



June 9, 2021

Via Electronic Mail

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

Re: Request for Public Input on Climate Change Disclosures

Ladies and Gentlemen:

The Bank Policy Institute¹ welcomes the opportunity to respond to the March 15, 2021 request for public input from the U.S. Securities and Exchange Commission seeking comment on how the SEC can best regulate climate disclosures.²

I. Executive Summary

We write from the vantage point of public companies that are both subject to SEC disclosure requirements and that are users of disclosures provided by clients. This unique perspective informs the banking sector's suggestions on how the SEC might best mandate climate disclosures.

BPI supports consistent and meaningful climate disclosures. Many banking organizations have already taken several important climate-related actions, including publishing extensive disclosures publicly via their websites or through voluntary reports. These actions are part of an increasing trend of registrants voluntarily disclosing climate information to investors, and we expect this trend would

¹ BPI is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

² Throughout this letter, we use the term "climate disclosures"—and related terms such as "climate information" and "climate risks"—to refer to climate-related risks for financial institutions, as differentiated from risks to the climate itself.

continue in response to investor interest in this information and registrants' desire to meet investor demand even absent SEC action on climate disclosures. For such disclosures to be meaningful to investors, however, they need to have a common form and lexicon. Beyond comparability of climate disclosures within the United States alone, given that many banking organizations, along with other companies, operate internationally, any SEC rule or guidance should be consistent with those of regulators in other major financial centers. It is important that the SEC continue to engage with international regulatory counterparts and shape international efforts to ensure any internationally developed standards achieve the SEC's objectives and avoid possible conflicting regimes and fragmentation. In implementing disclosure requirements in the United States, the SEC should ensure it is acting in line with, and not beyond, its core investor protection mandate.³

Given the increasing momentum behind voluntary climate disclosures, it is important that any approach taken by the SEC creates the right incentives and does not disincentivize climate disclosures, including those made outside filings under the Securities Act of 1933 and the Securities Exchange Act of 1934. Potential liability is a key factor. Risk of civil litigation from private litigants and the SEC under the U.S. securities disclosure regime, along with the potential for investigation, enforcement, and liability, could result in registrants being more cautious in their disclosures and supplying fewer and less informative climate disclosures. In any event, like other forward-looking statements, forward-looking climate disclosures made in good faith should not subject a public company to liability. Similarly, liability should be limited for good-faith climate disclosures based on third-party information outside registrants' ability to verify and control.

With these foundational considerations in mind, we offer three guiding principles and three recommendations for any SEC actions with respect to climate change disclosures.

A. Guiding Principles.

The principles that should guide the SEC in any rulemaking or guidance are as follows.

- The SEC should hew closely to and build upon its existing approach of a flexible disclosure regime focused on the SEC's core mission of investor protection, capital markets integrity, and capital formation facilitation.
- The SEC should continue to engage and coordinate with foreign regulators and international standard setters to promote consistency in disclosures across borders to the maximum extent possible, but consistent with U.S. law and practice.
- Given the complexity and dynamism of the climate regulatory landscape, the SEC should move in a deliberative manner, taking account of evolving practices in how best to measure and report climate risks.

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In this letter, we focus on the substantive policy of potential SEC action on climate disclosures and make some practical suggestions for how SEC rulemaking or guidance might be best suited, rather than focus on the details of the process by which the SEC might act. For example, we do not address the authority of the SEC to act, whether under the Administrative Procedure Act or otherwise.

B. Recommendations.

BPI makes the following three recommendations.

