INVESTMENT COMPANY INSTITUTE®

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Eric J. Pan
PRESIDENT & CEO

[redacted]

June 4, 2021

Ms. Vanessa Countryman
Secretary
US Securities and Exchange Commission
100 F Street NE
Washington DC 20549-1090

Re: *Public Input Welcomed on Climate Change Disclosures (March 15, 2021)*

Dear Ms. Countryman:

The Investment Company Institute (ICI)[1] is writing to provide the views of the regulated fund industry on how the Securities and Exchange Commission (SEC or Commission) should regulate and monitor how public companies disclose information related to climate change and human capital.[2] We commend then Acting Chair Lee for prioritizing the Commission's engagement and inviting public input on these important and timely matters.[3] ICI and its members have a significant interest in how climate change-related and human capital disclosure evolves. This disclosure is important to the investment decisions fund managers make on behalf of the millions of retail investors around the world choosing funds to save for retirement, education, and other important financial goals.[4]

[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$30.8 trillion in the United States, serving more than 100 million US shareholders, and US$9.7 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in Washington, DC, London, Brussels, and Hong Kong.

[2] Throughout this letter, we use the term "companies" to refer both to public companies and private companies that meet the asset and shareholder thresholds that trigger Securities Exchange Act of 1934 Rule 12g-1's reporting requirements. We also refer only to "Rule 12g-1 reporting private companies as appropriate, such as in Section III.F of this letter.

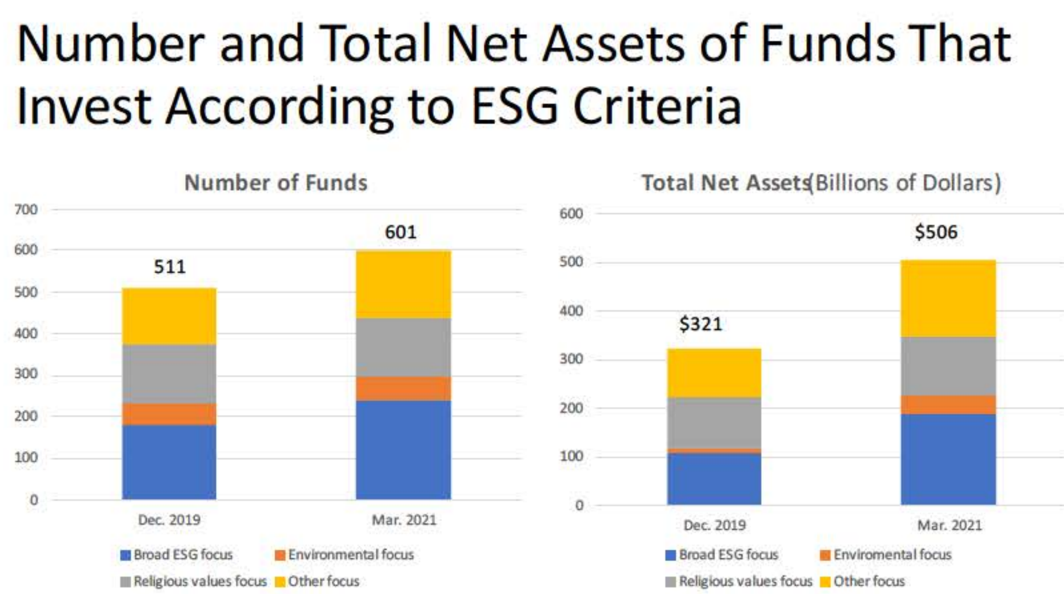
[3] Acting Chair Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures* (March 15, 2021) (RFI), available at https://www.sec.gov/news/public-statement/lee-climate-change-disclosures. Allison Herren Lee served as Acting Chair of the SEC from January 21, 2021 until April 17, 2021.

[4] Throughout this letter we use the terms "funds" and "fund managers" interchangeably.

Public companies currently take a variety of approaches to disclosing climate change-related information, including what information to disclose, when to disclose it, and where to provide that disclosure. Fund managers desire access to comparable, consistent, and comprehensive information on how companies are affected by, or are seeking to respond to, climate change. Therefore, it is critical for the Commission to implement more uniform reporting standards for companies for the benefit of investors, efficient allocation of capital, and enhanced capital formation.

I. Background and Introduction

The number of funds that focus on climate and other environmental, social, and governance (ESG) related investment strategies has grown substantially since 2019. As of the end of December 2019, ICI's Research Department classified 511 mutual funds and exchange-traded funds (ETFs), with assets of $321.4 billion as generally investing using an exclusionary, inclusionary, or impact investment strategy.[5] Between then and the end of March 2021, more than 90 new funds—focused on climate and other ESG-related investment strategies—opened, representing about 15 percent of total open-end fund launches. At the same time, assets of ESG funds increased from $321 billion to $506 billion.



In addition, many fund managers integrate ESG factors into their investment process. They consider climate change-related disclosure, along with other material factors and analysis, to be

[5] See Investment Company Fact Book (61st edition) at pp. 60-63, available at https://www.ici.org/system/files/2021-05/2021_factbook.pdf

an important part of that process. As a result, fund managers are significant users of climate change-related information.[6]

Our members believe that the Commission's approach to climate change-related disclosure is ripe for review. The Commission issued guidance more than ten years ago that described the most pertinent non-financial statement disclosure rules that might require companies to disclose climate change-related information.[7] Our members have found that many companies do not provide any climate change-related disclosure and companies that do disclose consistent with the guidance provide uneven information that can be challenging for fund managers to digest in any systematic way.[8]

The Commission therefore should examine the current state of climate change-related disclosure and work towards improving it in a measured manner that draws upon the views of investors, issuers, standard setters, and others.[9] Any such framework should be designed in a manner that:

- provides investors with material information that is consistent, comparable, and reliable;
- reflects an appropriate balance of costs and benefits;
- is sufficiently flexible to respond to changing circumstances; and
- promotes investors' ability to efficiently allocate capital.

Doing so would be consistent with the Commission's view that, "[l]ack of information may affect investors' willingness to invest and may decrease the allocative efficiency of the capital

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[6] See ICI, *Funds' Use of ESG Integration and Sustainable Investing Strategies: An Introduction* (July 2020), available at https://www.ici.org/system/files/attachments/20_ppr_esg_integration.pdf (pointing out that fund managers incorporating, or integrating, ESG considerations into their investment process is a long-standing element of investing. Managers seek to enhance a fund's financial performance by analyzing material ESG considerations along with other material risks such as credit risk.).

[7] See Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 2, 2010) (2010 Guidance), available at https://www.sec.gov/rules/interp/2010/33-9106.pdf.

[8] For example, data indicates more than half of S&P 500 companies are reporting Scope 1 and 2 emissions, available at https://www.iea.org/data-and-statistics/charts/number-of-companies-in-the-s-and-p-500-reporting-energy-and-emissions-related-metrics.We reference Scope 1 and 2 emissions *infra*.

[9] Doing so would be consistent with the Commission's practice of periodically evaluating and recalibrating disclosure requirements for public companies. See, e.g., Business and Financial Disclosures Required by Regulation S-K, Rel. Nos. 33-10064, 34-77599 (April 13, 2016) (Regulation S-K Concept Release), available at https://www.sec.gov/rules/concept/2016/33-10064.pdf.

markets. Thus, requiring an appropriate level of disclosure is critical to a well-functioning capital market."[10] More recently, Commission staff has opined that it is important to assess:

> the costs associated with *not* having ESG disclosure requirements. The status quo is costly for companies, and increasingly so over time. Companies face higher costs in responding to investor demand for ESG information because there is no consensus ESG disclosure system. Rather, they are faced with numerous, conflicting, and frequently redundant requests for different information about the same topics. These higher costs can be particularly burdensome for smaller and more capital constrained companies, and yet if these companies do not provide ESG disclosures, they risk higher costs of capital.[11]

We believe that the Commission's previous observations about how it could design an effective disclosure framework using a combination of principles-based and prescriptive elements in Regulation S-K is particularly apt here:

> Limiting prescriptive disclosure requirements and emphasizing principles-based disclosure could improve disclosure by reducing the amount of information that may be irrelevant, outdated, or immaterial. Because prescriptive disclosure requirements may result in disclosure that is not necessarily material …to investors, greater use of principles-based disclosure requirements may allow registrants to more effectively tailor their disclosure …. A principles-based approach also may allow registrants to readily adapt their disclosure to facts and circumstances that may change over time.
>
> On the other hand, reducing prescriptive disclosure requirements and shifting towards more principles-based disclosure requirements may limit the comparability, consistency, and completeness of disclosure. Also, in the absence of clear guidelines for determining when information is material, registrants may have difficulty applying principles-based disclosure requirements, and the disclosure provided may not give investors sufficient insight into how registrants apply different principles-based disclosure thresholds. Potentially important information that may be disclosed in response to a prescriptive disclosure requirement might not be included in response to a principles-based disclosure requirement.[12]

Given that the relevance of ESG information is not always reflected in quantitative financial metrics, it is critical that the underlying legal framework be applicable to non-quantitative factors that are nevertheless material to enterprise value creation over the short-, medium-, and long-

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[10] Regulation S-K Concept Release at pp. 52-53.

