June 13, 2021

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

RE: Public Input Welcomed on Climate Change Disclosures

Chair Gensler:

Today, I write on behalf of more than three million Americans for Prosperity (AFP) activists across the United States to raise concerns regarding the U.S. Security and Exchange Commission's (SEC) March 15 request for public input from Acting Chair Allison Herren Lee regarding climate change disclosures.

These comments focus on constitutional concerns with a compulsory climate or environmental, social, and governance (ESG) disclosure regime, the inadequate nature of the March 15 call for feedback as a basis for future rulemaking or updates to sub-regulatory guidance, and issues with a one-size-fits-all climate disclosure mandate. These comments are particularly relevant for the Commission to consider for questions 1, 2, 3, 4, 6, 9, 11, 13, 15.

SEC's Call for Input Fails to Provide a Basis for Future Rulemaking

Interested commenters have not been fairly apprised of the nature of the proposal, which has short-circuited meaningful notice and failed to provide reasonable specificity upon which the public could be expected to base their input. For example, absent from the March 15 request for comment are any details about the framework or process-related considerations that would allow Main Street to provide actionable feedback to the Commission ahead of future regulatory changes.

The March 15 call for public input footnotes the February 2021 issuance of a Statement on the Review of Climate-Related Disclosure, which directs the Division of Corporation Finance to review SEC's2010 climate change guidance,[1] "absorb lessons on how the market is currently managing climate-related risks," and "use insights from that work in considering updates to the 2010 Climate Change Guidance." The relationship between comments on the 15 questions for consideration and this effort is not clear.

[1] https://www.sec.gov/rules/interp/2010/33-9106.pdf.

As several Members of Congress noted in their comments,[2] SEC should follow a notice-and-comment process consistent with the Administrative Procedure Act rather than rushing to impose a new framework, pursuing regulation-by-enforcement, or updating guidance. Changes to the significant guidance issued in 2010 as well as any broader regulatory changes for climate-related disclosures should be proposed with reasonable specificity that enables the Commission to solicit necessary and specific feedback that enables reasoned decision making. The broad set of questions posed on March 15 do not satisfy this need.

Robust, meaningful public feedback is especially critical considering the lack of clear statutory authorization for these activities. The Congressional Research Service recognized in 2021 that: "Federal securities law does not explicitly require disclosure of specific climate-related risks."[3] In 2018 comments to the U.S. Environmental Protection Agency, the Federal Energy Regulatory Commission's then-Chairman Neil Chatterjee warned against agencies imposing "sweeping changes" related to climate change "through administrative action without a clear statutory directive or limiting principle,"[4] noting the Supreme Court's admonition that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes"[5] and characterization of climate-related issues as "questions of deep 'economic and political significance'" that are central to the statutory scheme.[6]

SEC Climate Disclosure Mandates Risk Compelling Speech at Odds with the First Amendment

The Commission should bear in mind that any proposed disclosures must comport with the First Amendment rights of the reporting organization. Compelled speech is a particularly egregious intrusion on First Amendment freedoms.[7] In *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943), the Court stated that "involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." Content-based regulation of speech is inherently suspect. Such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[8] And as the Supreme Court recently explained in *NIFLA v Becerra*, compelled speech is a content-based regulation because it "alters the content of [their] speech."[9] Here, the proposed disclosures would require the disclosing entities to speak on topics wholly unrelated to the SEC's legitimate regulatory purposes, expressing views they may not hold or would prefer to express in different ways.[10]

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[2] https://www.sec.gov/comments/climate-disclosure/cll12-8873201-240110.pdf.
[3] https://crsreports.congress.gov/product/pdf/R/R46766.
[4] https://www.regulations.gov/document/EPA-HQ-OAR-2017-0355-24053.
[5] *Whitman v. American Trucking Ass 'ns., Inc*., 531 U.S. 457, 468 (2001) (citing *MCI Telecomm 'ns Corp. v. American Tel. & Tel. Co*., 512 U.S. 218, 231 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-160 (2000)); accord, e.g., *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1612 (2014) (Scalia, J., dissenting).
[6] *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).
[7] *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
[8] *Reed* v. *Town of Gilbert*, 576 U. S. 155 (2015).
[9] *Riley* v. *National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988).
[10] *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 575 (1995) ("[I]t boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").

