



Crowe LLP
Independent Member Crowe Global
225 West Wacker Drive, Suite 2600
Chicago, Illinois 60606-1224
Tel +1 312 899 7000
Fax +1 312 899 5300
www.crowe.com

June 11, 2021

Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Request for Comment, “Climate Change Disclosure”

Dear Office of the Secretary:

Crowe LLP (we or Crowe) appreciates the opportunity to provide input on the Securities and Exchange Commission (SEC or Commission) request for comment, “Climate Change Disclosure” (Request).¹ We support the SEC’s efforts to gather public input to determine whether additional guidance or rules for public company climate change or other environmental, social, and governance (ESG) disclosure is needed, and we have organized our comments to reflect the SEC’s three part mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

Summary

Our comments address many, but not all, of the questions posed in the Request, and we intend for our comments to equally apply to the Commission’s consideration of climate change and other potential ESG disclosures given the interconnectedness of climate change disclosure with other elements of ESG matters. Further, our comments are grounded in the following views:

- Users are in the best position to provide feedback on the need for climate change and other ESG disclosures and, if needed, the appropriate content and cadence of disclosure.
- A single global framework and standard-setter provides for global transparency and comparability.
- Auditor involvement in climate change and ESG disclosure can provide enhanced disclosure reliability, if users perceive an incremental benefit from such involvement.

Investor Protection

Users and materiality

As Commissioner Lee noted in a recent speech,² Section 7 of the Securities Act of 1933 and similar provisions in the Exchange Act of 1934 provide the Commission with the statutory authority to require disclosures in the public interest and for the protection of investors. Materiality in the eyes of the user is an important consideration in the context of investor protection and public interest. Chair Gensler noted, in his

¹ <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>
² https://www.sec.gov/news/speech/lee-living-material-world-052421#_ftnref39

written responses³ to complete the nomination hearing record of the United States Senate Committee on Banking, Housing, and Urban Affairs on March 2, 2021, that “[i]f confirmed, materiality will guide my decisions as SEC Chair related to disclosure requirements under the federal securities laws.” As Chair Gensler further notes,⁴ “[t]he Supreme Court has held that information is material if there is a “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.” Users are in the best position to determine whether climate change disclosure incremental to an entity’s current disclosure duties under the federal securities laws⁵ or Commission interpretive guidance⁶ is needed. Given the importance of this threshold question, we encourage the Commission to continue engaging with a comprehensive range of users to understand, with respect to an individual user’s investment decision:

- How users define materiality in the context of climate change or other ESG disclosures
- Why, specifically, climate change disclosures are needed and whether “a comply or explain” framework would meet those needs
- What climate change metrics are most important or meaningful
- Whether meaningful metrics vary across entities (for example, by industry or entity size) or whether there is a baseline set of metrics that would be meaningful across all entities
- How investors use climate change or other ESG metrics, including in valuation models (for example, is the use case quantitative, qualitative, both)
- How often metrics should be disclosed or updated (for example, quarterly, annually, biennially)

We also encourage the SEC to consider a broad range of datapoints to evaluate user needs, including datapoints beyond feedback received from the request for comment. For example, a number of recent proxy statements included shareholder proposals related to climate change, ESG matters, or sustainability reporting, and the SEC might evaluate the outcome of shareholder proposals during the most recent proxy reporting period to determine whether users believe additional climate change or sustainability information is needed to make investment decisions.

Governance, controls, and auditor attestation

Investor protection necessitates that material information provided to users is accurate and reliable, and effective governance and controls are the foundation of accurate and reliable information. Assurance over information has been shown in the past to result in improved data accuracy and reliability.⁷

Establishing an effective system of governance and controls can result in a meaningful use of company resources. In our discussions with various stakeholders, we observe entities at various points in the process of establishing governance and controls over climate change disclosures, and some entities might not have identified climate change as a reporting need. Other entities might be considering how to establish appropriate governance and controls over relevant internal or external data that might be needed. Transition considerations are more fully addressed later in this letter; however, the SEC should carefully consider the need for a sufficient transition period to allow entities to appropriately design and place in operation governance and controls, if new climate change disclosures are required.

³ <https://www.banking.senate.gov/imo/media/doc/Gensler%20Resp%20to%20QFRs%203-2-21.pdf>

⁴ Ibid.