[11] See John Coates, Acting Director of the Division of Corporation Finance, Statement Published in Connection with Remarks at the 33rd Annual Tulane Corporate Law Institute (March 11, 2021), available at https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121.

[12] Regulation S-K Concept Release at pp. 42-43.

term. Courts and the Commission explicitly have affirmed that "qualitative" factors play an important role in the materiality analysis.[13] The focus in these cases tends to be whether the: (i) currently non-quantifiable factor at issue is likely to *lead to* quantifiable issues in the future,[14] or (ii) failure to disclose the non-quantifiable factor would be materially misleading.[15]

There is precedent for the Commission requiring companies to disclose non-quantifiable information. For example, recent amendments to Regulation S-K require companies to disclose a company's "human capital resources" and "any human capital measures or objectives that the registrant focuses on in managing the business (such as measures or objectives that address the development, attraction and retention of personnel)."[16] The Commission adopted these requirements with the express purpose of building on its "principles-based disclosure framework" that is "rooted in materiality."[17]

In determining the appropriate level of disclosure, it is important to note that the materiality standard as developed under the federal securities laws and resulting case law does not create an independent requirement that all material information automatically be disclosed.[18] Rather, within the context of a specific Commission-mandated duty to disclose, materiality is the benchmark for determining what information is required to be disclosed. Any climate change-

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[13] Staff Accounting Bulletin No. 99, Release No. 99, Materiality (Aug. 12, 1999) (where the staff stated that the materiality analysis requires one to "consider both 'quantitative' and 'qualitative' factors in assessing an item's materiality.") (SAB 99); see also *In the Matter of Franchard Corp.*, 42 S.E.C. 163 (July 31, 1964) (finding the "integrity" and "quality" of management to be material); *IBEW Loc. Union No. 58 Pension Tr. Fund & Annuity Fund v. Royal Bank of Scotland Grp., PLC*, 783 F.3d 383, 390 (2d Cir. 2015) ("Courts must also consider qualitative factors, which can turn a quantitatively immaterial statement into a material misstatement.").

[14] Compare *Cooperman v. Individual, Inc.*, 171 F.3d 43 (1st Cir.1999) (finding that disclosure of a board-level conflict over business strategy was not required) with *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228 (5th Cir. 2009) (distinguishing *Cooperman* because, in *Lormand*, "the entire management team of the company knew that disastrous effects would result" from the pending business strategy). *See also Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm'n*, 389 F. Supp. 689, 700 (D.D.C. 1974) ("[T]his Court is not prepared to say that a corporation's adverse impact on the environment or its equal employment practices *may not directly lead to* an unfortunate financial condition in the near future.") (emphasis added).

[15] See, e.g., *Cooperman*, 171 F.3d at 50 (1st Cir. 1999); *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 268 (2d Cir. 1993) (holding that disclosure of a new business strategy may be required "whenever secret information renders prior public statements materially misleading..."); *Frazier v. VitalWorks, Inc.*, 341 F. Supp. 2d 142, 152 (D. Conn. 2004).

[16] Regulation S-K, Item 101(c)((2)(ii).

[17] Modernization of Regulation S-K Items 101, 103, & 105, Release No. 10825 (Aug. 26, 2020) (2020 Regulation S-K amendments) available at https://www.sec.gov/rules/final/2020/33-10825.pdf) at p.6.

[18] See Commissioner Allison Herren Lee, Living in a Material World: Myths and Misconceptions about "Materiality" (correctly stating that "[t]here is no general requirement under the securities laws to reveal all material information.") (Material World Speech), *available at* https://www.sec.gov/news/speech/lee-living-material-world-052421?utm_medium=email&utm_source=govdelivery.

related disclosure requirements that the Commission ultimately prescribes should be rooted in materiality so that the level of detail and granularity of data to be disclosed *within* any prescribed categories of information can be benchmarked sensibly.

Notably, the SEC has repeatedly imposed the materiality standard in contexts comparable to those relating to the questions being raised today about climate change-related disclosures. In fact, many prior SEC releases requiring disclosure relating to environmental laws have used the materiality standard in connection with such disclosure requirements.[19] We recommend that the Commission take that same approach here and indicate as part of any follow-on regulatory action that Scopes 1 and 2 Greenhouse Gas (GhG) emissions, narrative disclosure consistent with the TCFD framework,[20] as well as the human capital-related data captured on Form EEO-1 is material to the reasonable investor.[21]

II. Summary of Recommendations

As discussed more fully below, we recommend that the Commission:

- require public companies and Rule 12g-1 reporting private companies to disclose Scopes 1 and 2 GhG emissions, narrative information consistent with the TCFD framework, and their Form EEO-1 data (sustainability-related reporting) to promote consistency, comparability, and reliability of key information for their investors;

- should promote the development of reporting practices, including assumptions, models, and methodologies before considering requiring companies to disclose Scope 3 GhG emissions;

- leverage private sector initiatives so that it more easily can catch up to, and solidify, the progress on sustainability-related reporting that US market participants voluntarily have achieved over the past decade;

- take steps to address companies' liability concerns associated with providing climate change-related information in Form 10-K to promote more fulsome disclosure;

- lead work to promote a global baseline of consistent and comparable sustainability-related disclosure to support the global character of companies and asset managers;

[19] Appendix A provides commentary on the importance and usefulness of the continued focus on the touchstone of materiality in the federal securities laws, including an explanation as to why any Commission sustainability-related disclosure regime must be rooted in this longstanding legal doctrine.

[20] The Task Force on Climate-Related Financial Disclosures, or TCFD, framework is described in more detail *infra*.

[21] Form Employment Information Report Component 1, or Form EEO-1, which is reported to the Equal Employment Opportunity Commission, or EEOC, is described in more detail *infra*.

- not require companies to provide a new, separate "sustainability discussion and analysis" because doing so would be unnecessary given the existing requirement for management's discussion and analysis of financial condition and operations (MD&A);

- not mandate third-party assurance at this time given the rapidly changing state of sustainability disclosures, but phase in such assurance over time to increase the reliability of sustainability-related information for investors provided that the benefits of doing so exceed the costs; and

- establish, and seek the advice of, a committee of relevant market participants (including companies, funds, investors), auditors, technical experts, and other relevant government authorities to allow the Commission to keep pace with the evolution of climate change-related reporting, well positioning it to undertake any future rulemaking initiatives.

III. Responses to Selected Aspects of the Request for Input

As noted above, we believe using a combination of principles-based and prescriptive elements is particularly apt in the context of climate change-related disclosures. In particular, we acknowledge the need for comparability and consistency with respect to certain information about climate change, and we support the Commission requiring companies to disclose the information discussed below.

