



NYC CYBERLAW GROUP RESEPNSE TO:
SEC Request for Comment on Climate Change Disclosures

June 13, 2021

Via Webform on: <https://www.sec.gov/cgi-bin/ruling-comments>

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

Dear Chair Gensler,

This letter is submitted in response to the Request for Input on Climate Change Disclosures issued by Acting Chair Allison Herren Lee on March 15, 2021.

The NYC CyberLaw Group, PLLC, is a boutique law firm specialized in the fields of cybersecurity, technology, and data privacy law primarily in the financial and healthcare sectors. Our team has provided legal counsel and advisory services to a full range of Clients including Fortune 500 companies, U.S. government entities, multilateral development banks, non-governmental organizations, international trade bodies, SME/SMB's, and a wide-range of companies in emerging technology sectors (e.g. RegTech, FinTech, AgTech). Our services include development of legal, risk, and compliance models, strategies, and documentation to address emerging risks (including those arising from technology and climate change), while promoting equity, innovation, and competition.

We appreciate the opportunity to provide our perspective and feedback during this consultation to on a vital set of issues at a critical juncture.

Questions for Consideration

- 1. 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 while also providing greater clarity to registrants as to what is expected of them? Where and how should such disclosures be provided? Should any such disclosures be included in annual reports, other periodic filings, or otherwise be furnished?*

One of the most effective means to securely and effectively regulate, monitor, review, and guide climate change disclosures to provide more consistent, comparable, and reliable information is by leveraging technical developments in the field of regulatory technology "RegTech" to assist

regulators and other audit and governance sectors in meeting increasing risks amidst diminishing resources.

One tool that has been tested and deployed by various regulators including the UK Financial Conduct Authority (FCA) is “Machine-Readable Regulation”, also known as “Digital Regulatory Reporting”. From a technical vantage point, one of the more efficient methodologies for a regulator to leverage technology for this purpose would be as follows: (i) the regulator identifies data sets (e.g. frameworks, regulations); (ii) the regulator may then provide guidance for measuring (and weighing) the data sets; (iii) the regulator then issues the data sets and corresponding weighing guidelines in a machine readable format to be benchmarked against the data sets within regulated entities. Once established, the regulated sector entities are then able to develop the tools to effectively map, monitor, and generate accurate reporting of those measurable data sets and provide the regulator with consistent, comparable, and reliable reporting of those data sets as derived directly from the regulated entity’s own primary sources. Additionally, this machine-readable regulatory model enables a powerful tool for the regulators to then conduct consultations involving those data sets merely by drafting a modified data set (i.e. a modified regulation), providing that data set in a machine-readable format against which regulated entities can benchmark their existing frameworks rather quickly, and then receiving responses illustrating the extent to which those modifications would impact the existing sector participants and their respective operations.

Example 1: WidgetCo (not intended to be an actual company) provides an exchange where tokens corresponding to tokenized assets of a particular industry (e.g. real estate, NFT’s, movies) can be generated in order to raise financing (e.g. Reg CF), and then exchanged amongst token holders. WidgetCo services are leveraged using a cloud service provider that has servers in one state that has servers powered by energy from coal-fired power plants and in another state that has servers powered by renewable energy and operating at a much lower cost. Each token trade (e.g. set of API calls), as well as the effective storage and backup of such tokens (on a direct API, blockchain-based system, or otherwise), calls upon a certain amount of power from the cloud service provider. WidgetCo chooses the server powered by renewable energy at a cheaper price and less adverse impact to the climate. Since the regulator has provided a machine-readable regulation with the parameters of “Server Energy Consumption” and “Energy Type: Fossil/Hydroelectric/Solar...”, WidgetCo can match that machine readable code to an API provided by the cloud service provider that automatically fills in that data. As a result, by providing clear requirements for server energy consumption, the regulated entity can now automatically provide a direct, consistent, comparable, and accurate report to investors, regulators, auditors, or any other desired party.

Example 2: Agriculture is the second biggest adverse impact to climate change after fossil fuels. AgTech solutions have sought to address climate change by developing and implementing methods to produce identical crops using less water, less space, and no chemicals (amongst other benefits). AgTech solutions are more than willing to provide such data sets to regulators and auditors to illustrate the benefits of their solutions. Yet, in this example, regulators may also choose to guide industry participants to use their own data and cross reference that with publicly available data sets (eventually made available via API) to ensure consistent and cross-checked usage metrics (e.g. electrical grid usage, land usage, water usage).

One of the core concerns with the machine-readable regulatory model is the necessity for prescriptive instead of principles-based regulation. It is not feasible to expect a regulator to try and create prescriptive guidance covering all the climate impact related intricacies of all regulated entities. Instead, regulators may address this concern by providing high level guidance (e.g. high level data sets; standard sustainability indexes) limited to the defined regulator's jurisdictional and material scope, with specific industry requirements and reporting incorporated by reference. From a technical perspective, "incorporated by reference" may be implemented by taking machine readable parameters and/or audit results from an industry-specific governance framework and incorporating the overall result via API as a limited set of supplemental parameters, or alternatively, as a set of parameters mapped as weighted components or subsets of the broader guidance.

