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Hon. Gary Gensler
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Dear Chair Gensler:

On March 15, 2021, then-Acting Chair Lee initiated a request for information (the "Request") about "the best approach for requiring climate-related disclosures."[1] The Acting Chair left no doubt about either the Request's premise or its goal: in her accompanying remarks, she explained that "it's time to move from the question of 'if' to the more difficult question of 'how' we obtain disclosure on climate."[2] Consistent with that goal, the Request asks how "the Commission [can] best regulate … climate change disclosures in order to provide more consistent, comparable, and reliable information," as well as "[w]here and how … such disclosures" should be made.[3] Absent from the Request, however, is the most basic question of all: should the Commission issue additional regulations on climate disclosures in the first place?

Because the Request fails to seek information on this foundational question, the Commission will not receive the data it needs to decide whether to issue new regulations. Indeed, the Acting Chair actively discouraged the submission of information of this sort, asserting—in an astonishing legal theory that would certainly violate the First Amendment if used as a basis for enforcement—that support of the "wrong" public policy on climate issues may expose registrants to liability under the securities laws. Without this information, the Commission cannot know whether there is a disclosure problem that regulations could address, and it cannot assess either the scope of any such problem or the costs and benefits of a regulation versus the status quo or other regulatory mechanisms.

The Request's glaring omission is all the more remarkable as the Commission does not write on a blank slate. The Commission already directs registrants to disclose climate-related information, and the Commission has prioritized such disclosures for examination and enforcement. State-level and private initiatives on climate disclosures continue to develop rapidly. Moreover,

DEFENDING CONSUMERS

[1] Public Input Welcomed on Climate Change Disclosures, available at https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

[2] A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC (Mar. 15, 2021), available at https://www.sec.gov/news/speech/lee-climate-change.

[3] Request § 1.

agencies across the federal government are aggressively pursuing climate-related policies pursuant to presidential direction. Regardless of the wisdom and lawfulness of these initiatives, at the very least their existence raises serious questions about the benefits to be achieved by additional Commission climate disclosure regulations as well as whether those benefits outweigh the substantial costs of additional disclosures. These are questions that the Request will not equip the Commission to answer.

Moreover, Acting Chair Lee lacked authority to initiate the Request. Because the Request seeks information to assess "potential new disclosure frameworks that the Commission might adopt or incorporate in its disclosure rules,"[4] it constitutes part of a rulemaking, which under governing law may not be exercised on a delegated basis.[5] Yet the Commission never voted on whether to issue the Request. The Request's legal infirmity will undermine the legitimacy of any future final rule and further discourage submission of needed data.

We agree with Acting Chair Lee that, where "complex issues" such as those involved in climate disclosures are in play, the Commission "will reach the best result through thoughtful engagement across a wide range of perspectives."[6] We also agree that a well-tailored and widely-engaged request for information can help to identify and assess those perspectives. That is why we urge that the full Commission consider whether to issue a request that, in addition to the inquiries in the current Request, includes questions about whether the Commission should issue new regulations on climate disclosures in the first place. Such a request would obtain valuable information about, e.g., disclosures under the Commission's current regulations; evolving State and private-sector climate-disclosure efforts; views on the interaction between Commission-led efforts and those of other federal agencies; and the costs of additional disclosures, particularly to America's workers and those seeking work. Failure to consider this and other critical information will inevitably skew the Commission's perspective on the question of climate disclosures, leading to a poorly-formulated notice of proposed rulemaking that will be unable to produce a well-reasoned and legally defensible final rule. Moreover, plenary Commission consideration of whether to issue a request would remove the taint of unlawfulness that adheres to the current Request.

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[4] *Id.* (preamble).

[5] 15 U.S.C. 78d-1(a).

[6] A Climate for Change.

BACKGROUND

The Request is far from the first SEC engagement on climate disclosures. In 2010, the Commission issued an interpretation, *Commission Guidance Regarding Disclosure Related to Climate Change*, 75 Fed. Reg. 6289 (Feb. 8, 2010), which described registrants' existing obligations to disclose material information related to climate change, an obligation arising under various provisions of Regulation S-K. In the guidance, the Commission explained that climate-related information for which "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote or make an investment decision" must be disclosed under existing law.[7] In particular, the guidance directed registrants to disclose, to the extent their business operations or financial condition are materially affected:

