June 17, 2022

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549
VIA EMAIL

Re: The Enhancement and Standardization of Climate-Related Disclosures for Investors (File No. S7-10-22)

Dear Ms. Countryman:

We write to provide our perspective on the Commission's recent proposal in the above-referenced release (the "Proposal"). In our view, the Proposal suffers from several serious deficiencies, many of which have been raised and examined by other commenters. We focus here on deficiencies that place the Proposal at odds with the Commission's appropriate role and statutory mandate, into which, as former Chairmen and Commissioners, we believe we have particular insight.

We fear that the Proposal's disregard of financial materiality, together with what we view as the almost certain judicial reaction (based on existing case law) to inevitable challenges to an eventual rule, ultimately will do irreparable damage to the SEC's regulatory and enforcement program. The Commission's reputation and ability to pursue its mission would be placed at risk. We strongly urge the Commission to rescind or substantially modify the Proposal.

I. The Standard for Climate-Related Disclosure Should Remain Financial Materiality

The Commission has long recognized that materiality is the "cornerstone" of the federal securities laws.[1] Familiar black-letter securities law holds that information is material if "there is a substantial likelihood that a reasonable investor would consider it important" in making an investment decision;[2] or alternatively, if there is a "substantial likelihood" that, in the eyes of the reasonable investor, the facts at issue "significantly altered the 'total mix' of information made available."[3] The "reasonable investor" is the critical reference point in this analysis. The standard is objective[4]; the subjective desires of particular investors, whether few or many, do not change it. The standard is oriented toward financial outcomes[5], for it inquires about the relevance of

[1] Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916, 23924 (April 22, 2016).
[2] Proposal, 87 Fed. Reg. at 21351; TSC Indus., Inc. v. Northway Inc., 426 U.S. 438, 449 (1976); Basic Inc. vs. Levinson, 485 U.S. 224, 231-32 (1988).
[3] Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 38 (2011) (quoting *Basic*, 485 U.S. at 231-32).
[4] *See, e.g.*, Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds, 568 U.S. 455, 459 (2013) ("[M]ateriality is judged according to an objective standard.").
[5] *See, e.g.*, Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 12:62 ("It has been said that 'materiality' encompasses those facts 'which in reasonable and objective contemplation might affect the value of the corporation's stock or securities.'" (quoting Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963)).

information to investors in securities, and the Supreme Court has explained that the defining feature of such financial activity is the expectation of profit.[6] Information is relevant to someone whose aim is the expectation of profit if it bears on whether that expectation will be realized. Such information is the only sort that passes muster as material under the objective standard, for that standard abstracts investors from their subjective, particular preferences, sweeping in only information that is relevant to all reasonable investors—and information relevant to risks and returns is the only sort that all reasonable investors necessarily care about.

The Commission has long limited disclosure obligations to material information, in order to give investors what they need without inundating them with useless or irrelevant information. Thus, for example, the Commission explained in 1975, specifically regarding environmental and social disclosures, that it has generally "requir[ed] disclosure only of such information as the Commission believes is important to the reasonable investor—'material information.'"[7] In the Commission's view, this limitation is "necessary in order to insure meaningful and useful disclosure documents of benefit to most investors without unreasonable costs to registrants and their shareholders."[8] Likewise, two years later, the Commission's Advisory Committee on Corporate Disclosure recommended specifically that, with respect to "social and environmental information," the Commission require disclosure "only when the information in question is material to informed investment or corporate suffrage decision-making or required by laws other than the securities laws."[9]

The Proposal abandons these prudent pronouncements and the longstanding practice they represent. Instead, the Proposal would require the disclosure of, and in many cases the creation of, mountains of financially immaterial information. It is difficult to imagine how Scopes 1, 2, or 3 emissions in and of themselves could be financially material with respect to the vast majority of companies.[10] That is true, among other reasons, because information about greenhouse gas emissions will fail in many cases to provide investors any basis for a reasonable prediction about expenses that companies will face from future statutory, regulatory, and public opinion changes (the rationale the Commission advances in its release for the relevance of Scopes 1, 2, and 3 to investors).[11] Moreover, disclosure of the effects of "physical" and "transition" risks—risks that are largely if not entirely speculative—on each line item of a registrant's financial statements to a 1% threshold[12] seems almost a perfect example of the "avalanche of trivial information" the Supreme Court cautioned could "bury investors" and thus impede their informed decision-

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[6] SEC v. W.J. Howey Co., 328 U.S. 293, 298 (1946).

[7] Environmental and Social Disclosure, 40 Fed. Reg. 51,656, 51,660 (Nov. 6, 1975); *see also* TSC Indus., Inc., 426 U.S. at 449; Basic Inc., 485 U.S. at 231-32; Proposal, 87 Fed. Reg. at 21351 ("As defined by the Commission and consistent with Supreme Court precedent, 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.").

[8] Id.