- To create the right incentives for continued progress on climate disclosures, the SEC should limit potential liability for climate disclosures. Under current law, the existing general safe harbor against private litigation for forward-looking statements applies to climate disclosures in the same manner as it would to other forward-looking disclosures, but climate disclosures have certain features that merit an additional safe harbor against SEC investigations and enforcement actions for forward-looking statements, as the existing safe harbor applies only to private litigants. A climate safe harbor applicable to the SEC for forward-looking statements is appropriate given present data limitations and necessary reliance by some registrants (including financial intermediaries) on third-party information and data. Beyond forward-looking statements, the SEC should limit liability for point-in-time climate disclosures based on information and data from third parties that are outside registrants' ability to reasonably verify and control.
- If the SEC requires additional climate disclosures, it should require those disclosures outside of existing securities filings. Any incremental mandated disclosures of climate information should be placed in separate documents that do not attract liability under the Securities Act. To be clear, there would still be liability under Exchange Act Section 10(b) and Rule 10b-5 for these climate disclosures, but for such liability to attach *scienter* would need to be shown. The SEC took this approach in its Conflict Minerals Rule, which requires a specialized disclosure report on newly created Form SD, and the SEC should follow a similar approach here. This approach would better promote climate disclosures by avoiding the risk of liability that attaches to 10-Ks and 10-Qs, which are routinely incorporated by reference into securities offering documents. It would be consistent with the existing SEC liability framework, which limits liability for disclosures based on information outside the knowledge cone and control of registrants, such as for forward-looking statements about general trends and liability protections provided by risk factors. It would also be necessary as a timing matter, because it may not be possible to obtain climate information that needs to be gathered in time to meet the deadlines for 10-K and 10-Q filings.
- The SEC should not require at this stage that any additional climate disclosure requirements be subject to an audit or assurance process given the nascent stage of verification and data inconsistencies. Such a process would be an unduly burdensome requirement given how costly and time-consuming climate assurance is at this time.

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The remainder of this letter provides more detail on our guiding principles and recommendations.

II. Principle 1: The SEC should hew closely to and build upon its existing flexible-disclosure approach and core mission.

Any SEC climate disclosure regime should be consistent with the SEC's existing approach of a flexible, principles-based disclosure regime focused on its core mission.

A. Any standards the SEC adopts should be flexible given the dynamic and evolving nature of climate disclosures across sectors.

Flexibility in any new SEC climate disclosure regime is critical because there is not yet a consensus from investors about which climate disclosures they would find most relevant for investment decisions.

Even if there were agreement from investors regarding which climate disclosures would be most useful, there are impediments to registrants providing meaningful disclosures on a consistent basis. Because of current limitations on climate metrics and data, a prescriptive approach cannot adequately capture the differences across companies, both between and within economic sectors. These difficulties are particularly acute for registrants that are banking organizations, which are necessarily reliant on information from clients to be able to generate their own climate-related disclosures. Even as compared to other types of registrants that may be reliant on third-party data to produce climate disclosures, banking organizations—both small and large—face the additional challenge that their portfolios may be weighted more heavily toward retail clients and institutional clients that are private companies, for whom climate data is not widely disclosed or is non-existent.

Thus, until a uniformly applicable single disclosure or set of disclosures is established, the SEC should maintain its existing approach and have any new climate disclosure regime be flexible.

B. An SEC climate disclosure regime should fit within the SEC’s mission of investor protection, capital markets integrity, and capital formation facilitation.

Material climate risk should be disclosed just as any other material risk in Securities Act and Exchange Act filings, such as 10-Ks and 10-Qs, using the ordinary U.S. Supreme Court definition of materiality from *Basic v. Levinson* and *TSC Industries v. Northway*.⁴ Material climate disclosures should be made in accordance with the SEC’s 2010 Climate Change Guidance or any applicable update to that guidance.

This letter is focused on the possible creation of incremental climate disclosure requirements. It would be similar to the regime the SEC created for conflict minerals disclosures under the Conflict Minerals Rule and using Form SD.

Additional climate disclosure requirements—as could be implemented using a new Form Climate Disclosure, or “Form CD”⁵—should be grounded in the SEC’s mission. In particular, BPI urges the SEC to adopt only those additional climate disclosure requirements that would further the SEC’s

⁴ The definition is, “[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” and that to be material “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.” *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). The *Basic* Court framed the materiality question as whether the information “is significant to the reasonable investor’s trading decision.” 485 U.S. at 235.