Compelling responses to the categories of speech suggested in Questions for Consideration could imply that the speaker had adopted a position on the topic of climate change, the relevance of the disclosed information to that topic, and whether either one had any bearing on the business. Such compelled statements would go beyond conveying neutral information, but would use a regulatory sword of Damocles to compel the speaker not only to speak, but to speak contrary to its actual beliefs. Such a requirement would exceed even the allowed regulation in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), which required radio frequency licensees to air speech by others – but not to compel the speech from the licensees themselves. The proposals here, by contrast, risk fostering the appearance that the speaker is expressing its own opinion—even where such disclosures are contrary to its true position—creating confusion in messaging as well as violating the First Amendment rights of the speaker. The government is free to express its own views. It is not free to command private parties to speak.

The First Amendment would prohibit mandating this speech even if it were deemed to be "professional speech", *i.e.*, speech based on expert knowledge and judgment. The Supreme Court "has not recognized 'professional speech' as a separate category of speech merely because it is uttered by 'professionals.'"[11] Instead, the "Court has afforded less protection for professional speech only for "factual, noncontroversial information in . . . 'commercial speech,'"[12] or regulations of professional conduct that incidentally burden speech.[13]

The *Zauderer* standard would not permit mandating the proposed disclosures because the proposals do not relate to either "commercial speech" or speech that is "noncontroversial." Indeed, as the Commission recognizes in question 6 and 9, the proposals relate to information that is unsettled, subject to change over time, and lacking any recognized standards.[14] Accordingly, as the Court held in *NIFLA*, requiring disclosure about "anything but an 'uncontroversial' topic" falls outside of the *Zauderer* standard.[15] The second circumstance, burden, likewise does not apply. There is no issue here of professional conduct and thus no "incidental" speech. In addition, the scope of the proposed disclosures would be burdensome for any entity that did not already perform such analysis under its business model because the proposed categories of disclosures relate largely to data-gathering, modeling, analysis, and

[11] *Nat'l Institute of Family and Live Advocates v. Becerra*, ("NIFLA"), 138 S.Ct. 2361, 2371–72 (2018).
[12] *Id*. citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985).
[13] *Id*. at 2373.
[14] *See* https://www.sec.gov/news/public-statement/lee-climate-change-disclosures "6. How should any disclosure requirements be updated, improved, augmented, or otherwise changed over time? Should the Commission itself carry out these tasks, or should it adopt or identify criteria for identifying other organization(s) to do so? If the latter, what organization(s) should be responsible for doing so, and what role should the Commission play in governance or funding? Should the Commission designate a climate or ESG disclosure standard setter? If so, what should the characteristics of such a standard setter be? Is there an existing climate disclosure standard setter that the Commission should consider?"; "9. What are the advantages and disadvantages of developing a single set of global standards applicable to companies around the world, including registrants under the Commission's rules, versus multiple standard setters and standards? If there were to be a single standard setter and set of standards, which one should it be? What are the advantages and disadvantages of establishing a minimum global set of standards as a baseline that individual jurisdictions could build on versus a comprehensive set of standards? If there are multiple standard setters, how can standards be aligned to enhance comparability and reliability? What should be the interaction between any global standard and Commission requirements? If the Commission were to endorse or incorporate a global standard, what are the advantages and disadvantages of having mandatory compliance?"
[15] *NIFLA*, 138 S. Ct. at 2372.

framing not within the expertise of any entity that does not operate squarely within those fields. Thus, undertaking such studies would impose a material obligation outside the expertise of many speakers that would exceed the allowable burden.