A. Requiring Companies to Disclose Climate Change-Related Information

To promote comparable and consistent disclosures, we recommend that the Commission require companies to disclose a variety of climate change-related information that would provide insights regarding the company's strategy to mitigate climate change-related risks and realize climate change-related opportunities. The Commission should require companies to disclose Scopes 1 and 2 GhG emissions and consider doing so consistent with the widely-received methodology contained in *The Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard* (Greenhouse Gas Protocol).[22] Our understanding is that most companies are

[22] The Greenhouse Gas Protocol is available at https://ghgprotocol.org/corporate-standard. It is a multi-stakeholder partnership of businesses, non-governmental organizations (NGOs), governments, and others convened by the World Resources Institute, a US-based environmental NGO, and the World Business Council for Sustainable Development, a coalition of 170 international companies. The Initiative's mission is to develop internationally accepted GhG accounting and reporting standards for business and to promote their broad adoption. *See also* Reporting on Enterprise Value (December 2020), available at https://29kjwb3armds2g3gi4lq2sx1-wpengine netdna-ssl.com/wp-content/uploads/Reporting-on-enterprise-value_climate-prototype_Dec20.pdf (which contains a prototype developed by several sustainability reporting organizations, including the Carbon Disclosure Project, Climate Disclosure Standards Board, International Integrated Reporting Council, and the Sustainability Accounting Standards Board (SASB)). See also SASB, Climate Risk Technical Bulletin, (2021 Edition), (April 12, 2021), available at https://www.sasb.org/knowledge-hub/climate-risk-technical-bulletin/.

able to access the requisite information to reliably report this information.[23] Doing so would provide investors with comparable, consistent emissions related disclosure, facilitating investors' ability to evaluate whether a company is taking steps to mitigate climate change-related risks and realize climate change-related opportunities associated with its business operations and strategy.[24] Reporting would reveal the companies that are further along in their efforts to reduce emissions. This disclosure also would give investors the information needed to run scenario analyses that price carbon emissions (i.e., a carbon tax) and assess how such a tax would affect the issuer's profitability and earnings.

We recommend that the Commission also require companies, consistent with the TCFD framework, to provide narrative disclosure regarding the:

- governance of climate-related risks and opportunities;
- actual and potential impacts of climate-related risks and opportunities on the company's businesses, strategy, and financial planning, where such information is material; and
- means by which the company identifies, assesses, and manages climate-related risks and how these are integrated into an overall risk management framework.[25]

[23] Scope 1 emissions (direct GhG emissions) are those emitted from sources owned or operated by a company such as the fuel used to heat its building. Scope 2 emissions (indirect GhG emissions) are those emitted from a company's consumption of purchased electricity, heat, or steam. Scope 3 emissions are other indirect emissions not covered in Scope 2, such as emissions from the extraction and production of purchased materials and fuels, transport-related activities in vehicles not owned or controlled by the reporting entity, and waste disposal. See, e.g., Greenhouse Gas Protocol for additional detail about Scopes 1, 2, and 3 emissions.

[24] There is widespread recognition that investors need comparable, consistent, and reliable climate change related information. See, e.g., Managing Climate Risk in the U.S. Financial System, Report of the Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the US Commodity Futures Trading Commission at p. iii, 35 (stating that to undertake climate risk analysis that can inform decision-making across the financial system, regulators and financial institutions need reliable, consistent, and comparable data and projections for climate risks, exposure, sensitivity, vulnerability, and adaptation and resilience; and as of February 2020, more than 1,000 companies and other organizations, including private sector organizations with a collective market capitalization of $12 trillion and financial firms responsible for $138.8 trillion of assets, have declared support for the TCFD recommendations), available at https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf; the US Government Accountability Office has issued a number of reports regarding climate change including *Public Companies: Disclosure of Environmental, Social and Governance Factors and Options to Enhance Them* (July 2020) (where GAO found that most institutional investors they interviewed said they seek information on ESG issues to better understand risks that could affect company financial performance over time), available at https://www.gao.gov/assets/gao-20-530.pdf.

[25] See *Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures*, Task Force on Climate-Related Financial Disclosures (June 2017) (TCFD Report), available at https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf.
The framework also guides companies on how to provide "disclosure regarding metrics and targets used to assess and manage relevant climate-related risk and opportunities, where such information is material." The TCFD

Enhancing the availability of Scope 1 and 2 GhG emissions and narrative disclosure consistent with TCFD will permit markets to more efficiently price climate change-related risks and opportunities and allocate capital more efficiently to firms that better manage these risks.

We do not believe that the Commission should require companies to report Scope 3 GhG emissions at this time, because most companies are not able to access the requisite information to report consistent, comparable, and verifiably reliable data.[26] Scope 3 GhG emissions capture, among other things, upstream emissions associated with a company's supply chain and downstream emissions associated with a company's products and services. There currently is no common methodology for calculating Scope 3 GhG emissions that would produce sufficiently comparable data across companies in an industry. In fact, calculating Scope 3 GhG emissions necessarily involves a significant amount of work as well as assumptions that can vary greatly in magnitude. We therefore recommend that the Commission promote the development of reporting practices, including assumptions, models, and methodologies, before considering requiring companies to disclose this information. Further, companies that are currently providing investors with Scope 3 GhG emission information should not be prohibited or discouraged from doing so. Voluntary reporting could foster a more informed understanding of climate-related risks and opportunities. [27]

We also recommend that the Commission provide smaller companies with more time to comply with any new disclosure requirements. The recommended approach would be consistent with

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recommends that companies disclose: Scopes 1 and 2 GhG emissions and Scope 3 GhG emissions, as appropriate; metrics used to assess climate-related risks and opportunities in line with the strategy and risk management process; and the targets used to manage climate-related risks and opportunities and performance against targets.

The TCFD framework is not static. In fact, in October 2020, the TCFD published a consultation seeking feedback on changes to certain forward-looking financial sector metrics. We urge the Commission to evaluate future changes to the TCFD framework with a view towards achieving a consistent global baseline for climate change-related disclosure. See, *infra*, for a discussion of the importance of a consistent global baseline. See also Letter from Susan Olson, General Counsel, Investment Company Institute to Task Force on Climate-related Disclosures regarding Forward-Looking Financial Sector Metrics Consultation (stating that any asset manager reporting of climate change-related information depends on companies providing that information in the first instance), available at https://www.ici.org/system/files/attachments/pdf/33073a.pdf.

[26] The TCFD recognized the gaps in methodologies for measuring Scope 3 emissions, making reliable and accurate emissions data difficult to calculate in its *2020 Status Report: Task Force on Climate-related Financial Disclosures* at p. 65, available at https://www.fsb.org/2020/10/2020-status-report-task-force-on-climate-related-financial-disclosures/. If the Commission determines to mandate Scope 3 GhG emissions, we recommend it take a phased in approach to address companies' concerns about accessibility and liability.

[27] For example, an energy company voluntarily reporting reduced Scope 3 emissions could demonstrate to investors that it is shifting its production mix towards lower carbon sources of energy.

existing Commission rules that allow certain smaller companies to avail themselves of rules designed to ease compliance burdens.[28]

B. Requiring Companies to Disclose Human Capital-Related Data

We recommend that the Commission require all companies to disclose human capital-related data that they already report to the EEOC on Form EEO-1.[29] This data would provide insight into a company's management and investment in its people — one indicator of a company's long-term value — in a comparable and consistent format. In fact, our review of a sample of fund manager stewardship reports found that a number of our members identify the effect of human capital management on the expected long-term value of companies. In addition, Commissioner Lee recently pointed to research showing that diversity correlates with enhanced performance.[30] While some companies provide this information voluntarily today, the Commission requiring all companies to provide the Form EEO-1 information would make it more widely available for fund managers to use in the investment process.[31]

C. Leveraging Existing Sustainability Standards

We recommend that the Commission leverage private sector initiatives to govern public company disclosure of consistent, comparable, reliable climate change-related information.[32] The recommended approach would allow the Commission to catch up to, and solidify, the progress

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[28] See, e.g., Small Business and the SEC (February 27, 2014), available at https://www.sec.gov/reportspubs/investor-publications/infosmallbusqasbsechtm.html. The SEC defines smaller reporting companies in Item 10(f)(1) of Regulation S-K and in Article 8 of Regulation S-X as companies with a public float of less than $250 million or revenues of less than $700 million.

[29] The EEOC requires certain private employers that have 100 or more employees to file annually the Form EEO-1. In addition, the Office of Federal Contract Compliance Programs requires certain federal contractors to file the Form EEO-1 if they have 50 or more employees. Employers meeting the reporting thresholds have a legal obligation to submit annual data on their employees, including employees' race/ethnicity, gender, and job category.