⁵ As discussed further below, unlike Form SD, BPI recommends that Form CD be furnished (and not filed) and not subject to any audit or assurance requirement at this stage.

mandate of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

There are ongoing efforts outside of the SEC disclosure process where banking organizations are being asked to provide granular disclosures directed toward aims other than investor protection. For example, the Financial Stability Board is currently assessing disclosure requirements, and regulators in the United Kingdom, European Union, and other jurisdictions are considering disclosure of firm-specific financial risk and financial stability risks.⁶ The SEC therefore should focus on its core mission, as other regulators focus on theirs.

III. Principle 2: The SEC should engage with bodies developing international climate disclosure standards to ensure any U.S. approach to disclosure is coordinated with other jurisdictions.

Because comparability and consistency of climate disclosure regimes will be critically important—both to registrants⁷ and to investors—the SEC should coordinate its approach to developing a climate disclosure regime with bodies developing international standards, while maintaining U.S. principles of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation. With respect to international organizations, the SEC should continue to actively participate in the efforts of the International Organization of Securities Commissions, particularly with respect to the SEC’s role as co-lead of its Technical Expert Group (TEG) reviewing prototype sustainability reporting standards that the International Financial Reporting Standards Foundation is expected to issue later this year.

With respect to banking organizations, the SEC should also coordinate its efforts with ongoing climate efforts among the U.S. banking agencies, including through the Financial Stability Oversight Council, in order to ensure that there is no inconsistency or overlap in those efforts.⁸

A. The SEC should continue to coordinate its climate disclosure efforts with those of bodies developing international standards.

Question 6 of the Request for Public Input asks whether the SEC should designate a climate or environmental, social, and governance (ESG) disclosure standard setter. The SEC, through its role in the TEG, should continue to engage and shape the IFRS Foundation’s current efforts to establish an international sustainability standard setter. BPI therefore encourages the SEC to continue to work through the IFRS Foundation’s ongoing process, including as set forth in the Biden administration’s April

⁶ See European Banking Authority, Consultation on Draft ITS on Pillar Disclosures on ESG Risk (Jan. 3, 2021), <https://www.eba.europa.eu/calendar/consultation-draft-its-pillar-disclosures-esg-risk>.

⁷ For example, lack of coordination with international bodies poses a risk that inconsistent standards might apply to registrants that operate cross-border.

⁸ Coordination between the SEC and U.S. banking agencies would be consistent with President Biden’s May 2021 Executive Order 14030 on Climate-Related Financial Risk, which calls for the FSOC to consider a number of actions, including issuing a report to the President that includes a discussion of the necessity of any actions to enhance climate-related disclosures. 86 Fed. Reg. 27967, 27968 (May 25, 2021).

22, 2021 U.S. International Climate Finance Plan.⁹ We would expect that if the SEC ultimately were to endorse, or delegate to, a separate standard setter, the organization would be free of actual or potential conflicts of interest; and that either it would be politically accountable or the SEC would have sufficient oversight and governance of the standard setter to ensure accountability.

As part of these international efforts, BPI supports the development and use of a harmonized international climate disclosure standard with national adoption and modification as needed. An internationally harmonized standard would make climate disclosures more useful and easier to produce, while national adoption and modification would permit the SEC to tailor the standard as needed to the SEC's existing regulatory focus and to unique aspects of securities disclosure in the United States. In pursuing this international coordination, the SEC should coordinate the timing of any actions it takes to mandate climate disclosures with the development of the international standard.

B. Development and use of a harmonized international standard, with national adoption and modification as needed, would have multiple benefits.

International harmonization is critical for comparability of climate disclosures, making disclosures easier to use and interpret as well as less burdensome to produce.

Unlike in some other regulatory areas, such as prudential banking regulation under the Basel Committee on Banking Supervision Core Principles for Effective Banking Supervision and Financial Stability Board standards, disclosure approaches are more heterogeneous across countries, so the ability to have national tailoring of an international disclosure standard is paramount. The SEC has adhered to a principles-based approach to securities disclosures. This approach is distinct from those employed by regulators in some other jurisdictions, where regulators have taken a much more prescriptive approach focused on disclosure templates. Adopting an international standard without an opportunity for adjustments therefore could result in a U.S. climate disclosure regime that would be inconsistent with the long-standing U.S. securities law framework. We encourage the SEC to engage with international standard setters and advocate that they create a national adoption and modification process for implementing an international climate disclosure standard.