Lacking any basis for special treatment, the proposals that may result from this process would be subject to the same First Amendment speech protections as any other content-based regulation.[16] As such, the proposed disclosures, which "target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[17] To meet that standard, the government would have to show that the proposed disclosures are neither overinclusive: compelling disclosures not necessary to address the proffered governmental interest; nor underinclusive: failing to compel disclosures equally or more necessary to address the proffered governmental interest. Here, as an initial matter, any compelling agency interest has yet to be identified. But even were that hurdle to be overcome, establishing parameters for the mandated information to satisfy narrow tailoring would be infeasible considering the fluid state of affairs.

Again, the lack of clear statutory authority for SEC climate disclosure requirements undermines the arguments in favor of a compelling government interest. As West Virginia Attorney General Patrick Morrisey explain on March 25, "merely meeting a 'demand' for company statements' does not satisfy this requirement.[18] Commissioner Hester Peirce identified some of the risk of compelled speech in this context during June 2019 remarks before the American Enterprise Institute, including public shaming and shunning based on nebulous, incomplete, arbitrary, inconsistent, and political information which would be incorporated as part of an SEC climate or ESG disclosure regime.[19]

The Proposed Climate Disclosure Regime Ignores Materiality Considerations

In addition to the SEC failing to have established a clear, causal relationship between climate-related risks that applies across industries, geographies, and companies, the Commission is also not well-suited to evaluate that materiality in ostensibly clear situations. As Paul G. Mahoney and Julia D. Mahoney of the University of Virginia School of Law explain in a forthcoming article, "The SEC has neither the expertise nor the political accountability to pursue climate, diversity, or other public policy goals."[20]

While heavy-handed climate legislation or regulations can have predictable effects on expanded government authority as well as negative economic consequences (including reduced economic growth, job losses, and increased energy prices), recent evidence suggests that there is virtually no relationship between top-down climate policies, including ratification or implementation of international agreements as well as carbon pricing, cap-and-trade, or command-and-control

[16] *Reed v. Town of Gilbert, Ariz*., 576 U.S. 155, 163 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.")
[17] *Id*. at 163.
[18] https://www.sec.gov/comments/climate-disclosure/cll12-8563794-230748.pdf.
[19] https://www.sec.gov/news/speech/speech-peirce-061819.
[20] https://www.sec.gov/comments/climate-disclosure/cll12-8855236-238441.pdf.

sectoral regulation at the national or sub-national level, and trends in energy-related carbon dioxide emissions as well as carbon and energy intensity.[21] In fact, since the 2007 *Massachusetts v. EPA* decision, countries[22] as well as states[23] that have not embraced top-down policies have generally reduced some greenhouse gas emissions at a far greater pace than those that have.

Recent reports from the United Nations, for example, appear to acknowledge the irrelevance of participation in the Paris climate accord with national reductions in greenhouse gas emissions.[24] Similarly, the U.S. Environmental Protection Agency has repeatedly recognized that its recent sectoral regulations adopted in the Obama and Trump administrations to address greenhouse gas emissions from new power plants,[25] existing power plants,[26] new oil and gas production,[27] and new aircraft[28] have negligible effects on actual greenhouse gas emissions for a variety of reasons, including the pace of market-driven trends.

The 2010 SEC Climate Change Guidance, for example, identifies the impact of climate change legislation and regulation as well as the impact of international accords on climate changes as potentially material disclosures. The SEC's March 15 request as well as ESG advocates have failed to recognize the complex and often counterintuitive consequences of these policies, which may at first glance appear to result in material effects related to emissions for a particular industry or company. SEC is not well-suited to make those nuanced determinations.

Multiple commenters have outlined the ways in which one-size-fits-all climate or ESG disclosures are not reliable or consistent evaluative metrics and fail to match consumer insights for companies across the economy. As noted in previous comments to the Department of Labor by AFP[29] as well as scholars like Dr. Ellen Wald of the Global Energy Center at the Atlantic Council,[30] the evidence of ESG-certified investments – whether by governments or third parties – achieving financial or environmental objectives is likely overblown. Even if those investments consistently outperformed non-ESG alternatives, the Commission should meet the standard you

