SEC Request for Public Input: Climate Change Disclosures

ClientEarth US Response

ClientEarth is an international non-profit organization dedicated to protecting life on Earth. Its team of over 200 people operates in over 50 countries, using the law to create systemic change. ClientEarth addresses the most pressing environmental challenges of today, including climate change, air pollution, deforestation, and species destruction. It offers practical solutions to the world's toughest environmental challenges, and works with people, campaigners, governments, and industry to make those solutions a reality.

Executive Summary

As our understanding of the impacts of our planet's changing climate has evolved, it has become obvious that climate change is not merely a moral or environmental challenge, but also a financial one. The enormous planet-wide environmental changes caused by humanity's emission of greenhouse gases ("GHG"), coupled with the efforts of individuals and groups to mitigate or reverse those changes, pose significant risks and opportunities for all for-profit corporations. Collectively, these climate risks materially impact individual corporation's financial performance, undermine the stability of financial markets, and destabilize the entire economic system of the United States.

The true magnitude of these risks is only now becoming clear. Businesses face at least three primary forms of climate financial risk:

Physical Risks — Climate change is already increasing the frequency of severe weather events such as hurricanes, droughts, wildfires, freezes, and floods.[1] According to McKinsey Global Institute, the frequency of these events will continue

[1] *See* McKinsey Global Institute, Climate risk and response: Physical hazards and socioeconomic impacts (2020), https://www.mckinsey.com/business-functions/sustainability/our-insights/climate-risk-and-response-physical-hazards-and-socioeconomic-impacts.

to increase over the next ten years and beyond due to rising global mean temperatures. [2] These extreme weather events threaten corporation's assets, facilities, and employees. There is no denying that the physical impacts of climate change have already have a material impact on corporations, and that this impact will only be magnified in coming years.[3]

Transition Risks — As the global community takes steps to address climate change, major economic shifts will require corporations to update, adapt, or even abandon prior business models.[4] With transitions to renewably energy and carbon-neutrality already in progress, businesses in all industries will have to adapt to shifting consumer demand, prices, taxation, and regulations. This transition from a carbon-intensive economy to a carbon-neutral one will present major economic risks to corporations.

Legal Risks — Policy initiatives both domestic and global, including the Paris Agreement, are already resulting in enhanced regulation and taxation of GHG emitting industries. Corporations operating within these industries, and in the broader economy, will therefore be exposed to increased regulatory risk and higher compliance costs. Likewise, the rise of private climate change litigation presents additional legal risks to companies.[5]

Collectively, the physical and financial impacts of climate change create **Systemic Risk** to the U.S. and global economic systems.[6]

There is also no doubt that these risks are both quantitatively and qualitatively material to investors:

Quantitative Materiality — Copious research has established that climate risks will have a massive financial impact on world economies.[7] The NRDC has estimated

---

[2] *Id.*
[3] *See* S&P Global, The Big Picture on Climate Risk, https://www.spglobal.com/en/research-insights/featured/the-big-picture-on-climate-risk.
[4] *See* U.S. Commodity Futures Trading Commission, Managing Climate Risk in the U.S. Financial System, Chapter 2: Physical and Transition Risks in the Context of the United States (2020).
[5] See, e.g., the recent Netherlands court decision ordering Shell to cut its CO_2 emissions by 45% compared to 2019 levels by 2030.
[6] *See* Ceres, Addressing Climate as a Systemic Risk: A Call To Action For U.S. Financial Regulators (2020).
[7] *See, e.g.,* Network for Greening the Financial System, 'Technical supplement to the First NGFS Comprehensive Report' (2019); Mercer, 'Investing In A Time Of Climate Change — The Sequel' (2019) ("for nearly all asset classes, regions and timeframes, a 2ºC scenario leads to enhanced projected returns versus 3ºC or 4ºC and therefore a better outcome for

that over the next 80 years, the costs from four impacts of climate change (hurricanes, real estate losses, energy-sector costs, and water costs) will approach $2 trillion in the United States alone.[8] Similarly, the Brookings Institution estimates that the economic impact to the United States economy could amount to more than 2% of GDP per year.[9] And at the level of individual securities, studies have shown that companies with better ESG disclosures outperform their competitors.[10] Accordingly, information concerning a corporation's physical, transition, and legal risks are quantitatively material within the guidelines of the SEC and federal securities laws.

Qualitative Materiality — In addition to the stark financial realities of climate change risks, research has also established that investors consider information about climate change risks and strategies to be crucial information when making investment decisions.[11] Thus, even in situations where the immediate financial risks of climate change may not be quantitatively material for a corporation, this information is still qualitatively material under the federal securities laws.[12]

Because these risks are material, the federal securities laws and current SEC rules mandate that corporations must disclose information concerning these risks to investors. However, the current state of climate risk disclosure reveals that many corporations are failing to do so—in its 2020 status report, TCFD has noted that although support for its disclosure framework has grown dramatically, full adoption of the TCFD recommendations remains low.[13]

The U.S. Securities and Exchange Commission ("SEC" or "the Commission")'s mission statement is to "protect investors; maintain fair, orderly, and efficient markets; and facilitate the formation of capital." This mission can only be achieved if the Commission takes bold and immediate steps to ensure the adequate disclosure of climate change and other environmental, social, and governance ("ESG") risks. In

---

investors"); Swiss Re, 'The economics of climate change: no action not an option' (2021) ("global GDP could be 10% lower if the Paris Goals are not met"); 'Bank for International Settlements, 'The Green Swan: Central banking and financial stability in the age of climate change' (2020).