- Capital expenditures to modify operations to reduce greenhouse gas emissions;
- Revenue loss or gain from shifts in climate-related consumer preferences;
- Changes to the cost of energy;
- Changes to competition in light of climate-driven innovation;
- Potential for damage to physical assets from extreme weather; and
- Possible reputational harm arising from adverse public perception of greenhouse gas emissions.[8]

While many registrants had made climate disclosures even before the 2010 guidance,[9] the guidance was viewed by at least one prominent environmental non-profit as "a watershed in longstanding efforts to improve the quality of corporate disclosure on climate change."[10] Over the coming years, the Commission issued a number of letters to registrants reminding them of their obligations under existing law as interpreted in the guidance.[11]

The Commission has continued to act on the climate disclosure issue, including in recent months. For instance, just a month before release of the Request, the Acting Chair "direct[ed] the Division

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[7] 75 Fed. Reg. 6290, 6293 (2010).

[8] *Id.* at 6295-97 (2010).

[9] *See* Government Accountability Office, *Climate-Related Risks* (Feb. 2018) at 15, available at https://www.gao.gov/assets/gao-18-188.pdf.

[10] Ceres, *Disclosing Climate Risks & Opportunities in SEC Filings: A Guide for Corporate Executives, Attorneys & Directors* at 9 (Feb. 2011), available at https://environblog.jenner.com/files/disclosing-climate-risks-and-opportunities-in-sec-filings.pdf.

[11] Andrew Ramonas, New SEC's First Climate Disclosure Tool Is a Blast from the Past, Bloomberg Law (Feb. 9, 2021), available at https://bnanews102.bna.com/securities-law/new-secs-first-climate-disclosure-tool-is-blast-from-the-past.

of Corporation Finance to enhance its focus on climate-related disclosure" by, among other things, "review[ing] the extent to which public companies address the topics identified in the 2010 guidance."[12] The Commission's Division of Examinations announced a special focus this year on "climate and ESG-related risks."[13] And the Division of Enforcement formed a Climate and ESG Task Force to "develop initiatives to proactively identify ESG-related misconduct."[14]

The Commission is hardly alone in its focus on climate disclosures. The private sector has also been very active. For example, the Task Force on Climate-Related Financial Disclosures, an industry-led group founded by the Financial Stability Board, has "developed a framework to help public companies and other organizations more effectively disclose climate-related risks and opportunities through their existing reporting processes."[15] The Sustainability Accounting Standards Board has developed a set of seventy-seven industry-specific standards to "enable businesses around the world to identify, manage and communicate financially-material sustainability information to their investors."[16] And the Climate Disclosure Standards Board "offer[s] companies a framework for reporting environmental information with the same rigour as financial information," so that investors may receive "decision-useful environmental information via … corporate report[s]."[17]

States, too, have engaged on the issue. For instance, the California legislature is currently considering a bill that would require many businesses to disclose greenhouse gas emissions.[18] And last year, New York's Superintendent of Financial Services directed insurers to develop approaches to climate disclosures.[19]

Other federal agencies are also engaged. For instance, the Environmental Protection Agency's

[12] Statement on the Review of Climate-Related Disclosure (Feb. 24, 2021), available at https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure.

[13] SEC Division of Examinations Announces 2021 Examination Priorities (Mar. 3, 2021), available at https://www.sec.gov/news/press-release/2021-39.

[14] SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), available at https://www.sec.gov/news/press-release/2021-42.

[15] Task Force on Climate-Related Financial Disclosures – Homepage, available at https://www.fsb-tcfd.org/.

[16] Sustainability Accounting Standards Board, Standards Overview, available at https://www.sasb.org/standards/.

[17] Climate Disclosure Standards Board, Homepage, available at https://www.cdsb.net/.

[18] *See* S.B. 260 (2021).

[19] *See* Insurance Circular Letter No. 15 (Sept. 22, 2020), available at https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2020_15.