[30] See Commissioner Allison Herren Lee, Diversity Matters, Disclosure Works, and the SEC Can Do More, Remarks at the Council of Institutional Investors Fall 2020 Conference (September 22, 2020) (stating that "there is an increasing body of research showing that diversity correlates with enhanced performance ... [and] the SEC requiring companies to provide diversity related information will provide investors the information they need to make investment decisions based on their own judgment of what indicators matter for long-term value"), available at https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922.

[31] See, e.g., Kavya Vaghul, A Small Fraction of Corporations Share Diversity Data, but Disclosure is Rapidly on the Rise (Jan. 19, 2021), available at https://justcapital.com/news/a-small-fraction-of-corporations-share-diversity-data-but-disclosure-is-rapidly-on-the-rise/ (listing 53 Russell 1000 companies that voluntarily provide their EEO-1 reports). We would not support the Commission requiring what many companies consider to be competitively sensitive information (e.g., retailers disclosing workers' average hourly wages; industrial companies disclosing cost of raw inputs). Requiring such disclosure could have unintended anticompetitive effects.

[32] RFI, Question 6.

on climate change-related reporting that US market participants have achieved voluntarily over the past decade. Doing so should lead to more consistent, comparable, and useful information for fund managers to assess company performance and enterprise value and relieve companies of time currently spent responding to a variety of disparate individual investor requests for climate change-related related information.[33] To accomplish this, the Commission might consider using a standard-setter that could facilitate an efficient and inclusive means for creating new, and maintaining the currency of, existing disclosure standards in this rapidly evolving area.[34] The Commission could consider features of existing standard-setters.

If the Commission chooses to take this approach, it would be critical for the Commission to:

- create a balanced funding model to ensure that any standard setter will be independent, and not subject to conflicts of interest or undue influence by third parties;[35] and

- develop a governance structure for any standard setter that provides robust oversight, appropriately represents the interests of investors, and incorporates a review process for assessing the effectiveness of existing standards.[36]

Further, it would be essential that any new standards developed:

- be grounded in materiality;

- reflect an appropriate balance of costs and benefits;

[33] For example, the SASB framework includes a set of 77 industry-specific standards that identify the minimal set of financially material sustainability information and associated metrics for the typical company in an industry. This approach recognizes that a particular sustainability risk may be material to one company but not material to another depending on various factors, including the relevance of the information to the industry in which the company operates and the potential impact on the company.

[34] See, e.g., Commission Statement of Policy Reaffirming the Status of FASB as a Designated Private Sector Standard Setter, Release Nos. 33-8221; 34-47743; IC-26028 (April 25, 2003); and Management's Report on Internal Control over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Release Nos. 33-8545; 34-51293 (March 2, 2005) (indicating that companies are required to use a suitable, recognized control framework established by a body or group that has followed due process procedures, such as the framework established by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) to assess the effectiveness of the company's internal control over financial reporting).

[35] We recommend that the Commission consider using a funding model similar to that established for the Financial Accounting Standards Board (FASB), which operates on a cost-recovery basis. Section 109 under the Sarbanes-Oxley Act of 2002 requires public companies, including investment companies, to pay an annual accounting support fee to fund the operations of FASB.

[36] For example, the Financial Accounting Foundation, or FAF, could oversee a standard setter, using its existing governance structure dedicated to the public interest, established due process for public comment and standards development, and post implementation review process for assessing the effectiveness of standards adopted.

- be sufficiently flexible to accommodate changing circumstances; and

- promote investors' ability to efficiently allocate capital.

D. Promoting Fulsome Company Disclosure

The Commission should take steps to address companies' liability concerns associated with providing climate change information via Form 10-K.[37] Our members' need for consistent, comparable, reliable climate change information can be met regardless of whether the information is provided in Form 10-K or elsewhere. We therefore recommend that the Commission permit companies to satisfy any new disclosure requirement by providing information in a widely disseminated, publicly available manner (such as furnished on a Form 8-K, in a separate public report, or on a company website). Disclosure that is furnished, but not filed, is not subject to strict liability under Section 11 of the Securities Act or Section 18 of the Securities Exchange Act.[38] At the same time, the Commission should encourage companies to provide climate change disclosure that is not boilerplate. Coupling this expectation with protection from strict liability should promote more robust disclosure. Of course, companies still would be subject to antifraud liability for materially misleading information.[39]

More generally, as the Commission pursues how best to design climate-related disclosure requirements, we urge it to keep in mind that climate change-related reporting still is evolving, including the associated qualitative risks, opportunities, strategies, and quantitative metrics.[40] We therefore encourage the Commission to foster a regulatory environment that permits disclosure practices to develop organically.[41] Doing so ultimately should enhance the volume and quality of disclosures related to the potential effects of climate change on companies and, consequently,

[37] RFI, Question 1.

[38] The Commission previously has permitted companies to furnish rather than file certain information. See, e.g., Regulation Fair Disclosure, Rel. Nos. 33-7881, 34-43154 (August 15, 2000), available at https://www.sec.gov/rules/final/33-7881 htm (where the Commission noted that while Regulation FD requires an issuer that discloses material non-public information to make that material information broadly available, it recognizes that issuers may not always know if the information is material and providing a means to make it available will help to minimize liability concerns. The Commission stated in the adopting release for Regulation FD that "[i]n light of the timing requirements for making materiality judgments under Regulation FD, commenters wanted to be able to err on the side of filing information that may or may not be material, without precluding a later conclusion that the information was not material.").

[39] See Section 17(a) of the Securities Act; and Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder.

[40] For example, investors are increasingly interested in information on internally developed and purchased offsets and credits that may be used to reduce reported GhG emissions.

[41] For example, the Commission should limit liability for companies that voluntarily and in good faith provide scenario analyses.

companies' ability to create value for shareholders.[42] We also encourage the Commission to direct staff to prioritize reviewing the quality of the resulting disclosure to promote its consistency and effectiveness.

E. Considering How to Design a Global Framework

The Commission requests comment on what the interaction should be between any global standard and Commission requirements.[43] Many ICI members are global firms and, as a general matter, strongly support consistency of regulatory requirements across jurisdictions. As the Commission considers how to drive toward more consistent climate change-related disclosure, the experience of the European Union, which has moved ahead on many sustainability standards, provides apt lessons. Moreover, as the Commission looks to other jurisdictions for examples of sustainability standards, it is important to recognize that the policy objectives of each jurisdiction may differ.

First, one of the most important lessons from the EU experience is the need to properly sequence disclosure requirements. The European Union required certain asset managers to disclose sustainability-related information about their investments before requiring companies in which the managers invested to provide sustainability-related disclosure. This approach put asset managers in the position of having to provide information to which they did not have access through public disclosures (and even if they were to obtain it in other ways, methodologies on evaluating and reporting the data were inconsistent). The Commission instead should directly require companies to provide climate change-related information, which should yield more comparable, consistent, and reliable information.

Second, the European Union's objective for sustainability-related legislation, such as the Sustainable Finance Disclosure Regulation (SFDR), is to re-orient flows of capital to fulfill its Green Deal objective and meet its Paris Agreement commitments. The European Union is using a variety of levers to accomplish these goals, including relying on asset managers to drive change and embedding double materiality into disclosure standards.[44] Double materiality generally has been described as a requirement for companies to report both on how sustainability issues affect

[42] The recommended approach would be consistent with the Commission's historical approach of making incremental changes when creating new disclosure concepts "by first adopting modest revisions and then expanding their application after observing and evaluating the rules' effectiveness." See, e.g., Reg S-K Concept Release at p. 29.

[43] RFI, Question 9.

[44] The EU's SFDR requires large asset managers to provide detailed information under a double materiality reporting standard (other asset managers may comply or explain the reason for not providing disclosure). We expect the EU to incorporate explicitly the concept of double materiality in mandatory corporate issuer disclosure – an additional lever to meet its policy objectives.

their performance, position, and development (the "outside in" perspective), and on their impact on people and the environment (the "inside out" perspective).[45]

In the United States, there has not been any legislative mandate to direct investors' capital to meet objectives like those committed to via the Paris Agreement. The Commission, therefore, must continue to adhere to the federal securities laws and its mission to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation.[46] Most recently, Commissioner Lee has advocated that the Commission utilize its investor protection lens for new disclosure requirements for companies.[47]As noted above, the need for comparable useful information to investors will be an important factor for the Commission to consider in adopting any new climate change-related disclosure requirements.