[8] NRDC, The Cost of Climate Change: What We'll Pay if Global Warming Continues Unchecked (2008).

[9] *See* Brookings Institution, Ten Facts about the Economics of Climate Change and Climate Policy (2019).

[10] *See* Financial Times, Jennifer Thompson, Companies with Strong ESG scores outperform, study finds (2018).

[11] *See* SEC Acting Chair Allison Herren Lee, A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC (2021 speech).

[12] *See generally* Securities and Exchange Commission, SEC Staff Accounting Bulletin No. 99-Materiality, Release No. SAB 99, (1999)

[13] *See* Task Force on Climate-related Financial Disclosures, 2020 Status Report.

response to the Commission's March 15, 2021 Request for Public Input on Climate Disclosures, ClientEarth US offers the following recommendations for ensuring adequate and enforceable climate disclosures:

1. Require mandatory disclosure of the TCFD's eleven recommended disclosures by amending Regulation S-K and Regulation S-X.

2. Require that all Management Discussion & Analysis ("MD&A") sections of annual SEC filings contain a description of how the entities' strategy and business model contribute to (or hinder) meeting the goals of the Paris Agreement, i.e., limiting global warming to less than 2º C, including Paris-aligned financial accounts and disclosure of all assumptions.

3. Coordinate with foreign regulators to promote the universal adoption of robust requirements for corporate climate change disclosure that, at a minimum, include the disclosure obligations described in recommendations 1 & 2.

4. Require that the climate-related disclosures described in recommendations 1 & 2 are subject to certification by the Chief Executive Officer and Chief Financial Officer or their equivalents.

5. Ensure that climate-related disclosures are subject to third-party, independent auditor assurance and certification.

6. Expand the recently created Climate and ESG Task Force within the Division of Enforcement to incorporate resources from the Division of Corporate Finance, Division of Economic and Risk Analysis, Office of Investor Education and Advocacy, Office of Credit Ratings, and Officer of the Whistleblower. Constitute this expanded Task Force as a new Office of ESG Issues.

7. Allocate more resources to the Office of the Whistleblower for the creation of a dedicated ESG whistleblower hub and reporting hotline.

These proposals aim to achieve three primary goals. First, they will improve the quality of information provided by corporations to investors, enabling them to make more informed investment decisions consistent with their values. Second, these changes promote international reporting consistency, thereby easing the compliance burden of corporations, increasing the predictability of regulatory impact, and promoting more efficient capital flows between markets. Finally, they ensure that any new rulemaking is enforceable, in SEC enforcement proceedings, by independent third-parties, and through private securities litigation.

By mandating sufficient climate-related disclosures, adopting international standards, and ensuring that new ESG requirements are enforceable, the SEC can help promote a virtuous cycle that improves the accuracy of securities pricing, protects investors, and also aligns the SEC's regulatory framework with the Biden Administration's policy directives. Accordingly, we ask that the SEC adopts these and other robust changes to the current ESG disclosure requirements.

Responses to the SEC's Questions for Consideration

Question 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?

Response

The Commission should adopt concrete disclosure requirements for all filers that follow international disclosure frameworks. The historical framework for disclosure of climate-related risks is composed solely of the *Basic* materiality standard, *i.e.*, companies are required to disclose only that information which is deemed material to an average investor.[14] The application of this materiality standard to climate-related information was codified and expanded upon in the Commission's 2010 Guidance Regarding Disclosure Related to Climate Change.[15]

While the Commission's 2010 guidance was a good first step towards establishing robust climate change disclosure requirements, it is clear that the Commission's Guidance has not resulted in adequate disclosure.[16] In theory, the baseline materiality standard would be sufficient if all parties had an adequate understanding of the qualitative and quantitative materiality of climate risks. However, the chronic under-disclosure of climate change information evidences the fact that companies are either failing to properly identify the materiality of climate information or are intentionally choosing not to disclose this material information due to the low perceived enforcement risk.

---

[14] See *Basic v. Levinson*, 485 U.S. 224 (1988);

[15]Securities and Exchange Commission, Release Nos. 33-9106; 34-61469; FR-82, Commission Guidance Regarding Disclosure Related to Climate Change (2010).

[16] U.S. Commodity Futures Trading Commission, Managing Climate Risk in the U.S. Financial System, Chapter 7: A Closer Look at Climate Risk Disclosure (2020).

One possible option for addressing the drastic under-disclosure of material climate information would be to significantly increase the SEC's enforcement resources and prioritize actions against companies failing to adequately disclose climate risks. However, given the resource intensive nature of enforcement proceedings, we recommend that the far better approach is to transition from a materiality-only disclosure framework to a checklist or standards-based framework. Rather than relying on companies to conduct independent analyses of whether specific climate-related information meets the materiality threshold, the SEC should adopt new disclosure requirements that specify categories of climate-related information that are *per se* material and must be disclosed.