[9] Report of the Advisory Committee on Corporate Disclosure to the SEC (Nov. 3, 1977) at D-21, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1977_1103_AdvisoryDisclosure.pdf.

[10] *See* 87 Fed. Reg. at 21374, 21377.

[11] *See id.* at 21375.

[12] *Id.* at 21365-66.

making.[13] The same applies to the Proposal's climate-related governance and risk management disclosures.[14]

This perhaps explains why the Proposal does not hide the fact that its purpose is not to elicit financially material information. Indeed, the Proposal appears to admit that material climate-related risks are already subject to disclosure under existing rules, as the Commission previously expressed in its 2010 interpretive guidance regarding climate change disclosures.[15] The Commission acknowledges in the Proposal that "[a] number of [its] existing disclosure requirements may elicit disclosures about climate-related risks."[16] It also "agree[s] that registrants are currently required to disclose material financial impacts on the financial statements."[17]

Moreover, throughout the Proposal, the Commission refers to "decision-useful" information rather than "material" information, a formulation that is perhaps carefully designed to skirt or obfuscate the issue of materiality. Remarkably, the Commission even appears to concede that it does not feel itself bound by the materiality standard, asking commenters whether it should eliminate the materiality condition for Scope 3 emissions and demanding the disclosure of Scopes 1 and 2 information without any limitation to situations in which such information is material.[18]

Instead, the Commission's stated purpose for the Proposal is to provide "consistent, comparable, and reliable" information about "climate-related risks"[19] in response to purported "investor demand."[20] Rather than foster the provision of *material* information, the Commission seeks to require "additional transparency" that could be "relevant to investors when making investment or voting decisions."[21] These justifications, far afield from financial materiality, are not an appropriate basis for some of the most extensive regulatory proposals in the Commission's history.

Certainly, climate risks could conceivably be material to a particular company's financial performance. If the Commission has concluded that such risks are not being adequately disclosed under its current rules,[22] it should address those specific circumstances, rather than adopting the

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[13] See TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 448-49 (1976); see also Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23916, 23919 (April 22, 2016) ("There is also a possibility that high levels of immaterial disclosure can obscure important information or reduce incentives for certain market participants to trade or create markets for securities.").
[14] 87 Fed. Reg. at 21359-62.
[15] Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6289 (Feb. 8, 2010).
[16] 87 Fed. Reg. at 21413; *see also* id. ("The 2010 Guidance emphasized that if climate-related factors have a material impact on a firm's financial condition, disclosure may be required under current Item 101 (Description of Business), Item 103 (Legal Proceedings), Item 105 (Risk Factors), or Item 303 (MD&A) of Regulation S-K.").
[17] 87 Fed. Reg. at 21368.
[18] *Id.* at 21377, 21381.
[19] *Id.* at 21335.
[20] *Id.* at 21394; 21424-25.
[21] *Id.* at 21368.
[22] The Commission complains that current disclosures requirements are "principles-based" and thus depend upon the "judgment of management." 87 Fed. Reg. at 21413. If, in the Commission's view, registrants are currently abusing their discretion and consequently are failing to disclose material climate risks, the Commission should address those areas specifically.

Proposal's blunderbuss approach. The standard for any additional disclosure requirements regarding climate-related risks should remain financial materiality.

II. The Effort to Dictate Affirmative Emissions Standards Is Beyond the Commission's Authority

Perhaps more fundamentally, the Proposal oversteps the Commission's congressionally delegated regulatory authority. The Commission's rulemaking powers simply do not authorize it to require disclosure of the vast quantities of immaterial information the Proposal contemplates.

In effect, though nominally framed as an investor protection initiative, the Proposal represents a roundabout way of regulating greenhouse gas emissions themselves, by handing a weapon to climate advocates. Environmental regulation is, however, not within the scope of the Commission's statutory ambit. The Supreme Court has instructed that in construing the scope of a grant of rulemaking authority to an agency, "the words of [the] statute must be read in their context and with a view to their place in the overall statutory scheme," and "a degree [of] common sense" must be employed to determine "the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[23] It beggars belief that Congress would have delegated to the Commission the authority to set substantive climate policy through entrusting to it the authority to prevent fraud and ensure orderly markets.

The Commission asserts that it has "broad authority to promulgate disclosure requirements that are 'necessary or appropriate in the public interest or for the protection of investors'" and that the Proposal would further those aims.[24] Yet, neither the public interest nor the protection of investors adequately supports the Proposal. As noted above, the Proposal would require the disclosure of volumes of immaterial information. Absent materiality, there is no plausible connection between the Proposal and the protection of *investors*, that is, of those purchasing or selling securities with the expectation of profit.[25]

Nor is the "public interest" carte blanche to regulate outside of the context of the Commission's enabling statute.[26] "[T]he use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare."[27] Yet the Proposal presupposes exactly that. Moreover, the amount of and complexity of the information required by the Proposal would not be in the "public interest" as it would overload investors with complex information and obscure vital decision-making information.