Against this backdrop, we believe that the Commission can and should play a leadership role to promote the consistency and comparability of cross-border climate change-related reporting and create a sound foundation for a global framework that guides company disclosure. In this regard, we were very pleased to see the Commission taking a leadership role through its participation in the sustainability work of the International Organization of Securities Commissions (IOSCO) and IOSCO's consideration of the International Financial Reporting Standards (IFRS) Foundation's proposal to create a Sustainability Standards Board.[48] The Commission should continue to play an active role in the international dialogue at IOSCO and on the future role that the IFRS Foundation might play overseeing the development of a new global baseline. In seeking to establish this baseline, we recommend that the Commission support the following five essential requirements for success:

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[45] See Corporate Sustainability Reporting Directive Proposal at p. 1, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0189.

[46] See, e.g., The Role of the SEC, available at https://www.investor.gov/introduction-investing/investing-basics/role-sec#:~:text=The%20U.%20S.%20Securities%20and%20Exchange,Facilitate%20capital%20formation].

[47] See Material World Speech (stating that the viewpoint of the reasonable investor is the lens through which we all are meant to operate, *citing Basic Inc. v. Levinson*, ("[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information.); *TSC Industries, Inc. v. Northway, Inc.*, ("[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote… Put another way, 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 made available.").

[48] See, e.g., SEC Acting Chair Allison Herren Lee, A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC (March 16, 2021), available at https://www.sec.gov/news/speech/lee-climate-change, and IOSCO Media Release (March 30, 2021), available at https://www.iosco.org/news/pdf/IOSCONEWS599.pdf, announcing that the SEC will co-lead an IOSCO Technical Expert Group, which will review and assess the technical recommendations of an IFRS Foundation working group undertaking technical preparation for a potential international Sustainability Standards Board (SSB).

1. Focus on sustainability information that is not reflected in the financial accounts, but which is nevertheless material to enterprise value creation over the short, medium, and long term.

2. Leverage existing global sustainability standards that have broad investor support, such as the narrative disclosure in the TCFD framework.

3. Develop a governance structure that appropriately represents the interests of investors.

4. Create a balanced funding model to ensure an SSB's independence and avoid undue influence of third parties and conflicts of interest.

5. Ensure sufficient coordination among international regulators to facilitate cohesive baseline disclosure of sustainability information that is material to enterprise value creation.[49]

F. Considering Disclosure Obligations of Private Companies

The RFI requests comment on how the Commission's rules "should address private companies' climate change-related disclosures, such as through … its oversight of certain investment advisers and funds."[50] Our members support requiring private companies of the size that must provide periodic reports, or Rule 12g-1 reporting companies, to disclose the same sustainability-related information as public companies.[51] The Commission doing so will enable fund managers to better understand the entire competitive landscape and value chain and place both types of companies on a more level playing field.[52]

We would strongly object to the Commission addressing private companies' climate change-related disclosures through its oversight of investment advisers and funds. If the Commission

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[49] See Letter from Eric J. Pan, President & CEO, Investment Company Institute to IFRS Foundation (December 31, 2020), available at https://www.ici.org/system/files/attachments/pdf/20_ltr_ifrs.pdf.

[50] RFI, Question 14.

[51] Section 12 of the Securities Exchange Act of 1934 and Rule 12g-1 thereunder require any private company with more than $10 million in total assets and a class of equity securities that is held of record by either 2,000 or more persons or 500 or more persons who are not accredited investors to report on Form 10-K. The Commission has periodically amended the asset thresholds in Rule 12g-1 in a manner intended to "strike the right balance between … costs of … [periodic reporting] and investors' need for the information required in … [these reports]." See, e.g., Relief from Reporting for Small Issuers, Release No. 34-37157 (May 1, 1996) at p. 4, available at https://www.sec.gov/rules/final/34-37157.txt.

[52] See Letter from Susan Olson, General Counsel, Investment Company Institute to Vanessa Countryman, Secretary, US Securities and Exchange Commission (September 24, 2019) (where we strongly recommended that the Commission encourage investor protection by increasing retail investors' access to private markets through regulated funds), available at https://www.sec.gov/comments/s7-08-19/s70819-6190597-192465.pdf.

determines that this information should be mandated, it should require the information directly from private companies, not indirectly by imposing disclosure requirements on funds and advisers. Proper sequencing is critical to avoid creating the regulatory conundrum of requiring funds to disclose information about companies that the companies themselves are not required to provide to the funds.

G. Considering Sustainability Discussion and Analysis Requirements

The Commission requests comment on whether it should implement a separate "sustainability discussion and analysis" requirement similar to the MD&A.[53] We do not believe doing so is necessary because it would duplicate elements of currently required disclosures, such as requirements to disclose material risk factors associated with an investment in the issuer's securities,[54] the mandated human capital related discussion, and more general forward-looking assessments of significant trends and uncertainties.[55] Furthermore, to the extent companies are not providing sufficient disclosure today, we believe that the Commission requiring each company to disclose, consistent with the TCFD framework, how its board oversees climate-related risks and opportunities and the role of management in assessing and managing climate-related risks and opportunities would prompt companies to provide relevant disclosure.

H. Considering Third-Party Assurance and Internal Control Requirements

The Commission also requests comment on whether it should mandate third-party assurance.[56] Given the developing state of sustainability reporting standards and related issuer disclosures, conditions are not yet ripe for mandatory third-party assurance. Yet, once the disclosure standards have stabilized and companies and those providing assurance have gained sufficient familiarity with them, we believe assurance will improve comparability and reliability. At that point, the Commission should consider requiring third-party assurance, provided that it determines that the benefits associated with the assurance exceed the costs. Third-party assurance will provide investors with confidence that the company's disclosures comply with the sustainability reporting standards and that the metrics disclosed are not materially misstated. This will allow investors and other stakeholders to place greater reliance on the company's disclosures and increase the utility of the information reported.

In the meantime, we recommend that, as a first step, the Commission require companies to develop and maintain internal controls and disclosure controls and procedures related to

[53] RFI, Question 13.

[54] See Item 105 of Regulation S-K.

[55] See Item 303 of Regulation S-K.

[56] RFI, Question 10.

climate change-related reporting, provided it gives companies sufficient time to develop these controls and procedures.

We also recommend that the Commission involve those that would provide third-party assurance in the development of the standards to ensure that their design facilitates third-party assurance. In addition, we recommend that the Commission subject any entities providing assurance to professional standards, including independence requirements and inspection and oversight.

I. Advancing Understanding of Sustainability-Related Information

To support a longer-term approach to this complex and ever-evolving area, the Commission should establish, seek the advice of, and oversee, a committee of relevant market participants (including companies, fund managers, funds and other investors), auditors, technical experts, and other relevant government authorities to develop a greater understanding of the impact of physical and transitional climate change-related risks on companies.[57] For example, the committee could examine which scenarios and pathways companies use when calculating forward-looking metrics. The committee could serve as a vital ongoing resource for the Commission to keep pace with the evolution of climate change-related reporting, well positioning it for any future rulemaking initiatives.[58]

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[57] The Commission could model this new committee on its Asset Management Advisory Committee, which was established as a means for the Commission to hear "informed, diverse perspectives and related advice and recommendations … [to] inform the Commission's policy decisions… [which is particularly necessary given] that the asset management industry and our markets more generally are rapidly evolving." See Remarks at the Inaugural Meeting of the Asset Management Advisory Commission, former Chairman Jay Clayton (January 14, 2020), available at https://www.sec.gov/news/public-statement/clayton-statement-asset-management-advisory-committee-meeting-011420.

[58] Cf. Commissioner Caroline Crenshaw, Statement on the Modernization of Regulation S-K Items 101, 103, and 105 (August 26, 2020) (stating that the SEC could, over the longer term, create an ESG Advisory Committee, comprised of investors, issuers, and subject matter experts to ensure that the Commission is aware of and responding to current ESG trends affecting all aspects of the market), available at https://www.sec.gov/news/public-statement/crenshaw-statement-modernization-regulation-s-k.

