June 12, 2021

The Honorable Gary Gensler,
Chair, U.S. Securities & Exchange Commission
100 F Street NE
Washington, DC 20549

VIA EMAIL (rule-comments@sec.gov)

RE: Comments of the National Retail Federation in Response to March 15, 2021 Statement Welcoming Public Input on Climate Change Disclosures

Dear Chairman Gensler,

The National Retail Federation (NRF) appreciates the opportunity to respond to the Securities and Exchange Commission's (SEC or Commission) request for public input regarding disclosure rules and guidance as they apply to climate change and environmental, social, and governance (ESG) issues. These issues are increasingly important to retailers and to investors. We welcome the chance to share our insights.

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 52 million working Americans. Contributing $3.9 trillion to annual GDP, retail is a daily barometer for the nation's economy.

Retailers and restaurants are at the forefront of sustainability and sustainability reporting initiatives. Many have made public commitments to reduce their direct and indirect contributions to climate change and are setting science-based emissions reduction targets. NRF members are integrating sustainable practices into their businesses through energy-efficiency improvements and renewable energy purchases. They are working with suppliers throughout their extensive supply chains to encourage suppliers to reduce their contributions to climate change. They are also publishing annual sustainability reports, following well established and vetted protocols by respected sustainability leaders, as appropriate, based on investor interest and their own business needs.

In fact, retailers and chain restaurants are not just focused on their own operations and those of their suppliers, they also make it possible for everyone to find and buy the more sustainable products they seek. Retailers are proud to be among those leading companies that advance environmental and sustainability goals. For this reason, we think we are particularly well suited to comment on the Commission's request for information.

In the comments below we explain how retailers' commitment to climate and sustainability issues has been enhanced by the many well-crafted, vetted and voluntary sustainability reporting protocols available to issuers and investors. These protocols present the information most important to investors focused on climate and sustainability issues in a manner that is consistent and meaningful to their investment decisions. We further address many of questions presented in the March 15 request for information and look forward to the opportunity to engage in deeper, more substantive conversations around these topics.

General Considerations

A. Retailers Are Already Providing Voluntary Climate Change Disclosure and Related ESG Information to Investors

Retailers and chain restaurants, as noted above, already provide voluntary climate change disclosure and related ESG information to investors. They further inform investors and other interested parties that they are committed to addressing climate change and related issues by making public pledges. Multiple retailers, for example, signed the "*We Are Still In*" pledge supporting climate action consistent to meet the requirements of the Paris Agreement. Retailers also provide information on ESG, corporate social responsibility (CSR), and sustainability topics in reports that follow the voluntary approaches, frameworks, and priorities recommended by and contained in reporting frameworks such as:

- Global Reporting Initiative (GRI)
- CDP (formerly Carbon Disclosure Project)
- Climate Disclosure Standards Board (CDSB)
- International Integrated Reporting Council (IIRC)
- Sustainability Accounting Standards Board (SASB)
- Task Force on Climate-related Financial Disclosures (TCFD)

An increasing number of NRF members also participate in the Science Based Targets Initiative (SBTi). SBTi helps companies set science-based targets designed to achieve reductions in line with "what the latest climate science deems necessary to meet the goals of the Paris Agreement – limiting global warming to well-below 2^{o} C above pre-industrial levels and pursuing efforts to limit warming to 1.5^{o} C." Companies make commitments consistent with those targets and their efforts toward meeting those commitments are independently verified through SBTi.

Importantly, all of these voluntary initiatives engage in stakeholder outreach and materiality assessments that help guide the companies toward appropriate and meaningful commitments and the opportunity to report information that is most important to their stakeholders. Experience shows that different stakeholders in different sectors want different information about a company's sustainability commitments. For example, some may be most interested in supply chain and indirect emissions issues, while others focus on worker safety and diversity and inclusion.

These various initiatives make sure effective measures are in place for companies to make public commitments to track and report on their progress through third party verified reporting. They account for sector specific factors, changes in science and reporting methods, and technological advancements. They also help companies make targets based on what they can achieve on a timeframe consistent with the goals of the Paris Agreement and non-environmental sustainability goals. And they do so in a transparent manner that provides a wealth of reliable information for those looking to evaluate companies' progress and commitment on these issues. We believe efforts like these, backed by third party experts, are far better at providing useful information to investors than any once size-fits-all reporting mandate could.

