May 27, 2021

By Electronic Delivery

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

Re: Public Input on Climate Change Disclosures

I appreciate the opportunity to provide comments to the Securities and Exchange Commission (the "Commission") regarding climate change disclosures. The views contained herein are my own and do not necessarily reflect the views of my clients or any other attorney with whom I work.

I am deeply concerned with recent statements concerning the involvement of the Commission on climate and other non-financial matters. For the reasons described below, the Commission's authority to act on climate-related matters is limited, and it unclear why Commission action relating climate-related matters is either necessary or appropriate. If pursued, the Commission risks misappropriating the longstanding historic and effective disclosure framework established by the federal securities laws for nebulous political agendas and social movements, which may change with successive administrations. Lastly, I wanted to express concern regarding recent statements suggesting the Commission may use its enforcement authority against issuers for political spending and expressing political opinions on climate related issues and other matters of social concern.

The Commission's role in administering the federal securities laws is critically important to the continued strength and proper functioning of the U.S. capital markets. Engaging in rulemaking, guidance, or enforcement on matters distinct from the Commission's mission, and its statutory mandates, risks tainting the Commission's reputation as a neutral body. I therefore urge the Commission to abide by its historical approach to disclosure, and encourage the Commission not to mandate prescriptive disclosures relating to environmental matters to all registrants unless the Commission is authorized by Congress to do so, or if such disclosure would be material, as determined on a company-by-company basis.

I. Statutory Authority.

Prior to any further regulatory action regarding mandated climate change disclosures, the Commission should consider whether such action is consistent with its statutory mandates. Congress designed the federal securities regulatory framework, as embodied in the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"), with restraint. Despite the strong temptations of the times to assign the government a heavier, more substantive role, the Congress embraced the principles of full disclosure and fairness as both necessary and sufficient.

The basic canon of the Commission's disclosure apparatus is found in Schedule A of the Securities Act, which specifies certain items of disclosure to be included in registration statements file in public offerings and provides the basis for many of the disclosure requirements in Regulation S-K. Items in Schedule A are largely financial in nature and were intended to help investors assess a security's value. According to the House Report that preceded the Securities Act:

> The items required to be disclosed…are items indispensable to any accurate judgment upon the value of a security…The type of information required to be disclosed is of a character comparable to that demanded by competent bankers from their borrowers, and has been worked out in light of these and other requirements. They are…adequate to bring into full glare of publicity those elements of real and unreal values which may lie behind a security.[1]

The Exchange Act requires similar business and financial information to be disclosed in Exchange Act registration statements and periodic reports.[2]

The Securities Act and the Exchange Act grant the Commission certain authority to modify and supplement these requirements as necessary or appropriate to implement the purpose of the statutes.[3] This grant of authority by no means plenary. In mandating disclosure, the Commission must determine that such information is necessary or appropriate in the public interest or for the protection of investors.[4] Importantly, the Commission must also consider whether the action will promote efficiency, competition and capital formation.[5] Section 2(b) of the Securities Act sets forth this same requirement.

On occasion, *Congress* has mandated disclosure of information that is not necessarily financial in nature. For example, under the National Environmental Policy Act of 1969, Congress required all federal agencies to consider the environment in regulatory action. In response to this mandate, the Commission adopted environmental compliance and litigation disclosure requirements by amending its forms to require disclosure of any material estimated expenditures for environmental control facilities. In doing so, the Commission explicitly concluded that, although it is generally <u>not</u> authorized to consider the promotion of social goals unrelated to the objectives of the federal securities laws, it is authorized and required by NEPA

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1 H.R REP. NO. 73-85, 73rd Cong., 1st Sess., 1933.
2 *See* Exchange Act Section 12(b)(1)(A).
3 *See* Securities Act Sections 19(a) & 28, and Exchange Act Sections 3(b), 23(a)(1) and 36(a)(1). Securities Act Section 19(a) and Exchange Act Section 23(a)(1) grant the Commission authority to make such rules and regulations as may be necessary to carry out the provisions of each title; Section 3(b) of the Exchange Act provides that the Commission shall have power to define technical, trade, accounting, and other terms used in the Exchange Act, consistently with the provisions and purposes of the Exchange Act; Section 28 of the Securities Act and Section 36(a)(1) of the Exchange Act provide that the Commission may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of each title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.
4 Exchange Act Section 12(b)(1).
5 Exchange Act Section 3(f).

to consider promotion of environmental protection as a factor in exercising its rulemaking authority.[6]

It is not clear how any new, prescriptive Commission action on climate change would be appropriate under its existing statutory framework. The Commission's recent focus on climate change is explained as driven by a purported investor demand,[7] but acting upon the demands of a subgroup of ideological investors is not the same as acting in the public interest, which the Commission's mandate requires. Requiring U.S. companies to provide information is not free of cost. Disclosure can be costly for registrants (and ultimately, their shareholders) to produce and disseminate, and disclosure of certain sensitive information can result in competitive disadvantages. Moreover, high levels of immaterial disclosure obscures important information. In the words of former Commissioner Troy Paredes, "[t]o the extent that investors, analysts and other securities market participants are subject to information overload, the model of mandatory disclosure that says more is better than less is incomplete and may be counterproductive."[8] To date, the Commission has failed to support its focus on climate related policymaking with evidence demonstrating these efforts promote efficiency, competition and capital formation.