2. *What information related to climate risks can be quantified and measured? How are markets currently using quantified information? Are there specific metrics on which all registrants should report (such as, for example, scopes 1, 2, and 3 greenhouse gas emissions, and greenhouse gas reduction goals)? What quantified and measured information or metrics should be disclosed because it may be material to an investment or voting decision? Should disclosures be tiered or scaled based on the size and/or type of registrant)? If so, how? Should disclosures be phased in over time? If so, how? How are markets evaluating and pricing externalities of contributions to climate change? Do climate change related impacts affect the cost of capital, and if so, how and in what ways? How have registrants or investors analyzed risks and costs associated with climate change? What are registrants doing internally to evaluate or project climate scenarios, and what information from or about such internal evaluations should be disclosed to investors to inform investment and voting decisions? How does the absence or presence of robust carbon markets impact firms' analysis of the risks and costs associated with climate change?*

Increased attention to linkages between certain business activities and climate impact (either from litigation, incentive programs, fines, etc...) has motivated most industry sectors to ensure that climate data is readily available. Furthermore, as industry participants become more aware of the breadth and depth of climate impacts, and the reality that even renewable resources are finite under certain circumstances, frameworks will continue to be expanded and enriched with climate impact factors and corresponding metrics for data reporting.

With this increased awareness, though, regulators may choose to be conscious of the proximity and causation of the climate impact of the business activity in question. So, to use the example above, if a company chooses to use a cloud service provider and pay for that cloud service provider to use a large amount of energy, then that company is the proximate beneficiary of the climate impact ("proximity"), yet the cloud service provider is the entity that is causing that energy consumption ("causation"). As a result, regarding measurements, benefits, and liabilities, of climate impact, there will be an increased demand on vendor management and contracting to clearly determine to whom such benefits and liabilities are attributed. By analogy with the field of Privacy Law, one must consider who is the "Data Processor" and who is the "Data Controller" when it comes to the governance of private data.

Though there may be some limited, quantified, and measured, information or metrics by sector that should be disclosed because it may be material to an investment or voting decision, generally, all climate impact metrics should be disclosed if they are simply material in order to ensure compliance with applicable laws and regulations. Failure to comply with operational requirements that include climate impact considerations (and perhaps disclosure requirements) may result in significant damage to a company arising from fines, litigation, reputational damage or otherwise. As a result, disclosure of ESG risks should be mandatory to ensure that those people making investment or voting decisions are informed enough to fulfill their own fiduciary duty and/or other management obligations to the company

In order to promote competition and innovation in industry sectors regarding climate impact, the size and scale of a registrant should be taken into consideration for companies developing ESG principles and practices. A small company that cannot participate in a consultation may be overburdened with ESG reporting requirements and therefore need to cease operations. On the other hand, a larger company may choose to create burdensome ESG principles for industry participants, and either apply resources to meet those principles, or otherwise leverage various legal or other vehicles (e.g. offshoring, subsidiarization, etc...) to offset risks and costs. Lowering the costs of ESG compliance, ensuring a more direct and uniform application of such requirements, and providing robust and equally accessible tools for identifying and reporting climate impact requirements would promote a more equitable, competitive, and innovative environment.

Deploying regulatory frameworks and governance structures should build upon any and all existing relevant resources and efforts. Existing ESG-relevant disclosure requirements from regulators should be retained, as should be any and all ESG-relevant disclosure requirements that are industry specific. Over time, ESG reporting may benefit from having all ESG-related disclosure requirements aggregated. These aggregated requirements may provide better clarity amongst regulators and provide an opportunity for industry-specific governing bodies to create supplemental reporting for those disclosures.

Markets are evaluating and pricing externalities of contributions to climate change primarily by establishing self-governing standards until such time as there is more regulatory clarity. These self-governing standards are established partially to help protect industries within each specific sector from the increasing risks of fines and litigation arising from climate impact issues for that sector, and partially in response to incentives including tax credits and reputational enhancement. Incentives including these tax credits and reputational enhancement are seen as the short-term means to help companies defray the costs to capital from requiring enhanced monitoring and reporting practices and ensuring compliance with those practices. Depending on the sector, there are often various groups of specific mid-to-long term benefits that may ultimately defray these costs and lead to enhanced profitability, including, but not limited to, a healthier and more productive workforce and avoidance of eventual costs of environmental remediation for any adverse climate impacts. These risks and costs have led to the development of a plethora of high-level and industry-specific frameworks from which registrants base internal evaluation or project climate scenarios. Many of these frameworks, though, fail to provide a comprehensive industry-specific view of requirements both within that industry, as well as within the context of a broader climate impact framework. For example, in the late 1970s various industries were creating their



own internal standards governing the use of chlorofluorocarbons (CFCs), which may have provided effective controls for the safe usage of CFCs within specific industries, but only with the involvement of the international community considering the broader impact to the environment were CFCs ultimately phased out of usage. By analogy, in the absence of robust carbon markets, a firm's analysis of the risks and costs associated with climate change may be significantly impacted by precluding that company from being aware or adequately prepared for such markets as they develop and become more robust.

Thank you,

A handwritten signature in black ink, appearing to read "P. McCulloch", written over a horizontal line.

Paul McCulloch
Managing Partner
NYC CyberLaw Group, PLLC