

June 11, 2021

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Public Input on Climate Change Disclosures

Ladies and Gentlemen:

We appreciate the opportunity to provide comments to the Staff (the “Staff”) of the Securities and Exchange Commission (the “SEC”) in response to the request for comments included in the public statement of Commissioner Allison Herren Lee, dated March 15, 2021 (the “Request”), regarding the establishment of climate change disclosures. Our suggestions are limited to potential climate change disclosures for public companies in the context of an overarching ESG-related disclosure framework.

As the Staff is aware, investors are increasingly demanding reliable information on climate change and other ESG-related issues upon which to make educated investment and voting decisions. Financial institutions responsible for \$150 trillion of assets have voiced support for the recommendations of the Task Force on Climate-Related Financial Disclosure calling for climate-related financial disclosures by companies for investors, lenders, and other stakeholders.¹ In addition, investors with approximately \$100 trillion of assets under management have signed on to the United Nations-backed Principles for Responsible Investment whereby they have committed to incorporating ESG criteria into their investment analyses.² Many companies have responded to this call for information on climate change and other ESG-related issues by voluntarily providing such disclosures in their proxy statements and securities filings. However, the lack of uniformity in reporting standards and guidance around such reporting, as well as questions regarding the reliability of such disclosures, make it difficult for investors to analyze, locate and incorporate this information into their decision-making.

The Request suggests many potential approaches to address these concerns, and our proposal below outlines in detail responses to certain of the questions presented. In particular, while we recognize the primary importance of addressing climate change, we believe other ESG-related issues

¹ See Timothy Massad, *The SEC Needs to Catch Up on Sustainability*, BLOOMBERG (Jan. 27, 2021), <https://www.bloomberg.com/opinion/articles/2021-01-27/sec-s-gensler-must-decide-on-new-esg-disclosure-rules>; TCFD, *Recommendations of the Task Force on Climate-Related Financial Disclosures: Final Report* (June 2017), <https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf>.

² See Mark S. Bergman, *ESG Disclosures: Frameworks and Standards Developed by Intergovernmental and Non-Governmental Organizations*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Sept. 21, 2020), <https://corpgov.law.harvard.edu/2020/09/21/esg-disclosures-frameworks-and-standards-developed-by-intergovernmental-and-non-governmental-organizations/>.

of concern to investors can and should be addressed at the same time. If rules and guidance are sufficiently broad and flexible, they can address not just the climate and ESG concerns of the day, but other concerns that may fit within these categories as investors' concerns surely evolve. Illustratively, the term "ESG" has gained widespread acceptance over the past two decades and has in doing so seemingly eclipsed earlier conversations around "Corporate Social Responsibility" (which now typically refers to an extension of philanthropy), "Sustainability" (which now typically refers just to the environmental aspects of ESG) and "Socially Responsible Investment." The variability of climate and ESG concerns calls for a flexible disclosure framework capable of evolving over time and across companies that would encourage voluntary disclosure, with the further aims of organically fostering consensus in the reporting standards.

With this in mind, as an overarching principle, we recommend that the SEC take a measured approach to adopting rules and issuing guidance around climate and ESG disclosures that is built upon and consistent with existing securities law frameworks.

Proposals

Expanding Disclosures Relating to Codes of Conduct

Many public companies are beginning to adopt policies and codes covering a variety of climate and ESG-related matters, styling such documents as "ESG Codes" or "Sustainability Policies" and often posting them to their websites. Rather than create new rules requiring all issuers to follow suit by adopting and disclosing specific climate policies, we recommend that the Staff simply expand upon the existing disclosure regime in Regulation S-K. Specifically, Item 406 of Regulation S-K could be revised to not only cover a code of ethics that applies to specified executive officers ("Code of Ethics"),³ but to also include any code *or policy* related to ethics *or other aspects of business conduct* that (a) applies to such executive officers, (b) *is intended to guide or influence decision-making by such officers or the board of directors in a manner that would be expected to materially impact the issuer's results of operations*, or (c) *provides the framework for management's preparation of any Impact Report* (defined and discussed below under the section entitled "*Requiring Accessible Disclosure of Impact Reports*"). The instructions to the item, or relevant guidance, would suggest that this added language is intended to apply to any material code or policy related to, among other things, climate, sustainability, ESG, or corporate social responsibility. Any such document (a "Business Conduct Policy") thus would be treated similar to, if not the same, as a Code of Ethics.