⁵ For example, Exchange Act Rule 12b-20 or Securities Act Rule 408

⁶ <https://www.sec.gov/rules/interp/2010/33-9106.pdf>

⁷ See, for example, Audit Analytics, *Restatements Disclosed by the Two Types of SOX 404 Issuers: (1) Auditor Attestations Filers and (2) Management-Only Report Filers* (November 2009)

If users indicate climate change disclosures are needed, the Commission should further assess user feedback on what level of auditor involvement would be necessary to meet investor expectations. Current Public Company Accounting Oversight Board (PCAOB) standards⁸ require auditors, depending on the document to be filed, to read and consider whether there is a material inconsistency between the audited financial statements and information included in the filing outside the financial statements. Should users want additional assurance from auditor attestation, users should also indicate what level of auditor attestation (for example, examination or review) is needed to meet their disclosure accuracy and reliability expectations. An examination provides the auditor's opinion on whether the presented information is in accordance with the relevant criteria, in all material respects, whereas a review engagement provides more limited assurance on whether the auditor is aware of any material modifications that should be made to the presented information in order for it to be fairly stated or in accordance with the relevant criteria.

An examination or review is based on relevant attestation standards (for example, PCAOB, AICPA), and the SEC should engage with attestation standard setters to consider: 1) whether current attestation standards are sufficient to address user needs for auditor involvement in climate change or other ESG disclosure; and 2) specifying required attestation standards. If users deem auditor involvement beneficial (or necessary), we stand ready to provide assurance on climate change and ESG disclosures that are based on an appropriate framework and reporting standards.

Maintaining Fair, Orderly, and Efficient Markets

Framework and standards

Capital allocation decisions are increasingly global, and fair, orderly, and efficient markets function as intended when stakeholder decisions are based on transparent and comparable information. In addition, many entities have global risks (for example, supply chain risk) and have global financial users. As the International Organization of Securities Commissions (IOSCO) recently noted, there is an “an urgent need for globally consistent, comparable, and reliable sustainability disclosure standards.”⁹ Crowe supports a single global framework and reporting standards because a single framework and standards would allow for enhanced consistency, comparability, and reliability of disclosure.

While various ESG reporting frameworks and standards exist today (for example, the Task Force on Climate-related Financial Disclosures (TCFD), the Global Reporting Initiative (GRI), and Sustainability Accounting Standards Board (SASB); each has a different goal and perspective on relevant disclosures to achieve the respective goal. Addressing the challenges of global capital allocation decisions in the face of global risks, five ESG focused framework and standard setting institutions (CDP, Climate Disclosure Standards Board (CDSB), GRI, International Integrated Reporting Council (IIRC) and SASB released a *Statement of Intent to Work Together Towards Comprehensive Reporting*,¹⁰ which discusses how current frameworks and standards might work together to meet investor needs. The group also released the companion document, *Reporting on enterprise value: Illustrated with a prototype climate-related financial disclosure standard*,¹¹ to illustrate the operability of a single global climate-related disclosure model, which can inform the Commission on the achievability and advantages of a single global framework. Building on current frameworks also provides advantages in terms of efficiency, both in regulatory terms as well as from the perspective of other stakeholders already versed in current frameworks and reporting standards.

⁸ PCAOB AS 2710 and PCAOB AS 4101

⁹ <https://www.iosco.org/news/pdf/IOSCONEWS594.pdf>

¹⁰ <https://29kjob3armds2q3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Statement-of-Intent-to-Work-Together-Towards-Comprehensive-Corporate-Reporting.pdf>

¹¹ https://29kjob3armds2q3gi4lq2sx1-wpengine.netdna-ssl.com/wp-content/uploads/Reporting-on-enterprise-value_climate-prototype_Dec20.pdf

Standard setter(s)

A single global framework and reporting standards likely requires a single global standard setter. The Commission has previously determined and reaffirmed that the Financial Accounting Standards Board is the SEC's designated accounting standard setter¹² for registrants. Similarly, the federal securities laws hold that registrants can follow, for purposes of management's annual assessment of the effectiveness of internal control over financial reporting, "a suitable, recognized control framework that is established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment."¹³ The SEC should work with other jurisdictions to designate a single, global climate change disclosure standard setter, and such a standard setter should be independent from political, governmental, business or other interferences. The standard setting process should also be deliberative and allow feedback from all stakeholders.

The Commission should carefully consider any decision to create a separate US standard setter as that path might decrease cross-jurisdictional comparability and transparency, both of which are fundamental to maintaining fair, orderly, and efficient markets. Additionally, even after designation of a single global standard setter, the Commission would also have the ability, when necessary, to promulgate separate Commission rules to enhance or provide relief from global standards, when such enhancement or relief is consistent with the SEC's three-part mission.

Other considerations

Industry Specific Disclosures

Comparability within an industry is as important as cross-industry comparability when considering orderly and efficient markets. Certain current standard setters (for example, SASB) focus on industry specific metrics and disclosures, and, if users determine climate change disclosure is material information, the SEC should consider the advantages of industry specific metrics and disclosures in its deliberation of a global framework and standard setter. A global framework and standard setter approach layered with Commission promulgated industry specific guidance or disclosure, when necessary, is consistent with the SEC's historical approach to disclosure rulemaking¹⁴ and couples the advantages of a global framework and standard setter with jurisdictional flexibility, consistent with the SEC's mission.