B. Mandatory Disclosure, Depending on How It is Implemented, Could Be Unnecessarily Burdensome and Expensive and Create Significant Unintended Consequences

Generating accurate and meaningful climate change and related ESG disclosure information is an extremely expensive and human capital-intensive endeavor. Retailers spend thousands of labor-hours and significant consulting fees to multiple parties, including consultants and independent auditors, to provide the requested information every year. Even retailers that have been voluntarily providing such information for a decade or more decry a continually evolving process as the scientific understanding of the related climate issues evolves and reporting formats continue to mature. They spend 6-months preparing a 100-page report that few investors may read because they have differing views of what they consider to be material.

Furthermore, traditional financial reporting metrics are clearly material and well understood; the emerging climate and ESG reporting metrics are significantly more complex, volatile, and uncertain and can create additional barriers for companies trying to grow. Some retailers on the cusp of going public report that mandatory climate change and related ESG reporting requirements risk presenting a level of expense and complexity that can discourage growing companies from accessing the public markets to accelerate their growth.

C. SEC Should Encourage Voluntary Disclosure and Provide Safe Harbor Provisions

Current private-sector climate change and ESG disclosure statements are appropriately voluntary in nature. This enables retailers and chain restaurants to provide accurate and meaningful information for investors when it is requested. It also simultaneously enables them to provide additional details and clarifying statements that highlight the challenges to providing complete information and the important underlying assumptions and estimates that are currently part of all carbon emission and ESG reporting efforts. The additional voluntary and explanatory information facilitates effective communication between companies and investors to ensure that both parties understand the value of the information requested and provided. Mandatory SEC requirements to disclose information on carbon emission and ESG issues are likely to result in less useful information being provided, as companies respond to SEC requirements and the associated liability concerns by carefully sharing only what is required instead of what might be most helpful.

D. Any Effort to Create New Reporting Requirements Must be Tailored to Material Information that is Not Already Available to Interested Investors

As stated earlier, retailers are already providing information to investors and other interested parties that a specific class of investors who are focused on climate and ESG issues consider to be material. Different retailers provide different types of information to reflect the significantly different business models across the retail industry. What is material for retailers that sell primarily textiles is different than retailers who primarily sell appliances or electronics and that is different from retailers who primarily sell books, groceries, housewares, or other product categories. Some retailers sell private label products; others do not. Every retailer is different and investors understand and reward these differences. As a result, different retailers share different types of CSR, ESG, and climate change information based on the needs of their investors. Retailers are already providing the information sought by those investors.

Reporting greenhouse gas emissions and tracking progress toward vital climate goals is important and the most significant opportunities to make progress differ from one retailer to the next and from one industry to another. That is why flexible, voluntary third-party verification and systematic reporting are key aspects of effective private initiatives. Any consideration of requiring reporting through SEC mandates must carefully evaluate whether that information is financially material and not otherwise available.

The securities and exchange laws generally charge the Commission to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation while avoiding burdening issuers and investors with unnecessarily information and costs.[1] This authority is broad but not endless. For example, the Commission has long recognized that it could require disclosure of performance factors *only* if "such information . . . is important to the reasonable investor —material information."[2] And materiality in the context of financial reporting relates to the significance of information to decision makers. It focuses on what helps reasonable investors make investment decisions. As the Supreme Court put it, information is material under the securities laws if there is "a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."3 Materiality focuses on whether an objective investor would rely on the information to make an investment decision.[4]

Taking into consideration the total mix of information available to investors is particularly important in this context. Efforts to address greenhouse gas emissions and climate change are important to some investors. And we believe that the voluntary, third-party verified reports and array of public information on climate change and other ESG topics provide what is needed for investors. Any requirements added by the Commission should focus specifically on *material* information that is not already part of the 'total mix.'[5]

Moreover, failing to tailor any proposed requirements to what is material to financial performance would exceed the SEC's authority. As previously noted, the Commission has long recognized its disclosure authority is focused on materiality. Efforts to impose new disclosure requirements, particularly when the Commission has not previously viewed its authority as extending to those requirements, must be tied to the Commission's statutory mandate. The courts will not "presume that the act of delegation, rather than clear congressional command, work[s] . . . vast expansion[s]" of agency power to new subjects Rather, Congress "speak[s] clearly if it wishes to assign to an agency decisions of vast 'economic and political

[1] *E.g.,* 15 U.S.C. §§ 77b(b), 78c(f), 78w(a)(2).

[2] *E.g.*, Environmental and Social Disclosure, Release No. 33-5627 (Oct. 14, 1975), 40 Fed. Reg. 51,656, 51,666 (Nov. 6, 1975).