Given the intentionally broad language of our proposed rule change, a Business Conduct Policy could cover a variety of matters. Issuers should therefore be required to summarize the content of any Business Conduct Policy and to confirm whether it is relevant for preparation of an Impact Report. Moreover, if an issuer has not adopted a Business Conduct Policy, it could be required to explain its decision not to do so, just as a registrant is currently so required with regard to its Code of Ethics or lack thereof.⁴ Many issuers may elect to take the position that they have no Business Conduct Policy simply because no policy they have adopted related to such matters is intended to materially guide or influence executive officer and director decision-making in light of their fiduciary

³ See 17 C.F.R. § 229.406.

⁴ See *id.*

duties to shareholders. If so, we still believe an issuer's disclosure of such a position will provide meaningful information for investors in their decision-making.

Requiring Accessible Disclosure of Impact Reports

Many issuers are presently voluntarily preparing and publicly promoting reports related to climate, sustainability, ESG, corporate social responsibility, and the like (collectively, "Impact Reports"). Unfortunately, not all of these Impact Reports have been subject to the same scrutiny as other public filings, and they can sometimes be difficult for investors to locate. We believe that without significant additional burden on issuers, the disclosure environment can be enhanced by requiring limited disclosures that make Impact Reports more transparent and accessible to investors, potentially under a new Item 106 of Regulation S-K.

First, issuers should confirm whether they produce any Impact Reports. If so, they should disclose whether any third-party reporting standards, such as those set by the Sustainability Accounting Standards Board (SASB)⁵ and/or Task Force on Climate-Related Financial Disclosure (TCFD), have been applied in its preparation, and if any standards-setting bodies or other independent entities have certified the report. Issuers should also disclose the material considerations and processes in preparing the Impact Reports (see below section entitled "*Requiring Disclosures Relating to the Role of the Board in Addressing Climate and ESG*" for additional considerations), and whether any such report is prepared subject to, or based upon, a formally adopted Business Conduct Policy. Further, issuers should disclose Impact Reports in their entirety in the investor relations section of its webpage alongside reports filed pursuant to the Securities Exchange Act of 1934.

While there are certain benefits to adhering to a uniform reporting standard, or standards, we note that at present, there is no "one size fits all" third-party reporting standard, as, among other factors, climate and ESG concerns vary widely across companies in reflection of the realities of different industries and geographies, and achieving a uniform standard may be difficult. We do not wish the perfect to be the enemy of the good. Therefore, until a uniformly accepted standard is achieved, as an interim measure, we believe the SEC should leave the choice of standards to market participants and merely call for disclosure of which, if any, third-party reporting standards underlie a company's Impact Report to promote transparency and accessibility.

Encouraging Climate and ESG Risk Analysis

We believe that climate and ESG may be useful tools in evaluating potential risks (as well as opportunities) that could materially impact the potential for an issuer to achieve strong financial returns. Given recent amendments to Item 105 of Regulation S-K regarding risk factors, we would not recommend expanding required risk factor disclosures to address climate or other ESG matters, nor do we recommend issuers be encouraged to include a "Risks Related to ESG" section. Rather, we

⁵ Note that SASB has announced an intent to merge with the International Integrated Reporting Council to create the Value Reporting Foundation to simplify recommended reporting requirements for listed companies. See, e.g., Sara White, *SASB and IIRC merger to create Value Reporting Foundation*, ACCOUNTANCY DAILY (Apr. 28, 2021) <https://www.accountancydaily.co/sasb-and-iirc-merger-create-value-reporting-foundation>.

would welcome guidance that encourages registrants to focus on climate and ESG in identifying material risks and to discuss such risks as already required by SEC rules.

Similarly, we do not believe that the SEC should require disclosure concerning the connection between executive or employee compensation and climate change risks and impacts, as any such link should already be incorporated into Item 402(b)(1) of Regulation S-K as drafted.

