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

Re: March 15, 2021 Request for Comment

Dear Chair Gensler,

On behalf of the employees of AMERCO and the U-Haul system (NASDAQ- UHAL[1]), I provide this response to your request for comment regarding prescriptive ESG disclosures.

U-Haul was started in 1945 by my mother and father as they returned from military service. U-Haul remains family managed today. As U-Haul approaches a community, our plan enables us to collaborate to reduce vehicle registrations and greenhouse gas emissions. Unilaterally, we have pioneered starch-based packing peanuts, permeable ground cover, cardboard-box reuse, improved fuel economy, moving pads from discarded fabrics, reuse of obsolete buildings and a long list of other award-winning sustainable business practices.

Since 1945, U-Haul has defined itself as being in the shared-use business. The rental concept itself is one of good husbandry and careful management of the Earth's resources, while making these resources readily available to more of the Earth's inhabitants. Done right, rentals enhance sustainability.

Despite our commitment to guarding the environment and reducing greenhouse emissions, we believe that prescriptive ESG disclosures, as broadly outlined by the Commission, involve significant practical and constitutional issues.

Policy Benefits of Principles-Based Approach

The SEC has previously considered and rejected calls for it to create mandatory prescriptive ESG disclosure standards. For S-K disclosure, the SEC has long employed a principles-based approach. As opposed to prescriptive standards, which employ a one size fits all approach to disclosure, a principles-based approach "provide[s] registrants with the flexibility to determine (i) whether certain information is material, and (ii) how to disclose such information." 85 Fed. Reg. at 63,747. The principles-based approach thus filters out immaterial information that would dilute material disclosures and make it more difficult for investors to make decisions. *Id.*; *see also* Am. Securities Ass'n, Comment, File No. S7-11-19 (Oct. 25, 2019) (noting principles-based approach "rightly emphasizes that the quality – rather than volume – of disclosure is what ultimately matters to investors"). Additionally, the principles-based system "elicit[s] disclosure that is more in line

[1] AMERCO has two Board members certified as a Certified Director of the National Association of Corporate Directors - AMERCO is the first public company to have 2 Directors receive this distinction.

with the way the registrant's management and its board of directors monitor and assess the business, and therefore (1) would be easier for registrants to prepare using existing metrics and reporting mechanisms and (2) would provide investors better insight into the decision-making process, current status, and prospects of the registrant." *Id.* This approach is particularly fitted to ESG disclosures because "the relevant information tends to vary greatly across companies" and "the more standardized prescriptive requirements are less likely to elicit information that is tailored to a specific company." *Id.* at 63,749; *see also* William Hinman, Director Corporation Finance, U.S. Securities and Exchange Commission, "Applying a Principles Based Approach to Disclosing Complex, Uncertain, and Evolving Risks" (March 19, 2019) ("As we approach [ESG] or other disclosure topics, I am always cognizant that imposing specific bright-line requirements can increase the costs associated with being a public company and yet not deliver the relevant and material information that market participants are seeking."); SEC, Report on Review of Disclosure Requirements in Regulation S-K 97-99 (2013). It makes no sense to carve out ESG for a prescriptive approach.

Additionally, a mandatory one size fits all approach would prevent the organic development of materiality standards to fit changing circumstances and market preferences. This is exactly why the SEC has refused to issue prescriptive standards: "The Business Roundtable cites 100 times the SEC failed to include societal issues as material, arguing, '[I]t is impossible to provide every item of information that might be of interest to some investor in making investment and voting decisions.'" Chandler Crenshaw, *Murky Skies Ahead! Analyzing Executive Authority and Future Policies Regarding Corporate Disclosure of Greenhouse Gases*, 42 Wm. & Mary Envtl. L. & Pol'y Rev. 285, 295 (2017) (quoting Business Roundtable, *the Materiality Standard for Public Company Disclosure: Maintain What Works* 5-6 (Oct. 2015).

<u>Prescriptive ESG Standards Transgress the Supreme Court's Interpretation of "Materiality"</u>

SEC Rule 405 sets out the definition of materiality for purposes of Regulation S-K: "The term material, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered." 17 C.F.R. §230.405. This definition reflects the Supreme Court's interpretation of "material" in *TSC Industries v. Northway*: "[T]here 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." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976). Under the principles-based approach, regulated entities use this definition to determine on a case by case basis whether a "reasonable investor" would consider the disclosure relevant. A prescriptive approach would fundamentally alter this definition by shifting the focus from a "reasonable investor" under the circumstances to a standardized requirement that does not take into account what is reasonable under varying conditions. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 30-31 (2011) ("We conclude that the materiality of adverse event reports cannot be reduced to a bright-line rule. Although in many cases reasonable investors would not consider reports of adverse events to be material information, respondents have alleged facts plausibly suggesting that reasonable investors would have viewed these particular reports as material."); *see also* Chandler Crenshaw, *Murky Skies Ahead! Analyzing Executive Authority and Future Policies Regarding Corporate Disclosure of Greenhouse Gases*, 42 Wm. & Mary Envtl. L. & Pol'y Rev. 285, 298 (2017) ("Similar to the risk factors test, the SEC needs to focus more on fact-based inquiries as opposed to introducing a blanket rule in order to survive judicial scrutiny.").