Greenhouse Gas Reporting Program, which identifies and makes publicly available greenhouse gas emissions data from thousands of facilities, fuel manufacturers, and others, results in the public reporting of 85-90% of U.S. anthropogenic emissions.[20] Each reporting facility must report its U.S. parent company, and EPA makes this information, too, available to the public.[21]

Notwithstanding these and other initiatives, in her remarks of March 15 at the Center for American Progress, Acting Chair Lee concluded that investor demand for climate disclosures "is not being met by the current voluntary framework."[22] Accordingly, in her view, now "it's time to move from the question of 'if' to the more difficult question of 'how' we obtain disclosure on climate."[23]

The Request, which the Acting Chair released in conjunction with her remarks and without a Commission vote, is designed to facilitate this project. To that end, it asks fifteen questions and sixty sub-questions about how to craft new climate-disclosure regulations. The Request seeks information about a wide range of approaches for additional disclosures; for instance, it asks about the "advantages and disadvantages of establishing different climate change reporting standards for different industries," as well as "the advantages and disadvantages of rules that incorporate or draw on existing frameworks" created by the private sector.[24] It asks about the wisdom of an industry-led, Commission-approved framework, or on the other hand about the viability of "a single set of global standards."[25] These and other questions seek information about "the costs and benefits of different regulatory approaches to climate disclosure,"[26] but no questions seek data on the costs and benefits of requiring additional disclosures versus the status quo or about regulations versus other regulatory mechanisms.[27] At times the Request asks

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[20] EPA, GHGRP Reported Data, available at https://www.epa.gov/ghgreporting/ghgrp-reported-data.

[21] EPA, GHG Reporting Program Data Sets, available at https://www.epa.gov/ghgreporting/ghg-reporting-program-data-sets.

[22] A Climate for Change.

[23] *Id.*

[24] Request §§ 4, 5.

[25] *Id.* §§ 3, 9.

[26] *Id.* (preamble).

[27] The Request does note that asserted increasing investor demand for additional climate disclosures raises "questions … about whether climate change disclosures adequately inform investors about known material risks, uncertainties, impacts, and opportunities, and whether greater consistency could be achieved." But far from seeking information to answer these questions, the Request presumes that current disclosures are inadequate; that is why the Request, a few sentences after noting the questions raised by increasing investor demand, "ask[s] the [SEC] staff to evaluate [the] disclosure rules *with an eye toward facilitating the disclosure of consistent, comparable, and*

about relatively minor operational details, such as whether and how new requirements should be phased in.[28] But it contains not a single question or sub-question about the most foundational inquiry: whether additional disclosures are needed or justified.

ANALYSIS

I. The Request Fails to Elicit Information About Whether New Disclosure Regulations Are Needed or Justified.

Acting Chair Lee's message in her remarks of March 15 was clear: the purpose of the Request is to study how, not if, to require additional disclosures. The Commission, according to the Acting Chair, is already "actively laying the groundwork" and "moving ahead with efforts" on new climate disclosure requirements; indeed, it has already "begun to take critical steps toward a comprehensive ESG disclosure framework."[29] It is no surprise, then, that the Request asks only for information that will help the Commission craft new disclosure regulations. The Request's limited purpose is evident from the first question, which begins by asking, "How can the Commission best regulate, monitor, review, and guide climate change disclosures in order to provide more consistent, comparable, and reliable information for investors….?"[30] The Request goes on to ask "[w]here and how should such disclosures be provided," and [w]hat is the best approach for requiring climate-related disclosures?"[31] As explained above, the Request inquires about a wide range of approaches to disclosure and poses many questions about implementing new disclosure requirements, but not about data or views that will help to evaluate whether new regulations are needed or justified.

Because the Request fails to solicit information relevant to whether additional climate disclosure regulations are required, commenters will not provide the data that the Commission needs to answer this foundational question. That is doubly true in light of the Acting Chair's statements making clear that the Request seeks information only about how new disclosure regulations should operate, not if they are needed. Courts have held that the public may not reasonably be expected to submit comments on every question related to the subject matter of a regulatory action; rather, the agency must notify the public of the particular issues in play, and failure to

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reliable information on climate change." Id.

[28] *Id.* § 2.

[29] Climate for Change.

[30] Request § 1.

[31] *Id.* §§ 1, 7.

raise a particular issue means that the public may not be expected to comment on it.[32] Here, far from identifying for comment the question of whether additional disclosure requirements are needed, the Request *disclaims* any interest in such information. As the D.C. Circuit has opined, commenters are most unlikely to "bother to submit their views" if they conclude that the issue on which they would comment is "a *fait accompli*."[33] In any event, even if some commenters do put themselves to the expense of submitting data in which the Request has disclaimed interest, others will not, leaving the Commission with a necessarily partial picture.