An international standard with national adoption and modification as needed would be in agreement with the U.S. International Climate Finance Plan issued by President Biden in April 2021. That plan states that the U.S. Department of the Treasury, in coordination with U.S. regulators, should “help shape any forthcoming recommendations or international standards to be compatible with the U.S. domestic framework and regulatory process.”¹⁰

The SEC should account for the fact that it may be the case that not all aspects of an international framework would be appropriate for incorporation into the SEC's existing disclosure

⁹ See The White House, U.S. International Climate Finance Plan, at 11–12 (Apr. 22, 2021), *available at* <https://www.whitehouse.gov/wp-content/uploads/2021/04/U.S.-International-Climate-Finance-Plan-4.22.21-Updated-Spacing.pdf> (stating that the Treasury Department will “[s]upport and help guide, in coordination with U.S. regulators, the direction of work undertaken by the [IFRS] Foundation, [IOSCO], and the [Financial Stability Board] towards consistent, comparable, and reliable climate-related financial disclosures”).

¹⁰ *Id.*

framework. As a result, some aspects of the international framework may be better left to other regulators in the United States. These could include either private-sector-led initiatives or other federal authorities.

For example, the Task Force on Climate-related Financial Disclosures (**TCFD**) and the climate-related portions of the Sustainability Accounting Standards Board (**SASB**) and the World Economic Forum-International Business Council standards provide a good starting point for the types of information companies might disclose. Nevertheless, not all elements of those standards may be appropriate for the SEC's mandate, as opposed to the mandates of other U.S. regulators. Therefore, if any of those standards are used as the basis for the international standard, the SEC should tailor the standard to the SEC's existing flexible-disclosure approach and the SEC's mission.

Such tailoring by the SEC would be neither unique nor unprecedented. In fact, the United Kingdom has already taken steps to adopt preexisting climate disclosure standards on a tailored basis. In March 2021, following its adoption of mandatory TCFD-aligned disclosures in November 2020,¹¹ the United Kingdom issued a consultation departing from TCFD by stating that "scenario analysis will be encouraged but will not be required."¹² The consultation recognized "that this is one of the most challenging areas of the TCFD recommendations and while some companies are quickly developing capabilities in this area, there remains a significant skills and expertise gap for many companies."¹³ In implementing an international standard in the United States, the SEC should similarly tailor the requirements as needed.

Furthermore, any international standard would need to be tailored with due regard to securities law liability considerations unique to the United States. The United States is atypical in the substantial role private litigants play with respect to its securities disclosure regime and in the fact that the SEC, unlike many foreign regulators, is active in investigations and enforcement. The SEC should be mindful of these potential liability considerations in adopting and tailoring an international climate disclosure standard.

IV. Principle 3: The SEC should proceed in a deliberative manner in developing a climate disclosure regime.

BPI encourages the SEC to proceed in a deliberative manner in developing a climate disclosure regime for three reasons. *First*, acting without deliberation runs the risk of creating a disclosure regime that is neither useful nor effective, especially given current data limitations. *Second*, banking organizations face additional challenges for producing meaningful disclosures because of their reliance on client data to evaluate their own activities. *Third*, as described in detail above, the SEC should coordinate with other actors on climate disclosure, which will take time.

¹¹ HM Treasury, Chancellor Sets Out Ambition for Future of UK Financial Services (Nov. 9, 2020), *available at* <https://www.gov.uk/government/news/chancellor-sets-out-ambition-for-future-of-uk-financial-services>.

¹² United Kingdom Department for Business, Energy & Industrial Strategy, Consultation on Requiring Mandatory Climate-Related Financial Disclosures by Publicly Quoted Companies, Large Private Companies and Limited Liability Partnerships (LLPs), at 25 (March 24, 2021).