We appreciate the opportunity to provide feedback on the Request for Public Input and look forward to evaluating and providing additional comments in response to any future Commission proposal. If you have any questions, or if we can be of assistance in any way, please contact me at [redacted], Dorothy M. Donohue, Deputy General Counsel, Securities Regulation at [redacted], Greg Smith, Senior Director, Fund Accounting, at [redacted] or Annette Capretta, Associate General Counsel, Securities Regulation at [redacted].

Sincerely,

Eric J. Pan

President & CEO
Investment Company
Institute

cc: Chair Gary Gensler
Commissioner Hester Peirce
Commissioner Elad Roisman
Commissioner Allison Herren Lee
Commissioner Caroline Crenshaw

John Coates, Acting Director
Division of Corporation Finance

Sarah ten Siethoff, Acting Director,
Division of Investment Management

Appendix A

This appendix provides commentary on the importance and usefulness of the continued focus on the touchstone of materiality in the federal securities laws, including an explanation as to why any Commission sustainability-related disclosure regime must be rooted in this longstanding legal doctrine. It also examines the concepts of decision-useful information and double materiality, concluding that neither is appropriate for the Commission to incorporate in any future rulemaking.

Sustainability-Related Disclosure Regime Must Be Rooted in Materiality

Any disclosure regime should be premised on a legal standard that is well understood and predictable, yet flexible to accommodate a changing landscape. Issuers of securities are required to disclose information "material" to allow investors' informed decision-making. As a result, materiality is a familiar concept under the securities laws, with a well-developed body of case law and regulatory guidance that provides a defined and well-understood framework for making materiality determinations. Thus, materiality is a well-suited lens through which to view ESG disclosures in several critical respects: (1) it is a standard with which the industry is familiar and that builds upon a well-established body of law; (2) it protects investors by, among other things, acting as a filter for the appropriate level of detail in disclosures to facilitate informed decision-making;[59] and (3) it is uniquely capable of accommodating a rapidly evolving global marketplace.

A. Overview of the Materiality Framework

The concept of materiality has been the touchstone of disclosure requirements under the securities laws for nearly nine decades.[60] The prevailing standard for determining whether allegedly misstated or omitted information is material was set forth by two decisive Supreme Court cases,[61] subsequently applied by federal courts across the country,[62] and universally

[59] We believe that, as a policy matter, the materiality of the category of information (in addition to the granular data within that category) is a prudent rubric for the Commission to use in deciding whether to prescribe disclosure of that category of information.

[60] Congress first included the concept in the Securities Act of 1933. Shortly thereafter, the SEC adopted rules incorporating and defining the "materiality" requirement on multiple occasions. See, e.g., SAB 99.

[61] See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

[62] See, e.g., *Dalberth v. Xerox Corp.*, 2014 WL 4390695, at *10 (2d Cir. 2014) (finding that for the materiality requirement to be satisfied, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information made available") (internal quotation marks omitted); *Petrie v. Electronic Game Card, Inc.*, 761 F.3d 959, 970 (9th Cir. 2014).

affirmed by SEC staff guidance.[63] Under the established framework, such information is "material" if there is a "substantial likelihood" that it "would have been viewed by a reasonable investor as having significantly altered the total mix of information made available."[64]

A finding of materiality does not require a showing that the information would have been outcome-determinative: "a fact may be material even if it would not have changed an investor's ultimate investment decision."[65] Where it is shown, however, that a reasonable investor could not have been influenced by an alleged misrepresentation or omission given the total mix of information available, a court may determine that the alleged misrepresentation or omission is immaterial as a matter of law.[66] As the courts have repeatedly noted, this inquiry is "inherently fact-specific."[67] The Commission has affirmed that "an assessment of materiality requires that one views the facts in the context of the 'surrounding circumstances.'"[68] In this way, *materiality* ensures that the information disclosed to the public is "customized to the unique characteristics of each public company and does not elicit 'overinclusive or underinclusive' information as would occur under a generic standard."[69]

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[63] See SAB 99 (where the staff stated that "[t]he omission or misstatement of an item in a financial report is material if, in the light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item."). *See* also Notice of Commission Conclusions & Rulemaking Proposals in the Public Proceeding Announced in Release No. 33-5569 (Feb. 11, 1975) Regarding (1) Such Further Disclosure, If Any, of Env't Matters in Registration Statements, Rep. & Other Documents Required to Be Filed or Furnished to Investors Pursuant to the Securities Act of 1933 & the Securities Exchange Act of 1934 As May Be Necessary, Consistent with the National Policy, Release No. 5627 (Oct. 14, 1975) ("[T]he Commission has generally resolved these various competing considerations [regarding full and fair disclosure] by requiring disclosure only of such information as the Commission believes is important to the reasonable investor — 'material information.' This limitation is believed necessary to insure meaningful and useful disclosure documents of benefit to investors generally without unreasonable costs to registrants and their shareholders.") (internal citations omitted).

[64] *TSC Indus. Inv.*, 426 U.S. at 445 (internal citation omitted).

[65] *In re Kidder Peabody Sec. Litig.*, 10 F. Supp. 2d 398 (S.D.N.Y. 1998) (citing Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b–5). *See also TSC Indus. Inv.*, 426 U.S. at 449; *Folger Adam Co. v. PMI Indus., Inc.*, 938 F.2d 1529, 1533 (2d Cir.1991).

[66] *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 (8th Cir. 1997) (citing *Hillson Partners Ltd. Partnership v. Adage, Inc.*, 42 F.3d 204, 211 (4th Cir.1994)).

[67] See, e.g., *Basic Inc.*, 485 U.S. at 236; *In re Barclays Bank PLC Sec. Litig.*, 756 F. App'x 41, 44 (2d Cir. 2018), *as amended* (Nov. 20, 2018); *Hutchison v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 485 (2d Cir. 2011); *Labul v. XPO Logistics*, 2021 WL 1056828, at *8 (D. Conn. Mar. 19, 2021); *Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F. Supp. 2d 624, 637 (S.D.N.Y. 2012).

[68] SAB 99.

[69] Business Roundtable, *The Materiality Standard for Public Company Disclosure: Maintain What Works*, Oct. 2015, p.8, available at https://s3.amazonaws.com/brt.org/archive/reports/BRT.The%20Materiality%20Standard%20for%20Public%20Company%20Disclosure.2015.10.29.pdf (quoting *Basic Inc.*, 485 U.S. at 236).

Finally, the materiality standard that has developed is an objective one that essentially requires a public company and its advisors to consider the perspective of the "reasonable investor" when preparing disclosures under the securities laws.[70] While neither the SEC nor the Supreme Court has offered a definition of "reasonable investor," judicial guidance has widely suggested that (s)he is a "rational actor" possessing, at minimum, a modest level of financial sophistication. For instance, case law has made clear that the reasonable investor "grasps market fundamentals" such as "the time value of money, the peril of trusting assumptions, and the potential for unpredictable difficulties to derail new products."[71]

B. Suitability of the Materiality Framework to Sustainability-Related

Given the long-standing effectiveness of the application of the materiality standard, any new initiative should build upon the established conceptual framework, rather than assess disclosures against new and relatively untested standards or expectations.[72] This is especially so given the growing need to protect investors seeking to invest in ESG initiatives, and the effectiveness of the materiality framework as applied to *qualitative* information (in addition to the often easier-to-measure category of *quantitative* information) and to an ever-evolving global marketplace.

a. Materiality Is Designed to Protect Investors

Given the "the magnitude of the shift in investor focus" to ESG information and consistent with the SEC's mission to protect investors, a disclosure framework designed to protect investors is not only desirable but wholly necessary. Courts and the SEC consistently have emphasized the importance of the materiality standard in protecting investors and have expressed concerns with the ability of an arguably less rigorous "usefulness" standard to adequately do so. The Supreme Court has expressly rejected a definition of materiality that asks only what a reasonable investor "*might* consider important,"[73] which is essentially the "decision useful" framework without a materiality threshold. The decision-usefulness inquiry is necessary but not determinative.