But not only the expense of preparing unwanted information will discourage commenters from submitting it; so will fear of enforcement action. In an astonishing portion of her address, Acting Chair Lee suggested that registrants that "have made carbon neutral pledges, or otherwise state [that] they support climate-friendly initiatives," may render those statements misleading if they donate to political "candidates with climate voting records inconsistent with such assertions."[34] This legal theory, if valid, would apply equally to a registrant's advocacy: if a registrant's truthful statements about its own climate-related efforts can be rendered misleading by donating to a candidate with the "wrong" positions on climate, then surely the registrant's advocacy to an arm of the federal government in favor of one of those "wrong" public policy positions would have the same effect. We are confident that the legal theory articulated by the Acting Chair would violate the First Amendment. Nevertheless, registrants may well wish not to test this constitutional defense in court; instead, they may simply decline to submit information that disfavors the adoption of additional climate disclosure obligations. Such reticence is made all the more attractive by the Commission's prioritization of statements about corporate environmental policy for both examination and enforcement.

The Commission will thus be left with woefully incomplete information that fails to address the fundamental question of whether additional disclosure regulations are needed and justified. The Commission will not receive data to assess whether a problem exists that new regulations could remedy; the scope of any such problem; the advantages of adopting new regulations versus other regulatory approaches; and the costs that new regulations will impose. Under the Administrative Procedure Act (the "APA"), the Commission must address these core questions before taking any regulatory action. The APA demands that, at minimum, an agency must "consider [the] important aspect[s] of the problem" it intends to address through regulation,[35] and no aspect is more important than whether the problem exists in the first place. Failure to

[32] *See, e.g.*, *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081-82 (D.C. Cir. 2009).

[33] *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978).

[34] A Climate for Change.

[35] *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

assess the need for additional requirements over and above the status quo renders a regulation arbitrary and capricious.[36] So does failure to evaluate whether any benefits of new regulatory requirements justify their costs.[37] The Request's designation of information about whether additional disclosure regulations are needed as *data non grata* ensures that the Commission will be unable to answer these questions.

II. The Request Fails to Solicit Several Categories of Information Necessary for Reasoned Decision-Making.

By disclaiming interest in whether additional disclosure regulations are needed and justified—and by suggesting that advocating for the "wrong" views on climate policy may lead to legal liability—the Request discourages members of the public from providing several categories of key data necessary for a reasoned decision that will withstand legal scrutiny. To show that this is so, we identify a few of the many additional categories of information about which the Request should have inquired.

First, the Request should have sought information about whether the disclosures that registrants make now under the Commission's 2010 guidance adequately apprise investors of material climate-related information. This line of questions is important because the 2010 guidance attempted to ensure precisely that. As explained above, the 2010 guidance claimed to apply the governing materiality standard to climate-related scenarios and explained registrants' obligation to disclose climate-related impacts with respect to capital expenditures, shifting consumer preferences, energy costs, innovation-driven changes to competition, damage to physical assets, and reputational harm.[38] This thorough list at least appears to cover all categories of potential climate impacts on the business operations or financial conditions of registrants. If the Commission suspects that the guidance fails to capture certain kinds of material information or that registrants fail to comply notwithstanding the Commission's current focus on climate disclosure-related enforcement, then the appropriate next step would have been to seek information to evaluate those suspicions.

The Request appears to have been uninterested in this information because "[i]nvestors are demanding more and better information on climate and ESG, and that demand is not being met by the current voluntary framework."[39] But that some investors wish for additional climate-

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[36] *See, e.g.*, *Am. Equity Investment Life Ins. Co.*, 613 F.3d 166, 179 (D.C. Cir. 2010) (holding a regulation arbitrary and capricious on the basis that "the SEC's analysis is incomplete because it fails to determine whether, under the existing regime, sufficient protections existed").

[37] *See, e.g.*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

[38] 75 Fed. Reg. at 6295-97.

[39] A Climate for Change.

related disclosures should not *ipso facto* decide the Commission's policy. Other investors, recognizing the confusion that results from over-information (a danger to which the Commission itself pointed in its 2010 guidance[40]) may not wish for additional disclosures. And supporters of additional disclosure mandates may favor them for various reasons; for instance, registrants that already voluntarily disclose greenhouse gas emissions may support new disclosure mandates to impose costs on competitors or to erect barriers to entry.[41] The only way to assess whether a commanding majority of investors wish for additional disclosures, as well as the reasons for those wishes, is to solicit information on that subject.[42]

But even accepting at face value the asserted "investor demands" for additional disclosures, the existence of demand does not indicate how the Commission should address it. In 2010 the Commission responded to such demand through guidance about materiality in the context of climate-related risk. If the Commission now believes that that guidance is ineffective, one common-sense approach would be to amend the guidance. There is no reason that amendments could not address at least some of the claimed rationales for the Request. If, for instance, "there are real questions about [the] reliability and level of assurance"[43] for existing disclosures, the Commission could clarify in guidance the degree of and basis for confidence that registrants must have in the climate disclosures they make. Under the APA, the Commission will have to consider this sensible alternative before issuing a final rule expanding disclosure requirements.[44] But the Request did not ask for information to help the Commission in this task.