¹³ *Id.*

A deliberative approach is necessary to ensure climate disclosures are useful and effective, rather than counterproductive. In particular, if climate disclosure requirements are not crafted appropriately and are imposed too quickly, climate disclosures could have the imprimatur associated with U.S. capital markets disclosures without having the preconditions for registrants to be able to provide meaningful information to the market. The ability of registrants to produce comprehensive information about their emissions profile and climate risks is at an early stage. Because it will take time for registrants to develop the ability to provide reliable quantitative disclosures, especially if those disclosures were to be required at a granular level, the SEC should not rush to mandate detailed climate disclosures.

As noted earlier, these issues are magnified in the banking sector. Banking organizations are dependent upon information from their clients to understand the emissions profile and climate risks of their lending activities. Gathering this information from clients—who themselves will take time to be able to produce meaningful data—will take a significant amount of time. Banking organizations therefore face an additional hurdle beyond non-bank companies to be able to provide climate disclosures. Given these challenges, we recommend the SEC implement any climate disclosure requirements on a phased basis. Such phasing could be crafted in a number of ways that would be meaningful to registrants. For example, phased implementation could be done by type of registrant or by types of disclosure metrics for registrants across all sectors of the economy (e.g., qualitative disclosures preceding quantitative disclosures, and Scope 1 and 2 emissions data preceding Scope 3 disclosures).

It is important that climate disclosures be coordinated at both the international and domestic levels. If the SEC were to move quickly to establish a new climate disclosure regime, its efforts could front-run ongoing work to converge on an international standard. That could result in establishing U.S. disclosure requirements that are at odds with those used elsewhere in the world, which would harm the comparability and usefulness of the U.S. regime. Moreover, the domestic climate regulatory landscape is currently in significant flux, and the SEC should coordinate its actions with other U.S. regulators, including federal banking agencies, to minimize redundancies and inconsistencies and achieve a coherent overall regulatory framework.

V. BPI recommends that any new SEC climate disclosure regime should be accompanied by an appropriate liability regime, require disclosure on a separate form outside of existing securities filings, and not require an audit or assurance process.

BPI offers three recommendations, discussed in detail below, should the SEC decide to adopt additional requirements for disclosure of climate information. BPI reiterates that, in any efforts to adopt such a disclosure mandate, the SEC's approach should be grounded in its mission, coordinated with other international and domestic actors, and proceed in a considered and thoughtful manner.

A. Recommendation 1: To create the right incentives for continued progress on climate disclosures, the SEC should limit potential liability for any required climate disclosures.

In enacting any new climate disclosure regime, it is critical that the SEC limit liability through two paths: a safe harbor applicable to the SEC for forward-looking statements and explicit SEC guidance, rulemaking, or other relief limiting potential liability—whether from private litigants or the SEC—for point-in-time disclosures based on third-party information, which registrants can neither verify nor control. These limitations are necessary as a general matter for continued progress on climate

disclosures, and they are particularly necessary if the SEC requires disclosures without or before settling on which standard registrants must disclose against. BPI is not suggesting that the SEC provide blanket immunity from all potential liability, but certain liability limitations are appropriate for climate disclosures at this stage.

A safe harbor applicable to the SEC for forward-looking statements in climate disclosures is appropriate on several grounds. *First*, it is difficult to measure climate risk, so good-faith estimates of risks may have high variability and frequently prove incorrect. *Second*, what is disclosed may change over time as the disclosure regime and understanding of climate risk evolve. *Third*, banking organizations are necessarily reliant on third-party data from their customers to be able to generate certain climate disclosures, and have no practical ability to audit data being provided by potentially thousands or tens of thousands of counterparties. Thus, absent a safe harbor, a misstatement by a counterparty could trigger strict liability for any banking organization to which the counterparty reported the underlying data. Thus, in sum, absent a safe harbor, registrants are likely to face opportunistic lawsuits over disclosures that would be, at least in the short term, particularly uncertain.