II. Materiality and the SEC's Existing Disclosure Framework.

The materiality standard, which has long been the foundation of the SEC's approach to determining whether disclosure of information is required, remains the best approach for calibrating environmental disclosure requirements on a company-by-company basis. Justice Thurgood Marshall wrote for a unanimous Court in *TSC Industries v. Northway*, "[t]he question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." Justice Marshall expressed his concern that an unnecessarily low standard of materiality and the resulting fear of exposure to substantial liability may cause a company to "simply bury the shareholders in an avalanche of trivial information – a result that is hard conducive to informed decision making." Limiting required disclosures to material information is key to providing meaningful and useful disclosures to investors, without imposing unreasonable costs on issuers and their shareholders.

Regulation S-K and the SEC's existing disclosure framework already require disclosure of climate issues that bear on a company's financial condition and business prospects. Existing disclosure items in Regulation S-K already address climate-related risks and are designed to provide investors with information necessary to determine a security's value. For example:

- Item 101(c)(1)(xii) specifically requires disclosure of the cost for complying with federal, state and local environmental laws.
- Item 103 provides requirements that apply to the disclosure of certain environmental litigation.

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[6] *See* Environmental and Social Disclosure, Release No. 33-5627 (Oct. 14, 1975).
[7] *See* Statement by Acting Chair Allison Herren Lee, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021) available at https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.
[8] Troy A. Paredes, "Blinded by the Light: Information Overload and Its Consequences for Securities Regulation," 81 WASH. U. L. Q. 417 (2003), available at http://digitalcommons.law.wustl.edu/lawreview/vol81/iss2/7.

- Item 303 (MD&A) requires discussion of known trends, events or uncertainties that may have a material effect on the company's financial condition.
- Item 503(c) requires risk factor disclosure, which must clearly state the risk and how this risk affects the registrant.

These items balance flexibility for corporate management in preparing their disclosures with investors' need for material information that may impact a company's assets or earnings.

While certain climate-related, sustainability and public policy matter disclosure not currently itemized in prescriptive disclosure requirements may be material to investors in certain industries or on a unique company-by-company basis, a broad prescriptive disclosure regime would impose unnecessary costs on many companies to implement systems and produce disclosure that is ultimately not material to investors except those with niche preferences. Moreover, if such policy matters are material with respect to certain issuers and/or in certain cases, the SEC's current disclosure requirements, most notably Item 303 of Regulation S-K, adequately covers disclosure of such matters.

III. Politicizing the Commission.

Lastly, I have grave concerns about the direction of the Commission, and statements of Commission leadership, regarding the role of the Commission in social and political matters. In multiple public statements, Commission leadership has suggested that the Commission would find violations of an issuer's *disclosure* obligations based on the issuer's political activity. In a March 2021 statement, then Acting Chair Lee stated an issuer could violate its disclosure obligations by indicating support for "climate-friendly initiatives [while] donat[ing] substantial sums to candidates with climate voting records inconsistent with such assertions."[9] The Commissioner made similar statements regarding corporate diversity disclosures and with regard to issuers that advertise on television shows with purportedly unpopular political views.[10] Close in time to these statements, the Commission announced an enforcement task force focused on climate and ESG issues.[11]

Taking these statements to their logical conclusions, the Commission would place itself in the position of determining which elected officials or political views are "climate-friendly" and passing judgment on other socially-significant matters. Serving this role is wholly-inconsistent with the Commission's statutory mandate. It is also entirely inappropriate for a federal agency to declare it a crime (the making of a false disclosure) for an issuer to make a political contribution to an elected official who fails the Commission's current litmus test, or to assess the views expressed by television hosts on a show an issuer advertises. Any such action

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[9] "A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC," Allison Herren Lee (Mar. 15, 2021) available at https://www.sec.gov/news/speech/lee-climate-change.
[10] "Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference," Allison Herren Lee (Sept. 22, 2020) available at https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922.
[11] SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021) available at https://www.sec.gov/news/press-release/2021-42.

would likely implicate important core protections provided by the First Amendment of the U.S. Constitution.

I urge the Commission to clarify the mandate of its Climate and ESG Enforcement Task Force. More broadly, I urge the Commission not to adopt prescriptive disclosure requirements to address politically-charged climate-regulated (and other) matters that cannot be objectively demonstrated to be material to a broad base of reasonable investors, which effectively will taint, perhaps immeasurably, the Commission's reputation as a neutral body.

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Thank you for considering my views on this subject. I would be pleased to discuss my comments with you and answer any questions you may have. Please do not hesitate to contact me at [redacted].

Sincerely,

/s/ Aaron J. Friedman

Aaron J. Friedman