No federal agency has any power to make rules "unless and until Congress confers power upon it."[28] As the Commission's Advisory Committee affirmed in 1977, "the Commission's

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[23] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) (citations and quotation marks omitted).
[24] 87 Fed. Reg. at 21335 (citing 15 U.S.C. §§ 77g, 78l, 78m, and 78o).
[25] *See* W.J. Howey Co., 328 U.S. at 298.
[26] *See* Andrew N. Vollmer, Does the SEC Have Legal Authority to Adopt climate-Change Disclosure Rules, Mercatus Center (Aug. 2021) at 5, https://www.mercatus.org/system/files/vollmer_-_policy_brief_-_does_the_sec_have_legal_authority_to_adopt_corporate_disclosure_rules_on_climate_change_-_v1.pdf (citing NAACP v. FPC, 425 U.S. 662 (1976)).
[27] NAACP v. FPC, 425 U.S. 662, 669 (1976).
[28] Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).

present statutory mandate extends only to information material to informed investment and corporate suffrage decision-making."[29] Congress has not expanded the Commission's authority to issue climate disclosure rules in the intervening time. To the contrary, it has—quite recently—specifically rejected it.[30]

The Proposal represents a dramatic shift in the Commission's time-honored use of its disclosure authority. If finalized, it will almost certainly be challenged in court and rejected. Standing alone, this is reason enough not to pursue it.

Equally concerning, the Commission has no special competence, let alone expertise, in climate science. As its mission suggests, its expertise is limited to financial markets. Moreover, the Commission is not the appropriate body to regulate climate-related matters, even if framed in terms of investor protection. Indeed, the Commission's heavy reliance on existing disclosure protocols developed by the Task Force on Climate-related Financial Disclosures (TCFD) and frequent citation of international climate organizations underscore that the agency itself does not have the necessary expertise to address these issues, choosing instead to rely on third parties to regulate in this area.

Nevertheless, with the Proposal the Commission embarks on a misadventure in climate regulation, by seeking to mandate disclosure of information climate activists have long sought in order to conduct pressure campaigns to achieve their desired political outcomes. Its frequent references to "investor demand"—a wholly inappropriate substitute for financial materiality[31]—reveal that the Commission is listening to some investors, *i.e.* those with a particular climate agenda,[32] and not others. Given that some investors demand additional disclosures and other investors demand that there shall be no additional disclosures, the Commission must have a reason to choose a side other than investor demand—yet it has no adequate reason for siding with the investors who want additional disclosures. This unreasoned decision to privilege certain investors over others is arbitrary and capricious under the Administrative Procedure Act.

As others have aptly pointed out,[33] Congress expressly delegated climate disclosure regulation to the Environmental Protection Agency—which possesses the relevant expertise—via the Clean Air Act of 1974, forty years after Congress set out the Commission's regulatory authority under the federal securities laws.[34] These matters are appropriately addressed by Congress and the agencies it has specifically tasked with environmental regulation—not the Commission.

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[29] Report of the Advisory Committee on Corporate Disclosure to the SEC (Nov. 3, 1977) at D-8, http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1977_1103_AdvisoryDisclosure.pdf.
[30] *See* H.R. 3623, Climate Risk Disclosure Act of 2019 § 6(a) (directing the Commission, in consultation with the EPA, the NOAA, and others, to issue "climate-related risk disclosure rules").
[31] *See, e.g.*, United States v. Litvak, 889 F.3d 56, 59 (2d Cir. 2018) ("Because the applicable materiality test is an objective one, evidence of [an] idiosyncratic and erroneous belief [is] irrelevant.").
[32] Letter of Lawrence A. Cunningham et al. to SEC re Proposal on Climate-Related Disclosures for Investors, (April 25, 2022) at 3-5, https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf.
[33] *See* id. at 13; Vollmer, supra note 26, at 2.
[34] Indeed, the Proposal would to a significant extent duplicate the EPA's existing Greenhouse Gas Reporting Program, a fact the Commission implicitly acknowledges, noting that the EPA's rules cover 85-90% of all GHG emissions from over 8,000 facilities in the United States. 87 Fed. Reg. at 21414.

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The Proposal represents an unprecedented and unjustified effort beyond financial materiality and engages the Commission in matters beyond its statutory remit. Should it finalize the Proposal, the Commission endangers its credibility and risks almost certain reversal in court. It thereby endangers its proper mission, namely, the protection of investors, maintenance of fair, orderly, and efficient markets, and the facilitation of capital formation.

Respectfully,

Richard C. Breeden
Chairman (1989-1993)

Harvey L. Pitt
Chairman (2001-2003)

Philip R. Lochner, Jr.
Commissioner (1990-1991)

Richard Y. Roberts
Commissioner (1990-1995)

Paul S. Atkins
Commissioner (2002-2008)