June 11, 2021

Re: Comments on Letter from Commissioner Lee titled, "Public Input Welcomed on Climate Change Disclosures"

Dear Commissioner Lee:

On behalf of Life:Powered, an energy policy initiative of the Texas Public Policy Foundation, I'm providing the following comments in response to your letter titled, "Public Input Welcomed on Climate Change Disclosures."

It is our opinion that *any* requirement for public companies to disclose climate-related risks exceeds the statutory authority of the SEC, impedes on the First Amendment rights of companies, their managers, and their shareholders, and is ultimately a detriment to shareholders and to the broader public welfare. Therefore, our comments will focus on the first two questions in your letter, covering the broader topics of whether such disclosures are necessary and feasible.

These comments will first address some problems with the two primary facets of existing climate risk disclosures, emissions tracking and predicting risks from rising temperatures, and then conclude with the legal and constitutional problems that these disclosure requirements could bring about.

**Emissions Tracking and Disclosures Are Not Beneficial for Shareholders**

Question 2 in your letter asks what information related to climate risks can be quantified and measured. A simple answer to this question would appear to be Scope 1 emissions, which are a direct result of a company's operations and can usually be quantified with some precision based on how many miles are driven in company vehicles, how much electricity a company consumes, and so on. However, even for those emissions that can be quantified, the link between emissions and the company's operations or their profitability is almost impossible to determine. Such a link must either be derived from the effect of the company's emissions on future global temperatures, a determination that far exceeds the precision of current climate models, or from regulatory risk, which depends on the effects of future political actions that are equally impossible to quantify and predict.

Perhaps near-term regulatory risk is material to investors, but in that case, current rules should require a company to disclose those risks. Plus, those risks, and the amount of time that should be invested in quantifying those risks, are different for each company. What emissions tracking does do is give regulators and environmental activists greater power to enforce emissions reductions schemes through either activist investor cartels—which are becoming increasingly powerful, as evidenced by the recent shake-up of ExxonMobil's board—or through unconstitutional regulatory activity.

The push to require companies to quantify Scope 3 emissions is a clear indicator that the efforts to track emissions are more about stigmatizing companies with the "sin" of greenhouse gas emissions than a sincere desire to engage those companies in environmental improvements. As I've written recently, Scope 3 emissions from a company's suppliers or distributors are virtually impossible to quantify, much less control, and will result in double-counting if investors are not aware of the overlap between emissions from related companies.

Fundamentally, as noted by Commissioner Roisman in a recent letter, "unless this information can *meaningfully* inform an investment decision, it is at best not useful and at worst misleading." It is also a waste of time and money, especially for smaller corporations who lack the scale to easily absorb the costs of tracking emissions. Given the distant and obscure links between emissions and a company's profitability, emissions tracking is far more likely to confuse and harm investors than it is to provide them with meaningful information about a company's performance and risks.

**Risks to Human Welfare from Climate Are Decreasing, Not Increasing**

One of the premises of climate risk disclosures is that rising temperatures, and associated effects such rising sea levels and extreme weather, are increasingly becoming a material threat to societal welfare and therefore to the operations and profitability of public companies. In fact, risks to human welfare from extreme weather have declined dramatically over the past century because our wealth and ability to adapt has increased, and there is not a reason to believe this trend will change in the future.

The clearest indicator of declining climate risk is the dramatic decline in lives lost due to climate-related disasters over the past century, 99% on a population-weighted basis since the 1920s (see Figure 1). Worldwide mortality from droughts, extreme temperatures, floods, storms, and wildfires has declined steadily from almost 250 deaths per million people in the 1920s to 2 deaths per million people over the last decade. Mortality from climate disasters is far lower than the global mortality rate of over 175 deaths per million people from vehicle crashes. By this measure, vehicle accidents are a much greater material risk than climate risks to corporate operations, yet the SEC is not calling for all companies to disclose the accident rates and safety records of employees driving company vehicles.

As detailed in our research on the Fourth National Climate Assessment, risks to economic output and human welfare from climate are greatly exaggerated by the chosen modeling assumptions, and the uncertainties in these estimates are vastly underreported. The common use of extreme emissions scenarios, such as RCP 8.5, and the emphasis on tail risks instead of the most likely—and far less daunting—model results seem to be intentionally designed to convince the public and policymakers of impending catastrophe rather than inform them of the full range of possibilities. These problems are also inherent in many corporate ESG disclosures today.