The existing general statutory safe harbor is insufficient. The Private Securities Litigation Reform Act of 1995 (**PSLRA**) provides a general safe harbor for forward-looking statements. However, the PSLRA's safe harbor applies only to private litigation.¹⁴ Given the uncertainty of climate disclosures and the location in which their disclosure may be mandated, a climate safe harbor is therefore warranted with protections against SEC investigations and enforcement actions for forward-looking statements. In addition, given that it is possible that it may take time between the final rule issuance and when either the SEC or any relevant standard setter selects a prevailing disclosure standard (e.g., IFRS's, TCFD's, SASB's, or another), a safe harbor would be particularly necessary during this time of evolution and uncertainty.

In addition to creating a safe harbor applicable to the SEC, to incentivize progress on climate disclosures it is critical that the SEC issue guidance, rulemaking, or other relief limiting the scope of liability for disclosures based, in whole or in part, on third-party information. This SEC guidance, rulemaking, or other relief is particularly important to the extent the SEC requires additional climate disclosures in 10-Ks and 10-Qs. Registrants will be hesitant to disclose information if liability attaches to client and other third-party information that they cannot verify or control.

This limitation on liability would be consistent with the long-standing U.S. disclosure liability framework. Since the securities laws were enacted in 1933 and 1934, their organizing principle has been that a registrant can be held liable by either the SEC or a private litigant for information about the registrant that the registrant has and controls. Examples include information about the registrant's financial statements, own operations and business, and certifications under the Sarbanes-Oxley Act, which are limited to financial condition and operation. Past SEC requirements for disclosures that may or may not be material—such as information in Guide 3 or regarding related-party transactions—has been confined solely to information that is within the knowledge and ability of the registrant to verify. By sharp contrast, there is liability protection for disclosures based on information outside the knowledge cone and control of the company. Examples include forward-looking statements that discuss general economic, social, and political trends and the protections provided by risk factors.

¹⁴ See 15 U.S.C. §§ 77z-2(c)(1), 78u-5(c)(1) (stating that the safe harbor applies to “private action[s]”).

Climate disclosures present new challenges to this schema. Although some climate disclosures are based on information known to and in the control of the registrant and some climate disclosures concern general trends and are already protected from liability, other climate disclosures under public discussion would be unrelated to information within the knowledge or ability to verify of the registrant. These disclosures would necessarily require reliance on others, such as reliance on third-party-created climate scenarios, scientific information, models or client data, as well as on actions by governments around the world to address climate change. This reliance presents a unique challenge in the United States, where registrants can be frequent targets of opportunistic private lawsuits. If the liability regime is not constructed properly, the risk of private sector litigation as well as the risk of SEC investigation and enforcement would have the consequence of discouraging registrants from making fulsome disclosures to investors. Without a limitation on liability, there is also an open question whether the SEC could achieve an adequate cost-benefit analysis of a scheme that would open up liability to disclosures based on third-party information that is unverifiable and/or difficult to access.

The SEC therefore should provide explicit SEC-level guidance, rulemaking, or other relief that addresses these issues. This SEC guidance, rulemaking, or other relief should state that no registrant should be held liable—whether in an SEC or a private action—for disclosures based on information and data from third parties that are outside of its ability to verify and control or access. It should include a statement that, in such cases, there *per se* can be no *scienter*—i.e., a mental state embracing an intent to deceive, manipulate, or defraud.¹⁵ It would mean that liability would not attach under Exchange Act Section 10(b) and Rule 10b-5, which unlike liability provisions under the Securities Act require showing *scienter* and apply to registrants' statements whether or not those statements are made in Securities Act filings. SEC guidance, rulemaking, or other relief confirming that climate disclosures based on third-party information *per se* are not made with *scienter* would be particularly helpful if the SEC agrees with our recommendation that any new climate disclosure requirements be made outside of documents to which Securities Act liability attaches. Alternatively, if the SEC disagrees and requires additional climate disclosures in 10-Ks and 10-Qs—which are incorporated by reference in Securities Act filings—the SEC's liability guidance, rulemaking, or other relief should provide greater protection beyond lack of *scienter* alone.¹⁶ There would also be a concern with respect to the lower standards for SEC enforcement liability under Section 13(a) of the Exchange Act and Sections 17(a)(2) and (3) of the Securities Act. In either case, the SEC should not upend a statutory scheme that is 88 years old by creating the risk of private lawsuits or SEC investigation and enforcement that hold registrants liable for third-party information they cannot control.