[21] https://americansforprosperity.org/wp-content/uploads/2020/11/AFP-Coalition-Comments-FERC-Carbon-Pricing.pdf.
[22] https://www.iea.org/articles/global-co2-emissions-in-2019.
[23] https://www.eia.gov/environment/emissions/state/.
[24] Ellen R. Wald, "The U.N. Says America Is Already Cutting So Much Carbon It Doesn't Need The Paris Climate Accord," *Forbes*, December 10, 2020, https://www.forbes.com/sites/ellenrwald/2020/12/10/the-un-makes-the-case-for-the-us-to-stay-out-of-the-paris-climate-accord/?sh=4c299f6227e5.
[25] 80 FR 64515; 83 FR 65427.
[26] https://www.epa.gov/sites/production/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf#page49 ("…the EPA ultimately concluded that…, fully considering a number of factors, the most likely result of implementation of the [Clean Power Plan] would be no change in emissions and therefore no cost savings or changes in health disbenefits relative to a world without the CPP.")
[27] https://www.epa.gov/sites/production/files/2020-08/documents/oil_and_natural_gas_nsps_review_and_reconsideration_final_ria.pdf.
[28] 85 FR 51558; 86 FR 2139.
[29] https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00704.pdf.
[30] https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00273.pdf.

set during your Senate confirmation hearing: "It's the investor community that gets to decide what is material to them. It's not a government person like myself."[31]

As Commissioner Peirce has articulated, the use of global, one-size-fits-all ESG and climate disclosure regimes may undermine the bottom-up, non-governmental innovations that respond to those investor and consumer interests:[32]

> The result of global reliance on a centrally determined set of metrics could undermine the very people-centered objectives of the ESG movement by displacing the insights of the people making and consuming products and services. Hampering the ability of the markets to collect, process, disseminate, and respond to price signals by boxing them in with preset, government-articulated metrics will stifle the people's innovation that otherwise would address the many challenges of our age…. Such a regime would likely expand the jurisdictional reach of the Commission, impose new costs on public companies, decrease the attractiveness of our capital markets, distort the allocation of capital, and undermine the role of shareholders in corporate governance.

As Commissioner Roisman has emphasized, the Commission's rules as currently interpreted already likely require disclosure of material effects of climate change or other issues on a business.[33] They do not, however, mandate such disclosure in a standardized fashion which is unlikely to be appropriate for all companies at all times. And to the extent the ESG disclosures will require non-material information, concerning the expected impact of a company on the climate, it is unclear why the SEC is the appropriate agency to implement such a requirement.

Finally, the SEC's move towards polarizing and legally dubious climate and ESG disclosure regimes in the absence of market failure risks undermining the independence of the Commission and public confidence in the Commission's ability to focus on issues relevant to the market. President Biden's push for multiple agencies to pursue climate-related regulatory actions with little or no authority from Congress,[34] including the recent executive order on climate-related financial risk,[35] represents a sweeping expansion of government power and mission creep for many parts of the federal government. Mobilizing the government to force the private sector to adhere to one-size-fits all requirements will only harm our ability to improve the environment, undermine America's capacity to lead in the global economy, and worsen energy poverty. Business leaders and consumers – not politicians and appointed Washington officials – have always been the driving force to innovate and deliver superior products that solve for the needs of today while also pushing our country toward a better future that benefits all.

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[31] Senate Banking Committee Nomination Hearing with Senator Van Hollen (Mar. 2, 2021), available at https://www.banking.senate.gov/hearings/02/22/202l/nomination-hearing.
[32] https://www.sec.gov/news/public-statement/rethinking-global-esg-metrics.
[33] https://www.sec.gov/news/speech/roisman-esg-2021-06-03.
[34] https://americansforprosperity.org/wp-content/uploads/2021/06/Pres.-Biden-Regulatory-and-Energy-Executive-Order-Timeline.pdf.
[35] https://americansforprosperity.org/afp-president-bidens-executive-order-on-climate-related-financial-risk-undermines-critical-innovation-to-improve-environment/.

AFP appreciates the opportunity to comment, and our activists look forward to consideration of this feedback.

Sincerely,

Clint Woods
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