To this end, Congress, courts, and the SEC have all recognized the importance of filtering out irrelevant and unnecessarily detailed information to protect the ability of investors to make informed decisions. By excluding information that a reasonable investor *could not* have been influenced by given the total mix of information available (because it is beside the point or so detailed as to add little value), this standard helps ensure that issuers do not bury shareholders in

[70] See, e.g., *Nolte v. Capital One Fin. Corp.*, 390 F.3d 311 (4th Cir. 2004); *Heller v. Goldin Restructuring Fund*, L.P., 590 F. Supp. 2d 603 (S.D.N.Y. 2008). A "reasonable investor" is distinguished for these purposes from a particular investor with his or her own preferences.

[71] Margaret V. Sachs, *Materiality and Social Change: The Case for Replacing "the Reasonable Investor" with "the Least Sophisticated Investor" in Inefficient Markets*, 81 TUL. L. REV. 473, 475-79 (2006) (citing *Levitin v. PaineWebber, Inc.*, 159 F.3d 698, 702 (2d Cir. 1998); *Itarris v. Ivax Corp.*, 182 F.3d 799, 807 (11th Cir. 1999); *Hillson Partners Ltd. Partnership v. Adage, Inc.*, 42 F.3d 204, 1213 & n.7 (4th Cir. 1994)).

[72] See Public Statement by Commissioners Hester M. Peirce and Elad L. Roisman, Enhancing Focus on the SEC's Enhanced Climate Change Efforts, SEC (Mar. 4, 2021), available at https://www.sec.gov/news/public-statement/roisman-peirce-sec-focus-climate-change.

[73] *TSC Indus. Inv.*, 426 U.S. at 445 (emphasis added).

an "avalanche of trivial information."[74] Similarly, in its 2003 guidance regarding Regulation S-K, the SEC noted that the usefulness of required disclosures "decreases with the accumulation of unnecessary detail or duplicative or uninformative disclosure that obscures material information."[75]

Notably, the SEC has repeatedly imposed the materiality standard in comparable contexts to those in which we find ourselves today relating to ESG disclosures. In fact, many prior SEC releases requiring disclosure relating to environmental laws have used the materiality standard in connection with such disclosure requirements. To provide some examples:

- In 1971, registrants were required to disclose the financial impact of compliance with environmental laws, based on the materiality of the information.[76]

- In 1973, registrants were required, among other things, to disclose the material effects that compliance with environmental statutory provisions may have upon capital expenditures, earnings, and the company's competitive position.[77]

- In 1976, registrants were required to disclose any material estimated capital expenditures for environmental control facilities.[78]

- And in 2010, public companies were reminded that climate-related disclosures are important and that material impacts should be disclosed to comply with existing SEC rules.[79]

We recommend that the Commission take that same approach here and indicate as part of any follow-on rulemaking that GhG emissions Scope 1 and Scope 2, narrative disclosure consistent with the TCFD framework, and the human capital-related information captured on Form EEO-1 is material to the reasonable investor.

b. Materiality May Be Applied to Non-Quantitative Information

Given that the relevance of ESG information is not always reflected in quantitative financial metrics, it is critical that the underlying legal framework be applicable to non-quantitative factors that are nevertheless material to enterprise value creation over the short, medium, and long term.

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[74] *Basic Inc.*, 485 U.S. at 236.

[75] SEC Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations (Dec. 29, 2003).

[76] *Disclosures Pertaining to Matters Involving the Env't & Civil Rights*, Release No. 33-5170 (July 19, 1971).

[77] *Notice of Adoption of Amends. to Registration & Rep. Forms to Require Disclosure with Respect to Compliance with Env't Requirements & Other Matters*, Release No. 5386 (Apr. 20, 1973).

[78] *Notice of Comm'n Conclusions & Final Action on the Rulemaking Proposals Announced in Sec. Act Release No. 5627 (Oct. 14, 1975) Relating to Env't Disclosure*, Release No. 33-5704 (May 6, 1976).

[79] 2010 Guidance.

Courts and the SEC have explicitly affirmed that "qualitative" factors play an important role in the materiality inquiry.[80] The focus in these cases tends to be whether: (i) the currently non-quantifiable factor at issue is likely to *lead to* quantifiable issues in the future,[81] or (ii) failure to disclose the non-quantifiable factor would be materially misleading.[82]

In fact, on August 26, 2020, the SEC adopted a series of amendments to its disclosure requirements.[83] These amendments were adopted with the express purpose of building upon the SEC's "principles-based disclosure framework" that is "rooted in materiality."[84] One such amendment includes the requirement to disclose "material changes to a registrant's previously disclosed business strategy."[85] Significantly, as Commissioner Lee correctly noted in her recent speech on materiality, the materiality standard as developed under the federal securities laws and resulting case law does not create an independent requirement that all material information automatically be disclosed.[86] Rather, it is a basis for benchmarking the level of information required *within* the categories of information that otherwise have been deemed appropriate for disclosure. As was done with the above-referenced environment-related disclosure requirements and the August 2020 human capital management disclosure amendments, any ESG disclosure requirements prescribed by the Commission should be rooted in materiality such that the level of detail and granularity of data to be disclosed *within* any prescribed categories of information can be benchmarked sensibly.

c. Materiality Is Uniquely Suited to a Rapidly Evolving Global Marketplace

In addition to acting as a filter for the appropriate level of detail as well as addressing the qualitative nature of information as discussed above, the materiality framework serves to accommodate a rapidly changing global marketplace that evolves over time. In today's world, it

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[80] SAB 99 (The materiality analysis requires one to "consider both 'quantitative' and 'qualitative' factors in assessing an item's materiality."); *see also* *In the Matter of Franchard Corp.*, 42 S.E.C. 163 (July 31, 1964) (finding the "integrity" and "quality" of management to be material); *IBEW Loc. Union No. 58 Pension Tr. Fund & Annuity Fund v. Royal Bank of Scotland Grp., PLC*, 783 F.3d 383, 390 (2d Cir. 2015) ("Courts must also consider qualitative factors, which can turn a quantitatively immaterial statement into a material misstatement.").

[81] See footnote 13, *supra*, for citations.

[82] See footnote 14, *supra*, for citations.

[83] News Release, *SEC Adopts Rule Amendments To Modernize Disclosures Of Business, Legal Proceedings, And Risk Factors Under Regulation S-K*, S.E.C. 20-192, 2020 WL 5036538.

[84] Id.

[85] 2020 Regulation S-K Amendments (where the Commission stated that "we believe that once a registrant has disclosed its business strategy, it is appropriate for it to discuss changes to that strategy, to the extent material to an understanding of the development of the registrant's business.").

[86] See Material World Speech (correctly stating that "[t]here is no general requirement under the securities laws to reveal all material information."), *available at* https://www.sec.gov/news/speech/lee-living-material-world-052421?utm_medium=email&utm_source=govdelivery.

is critical that federal securities laws be "dynamic and respond to changing circumstances."[87] Because materiality is analyzed from the perspective of the reasonable investor, it changes to reflect developments within the particular company, the broader economy, as well as the global marketplace and over time impacts what a company assesses as being material to a "reasonable investor's" investment or voting decisions.[88] "Since materiality depends upon whether information is important to a reasonable investor, it changes over time and provides a framework for addressing new issues and shedding issues whose importance has waned."[89] The need for a framework that can accommodate an evolving landscape is especially critical here where an ESG metric considered immaterial to enterprise value creation in an industry today may become material to that same industry in just one year's time. Thus, any framework for mandated ESG disclosure must be nimble to keep pace with the ever-changing realities market participants are facing.

C. Considering Appropriateness of Decision-Useful Terminology

"Decision-usefulness" is a financial reporting concept that has crept into the discourse on ESG disclosures, but we discourage the continued use of this term as it suggests a standard of disclosure separate from materiality. We assert that "decision-useful" cannot be helpfully applied to Commission-required disclosure except by reference to materiality, and we caution against the use of a "decision-useful" analysis that is not anchored in materiality.

We note that this approach would be consistent with the May 2020 recommendations of the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee, which urged the Commission to "begin in earnest an effort to update the reporting requirements of issuers to

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[87] Statement of the Commission Regarding Disclosure of the Year 2000 Issues, Release No. 34-40277 (Aug. 4, 1998), available at https://www.sec.gov/rules/interp/33-7558.htm.

