



June 11, 2021

The Honorable Gary Gensler
Chairman
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549

Re: Request for Public Input on Climate Change Disclosure

Dear Chairman Gensler,

The Bipartisan Policy Center (BPC) is a Washington, DC-based think tank that actively fosters bipartisanship by combining the best ideas from both parties to promote health, security, and opportunity for all Americans. Our policy solutions are the product of informed deliberations by former elected and appointed officials, business and labor leaders, and academics and advocates who represent both sides of the political spectrum. BPC prioritizes one thing above all else: getting things done.

BPC appreciates the opportunity to provide input in response to the U.S. Securities and Exchange Commission's (SEC) April 15, 2021 public request for comment.¹ We strongly support the notion that materially relevant risks should be disclosed so that investors can obtain decision-useful information in deciding how best to allocate their capital.

ESG (Environmental, Social, and Governance)

It may be useful to begin by acknowledging that there is an enormous difference between reporting on climate-related risk and as suggested in the 15th enumerated question that covers ESG issues. We at the BPC have been addressing ESG issues over the past few years and came to realize that while many know what the "E," "S," and "G" mean, what is intended when one uses the acronym varies widely depending on region, sector, company, and person. We would strongly recommend working collaboratively with non-profits, think-tanks, academics, and of course investors and corporations in finding common language when using the term ESG. Given the exponential growth in ESG investment funds and other financially based uses of the term ESG, we believe that this would be not only a prudent decision, but also one that is well within your tripartite mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation. Assuming that the SEC moves forward with further regulating disclosure of financially material ESG data, we will use "climate-related risk" disclosure and ESG disclosure interchangeably for purpose of this comment letter.

¹ *Public Input Welcomed on Climate Change Disclosures* (15 March 2021); available at <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.

Comparability

The stated purpose of the request for public input was a growing demand for increased ESG data and providing investors and other stakeholders with consistent, comparable, and reliable data that may be used to make informed investment decisions.² While financially material data should already be disclosed under existing SEC regulations coupled with the fact that 90% of S&P 500 companies are now producing suitability reports, and a recent uptick in the passage of shareholders proposals regarding disclosure, it certainly appears that there has *not* been a market failure in providing material information to investors, even regarding a topic as broad as ESG. As a result, while there may be other factors pressuring regulating in this area, we acknowledge that consistency and comparability of ESG data is a worthy pursuit.

When it comes to consistency and comparability, companies, with consultation of investors and other stakeholders, have a multitude of standards and frameworks to choose from in deciding how to disclose their ESG data.

Over the years there have been many broad-based standards and frameworks contemplated, but the "Group of Five" have been the most widely used and are now collaborating on certain issues. The Group includes: The Global Reporting Initiative (GRI); CDP (formerly, the "Carbon Disclosure Project"); The Climate Disclosure Standards Board (CDSB); The International Integrated Reporting Council (IIRC); and The Sustainability Accounting Standards Board (SASB). While the Group has different approaches to their standards and reporting, there is overlap that they as a group consider complementary.

As the Group of Five has recently moved toward their vision of a global corporate reporting system, the SEC should set their own standards and allow companies the flexibility to use third-party standard setters as tool to meet the SEC's disclosure requirements. This will allow corporations to disclose their ESG data by using one or more of the standards and frameworks that fits their industry-sector and size.

Corporations should be allowed to use these standards and frameworks to tell their story in a way that simultaneously provides investors with the data they need without burdening corporations and ultimately investors with unnecessary costs associated with disclosure, while effectively and efficiently being able to respond to the concern of "green-washing." As a result, we caution the SEC against applying a one-size-fits-all standard and framework. Instead, the SEC should work on developing standards based on principles that can be used in a comparable disclosure framework. This will allow corporations to individualize their disclosure in a way that is most helpful to their investors but does not overwhelm them with unnecessary data and costs.