Second, the Commission should also have asked about the efficacy of the various private initiatives to promote standardized frameworks for climate disclosures. The Request does mention them, but to ask whether the Commission should adopt one or more of the frameworks, rather than whether they obviate the need for Commission action in the first

[40] 75 Fed. Reg. at 6294.

[41] *See, e.g.*, Laura Weiss, Tech Companies Join Calls for Disclosure Mandate To Meet US Emissions Goals (May 4, 2021), in *Roll Call*, available at https://www.rollcall.com/2021/05/04/tech-companies-join-calls-for-disclosure-mandate-to-meet-us-emissions-goals/ (reporting that several large technology firms that already voluntarily report greenhouse gas emissions are calling for new climate-disclosure mandates).

[42] While Acting Chair Lee stated in her remarks that she has directed the Commission staff to "review the extent to which public companies address the topics identified in the 2010 guidance and comply with current requirements," that internal review is no substitute for gathering information from outside parties, and in any event will be focused, not on the "question of 'if,'" but on "the … question of 'how' we obtain disclosure on climate." A Climate for Change.

[43] *Id.*

[44] *See State Farm*, 463 U.S. at 50-51.

place.[45] Staying its hand in favor of the existing private sector-led standards is the kind of readily-apparent alternative that the Commission is obligated to consider;[46] it should have sought the information it needs to make this consideration effective.

Third, the Commission should have inquired about current State and local policies designed to ensure that investors are adequately informed with regard to climate issues. For instance, as noted above, the California legislature is currently considering a bill that would require companies that do business in California and that have more than $1 billion in annual revenue to disclose scope 1, 2, and 3 greenhouse gas emissions, with disclosures subject to third-party verification.[47] And last year, New York's Superintendent of Financial Services directed insurers to develop approaches to climate disclosures in anticipation of examination on climate-related issues starting this year.[48] Of course, the Commission might have concluded, after evaluating State policies, that a new uniform federal approach is needed. But the Commission cannot "accurately assess" this question without "assess[ing] the baseline level of … transparency and information disclosure under state law."[49]

Fourth, the Request should have inquired about the extent to which the objectives of the contemplated disclosure regulations are already being met under mandates from other federal regulators. EPA's Greenhouse Gas Reporting Program, although not mentioned in the Request, already makes publicly available greenhouse gas emissions data for 85-90% of U.S. anthropogenic emissions;[50] this data appears to satisfy at least some of the objectives of the disclosure regulations contemplated by the Request.[51] The Request should have sought information to determine the extent to which EPA's program informs investors, as well as whether other climate-related registrant data is reported to other agencies and made publicly

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[45] Request § 5 ("What are the advantages of disadvantages of rules that incorporate or draw on existing frameworks … ? Are there any specific frameworks that the Commission should consider?"). Similarly, Request § 3 asks about the advantages and disadvantages of the Commission allowing the private sector to develop its own standards to address the problem the Commission has identified (and likely subject to the Commission's direction), rather than recognizing that the private-sector frameworks that already exist may obviate the need for additional action.

[46] *See, e.g.*, *Chamber of Commerce vs. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005)

[47] *See* S.B. 260.

[48] *See* Insurance Circular Letter No. 15, available at https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2020_15.

[49] *Am. Equity*, 613 F.3d at 178.

[50] EPA, GHGRP Reported Data, available at https://www.epa.gov/ghgreporting/ghgrp-reported-data.

[51] *See* Request § 2 (seeking information about registrant greenhouse gas emissions).

available.