¹⁵ This formulation of *scienter* comes from the Supreme Court's opinion in *Ernst & Ernst v. Hochfelder*, which establishes that *scienter* is required for private actions under Exchange Act Section 10(b) and Rule 10b-5. See 425 U.S. 185, 193 & n.12 (1976). The Supreme Court subsequently held that *scienter* is required for SEC enforcement actions under Exchange Act Section 10(b) and Rule 10b-5. See *Aaron v. SEC*, 446 U.S. 680, 701–02 (1980).

¹⁶ In some cases, there are already statutory protections that would limit liability for reasonable reliance on third-party information. For example, in a suit over liability for a material misstatement or omission under Section 12(a)(2) of the Securities Act, there is a defense that an offeror or seller of a security “did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.” The SEC should state explicitly that this defense would apply to third-party information underpinning climate disclosures. More broadly, the SEC should provide guidance, rulemaking, or other relief limiting liability beyond Section 12(a)(2) alone.

B. Recommendation 2: Any incremental SEC climate disclosures requirements should require disclosures outside of Securities Act and Exchange Act filings.

Question 1 of the Request for Public Input asks where climate disclosures should be provided. Should the SEC require additional climate disclosures, BPI recommends that those disclosures be placed in a form outside securities disclosure documents.

BPI recommends as one approach consistent with the long-standing principles for SEC disclosure that any such additional climate disclosures be provided through a separate Form Climate Disclosure, or “Form CD.” Using a separate form would not be a novel approach, as this was the path taken by the SEC’s Conflict Minerals Rule, which required disclosure on a separate Form SD.¹⁷ We note that, unlike with Form SD, which the SEC initially proposed should be furnished but ultimately required to be filed based on statutory considerations not at issue with climate disclosures,¹⁸ we recommend that the SEC require Form CD to be furnished rather than filed. But like Form SD, we recommend that the SEC allow companies to file the form well after the 10-K deadline.

A separate Form CD is justified by precedent and consistent with existing SEC disclosure principles but is also warranted in light of potential liability considerations. Keeping disclosures outside of SEC filings would help avoid potential Securities Act liability and avoid potential liability associated with the fact that many 10-Ks and 10-Qs are incorporated by reference into Securities Act filings. As a practical matter, liability under Exchange Act Section 10 and Rule 10b-5 requires showing *scienter* whereas Securities Act Section 11 and Section 12(a)(2) liability do not, so not being subject to potential Securities Act liability is a meaningful difference. Given the SEC’s mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, the prospect of lawsuits alleging such liability would not be appropriate and would discourage disclosures, so a separate form is warranted for any incremental climate disclosures the SEC may require.

To be clear, potential liability under Exchange Act Section 10(b) and Rule 10b-5 would exist for material disclosures or omissions whether or not disclosures are in SEC filings or are provided elsewhere. For example, even though conflict mineral disclosures are required on Form SD outside, rather than inside, 10-Ks and 10-Qs, there is still potential Section 10(b) and Rule 10b-5 liability to the extent the disclosures or omissions are material under the U.S. securities law definition of materiality. Under our suggestion, the same would be true for Form CD. However, by keeping climate disclosures

¹⁷ With respect to materiality, in the Conflict Minerals Rule adopting release the SEC observed that the relevant statutory provision “has no materiality thresholds for disclosure based on the amount of conflict minerals an issuer uses in its manufacturing processes” and that therefore the SEC “did not propose to include a materiality threshold for the disclosure or reporting requirements in the proposed rules.” SEC, Conflict Minerals, 77 Fed. Reg. 56274, 56293 (Sept. 12, 2012). We note that commenters in that rulemaking debated whether conflict minerals disclosures are material. *See id.* at 56302–04.

