second, the Proposal violates basic standards of limited government by, for example, exceeding the agency's authority as expressed by Congress, and would require the disclosure of information that is not material for investors.

The Proposal is Unnecessary Because the Private Sector Is Already Leading

The Proposal seeks to accomplish through regulatory fiat what the private sector is presently accomplishing collaboratively. The private sector's behavior over the past decade belies the myth that a top-down approach is the only way to address climate concerns. At best, the view that direct federal government action is the only solution ignores the private sector's leadership; at worst, it seeks to displace the private sector with agency action.

Over the past decade or so, because of increased demand from the public – not just investors, but also consumers and others – most publicly traded companies crafted sustainability reports. The percentage of companies with sustainability reports has grown from about 20% a decade ago to more than more than 92% of all S&P 500 Index companies and 70% of the Russell 1000 Index companies as of late 2021.[7]

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[5] American Legislative Exchange Council, Resolution on Environmental and Economic Stewardship (August 25, 2021), https://alec.org/model-policy/resolution-on-environmental-and-economic-stewardship/.

[6] American Legislative Exchange Council, Resolution Opposing Securities and Exchange Commission and White House Mandates and Other Forms of Coercion on Climate-Related Financial Matters (December 16, 2021), https://alec.org/model-policy/resolution-opposing-securities-and-exchange-commission-and-white-house-mandates-on-climate-related-financial-matters/.

[7] Governance and Accountability Institute, "92% of S&P 500 Companies and 70% of Russell 1000 Companies Published Sustainability Reports in 2020, G&A Institute Research Shows," November 16, 2021. https://www.ga-institute.com/nc/storage/press-releases/article/92-of-sp-500r-companies-and-70-of-russell-1000r-companies-published-sustainability-reports-in-202.html.

The one-size-fits-all disclosure regime proposed by the SEC will cost substantial amounts of money, ranging from hundreds of thousands of dollars[8] to millions of dollars per year.[9] If enacted, this Proposal will harm companies without the resources to hire professional consultants or compliance officials to fulfill the Proposal's requirements.

Finally for purposes of this section, allowing the private sector to lead and innovate voluntarily has one more distinct advantage: an absence of civil (or criminal) liability. As proposed, the SEC rule would likely cause companies to sustain some measure of potential liability for any statements perceived as misleading or fraudulent. This would cause companies to be overly cautious and slow innovation that can benefit the environment.

The Proposal Would Violate Principles of Limited Government by Exceeding the Bounds of the Agency's Statutory Authority

Principles of limited government require that Congress and the Executive Branch – including commissions and agencies – recognize both constitutional restraints on authority and the philosophical view that government dictates can interfere with private sector efforts to solve society's problems. In this case, Congress empowered the SEC to promulgate rules governing securities and issuers, defining accounting and technical terms,[10] along with what is "necessary or appropriate for the proper protection of investors and to insure fair dealing in the security."[11]

Congress granted the SEC only specific, limited authority. None of its enabling statutes – The Securities Act or the Securities Exchange Act – provide the broad authority necessary to promulgate climate change related disclosure rules. Instead, the authority Congress granted fulfills one of three primary purposes: "protecting investors, facilitating capital formation, and fostering fair, orderly, and efficient markets."[12]

Congress authorized the SEC to promulgate rules relating to the disclosure of material financial and securities information from a regulated company including the forms in which that information is submitted. Nothing in its authorizing statutes permits the SEC to require disclosure of climate-change risk information which, by its nature, relates neither to securities nor to a regulated company's financial health. Moreover, the information sought through the Proposal would not help an investor determine whether a company is a good financial risk.

The SEC will certainly struggle to explain why it suddenly believes Congress granted it the authority to adopt climate-change risk related rules when nearly eight years ago, it reached the opposite conclusion, even noting the debate about whether to extend reporting requirements beyond securities regulation

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[8] Jane Fuller, "Sustainability reporting will cost," Accounting and Business, April 2022, https://abmagazine.accaglobal.com/global/articles/2022/apr/comment/sustainability-reporting-will-cost.html.

[9] The Sustainability Institute by ERM, "Costs and Benefits of Climate-Related Disclosure Activities by Corporate Issuers and Institutional Investors," https://www.sustainability.com/globalassets/sustainability.com/thinking/pdfs/2022/costs-and-benefits-of-climate-related-disclosure-activities-by-corporate-issuers-and-institutional-investors-17-may-22.pdf.

[10] *See, e.g.* 15 U.S.C. §77s(a)

[11] 15 U.S.C. § 78m(a)

[12] Securities and Exchange Commission, Statement of Commissioner Pierce, "We are Not the Securities and Environment Commission – At Least Not Yet," March 21, 2022, https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.

would likely require additional Congressional permission.[13] Without Congressional authorization, extending reporting requirements beyond securities would fundamentally alter the current regulatory scheme. The Supreme Court has made it clear that such a fundamental transformation without Congressional permission is improper. *See*, *e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 303 (2013),[14] *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120 (2000).

The Environmental Protection Agency (EPA) has a much broader mandate from Congress to protect, among other things, clean air, and water. In 2016, the EPA sought to add additional regulatory and permitting requirements for emissions from new vehicles under the Clean Air Act. The Supreme Court resoundingly rejected this attempt to redefine the purpose of the Clean Air Act, noting in part that the EPA's:

> interpretation is unreasonable because it would bring about an enormous and transformative expansion in [its] regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly it if wishes to assign to an agency decision of vast "economic and political significance."

Utility Air Regulatory Group v. E.P.A., 573 U.S. 302, 324 (2014).

If the Supreme Court determined that the EPA does not have the authority to expand its regulatory authority to compel a permitting regime for greenhouse gas emissions, an agency such as the SEC, with a narrow focus assigned by Congress, certainly does not have the authority to compel disclosure of climate-change related risks.

Ultimately, the Proposal's disclosure requirements are immaterial for "protecting investors, facilitating capital formation, or fostering fair, orderly, and efficient markets." An average, reasonable investor is unlikely to consider climate-change disclosures as significantly altering "the 'total mix' of information made available." Instead, mandating disclosure is likely to cause a company's management to "fear of exposing itself to liability for [otherwise] insignificant omissions or misstatements" and result in a decision to "bury the shareholders in an avalanche of trivial information" which is "a result that is hardly conducive to informed decision making." *TSC Industries, Inc. v. Northway, Inc*., 426 U.S. 438, 448-449 (1976).

The Proposal oversteps the SEC's authority as defined by Congress. It would create a disclosure regime that is unnecessary, and counterproductive, for investors by requiring minute non-financial details likely to confuse the average shareholder. More importantly, the private sector is already leading, creating

[13] *See generally*, Sec. and Exchange Commission, Concept Release, Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,971 (Apr. 22, 2016). ("In 1975, the Commission considered a variety of 'environmental and social' disclosure matters, as well as its own authority and responsibilities to require disclosure under the federal securities laws. Following extensive proceedings on these topics, the Commission concluded that it generally is not authorized to consider the promotion of goals unrelated to the objectives of the federal securities laws when promulgating disclosure requirements, although such considerations would be appropriate to further a specific congressional mandate.")

[14] "We have applies *Chevron* [to strike down regulations] where concerns about agency self-aggrandizement are at their apogee: in cases where an agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme."

voluntary disclosure regimes for public consumption independent of financial statements. These sustainability reports provide a better picture of how companies are seeking to protect the environment. Because of these facts, the SEC's climate-change disclosure proposal is unnecessary, and ALEC strongly urges the Commission to withdraw it.

Sincerely,

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L. Joseph Trotter III,
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