Likewise, the Request should have inquired how the goals of the contemplated disclosures could in the future be met under regulatory regimes administered by other federal agencies. Regulated parties often deal with multiple regulators and are therefore well-positioned to identify the most efficient regulatory regime for pursuing a particular objective. Receiving input of this sort from regulated parties is especially essential when, per presidential direction, the Executive Branch is "implement[ing] a Government-wide approach" to climate issues,[52] with anticipated initiatives from many agencies pursuing related goals. That is all the more true when multiple federal regulators are considering the issue of climate-focused disclosures in particular.[53]

Fifth, while the Request seeks information about the costs and benefits of various alternative forms that additional disclosure regulations could take, it should also have asked about the costs and benefits of additional disclosures versus the status quo, as well as of regulations versus other regulatory mechanisms. Perhaps most notably, the Request fails to inquire about the impacts of additional climate disclosures on the 9.8 million unemployed Americans, as well as currently-employed Americans who may join their ranks if the economic recovery continues to slow.[54] The additional recordkeeping and legal expenses that new disclosures would demand would, all else being equal, divert expenditure from more efficient uses, diminishing productivity and presumably employment along with it. Moreover, to the extent climate disclosures drive capital from sectors perceived to be less climate-friendly (for instance, auto manufacturing and air travel) to others seen to be more so (for instance, tech manufacturing and rail travel), additional disclosures are likely to have negative employment impacts, as capital is diverted from the sectors in which it is most efficiently used.

Even setting aside potential negative effects on net employment, additional disclosures could prompt economic dislocation, as workers struggle to keep up with shifts in demand among sectors. Such dislocation would further exacerbate the hardships of American communities dependent on traditional manufacturing jobs.[55] It would further stress communities that have

[52] Executive Order 14008, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619, 7622 (Jan. 27, 2021).

[53] *See Executive Order on Climate-Related Financial Risk* § 3 (May 20, 2021), available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/.

[54] U.S. Bureau of Labor Statistics, Employment Situation Summary (May 7, 2021), available at https://www.bls.gov/news.release/empsit.nr0.htm.

[55] *See, e.g.*, Richard Hernandez, "The Fall of Employment in the Manufacturing Sector," in *Monthly Labor Review* (Aug. 2018), available at https://www.bls.gov/opub/mlr/2018/beyond-bls/the-fall-of-employment-in-the-manufacturing-sector.htm.

already experienced massive job loss due to declining coal markets.[56] And dislocation may implicate serious racial and gender equity concerns, as various sectors employ women and people of color in widely varying proportions.[57]

Of course, supporters of more climate disclosures would demur from these concerns. They may argue that the administrative costs of new climate disclosures are outweighed by the benefits of a uniform framework for assessing climate impacts; that industries that embrace climate-driven innovation are likely to be more profitable and create more jobs in the long term; and that concerns about racial and gender equity should be addressed by even more ESG practices. Our objective here is not to resolve these disputes, but to point out that the Request, because it does not ask about the costs and benefits of additional disclosure regulations versus the status quo or versus other regulatory approaches, does not solicit the right information to resolve them.

III. The Request's Legal Infirmity Will Further Discourage Response.

The Commission is authorized under statute to delegate much of its authority to particular Members or Commission staff, but Congress mandated that one function, rulemaking, must be exercised by the Commission as a whole.[58] The statute incorporates the APA's definition of rulemaking, *id.*; that definition reads as follows: rulemaking is an "agency process for formulating, amending, or repealing a rule."[59]

The Request seeks input on "potential new disclosure frameworks that the Commission might adopt or incorporate in its disclosure rules";[60] it asks about the "advantages and disadvantages of rules" that draw on existing frameworks;[61] it inquires about whether to amend existing rules;[62] and it asks for views on how to "craft rules that elicit meaningful discussion of the

[56] *See, e.g.*, Taylor Kuykendall and Guarang Dholakia, US Coal Mining Employment Hits New Low at the End of 2019, May Go Lower in 2020 (Feb. 19, 2020), available at https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/us-coal-mining-employment-hits-new-low-at-the-end-of-2019-may-go-lower-in-2020-57173047.

[57] *See* Employed Persons by Detailed Industry, Sex, Race, and Hispanic or Latino Ethnicity (last updated Jan. 22, 2021), available at https://www.bls.gov/cps/cpsaat18.htm (noting that in 2020 18.2% of the workforce employed in motor vehicles and equipment manufacturing was African-American, whereas about 7.4% of workers in computer and computer equipment manufacturing were African-American).

[58] 15 U.S.C. 78d-1(a).

[59] 5 U.S.C. 551(5).

[60] Request (preamble).

[61] *Id.* § 5.

[62] *Id.* § 7.

registrant's views on its climate-related risks and opportunities."[63] As the Request clearly contemplates that the information it solicits will be used to prepare a notice of proposed rulemaking, the Request on its face is part of a "process for formulating … a rule." The decision about whether to issue the Request, then, fell within the province of the Commission as a whole rather than of any member purporting to act on delegated authority.