[88] For instance, over the decades, the SEC has provided specific guidance to companies in response to major world events, from the adoption of the euro in 1998 to climate change issues in 2010, always instructing them to disclose information regarding those events if that information is *material*. See, e.g., Staff Legal Bull. No. 6, Publication of Divisions of Corporation Finance, Market Regulation and Investment Management (July 22, 1998) ("An issuer should disclose the impact of the euro conversion if that impact is expected to be material to the issuer's business or financial condition."); SEC, Statement of the Commission Regarding Disclosure of Year 2000 Issues, Release No. 34-40277 (Aug. 4, 1998) ("[W]e believe a company must provide year 2000 disclosure if: (1) Its assessment of its Year 2000 issues is not complete, or (2) management determines that the consequences of its Year 2000 issues would have a material effect on the company's business, results of operations, or financial condition, without taking into account the company's efforts to avoid those consequences."); 2010 Guidance (noting that certain disclosures must be made depending on whether "developments in federal and state legislation and regulation regarding climate change" would have a material effect on the company); SEC Division of Corporate Finance, CF Disclosure Guidance: Topic No. 2. Cybersecurity (Oct. 13, 2011) ("[M]aterial information regarding cybersecurity risks and cyber incidents is required to be disclosed when necessary in order to make the other disclosures, in light of the circumstances under which they were made, not misleading.").

[89] Business Roundtable, *The Materiality Standard for Public Company Disclosure: Maintain What Works*, Oct. 2015, p.8, available at https://s3.amazonaws.com/brt.org/archive/reports/BRT.The%20Materiality%20Standard%20for%20Public%20Company%20Disclosure.2015.10.29.pdf.

include *material*, decision-useful ESG factors." (emphasis added) [90] In each instance where the Subcommittee refers to decision-usefulness in its recommendation, it consistently does so by reference first to materiality.

In his recent confirmation hearings, Chair Gensler also appeared to embrace the notion that a disclosure regime should be premised on materiality. Specifically, he stated that he believes "materiality has to be significant to the mix of information to a reasonable investor. That will always ground [the Commission's] analysis and how we move forward. . . I will always be grounded in the courts and the law about materiality."[91] In testimony before the House Financial Services Committee, Chair Gensler also indicated that public company disclosure has "a materiality component… but there are also individual disclosures that are often very small but still can have a really meaningful part to investment decisions."[92]

a. Considering Appropriateness of Double Materiality

While some jurisdictions require companies to measure the impact of a company on society (often referred to as "double materiality"), financial materiality and double materiality are two very different and distinct analytical lenses, serving different objectives and different sets of stakeholders. The financial materiality perspective looks 'outside-in' at the impact of ESG factors on a company's business with a focus on meeting the information needs of investors and other providers of financial capital.[93] In contrast, the double materiality perspective looks 'inside-out' at a company's impact on environmental and social sustainability with a much broader set of stakeholders and a more diffuse set of information needs. Were the Commission to pursue disclosure requirements based on double materiality, it would depart in a meaningful way from the disclosure regime that has existed in the Unites States until now. A double materiality disclosure standard would introduce uncertainty and confusion. Consistent with longstanding US law, we strongly support a framework that applies a financial materiality lens to ESG

[90] Recommendation from Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee relating to ESG Disclosure at 7, May 14, 2020 (available: https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-of-the-investor-as-owner-subcommittee-on-esg-disclosure.pdf).

[91] Transcript of the Nomination Hearing of the Honorable Gary Gensler before the Senate Committee on Banking, Housing and Urban Affairs, March 2, 2021, available at https://www.banking.senate.gov/imo/media/doc/Gensler%20Resp%20to%20QFRs%203-2-21.pdf.

[92] See Webcast of Virtual Hearing of the House Financial Services Committee, Game Stopped? Who Wins and Loses When Short Sellers, Social Media, and Retail Investors Collide, available at https://financialservices house.gov/calendar/eventsingle.aspx?EventID=407748.

[93] Although not all sustainability impacts are financially material, SASB and other sustainability disclosure standard setters have recognized, and we have discussed herein, that ESG impacts considered immaterial to enterprise value creation today may become material over time. Movement of information back and forth along this continuum—from sustainability impact to material sustainability information to information that is reflected in a company's financial accounts could happen either gradually or rapidly due to catalyst events, stakeholder reaction, and regulatory reaction as well as innovation. See Statement of Intent to Work Together Towards Comprehensive Corporate Reporting (September 2020), available at https://29kjwb3armds2g3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf.

information, with the objective of providing investors with information that is not reflected in a company's financial statements but is nevertheless material for enterprise value creation.[94]

[94] Enterprise value is a company's total market value rather than only its equity value. It is defined as market capitalization plus net debt, where market capitalization is determined by the market via the company's share price, which in turn is informed by its financial and operational performance as well as by market expectations of the company's ability to generate cash flows over the short, medium, and long term. Enterprise value is therefore influenced by factors such as revenue, costs, assets, liabilities, cost of capital, and risk profile. See, e.g., Corporate Finance Institute, What is Enterprise Value, available at https://corporatefinanceinstitute.com/resources/knowledge/valuation/what-is-enterprise-value-ev/.

Appendix B

ICI and its members have been actively involved in ESG-related issues, including company disclosure, for the last few years. In December 2020, ICI's Board of Governors recognized that enhancing the comparability of company disclosure would better equip regulated funds to make informed investment decisions on behalf of their shareholders. The Board therefore issued a statement, encouraging companies to provide disclosure consistent with the TCFD framework and the SASB standards so that fund managers have access to comparable, accurate, and timely disclosure.[95] ICI also encouraged the Biden administration and the SEC to work toward a consistent global standard for corporate ESG disclosure in its first 100 days.[96] Most recently, ICI commended President Biden and Treasury Secretary Yellen for calling upon policymakers to enhance efforts to foster consistent, reliable, financially material information from companies about the risks that climate change presents to their businesses.[97]

ICI leads an extensive work program on climate and ESG issues for the regulated fund industry. Our members are keenly interested in sustainability reporting frameworks and standards, particularly given investment funds' critical role in making sustainable finance work. The ICI's work is multi-faceted and includes:

- *Prioritizing ESG issues in ICI's policy work.* In 2018, ICI established the ESG Task Force, and in 2020, the ESG Advisory Group, to draw on the expertise and experience of its members and pursue initiatives, including creating a fund industry ESG roadmap.

- *Promoting consistent terminology for funds*. In July 2020, ICI's Board of Governors unanimously endorsed a fund industry ESG roadmap—an introduction to ESG investing strategies designed to encourage the use of consistent terminology when describing ESG integration and sustainable investing strategies.

- *Encouraging enhanced corporate ESG disclosure*. In December 2020, ICI's board unanimously called for enhanced ESG disclosure by corporate issuers. In April 2021, ICI President and CEO Eric J. Pan commended President Biden and Treasury Secretary Yellen for calling upon policymakers to enhance efforts to foster consistent, reliable, financially material information from companies about the risks that climate change presents to their businesses. Biden's US International Climate Finance Plan and Yellen's recent remarks outlined the administration's approach.

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[95] See ICI News Release, ICI Board Unanimously Calls for Enhanced ESG Disclosure by Corporate Issuers (December 7, 2020), available at https://www.ici.org/news-release/20_news_esg.

[96] In addition, ICI urged the Biden administration and the SEC to lead work on a global disclosure reporting standard using TCFD and SASB standards as a starting point for international deliberations. See Eric J. Pan, "The Fund-Management Industry Now Wants the US to Take the Lead on ESG Investing – Here's What It Says Biden Should Do," published in MarketWatch (December 7, 2020), available at https://www.ici.org/speeches-opinions/20_ejp_esg..

[97] See ICI News Release, ICI supports Biden Administration's Approach Toward Fostering Better Climate Risk Disclosure for Companies, available at https://www.ici.org/news-release/21_news_climate.

- *Advocating for a global minimum standard*. ICI President and CEO Eric J. Pan amplified the Institute's call for enhanced ESG disclosure with an op-ed in *MarketWatch*, urging the Biden administration and the SEC to lead work on a global disclosure reporting standard using TCFD and SASB standards as a starting point for international deliberations. Pan echoed this call in commentary published in *Le Monde*, the *South China Morning Post*, and *Nikkei*, asking policymakers in Europe and Asia to work with the United States to achieve a global minimum standard for what sustainability information companies should disclose.