Prescriptive ESG Standards are Arbitrary and Capricious

For many of the policy reasons discussed above, a prescriptive ESG standard would be arbitrary and capricious. For one, they ignore the relevant statutory factors, which focus on providing material information to investors rather than achieving social policy goals. Additionally, to justify a break with longstanding policy, the Commission would have to specifically confront its past findings and provide good reasons for departing from them grounded in the statutory factors. The Commission has not articulated why the current principles-based system of environment disclosure is insufficient. *See N.Y. Stock Exch. v. SEC*, 962 F.3d 541, 556-57 (D.C. Cir. 2020) ("Rules are not adopted in search of regulatory problems to solve; they are adopted to correct problems with existing regulatory requirements that an agency has delegated authority to address."); *American Equity Investors Life Insurance Company v. SEC*, 613 F.3d 166, 178-79 (D.C. Cir. 2010) (agency must consider whether "the existing regime" already provided "sufficient protections ... to enable investors to make informed investment decisions"); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1154 (D.C. Cir. 2011) (agency must consider whether existing "regulatory requirements ... reduce the need for, and hence the benefit to be had from," the challenged rules).

The SEC will also have to justify a prescriptive standard using cost-benefit analysis ("CBA"). The Commission has a "unique obligation" under the Exchange Act to "consider the effect of a new rule upon efficiency, competition and capital formation." *Bus. Roundtable*, 647 F.3d at 1148 (citing 15 U.S.C. §§78c(f), 78w(a)(2)). But just months ago, the SEC conducted a full CBA and determined that a principles-based approach had greater net benefits than a prescriptive approach. 85 Fed. Reg. at 63,747-754. Because its recent reaffirmation of the principles-based approach rested on robust factual findings, the Commission will have to provide an even more robust analysis to explain its abrupt change in course. *FCC v. Fox*, 556 U.S. 502, 515 (2009) (when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate"); *Music Choice v. CRB*, 970 F.3d 418, 429 (D.C. Cir. 2020).

The SEC will have to account for the significant reliance interests that have grown up around the decades old principles-based system. Regulated entities will have to fundamentally change their processes to shift from a principles-based approach to a prescriptive approach. *See, e.g.*, Am. Securities Ass'n, Comment, File No. S7-11-19 (Oct. 25, 2019); *see also* 85 Fed. Reg. at 63,747-754 (noting reliance interests and significant costs associated with shifting to prescriptive approach). The SEC cannot simply ignore these serious reliance interests. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("A summary discussion may suffice in other circumstances, but here—in particular because of decades of industry reliance on the Department's prior policy—the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position.").

Finally, the SEC's call for comments notes the possibility of adopting global ESG prescriptive standards. But this would bring the SEC's disregard of statutory factors to a new level because global standards, particularly the EU's, explicitly go beyond American concepts of investor protection and frankly acknowledge that the purpose of disclosure is to combat climate change rather than foster investor confidence. *See* Roberta S. Karmel, *Disclosure Reform-the SEC Is Riding Off in Two Directions at Once*, 71 Bus. Law. 781, 815 (2016) ("In spring 2014, the European Parliament passed a law that will go into effect in 2017, requiring publicly traded companies with more than 500 employees to report on nonfinancial sustainability factors."). Indeed, even the SEC's own advisory committee has acknowledged the incompatibility of global approaches with the Exchange Act. *See* Transcript of Asset Management Advisory Committee Meeting 84-85 (Dec. 1, 2020) (noting the EU's "more fulsome requirement" is not "[s]uitable for the mandate of investor protection").

<u>Prescriptive ESG Standards Create Serious First Amendment Concerns</u>

The Supreme Court recently reiterated that more lenient First Amendment scrutiny applies only to laws requiring the disclosure of "purely factual, *uncontroversial* information." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (emphasis added). Beyond this limited exception, the Court's precedents "have long protected the First Amendment rights of professionals," *id.* at 2374, and "[c]ommercial speech is no exception," *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 566 (2011). This is particularly so when a securities disclosure rule is "directed at achieving overall social benefits" rather than "generat[ing] measurable, direct economic benefits to investors or issuers." *NAM v. SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015). For such regulations, and ESG easily falls in this category, no form of securities exceptionalism or lax First Amendment standards apply. *See* Jerry W. Markham, *Securities & Exchange Commission vs. Elon Musk & the First Amendment*, 70 Case W. Res. L. Rev. 339, 369-70 (2019). Instead, "compelling an issuer to confess blood on its hands ... interferes with th[e] exercise of the freedom of speech under the First Amendment." *Id.* at 530. The D.C. Circuit applied this reasoning to hold the Dodd-Frank's conflict minerals provision unconstitutional. An ESG mandatory standard, having nothing to do with materiality, would also be an unconstitutional "name and shame." *See id.* ("Requiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey the views itself, but that makes the requirement more constitutionally offensive, not less so.").

While the SEC has been less than clear on the required prescriptive disclosures, we believe that the proposed rules will only serve as a means to a political end. Analysis of the "social cost of carbon" should not fail to include the positive benefits to U-Haul customers for over 75 years. We are proud to have provided to hundreds of millions of people the most affordable method to move to a better life for themselves and their families. U-Haul has intentionally sought to reduce the carbon footprint by allowing most United States residents the ability to rent U-Haul equipment within a short distance from their home. This includes thoughtfully investing in new locations in historically underserved and lower income neighborhoods, often as the first or only national business in these areas, hiring locally and allowing local residents the same opportunity to improve their lives.

U-Haul takes seriously our commitment to the environment, the future and reducing greenhouse gas emissions. However, we believe prescriptive disclosures involve serious practical and constitutional issues and first amendment violations.

Thank you,

EJ Shoen

Edward Joe Shoen