The false catastrophe narrative is also prevalent in the reporting of extreme weather. Contrary to popular belief, neither the frequency nor the intensity of U.S. landfalling hurricanes increasing, and hurricane damage is not increasing when adjusted for the growth in property values on the U.S. East Coast (see Figure 2). None of the extreme weather indicators for the U.S.—including droughts, floods, and wildfires—suggest an increasing need for measuring and disclosing climate risks.

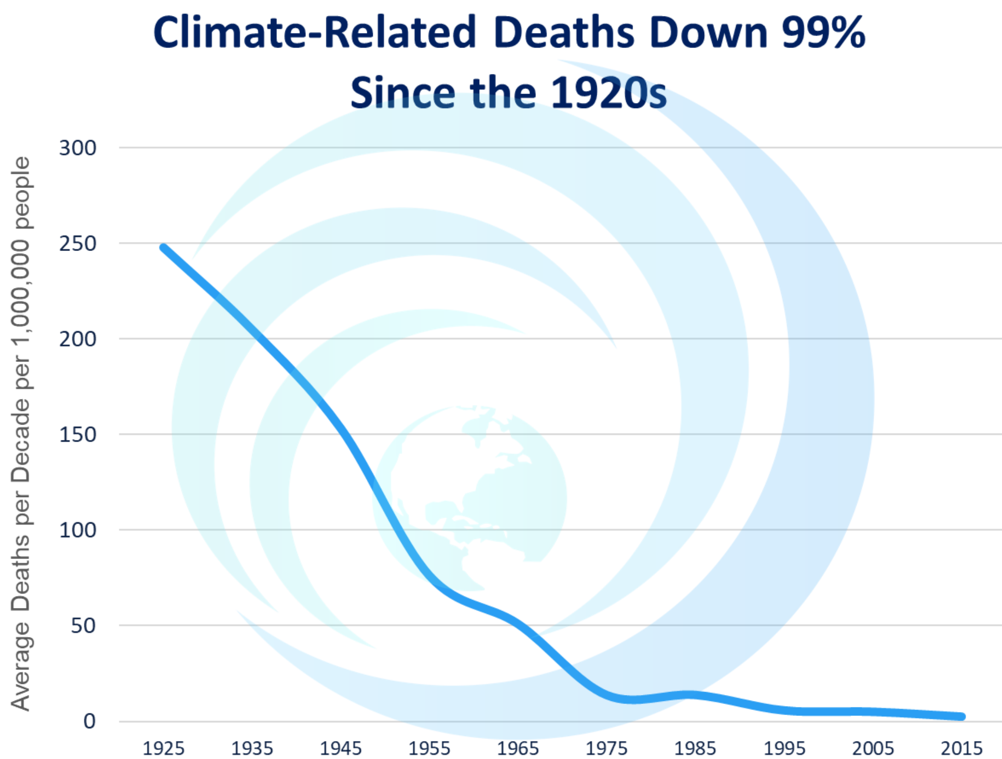


Figure 1: Deaths from climate related disasters since 1920, normalized by population and averaged across each decade from the 1920s to the 2010s. *Source: EM-DAT database.*