Consideration of Other Regulators

Other U.S. federal regulators are in the process of considering the impact of climate change on their regulatory regime.¹⁵ International bodies are also considering climate change disclosures and related issues. For example, the Financial Stability Board (FSB), which includes representatives from the Federal Reserve and the SEC as well as other global regulators, indicated in its 2021 workplan¹⁶ the FSB would seek "ways to promote globally comparable, high-quality and auditable standards of disclosure based on the recommendations of the [TCFD]." The SEC should consider the work of other regulators in its climate change disclosure deliberations and work closely with other regulators to enhance the overall efficiency of any new rulemakings and to avoid any frustration of purpose, particularly within the U.S. regulatory regime.

Facilitating Capital Formation

Transition, scalability, and reporting cadence/deadlines

As noted previously, entities are in various stages of addressing climate change and ESG reporting, including designing and implementing governance processes and controls, and it is also possible some

¹² <https://www.sec.gov/rules/policy/33-8221.htm>

¹³ See Exchange Act Rule 13a-15(c), for example.

¹⁴ See, for example, Sections 1200, 1300 and 1400 of Regulation S-K at https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title17/17cfr229_main_02.tpl

¹⁵ See, for example, <https://www.federalreserve.gov/newsevents/speech/brainard20210323a.htm>

¹⁶ <https://www.fsb.org/wp-content/uploads/P200121.pdf>

entities have yet to conclude climate change or ESG disclosures are material to users. The SEC should carefully consider the broad range of reporting entities subject to its jurisdiction in its cost-benefit analysis of any new requirements. Some datapoints the SEC might consider include:

- *Transition* – an appropriate transition period will enable entities to understand any new disclosure requirements, assess the appropriate framework and reporting standards, and design and place in operation appropriate governance and controls over relevant data. Auditors would also need an appropriate transition period if any new rules require auditor involvement.
- *Scalability* – for various reasons, in many instances, the SEC has scaled its rules based on the size¹⁷ or other specific attributes¹⁸ of the issuer, and a similar scalability might be considered for climate change and other ESG disclosures. Scalability might also be considered in transition provisions whereby smaller or less sophisticated issuers could learn from larger, more sophisticated issuers. In addition, the SEC might consider whether all entities would benefit from a scaled transition (for example, initially furnishing climate change disclosure and then transitioning to including climate change disclosure in filings).
- *Reporting cadence/deadlines* – many issuers who provide voluntary climate change or ESG disclosures today report such information on a cadence or timeline that does not necessarily match required SEC reporting. The SEC might consider whether for climate change or ESG disclosures, registrants have the appropriate resources to match, for example, quarterly or annual reporting deadlines and whether a different reporting deadline or cadence would be more appropriate. A similar analysis might apply to auditors, if users request auditor attestation, as the auditor's work would follow management's.

Disclosure location considerations

Registrants today typically provide voluntary climate change or ESG disclosures in one of three locations:

- On a company's website or through some other external means
- Furnished in a Form 8-K
- Filed in or incorporated by reference into an Exchange Act document or Securities Act registration statement

We encourage the SEC to carefully consider disclosure location for any required climate change or ESG disclosures as it raises important liability questions both from the perspective of the registrant and the auditor. For example, the SEC might consider whether:

- The required information should be furnished or filed given the differences in legal liability that attach and subsequent litigation risk
- Forward-looking safe harbors under the Private Securities Litigation Reform Act of 1995¹⁹ would apply
- Any auditor attestation report would be required to be included in a filing and whether any auditor reporting requirement would differ for registration statements

¹⁷ <https://www.sec.gov/rules/final/2020/34-88365.pdf>

¹⁸ <https://www.sec.gov/spotlight/jobs-act.shtml>

¹⁹ <https://www.govinfo.gov/content/pkg/PLAW-104publ67/pdf/PLAW-104publ67.pdf>

Office of the Secretary
Securities and Exchange Commission
June 11, 2021
Page 6

Certain disclosure location considerations might raise additional questions as to the ability of auditors to comply with professional standards. For example, hyperlinking from non-EDGAR source into a filed document has the potential to raise questions as to what constitutes the “document” for the purposes of fulfilling the auditor’s professional obligations under PCAOB AS 2710. We would have similar concerns with respect to our Section 11 liability in a Securities Act Registration Statement under PCAOB AS 4101. We encourage the SEC to work with the PCAOB to explore and resolve any downstream impacts of climate change or ESG disclosure location considerations.

Closing

We thank the SEC for providing the opportunity to express our views on questions raised in the Request. Please contact Mark Shannon at 202-779-9921 or Sydney Garmong at 202-779-9911 to answer any questions that the staff may have regarding the views expressed in this letter.

Sincerely,

A handwritten signature in black ink that reads "Crowe LLP". The word "Crowe" is written in a cursive style, and "LLP" is written in a more blocky, sans-serif style.

Crowe LLP