U.S. Chamber of Commerce

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February 27, 2023

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

Via email: rule-comments@sec.gov

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

Dear Ms. Countryman:

The U.S. Chamber of Commerce writes to further supplement its comments[1] on the Commission's proposed rules regarding climate-related disclosures[2] in light of two recent regulatory developments: the issuance of a final rule by the Department of Labor[3] and the issuance of a notice of proposed rulemaking by the Federal Acquisition Regulatory Council.[4] These regulatory developments conflict with a significant assumption underlying the Commission's proposal and fundamentally alter the cost-benefit calculation; they must be factored into the Commission's analysis.

The Commission's proposal is premised on the assumption that environmental considerations are *often* "important to investment decisions."[5] The Chamber has already explained that this assumption is not accurate,[6] and the Department of Labor's final rule provides further confirmation. Like the Commission, the Department of Labor had originally assumed that climate-related information was often financially material. Thus, in 2021, the Department had proposed to amend its rules governing Employee Retirement Income Security Act (ERISA)-covered employee benefit plans "to clarify that

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[1] *See* Comments of the U.S. Chamber of Commerce, File No. S7-10-22 (June 16, 2022) https://www.sec.gov/comments/s7-10-22/s71022-20131892-302347.pdf ("Chamber June Comments"); Comments of the U.S. Chamber of Commerce, File No. S7-10-22 (Nov. 1, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20148911-315866.pdf ("Chamber November Comments").

[2] *See The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21,334 (Apr. 11, 2022) ("Proposed Rules"). "[C]onsistent with the Commission's Informal and Other Procedures," the Commission considers "comments submitted after a comment period closes but before adoption of a final rule." *Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8*, 85 Fed. Reg. 70,240, 70,268 n.312 (Nov. 4, 2020).

[3] *See Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 87 Fed. Reg. 73,822 (Dec. 1, 2022) ("DOL Rule").

[4] *See Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk*, 87 Fed. Reg. 68,312 (Nov. 14, 2022) ("FAR Proposal").

[5] Proposed Rules, 87 Fed. Reg. at 21,373.

[6] *See, e.g.*, Chamber November Comments 16-17.

a [plan] fiduciary's duty of prudence may often require an evaluation of the effect of climate change and/or government policy changes to address climate change on investments' risks and returns."[7] The Department, however, reconsidered. Faced with "a great many" objections to its proposal, the Department recognized concerns that it lacked "sufficient evidence to support a position on the frequency" with which environmental considerations were material to investment decisions, and that giving disproportionate regulatory weight to environmental factors may cause fiduciaries to expend resources evaluating those factors, "even if not otherwise prudent."[8] The Department thus deleted the "may often require" language and, instead, "ma[de] clear" that "climate change" should "not ... be treated differently" than other "investment factors."[9]

"[S]ound administrative practice" requires the Commission to seriously grapple with the conclusions of the Department of Labor.[10] Contrary to the Department, Commission's proposal treats climate-related information as if it is "often" material to investment decisions and gives disproportionate weight to environmental factors, compared with many other investment considerations. The Department of Labor's actions demonstrate a need to reconsider, and—if the Commission persists in its current approach—a need to explain why it is taking a different course than taken by the Labor Department in administering another important law regarding investment decision-making.[11]

In support of its proposal, the Commission has tried to downplay the costs in a number of ways, including by emphasizing that certain disclosures would be required only "[i]f" a public company has adopted "climate-related targets and goals."[12] And it has stated that some compliance burdens would be mitigated for companies that are "already" making certain disclosures.[13] A recent proposal from the Federal Acquisition Regulatory Council, however, turns this calculus on its head. If adopted, the Council's proposal would *require* large federal contractors to set "science-based targets" for

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[7] *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, 86 Fed. Reg. 57,572, 57,276 (Oct. 14, 2021).

[8] DOL Rule, 87 Fed. Reg. at 73,830.

[9] *Id.*

[10] *Ala. Power Co. v. Fed. Power Comm'n*, 511 F.2d 383, 393 (D.C. Cir. 1974) ("The opportunity for consistency and evenhandedness in the development of policy that Congress has put within the ken of several administrative bodies is enhanced when one agency elicits the views of another and draws upon the latter's expertise. Such a procedure would embody sound administrative practice."); *see also City of Bos. Delegation v. FERC*, 897 F.3d 241, 255 (D.C. Cir. 2018) ("Agencies can be expected to 'respect the views of such other agencies as to the problems' for which those 'other agencies are more directly responsible and more competent.'" (cleaned up)); *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1513-14 (D.C. Cir. 1984) (setting aside order that "runs counter" to the practice of "many [other] regulatory agencies"); *cf. Del. Dep't of Nat. Res. & Env't Control v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015) ("On remand, we encourage EPA to solicit input from FERC, as necessary.").

[11] In comparing the Commission's rulemaking to Labor Department's, the Chamber does not intend to take a position on the final Labor Department rule or on the Department's rulemaking as a whole.

[12] Proposed Rules, 87 Fed. Reg. at 21,405.

[13] *Id.* at 21,345.

reducing greenhouse gas emissions.[14] This would trigger the full suite of the Commission's proposed disclosure requirements (and all the costs that come with it) for many public companies. This significantly increases the overall costs of the Commission's proposal yet is not accounted for in the Commission's cost-benefit analysis. The Council's proposal, moreover, is not aligned with the Commission's proposal. The Council, for example, would require disclosures based on the organizational boundaries set by the GHG Protocol,[15] whereas the Commission would require scope 1 and scope 2 disclosures based on the organizations included in a company's consolidated financial statements.[16] This is just one of a number of examples of misalignment between the Council's and the Commission's proposals.[17] Such misalignment would only add to the compliance burden by forcing companies to prepare *separate* disclosures for the different regulatory regimes—a massively costly undertaking. The FAR Proposal is thus another reason why the Commission must take its cost-benefit analysis back to the drawing board.[18]

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While the Chamber questions the Commission's statutory authority to adopt the Proposed Rules,[19] it remains committed to working with the Commission to craft a more practical and durable approach to climate disclosure. As the above regulatory developments confirm, however, the Proposed Rules are not the proper way to proceed.

Sincerely

Tom Quaadman
Executive Vice President
Center for Capital Markets Competitiveness
U.S. Chamber of Commerce

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[14] FAR Proposal, 87 Fed. Reg. at 68,314.

[15] *See id.* at 68,318.

[16] *See* Proposed Rules, 87 Fed. Reg. at 21,384.

[17] *Compare, e.g.*, Proposed Rules, 87 Fed. Reg. at 21,468 (requiring the disclosure of "total Scope 3 emissions if material"), *with* FAR Proposal, 87 Fed. Reg. at 68,328 (requiring the disclosure of "relevant Scope 3 emissions").

[18] *See* Chamber November Comments 2-3, 10-18.

[19] *See* Chamber June Comments 25-30.