Past Commission practice is generally in accord with our interpretation of 15 U.S.C. 78d-1, as the Commission routinely holds votes before issuance of requests for information just like the current Request. Indeed, the Commission has already held a vote on a request this year,[64] and the record shows that such votes are relatively common in recent years.[65]

Yet the Commission did not vote to issue the Request at issue here. Instead, Acting Chair Lee issued it on her own, in conjunction with her remarks at the Center for American Progress. That procedure is deeply problematic. The perception that the Request does not bear the imprimatur of the Commission can only discourage the submission of comments. This perception of unlawfulness may be expected to remain attached to the rulemaking, depressing public engagement on any notice of proposed rulemaking based on information received in response to the Request and eventually calling into question the fairness and legitimacy of any final rule.

IV. The Commission Should Decide Whether to Issue a Request, and Any Request Issued Should Seek Information about Whether Additional Disclosures Are Needed.

For the reasons set forth above, the current Request was issued unlawfully and will necessarily fail to equip the Commission to decide whether additional climate disclosure regulations are needed or justified. To obtain information relevant to that fundamental question, and to dispel the taint of unlawfulness, an adequate quorum of the Commission should consider in the first instance whether to issue a request. If the Commission shares the view that regulations requiring additional climate disclosures may be useful, the Commission should issue a request that, in addition to the inquiries contained in the current Request, includes questions seeking the full

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[63] *Id.* § 13.

[64] *See* Final Commission Votes for Agency Proceedings, Calendar Year 2021, available at https://www.sec.gov/about/commission-votes/annual/commission-votes-ap-2021.xml (showing that on February 4 the Commission approved a "Request for Comment on Potential Money Market Fund Reform Measures in President's Working Group Report").

[65] *See* Final Commission Votes for Agency Proceedings, Calendar Year 2020, available at https://www.sec.gov/about/commission-votes/annual/commission-votes-ap-2020.xml (showing two such votes in 2020); Final Commission Votes for Agency Proceedings, Calendar Year 2020, available at https://www.sec.gov/about/commission-votes/annual/commission-votes-ap-2018.xml (showing nine such votes in 2018).

range of information the Commission needs. Such a request should ask for *all* information needed to examine fully and fairly whether additional disclosures are in fact needed notwithstanding the extensive reporting already directed by the 2010 guidance and the aggressive initiatives being undertaken by the private sector, States, and other agencies. The Commission should solicit information that would allow it to define the scope of the problem it seeks to remedy, i.e., the extent to which current disclosure frameworks fail to provide adequate information. It should also obtain the data the Commission needs to understand the costs and benefits of additional disclosure regulations vis-à-vis the status quo and other regulatory options, especially with regard to anticipated impacts on employment.

Such an approach by the Commission is consistent with President Biden's recent Executive Order, *Climate-Related Financial Risk*. That order directs that the federal financial regulators "consider" several actions with respect to climate disclosures, including a report to the President on "the necessity of any actions to enhance climate-related disclosures by regulated entities to mitigate climate-related financial risk."[66] The President, in other words, has directed agencies to consider explaining whether additional disclosures are needed. The new request we describe would enable the Commission to explain just that.

The issuance of the Request shows that the Commission believes it presently lacks adequate information even to formulate a notice of proposed rulemaking and that the data elicited by the Request will help to prepare this notice. That lack cannot be cured by the Commission's opportunity to receive information on the topic of climate disclosures in comments on the notice of proposed rulemaking (which, under the APA, the Commission must issue before any final rule). If the Commission lacks sufficient data to issue a notice of proposed rulemaking with respect to details such as whether and how to phase in disclosure requirements,[67] how much more so with respect to whether to require additional disclosures in the first place? If the Commission lacks data sufficient to define even the scope of the problem it seeks to remedy, it is difficult to imagine how it could offer for public comment a proposed remedy to that problem "with reasonable specificity," as the APA requires.[68] Even assuming that Acting Chair Lee is correct that the status quo does not provide investors with the information they need, the Commission cannot determine the best regulatory mechanism (e.g., a new regulation, additional enforcement resources, new guidance, or compliance assistance) on which to seek public input without information about the scope of the problem and the costs and benefits of remedying it. Merely appending to a future proposal questions going to the very heart of the rulemaking's existence and design will not provide the Commission with the information it needs in time to shape the proposal so that the public may offer informed comments on it.