² See *id.*

Materiality

There has been much discussion as of late regarding materiality³. As the SEC is keenly aware the U.S. Supreme Court struck a balance in deciding the *TSC Industries*⁴ case. It is worth noting that a “reasonable investor” is held to prioritize investment returns over some political agenda. There are some arguments being made that ESG data should *always* be disclosed because it is *per se* material or that corporations do not disclose material data unless it is explicitly required to do so by the SEC or based on public statements made on behalf of the corporation. While there is certainly ESG information that would be financially material and has a duty to be disclosed under current regulations, there are certainly examples of ESG data that is neither financially relevant nor material for certain corporations in certain sectors. While there may be some very interesting data that stakeholders would like and frankly that corporations may want to disclose, but that does not make them necessarily financially material. In fact, there may be some political or social topics that are very concerning for some investors, but that does not make the concern an automatic one for the reasonable investor. Rather, this type of information can continue to be disclosed in ways other than under an SEC disclosure framework. In fact, this goes to the crux of what the Supreme Court warned about in *TSC Industries* regarding too much data for the reasonable investor. As for corporations making internal decisions on what is and what is not material, that is the job of management to make with oversight from the boards. In addition to corporate boards overseeing management, the market ultimately will drive the disclosure of ESG data as it has exponentially over the last few years.

As such, we encourage the SEC to maintain the current materiality standard so that investors receive only financial material data via a corporation’s SEC disclosures. The SEC should continue to acknowledge the vital role boards play in overseeing management decisions. Maintaining the current materiality standard also serves the purpose of protecting the reasonable investor from the inadvertent interjection of political issues into the SEC’s disclosure framework. If the materiality standard is changed in this way corporations and ultimately investors will have to contend with market uncertainty and unwarranted costs and burdens in an everchanging disclosure framework that has the potential to change with each succeeding new Administration as they pursue their preferred policy goals.

Consistency

It probably goes without saying that consistency seems to be the aspiration of most who regularly engage with the government. While reform is certainly supported in many instances, consistency of the applicable laws and ultimately regulation is paramount to thriving capital markets. Understanding that ESG issues have experienced exponential growth over the last few

³ Keynote Remarks by Commissioner Allison Herren Lee on Myths and Misconceptions about Materiality (May 24, 2021); available at <https://www.sec.gov/news/speech/lee-living-material-world-052421>

⁴ *TSC Industries v. Northway* 426 U.S. 438 (1976) and *Basic Inc. v. Levinson* 485 U.S. 224 (1988).



years, and some are still trying to understand how the issues affect them, we strongly recommend that the SEC continue the process of engaging with all stakeholders in developing regulations regarding ESG. While updating the 2010 guidance document is understandable, just as the broad request for public input was needed, so too will public comment be needed to increase the longevity of any envisioned regulatory framework necessary to address ESG issues. While using the benefit-cost analysis under the Administrative Procedures Act (APA) may take longer to develop new standards for ESG disclosure, given the importance of ESG issues and the continued desire for consistent, comparable, and reliable data we strongly suggest that the SEC engage in a full notice and comment procedure in developing a ESG disclosure framework. Additionally, as the SEC moves forward with enforcement options, we suggest that it would be prudent to engage corporations on that process and provide adequate time to understand the contemplated disclosure requirements.

Conclusion

We appreciate the opportunity to submit comments on this incredibly important topic and look forward to working with your team in any way that might be helpful. We believe the SEC should be a leader in helping understand all that encompasses ESG. The SEC should set the standards and give companies the flexibility to disclose under those standards based on clear principles. The SEC should strive to ensure any standard and framework brings clarity to corporations and better informs investors with comparable data. The SEC should maintain the materiality standard that has provided stability to the capital markets for decades. Lastly, the SEC should strive for a regulatory framework that can be relied on by corporations for years to come by developing it with as much practical input as possible.

Sincerely,

Timothy M. Doyle
Senior Advisor, Bipartisan Policy Center