[3] *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976). *See also Basic, Inc. v. Levinson*, 485 U.S. 224 (1988); *Ganino v. Citizens Utilities Co*., 228 F.3d 154, 161 (2d Cir. 2000) (the courts focus on whether a "reasonable investor would have considered the information significant in making investment decisions.")

[4] *See, e.g.*, Chris-Craft Indust., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 363 (2d Cir. 1973)

[5] Moreover, failing to tailor any proposed requirements to what is material to financial performance may jeopardize the success of any such requirements. As previously noted, the Commission has long recognized its disclosure authority is focused on materiality. Efforts to impose new disclosure requirements, particularly when the Commission has not previously viewed its authority as extending to those requirements, must be tied to the Commission's statutory mandate. The courts will not "presume that the act of delegation, rather than clear congressional command, work[s] . . . vast expansion[s]" of agency power to new subjects. *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849 (2020). Rather, Congress "speak[s] clearly if it wishes to assign to an agency decisions of vast 'economic and political significance'" previously untouched by the agency. *Util. Air Regulatory Grp. v. EPA,* 573 U.S. 302, 324 (2014 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000), and citing *MCI Telecomms. Corp. v. Am. Tel. & Telegraph Co.*, 512 U.S. 218, 231 (1994)); *see also, e.g., King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *Gonzales v. Oregon,* 546 U.S. 243, 267 (2006).

significance'" previously untouched by the agency. For example, Congress has previously taken specific legislative action when it wanted the Commission to adopt new requirements. The Dodd-Frank Act included specific provisions directing the SEC to promulgate increased disclosure from public companies about "conflict minerals," "extractive industries" issues, and connections with Iran. There has been no such congressional mandate to the Commission related to greenhouse gas emissions and climate issues.

With these considerations in mind, we urge the Commission to carefully consider the information already available to investors, the significant resources and commitments many companies have already taken to participate in climate action initiatives, the well-established sustainability protocols vetted by third parties, and the inherent limits to the authority the Commission has to impose additional requirements.

E. The Commissions Should Recognize the Qualitative Nature of Much of the Relevant Information

The Commission should recognize the qualitative nature of much of the relevant information and avoid strict quantitative reporting. For example, from a retail perspective, many companies are focused on improving their supply chains to make them less carbon-intensive, improving the energy efficiency of their operations, and offering more energy efficient products to their customers. While this creates quantifiable data, evaluating and projecting upstream and downstream emissions impacts from these efforts requires layers of interrelated judgements and subjective interpretations about how to calculate and predict the impacts.

In addition, while the risks from climate change concern everyone, some sectors will bear different degrees of risk based on geographic considerations and supply chain flexibilities. Evaluating those risks is necessarily case-specific and requires a number of qualitative evaluations. For example, some sectors face more risks based on competition for lower-carbon substitutes or future carbon pricing mechanisms than others. And different sectors face different physical risks, such as supply chain disturbances and the impact of climate events on the demand for their product. It is difficult or impossible to evaluate these factors based on quantitative data alone. And attempting to regulate qualitative assessments may negatively restrain discussion of these factors.

F. Any New Reporting Requirements Should be Considered Furnished, Not Filed

NRF believes that the SEC must carefully consider any new initiative to require a new, complex, and costly set of reporting, in no small part because the existing voluntary reporting efforts are meeting the needs of investors. However, if the SEC decides to promulgate new requirements, disclosures should be furnished, not filed. Greenhouse gas and climate related information is valuable to some investors. However, it is inherently different from traditional financial information. For example, as indicated above, evaluating a company's commitment and progress toward that commitment may require evaluation of a number of qualitative factors that cannot easily be consolidated into meaningful quantitative metrics.

Furthermore, allowing for furnished disclosure would promote more helpful information than filed disclosure. Filed disclosures are subject to strict liability under Section 11 of the Securities Act. Given the changing nature of issues surrounding climate change and the litigious nature of filings, liability concerns may restrain discussion of important factors. For example, much of the information related to climate commitments that is important to climate-concerned investors necessarily requires qualitative discussion of factors such as projected emissions and assumptions made about upstream and downstream activities. We believe furnished disclosure would promote more fulsome discussion of these factors.