[66] *Climate-Related Financial Risk* § 3.

[67] Request § 2.

[68] *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

Nor should the Commission rely on information submitted in response to an unlawful Request to decide whether to proceed with a proposal for rulemaking; such a process would irretrievably taint the entire rulemaking. The only way to dispel this taint is to do what should have been done in the first place: hold a Commission vote on whether to issue a request for information on the topic of additional climate disclosures.

V. Concerns Regarding Clarity for Consumer Investors

Advocates of ESG considerations often claim ESG metrics serve as a better guide for long term investment allocation than prevailing considerations. This claim assumes that ESG investments provide greater overall social benefits, even if ESG investments are not as profitable. However, no standard exists to qualify or quantify what makes ESG investments broadly beneficial to society. Even for an individual investment, there is no collective consensus as to an investment's social benefits. These issues exist across all three components of ESG.

1) For environmentally beneficial, "sustainable" investments, the issues are myriad. Many environmentally oriented investments altogether avoid fossil fuel energy investments, opting instead for renewables. However, nuclear energy produces no greenhouse gas emissions, so nuclear investments may be environmentally positive after the consideration of all pros and cons. Similarly, the increasing availability of natural gas has reduced pollution by replacing more environmentally damaging coal. ESG investment principles would eschew nuclear energy and natural gas, possibly leading to worse overall ecological outcomes.

   On the other hand, not all "renewable" energy investments lead to environmentally desirable outcomes when calculating the total environmental effects of all inputs needed to produce the energy. For example, corn ethanol is energy-inefficient and uses a sizable amount of excess energy from gas and oil to produce each gallon of ethanol.

   Furthermore, many ESG rubrics do not consider other types of ecological impacts beyond carbon emissions. For example, many resource inputs of industrial battery production for us in electric vehicles, such as cobalt, produce significant negative ecological externalities, along with horrific social impacts, such as the pervasive use of child labor in many of the extractive mines.

2) For socially desirable investments, the picture is even cloudier. What constitutes a socially desirable economic activity depends entirely on one's point of view – and often on one's economic interests. For example, investments in inner-cities are often considered by ESG rubrics as socially desirable, and some may be very beneficial. Still, it is impossible to mathematically qualify whether it is more socially desirable to invest in inner cities or rural areas. There is no consensus on what investments are socially undesirable without including morally subjective assumptions. For example, while most ESG proponents would avoid tobacco investments, there is likely no consensus on whether a company that produces

some fattening foods would make for a socially undesirable investment.

Internationally, there is even more controversy. Should investments in China be avoided, due to rampant human rights violations? What about Chinese state-sponsored systematic theft of intellectual property? Are Russian investments socially undesirable because Russia is under extensive international sanctions for its forcible seizure of Ukrainian territory?

3) Of the three, corporate governance considerations come closest to consensus. However, as governance considerations become more ubiquitous, it becomes nearly impossible to divorce an ever-increasing array of corporate board requirements from corporate operations. Boards are not always the most efficient and effective decision-makers. Many of the significant achievements of corporate America were and still are the result of bold, individual leaders, often largely untrammeled by board control bent on operation micromanagement. For example, Amazon's achievements in consumer delivery might have been curtailed without a strong CEO in Jeff Bezos.

Since there is no consensus on what qualifies as an ESG investment, nor is it possible to quantify the value of an ESG investment monetarily, using ESG considerations as a general guide to investment decisions could be a violation of fiduciary duty. Any investment advisor applying ESG metrics to investing does so under his or her personal moral and political views, skewed by beliefs and prejudices. Using ESG is thus especially susceptible to abuse by fiduciaries to further their own interests at the expense of the beneficiaries.

We believe the lack of a comprehensive definitions of ESG investing would add substantial uncertainty for consumer investors and investment advisors.

CONCLUSION

Because the Request fails to ask for information that will be essential if the Commission is to grapple with the most fundamental questions about new climate disclosure regulations, and because the current Request is unlawful, we urge the full Commission to consider whether to issue a request for information and, if the Commission decides to issue such a request, to solicit information about the full range of issues needed to decide whether to proceed with a rulemaking. We further urge that, absent such a request, the Commission decline to proceed with any proposal for rulemaking or other action based on information received in response to the current unlawful and partial Request.

Sincerely,

Will Hild

Will Hild, Executive Director