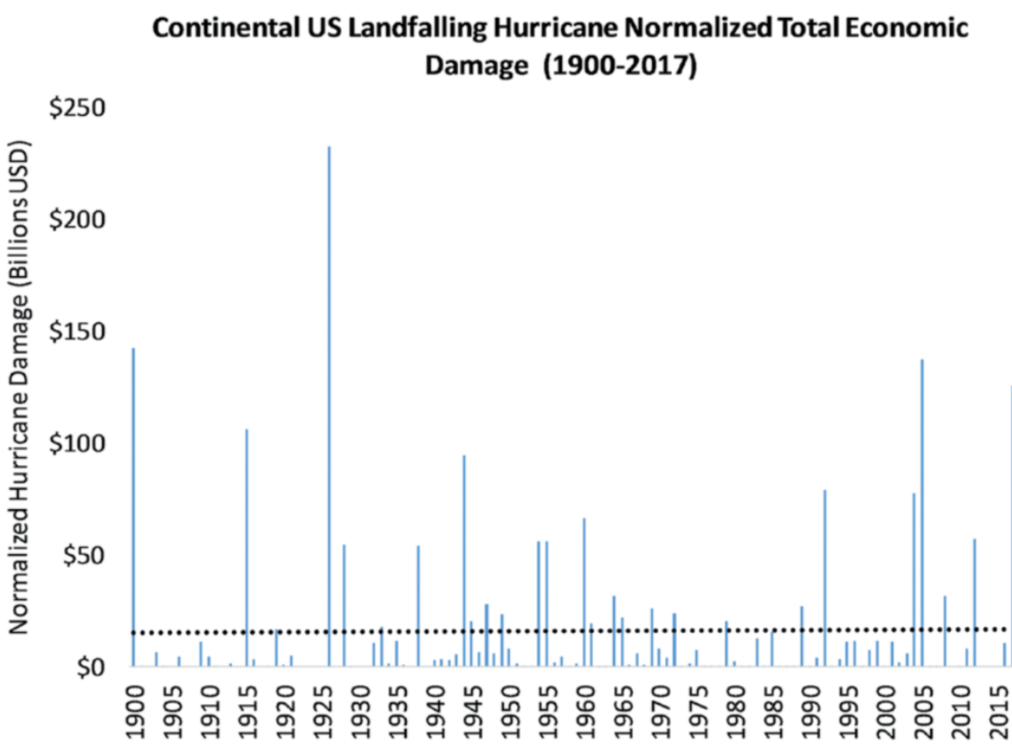


Figure 2: Damage from U.S. landfalling hurricanes, normalized by population and wealth increases in coastal areas. *Source: Klotzbach et al. 2018.*

To be clear, our argument is not that weather and climate-related risks are immaterial for all companies. Petrochemical companies along the Gulf Coast must account for potential lost output from hurricanes, which usually occur several times over the long life of their assets. Agricultural yields vary enormously with the weather every year, and many commodity prices, such as natural gas, depend heavily on the weather. These problems have existed for decades and will continue to be material information for decades to come.

However, relying on climate models to predict future climate risks from extreme weather, rising sea levels, and so on, is an exercise in futility. Existing climate models still fail to estimate the sensitivity of global surface temperature to carbon dioxide emissions with any better precision than 1.5°C to 4.5°C. Such exercises are also unnecessary considering that there is no significant observational evidence that risks to human welfare from extreme weather have increased as temperatures have risen over the past century. On the contrary, our ability to adapt to extreme weather and to changes in climate has brought about an enormous reduction in lost lives and lost economic output due to climate-related disasters over the past century.

**ESG Disclosure Requirements Could Violate First Amendment Rights**

We also want to highlight the concerns we share with many other parties, notably West Virginia Attorney General Patrick Morrissey, that additional disclosure requirements will result in First Amendment violations.

The primary purpose of disclosure requirements is to protect investors from fraud and deceptive practices, but, as noted by AG Morrissey in his recent letter to you, "[I]t is highly unlikely courts will find requiring statements of the kind you propose to directly and substantially serve that end." We wholeheartedly agree with that opinion. As I've shown with many examples in this letter, attempting to promulgate uniform disclosure requirements through an SEC rulemaking, instead of letting the market sort out what disclosures are material to investors, will do nothing to improve the quality of material information available to investors.

The clearest historical example of similar disclosure requirements running afoul of the First Amendment is the conflict minerals disclosure included in the Dodd-Frank Act. These requirements were shot down by the D.C. Court of Appeals, which held that, unless a company was using a "conflict free" label to deceptively sell products, compelling such disclosure was a violation of free speech rights. Of note in Judge Randolph's majority opinion is the following statement, "By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment." It is clear from this statement that the court would view emissions disclosure requirements, particularly for energy companies, as a similar violation of the First Amendment.

Such attempts to compel speech from corporations and their managers on ESG issues are far from novel. In 1971, the National Resources Defense Council petitioned the SEC to promulgate disclosure regulations for the environmental impact of pollution from corporate activities, which today would fall under the category of ESG. The SEC rebuffed these requests on the grounds that it was not compelled by

NEPA or other recently instituted statutes to adopt rules that exceeded the scope of the materiality disclosure standard, and the D.C. Court of Appeals upheld the SEC's position.

The courts have upheld many times since the 1970s that the SEC is not compelled to promulgate ESG-type disclosure requirements. Furthermore, its ability to stretch the materiality standard to include ESG issues is legally dubious. If the SEC attempts to institute uniform climate-risk and emissions disclosure requirements for public companies, we predict that it will run into a vast legal thicket and ultimately fail to promulgate rules that help investors. With so much uncertainty and lack of uniformity regarding what constitutes climate risk, how to measure it, and whether it is material to a company's operations or not, it is better to let each company's investors and mangers determine what is important to measure, track, and ultimately disclose.

Sincerely,

Jason Isaac
Director, Life:Powered
Texas Public Policy Foundation