G. The Commission Should Defer any Broader ESG Disclosure Rulemaking to Separate Procedures

Much like the climate and greenhouse gas issues discussed above, ESG commitments and reporting involve a number of sector, geographic, and case specific inquiries. Most if not all of the protocols mentioned above provide formats for discussing company performance regarding these factors. And they have led to a wealth of information to those focused on ESG issues and measurable improvements for workers, communities and the environment.

The commission also should defer any broader ESG disclosure rulemaking to separate rulemaking procedures. Issues of diversity, equity, and inclusion, corporate governance, and other ESG issues beyond climate-change issues raise their own additional complex and challenging policy issues, compliance issues, and statutory and constitutional issues as well. Those issues deserve further evaluation, separate proposals, and separate rulemaking proceedings, if any, rather than trying to restructure all of ESG reporting in a single omnibus rule.

H. The Commission Should Adhere to a Complete Notice and Comment Rulemaking Process

NRF appreciates the invitation to respond to the request. Both NRF and our members want to work collaboratively to address climate change. We also simultaneously encourage the use of the notice and comment rulemaking process afforded by the Administrative Procedure Act ("APA"), should the SEC believe regulations are warranted.

Notice and comment rulemaking would best serve the SEC's ultimate goal of assuring that companies' disclosures, whether relating to climate or financial positions, provide information that would assist informed decisions by reasonable investors. Climate and ESG-related disclosures can provide such information to some investors. However, in establishing standards or guidelines for such disclosures, the SEC would be operating in an area of policymaking that largely departs from its financial reporting policy orientation. GHG emissions and other ESG issues are outside the scope of the traditional financial SEC policy portfolio. Developing the appropriate scope of information to be disclosed, the method by which that information is disclosed, and which parties determine the standards for disclosure of information, among many other issues, should be done via a methodical and transparent policy making process. A transparent and methodical approach via the notice and comment rulemaking process is the best way to achieve this goal.

Moreover, the SEC should undertake notice and comment rulemaking if it seeks to create binding, enforceable requirements. The APA establishes the procedures for "rule making," defined as the process of "formulating, amending, or repealing a rule."[6] "Rule," in turn, is defined broadly to include "statement[s] of general or particular applicability and future effect" that are designed to "implement, interpret, or prescribe law or policy."[7] For rules to have binding legal effect on private parties, an agency must provide notice "of the terms or substance of the proposed rule or a description of the subjects and issues involve," and an opportunity for the public to comment.[8]

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[6] 5 U.S.C. § 551(5).

[7] *Id*. § 551(4).

[8] *Id*. §§ 553(b)(3), 553(c).

To be sure, the APA's notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."9 But that is, in large part, because interpretative (or interpretive) rules "do not have the force and effect of law."10 They are not binding on anyone. Thus, before the SEC can alter or create new legal obligations for issuers related to GHG emissions and other ESG issues, it must undertake the full-notice-and-comment rulemaking procedures required by the APA and amend the existing disclosure requirements in Regulation S-K.

Indeed, a rule making would be crucial to the enforceability of any such standards. The Commission's existing regulations contemplate some consideration of climate risks, and retailers already provide a wealth of material information surrounding GHG emissions and climate risks under voluntary protocols. However, the current regulations do not provide sufficient grounds for the Commission to interpret them in a way that would establish an enforceable framework or standard for governing GHG emissions disclosures and other ESG issues. For example, the current disclosure requirements under Regulation S-K provide some bases for companies to "consider climate change and its consequences as they prepare disclosure documents to be filed."11 This includes requirements for discussing the costs of compliance with certain environmental laws, disclosing certain types of environmental litigation, or discussing physical risks (e.g., natural disaster related risks) with the potential to impact operations.12 But it does come close to addressing the types of information or evaluation methods that would be necessary to establish specific standards for disclosing GHG emissions or quantifying risks. That would have to be done through new regulatory requirements, vetted through the notice and comment process.

Moreover, notice and comment rulemaking is necessary to provide the regulated community an adequate opportunity to comment on the specifics of any requirements the SEC might implement after considering the responses it receives to the request for input.

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Thank you for seeking the input of stakeholders on these important topics. We look forward to our continued engagement with the Commission. Please reach out to Stephanie Martz, [redacted] if you have questions regarding the comments above.

Sincerely,

Stephanie A. Martz
Chief Administrative Officer and General Counsel
National Retail Federation

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9 *Id*. § 553(b)(A).

10 *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995).

11 Commission Guidance Regarding Disclosure Related to Climate Changer, Release No. 33-9106 (Feb. 2, 2010), 75 Fed. Reg. 6,290 (Feb 8, 2010).

12 *Id*.