Requiring Disclosures Relating to the Role of the Board in Addressing Climate and ESG

The SEC should encourage companies to disclose information on oversight related to climate and ESG similar to disclosure that is already required regarding risk oversight. For example, Item 407(h) of Regulation S-K currently requires a registrant to describe the leadership structure of its board and therein disclose the extent of the board's role in risk oversight.⁶ Guidance already exists suggesting that elements of risk relevant to this disclosure requirement include, to the extent applicable, risks related to cyber-security and climate.⁷ This guidance could be expanded such that, to the extent a board has elected to use ESG as a framework for identifying risk, this is affirmatively disclosed and discussed. Similarly, this item could include discussion of the board's role in implementing and overseeing any Business Conduct Policy or preparing any Impact Report.

Guiding Climate and ESG Disclosures

Although issuers are not expressly required to disclose climate or ESG-related matters, as noted above, many issuers have prepared Impact Reports that are available to shareholders, and many issuers elected to include disclosure related to ESG and sustainability in the "Business" section of their Annual Report on Form 10-K for the 2020 fiscal year. We recommend that going forward, the SEC provide guidance to issuers electing to make such disclosures to help bring consistency of reporting to the market and reduce repetition of disclosures appearing elsewhere in a report.

First, issuers should be advised that to the extent certain disclosures in Impact Reports regarding climate or other ESG factors are related to matters discussed in an issuer's periodic reports or registration statements responsive to Items 101, 105 and 303 of Regulation S-K, and such Impact Report disclosures would be material to investors, the applicable filing should include the relevant information, or make reference to the availability of that information in the Impact Report. In any event, disclosures in an Impact Report should not be inconsistent with disclosures in any material filed or furnished with the SEC.

In addition, the SEC should encourage issuers to avoid duplicating information in an "environmental" subsection of an ESG section that could be found elsewhere, such as in a discussion of environmental compliance in a regulatory section responsive to Item 101(c)(2)(i) of Regulation S-K. Rather, issuers should focus on the extent, if any, of known effects their business has on climate and the environment generally, or their efforts and successes in ameliorating negative effects of their

⁶ See 17 CFR § 229.407(h).

⁷ See Securities and Exchange Commission, *Commission Statement and Guidance on Public Company Cybersecurity Disclosures*, SEC (Feb. 26, 2018), <https://www.sec.gov/rules/interp/2018/33-10459.pdf>; Securities and Exchange Commission, *Commission Guidance Regarding Disclosure Related to Climate Change*, SEC (Feb. 8, 2010), <https://www.sec.gov/rules/interp/2010/33-9106.pdf>.

business on the climate and the environment generally. Similarly, under the “social” subsection of an ESG section, the SEC should discourage issuers from repeating information on employees more appropriately disclosed in a Human Capital Resources section responsive to Item 101(c)(2)(ii) of Regulation S-K. While opinions differ as to the meaning of “governance” in the context of ESG, we believe that the “governance” subsection of an ESG portion of an Annual Report’s Business section may be an appropriate place for an issuer to briefly reference corporate governance matters that may not appear until an issuer’s subsequent filing of a proxy statement or Form 10-K/A, including Part III information, and to confirm where a Business Conduct Policy or Impact Report, if any, may be accessed.

Finally, consistent with prior SEC guidance, any climate or ESG-related disclosures should be subject to the same standards of accuracy and completeness applicable to any other information in an SEC filing, and issuers should be encouraged to focus on tangible advances in these areas as opposed to future goals.

Phase-In and Scaled Disclosure

It can be costly for an issuer to produce an Impact Report or make climate change and ESG-related disclosures. These costs can prove to be a significant burden for emerging growth companies (“EGCs”) and smaller reporting companies (“SRCs”). Therefore, we suggest the SEC allow for phase-in and scaled disclosure where possible such that EGCs and SRCs are not required to make disclosures relating to Business Conduct Policies or Impact Reports unless they choose to publicly discuss such Business Conduct Policies or Impact Reports.

Conclusion

We appreciate this opportunity to comment on potential climate change and ESG-related disclosure obligations. We would be pleased to respond to any inquiries you may have regarding this letter or our views on ESG disclosures more generally. Please contact us at [REDACTED].

Very truly yours,

/s/ Morrison & Foerster LLP