# Congress of the United States
## Washington, DC 20515

The Honorable Gary Gensler
Chairman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Mr. Chairman,

The Securities and Exchange Commission (SEC or Commission) has made clear that its top priority in the coming months will be to mandate disclosures for public companies regarding climate change and greenhouse gas emissions. The SEC has taken a scattershot approach to this initiative, including a staff directive to update existing guidance on climate disclosure,[1] a request for public information on the topic,[2] and the establishment of an enforcement "task force" charged with "identify[ing] any material gaps or misstatements in issuers' disclosure of climate risk under existing rules."[3]

We write to remind the Commission of the continued importance of the materiality standard for corporate disclosure, the Commission's obligations under the Administrative Procedures Act (APA), and the importance of the SEC's reputation as an expert regulator that operates independently of political agendas. We are concerned that in the context of climate change disclosures, the SEC is currently on a course that will take it far afield of its statutory mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.

There is little doubt that investor demand for climate change disclosure has increased significantly over the last decade. Public companies have responded to this demand by providing more information regarding the impacts of climate change on their financial performance and how they are adapting to an evolving climate. A recent Bloomberg Law analysis found that the number of S&P 500 companies reporting risks related to climate change or greenhouse gas emissions has quadrupled.[4] There is no evidence that points to public companies being unaware or ignoring the fact that investors are demanding more information on climate change.

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[1] Statement on the Review of Climate-Related Disclosure (Feb. 24, 2021) *available at* https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure.
[2] Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021) *available at* https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.
[3] 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.
[4] Andrew Ramonas & Jacob Rund, *Climate Change Risks Surge in Companies' Annual Reports to SEC* (Mar. 25, 2021) *available at* https://news.bloomberglaw.com/securities-law/climate-change-risks-surge-in-companies-annual-reports-to-sec.

The nature and scope of climate change disclosure rightfully depends upon a particular company's business line and their carbon footprint. For example, risks posed from climate change are fundamentally different between a software company, a cruise line, and an oil and gas company. One-size-fits-all, uniform mandates would be deeply misguided for an issue as complex as climate change.

**The importance of materiality**

The SEC must keep in mind that the longstanding materiality standard has served our capital markets incredibly well for decades. As articulated by the Supreme Court, for a fact to be considered material to an investment decision "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available."[5] If a particular risk to a company meets the standard of materiality – including any risk related to climate change – that company should already be disclosing it in their SEC filings.

During your confirmation hearing before the Senate Banking Committee, you echoed the importance of the materiality standard and further stated that "[i]t's the investor community that gets to decide what is material to them. It's not a government person like myself."[6] We agree and believe it would be inappropriate for the SEC to establish a prescriptive disclosure regime for climate change based upon what the SEC believes is material to every public company.

We also caution the SEC against outsourcing its responsibilities to ostensibly "independent" third-party standard setters that have agendas outside the scope of the Federal securities laws and that do not recognize the standard of materiality that has served U.S. capital markets so well. Some of these organizations are funded or supported by entities that have a vested interest in the SEC adopting a complex reporting regime for climate change and related environmental, social, and governance (ESG) disclosures. It is the SEC's job to look out for Main Street investors, not a cottage industry of standard setters and ratings firms that stand to benefit from further SEC regulation in this area.

We echo the concerns raised recently by Commissioner Hester Peirce about the SEC's open interest in aligning climate and ESG reporting standards with international standard setters. As Commissioner Peirce stated, "[h]ampering the ability of the markets to collect, process, disseminate, and respond to price signals by boxing them in with preset, government-articulated metrics will stifle the people's innovation that otherwise would address the many challenges of our age. Moreover, converging standards would be antithetical to our existing disclosure framework, which is rooted in investor-oriented financial materiality."[7] The Commission would be wise to heed Commissioner Peirce's warning and reconsider whether the United States should accede to a single set of climate reporting standards.

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[5] TSC Industries, Inc. v. Northway, 426 U.S. 438, 448–49 (1976).

[6] Senate Banking Committee Nomination Hearing with Senator Van Hollen (Mar. 2, 2021) *available at* https://www.banking.senate.gov/hearings/02/22/2021/nomination-hearing.

[7] Securities and Exchange Commission, *Rethinking Global ESG Metrics* (Apr. 14, 2021) *available at* https://www.sec.gov/news/public-statement/rethinking-global-esg-metrics.

**Obligations under the Administrative Procedures Act**

The SEC's approach to climate change disclosure so far in 2021 has been somewhat disjointed and undiscernible. On the one hand, the SEC has solicited public comment to better inform the Commission about climate change disclosures, while on the other the SEC has created an enforcement "task force" to take action against issuers for gaps in their climate change disclosure. Moreover, the Division of Corporation Finance has not yet completed its review of the 2010 climate disclosure guidance. If the SEC is not adequately informed about the types of climate change information companies should be disclosing and has not communicated its priorities in new guidance, how can it justify an enforcement action against an issuer for insufficient disclosure?

The SEC seems to again be going down the path of regulation-by-enforcement, whereby enforcement actions by SEC staff will have the effect of setting rules or standards in the market. This would be an abuse of regulatory authority, a violation of the APA, and would undermine the SEC's credibility and the larger issue of ensuring companies are providing investors with appropriate disclosure.

A better approach would be for the SEC to use the public comments it receives to first identify – and publicly communicate – specific areas where it thinks issuers could be enhancing disclosure. If the SEC ultimately determines that new requirements are the only way to remedy such deficiencies, then it should engage in notice-and-comment rulemaking that incorporates public feedback. Such a targeted approach would ultimately enhance the flow of information to investors without violating the APA and imposing enormous compliance costs on public company shareholders.

**The SEC must focus on its core competencies and maintain its independence**

The SEC's increasing willingness to wade into social and public policy debates, like climate change, risks the credibility and independence that has made the SEC such an effective regulator since its creation. The bipartisan structure of the SEC and its independence from the executive branch is designed to facilitate objective and informed thinking around complex market issues.

The SEC must not politicize the agency and risks diminishing its credibility in the eyes of the public. We urge you and your fellow commissioners to ensure that any further action the SEC takes regarding climate-related disclosure is clearly tied to its core competencies of investor protection; maintaining fair, orderly and efficient markets; and promoting capital formation. This ultimately will ensure that the Commission's rulemakings are in the long-term interest of Main Street investors.

We thank you for your attention to these critical issues.

Sincerely,

French Hill
Member of Congress

Andy Barr
Member of Congress

Tedd Budd
Member of Congress

John Rose
Member of Congress

David Kustoff
Member of Congress

Warren Davidson
Member of Congress

William Timmons
Member of Congress

Blaine Luetkemeyer
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Ann Wagner
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Van Taylor
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