We also note that one important difference between the Conflict Minerals Rule and any additional required climate disclosures is that the Conflict Minerals Rule was grounded in a Congressional mandate of a specific statutory direction to the SEC to promulgate regulations requiring disclosure about conflict minerals. *See* 15 U.S.C. § 78m(p)(1)(A). In compelling additional climate disclosures, the SEC should be mindful that Congress has not provided such a statutory mandate for climate disclosures, which is all the more reason any SEC action should hew to the SEC’s core mission as discussed in Principle 1 above.

¹⁸ *See* Conflict Minerals Rule, 77 Fed. Reg. 56274 at 56303–04.

outside of 10-Ks and 10-Qs, registrants would not be subject to Securities Act liability, and by furnishing rather than filing Form CD, registrants would not be subject to Exchange Act Section 18 liability. Coupled with a safe harbor applicable to the SEC for climate forward-looking statements and SEC guidance, rulemaking, or other relief that disclosures reliant on unverifiable and uncontrolled third-party information *per se* do not have *scienter*, this would create the right incentives for companies to disclose climate information.

Requiring disclosures inside 10-Ks and 10-Qs also presents challenges on timing. Aside from liability considerations, at this stage in the development of climate disclosures it may be very difficult as a practical matter for registrants to obtain necessary third-party information in time to meet filing deadlines. For this additional reason, the SEC should not require additional climate disclosures in 10-Ks and 10-Qs.

C. Recommendation 3: It is premature to impose an audit or assurance requirement as part of any SEC climate disclosure regime.

Question 10 of the Request for Public Input asks whether disclosures should be subject to an audit or assurance process or requirement. BPI encourages the SEC not to adopt an audit or assurance requirement as part of any SEC climate disclosure regime at this time.

The appropriateness of the existence and content of any assurance or audit process will ultimately depend on the substance of what would be assured or audited. BPI believes an audit or assurance requirement would be unduly burdensome at this juncture given how costly climate assurance is for the disclosure requirements under consideration by the SEC. Monetary cost is not the only impediment. To the extent the SEC disagrees with BPI's recommendation above and requires additional climate disclosures as part of 10-K and 10-Q filings, there is unlikely to be sufficient time to complete the audit or assurance process to meet filing deadlines. The audit or assurance process for climate information can take months, which may not be a feasible timetable for 10-K and 10-Q filings. These burdens would be particularly acute for small registrants.

In contrast to the Conflict Minerals Rule and Form SD—which have certain independent private sector audit requirements—an audit or assurance process in the climate change space is much more difficult. Instead of a relatively straightforward verification of the materials used in a registrant's business and of the source of those materials, an audit or assurance process for climate disclosures would likely require evaluating vast amounts of data, including third-party data, and uncertain predictive forecasts and judgments. Moreover, an audit or assurance process is not statutorily required for climate disclosures—unlike for the Conflict Minerals Rule and Form SD, which are grounded in a statutory audit mandate¹⁹—further counseling against the SEC expanding its reach to require an audit or assurance process in the climate context.

¹⁹ See 15 U.S.C. § 78m(p)(1)(A)(i).

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BPI appreciates the opportunity to comment on the request for public input regarding this important issue. We thank the SEC for its consideration and look forward to ongoing dialogue. If you have any questions, please contact the undersigned by phone at [REDACTED] or by email at [REDACTED]

Respectfully submitted,



Lauren Anderson
Senior Vice President & Associate General Counsel
Bank Policy Institute

cc: The Honorable Caroline A. Crenshaw
Commissioner
Securities and Exchange Commission

The Honorable Allison Herren Lee
Commissioner
Securities and Exchange Commission

The Honorable Hester M. Peirce
Commissioner
Securities and Exchange Commission

The Honorable Elad L. Roisman
Commissioner
Securities and Exchange Commission

John C. Coates
Acting Director, Division of Corporation Finance
Securities and Exchange Commission

Kristina S. Wyatt
Senior Counsel, Division of Corporation Finance
Securities and Exchange Commission