A common objection to this suggestion is that adopting mandatory disclosure contradicts the SEC's materiality-based approach and will burden companies with unnecessary, and costly, additional disclosures.[17] Such objections are baseless. Climate risks are both quantitatively and qualitatively material. They are also systemic, reaching every facet of the U.S. economy.[18] Thus, it is entirely reasonable for the SEC to determine that certain categories of climate change disclosure are per se material. The principles of materiality remain embedded within the TCFD framework, creating discretion for companies to still tailor their disclosures to the particularly material aspects of their business.

This approach is not new or radical. The SEC currently mandates a large number of disclosures that are not beholden to an individual filer's assessment of materiality. For example, the SEC currently requires that companies disclose legal proceedings, executive compensation, corporate codes of ethics, and even detailed information concerning mine safety.[19] The adoption of mandatory ESG disclosures is therefore entirely consistent with the SEC's historical regulatory approach.

Nor would the adoption of well-defined, mandatory disclosures create overly burdensome requirements for companies. It is a timeworn tenet of business management that companies value predictability.[20] Creating clear categories of mandatory disclosure actually relieves companies of the burden of analyzing and comparing various *ad hoc* disclosure regimes and reduces compliance risk. Though companies may initially push back against enhanced disclosures, a unified set of well-

[17] *See, e.g.*, National Review, Benjamin Zycher, The SEC Demands a One-Size-Fits-All Climate 'Risk' Disclosure System (2021), https://www.nationalreview.com/2021/04/the-sec-demands-a-one-size-fits-all-climate-risk-disclosure-system/.

[18] *See* Ceres, Addressing Climate as a Systemic Risk: A Call To Action For U.S. Financial Regulators (2020).

[19] *See* Securities and Exchange Commission, Regulation S-K, Items 103, 402, 406, and 104.

[20] *See, e.g.,* Howard H. Stevenson and Mihnea C. Moldoveanu, *The Power of Predictability*, Harvard Business Review (1995).

understood requirements will be greatly preferred over a complex morass of competing disclosure guidelines.

The benefits of standardized mandatory disclosures also extend to market efficiency and accurate securities pricing. Investors currently face a confusing and chimeric array of ESG disclosures; the lack of apples-to-apples comparison data undermines efforts to accurately gauge the competitive positions of companies.[21] Standardizing climate change disclosures at both the domestic and international level through the adoption of mandatory TCFD reporting and Paris-aligned financial disclosures will promote better pricing, enhanced capital formation, and more efficient market flows.

But the adoption of mandatory categories of climate change disclosures, by itself, is not enough to affect these outcomes. Such requirements must also be accompanied by sufficient means to ensure the adequate enforcement of these new standards. Accordingly, we recommend a number of measures to both ensure adequate disclosure and the enforceability of new disclosure requirements. The details of these recommendations are discussed more fully in the responses below.

Question 3

What are the advantages and disadvantages of permitting investors, registrants, and other industry participants to develop disclosure standards mutually agreed by them? Should those standards satisfy minimum disclosure requirements established by the Commission? How should such a system work? What minimum disclosure requirements should the Commission establish if it were to allow industry-led disclosure standards? What level of granularity should be used to define industries (e.g., two-digit SIC, four-digit SIC, etc.)?

Response:

It is not sufficient for investors, registrants, and other industry participants to develop and abide by mutually agreed disclosure standards. Such an approach is deficient for at least three reasons.

First, these voluntary disclosure frameworks are largely created by entities that lack the proper incentives to craft truly meaningful requirements. As with many environmental issues, the costs of climate change are widely distributed, giving rise

[21] *See* BlackRock, Inc., Towards a Common Language for Sustainable Investing (2020), https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-towards-a-common-language-for-sustainable-investing-january-2020.pdf.

to a classic collective action problem.[22] Fragmented organizations of industries or investors, even if well-intentioned, are not the best-suited actors to analyze the full universe of policy considerations implicated by climate change. Thus, the Commission is the best-situated entity to establish and promulgate new disclosure requirements. Even if the Commission were to adopt certain minimum requirements for these frameworks, the result would still be a patchwork quilt of disclosures subject to subjective interpretation and the need for constant guidance. The far better alternative is for the Commission, in its role as our nation's chief financial regulator, to ensure the protection of U.S. investors and markets by issuing clear and mandatory disclosure requirements.

Second, overlapping and competing disclosure frameworks would impair investors' ability to research and compare the ESG disclosures of companies. The lack of comparable climate change data is currently a major roadblock for investors seeking to promote the flow of capital consistent with their views on climate change.[23] Permitting individual organizations to issue competing climate change disclosure frameworks with the SEC's stamp of approval would only compound this problem.

Finally, lack of a standard mandatory disclosure framework will lead to the proliferation of competing standards, which will increase compliance costs for companies while also decreasing their confidence surrounding the compliance of their own disclosures. If the Commission adopts broad minimum standards but permits companies to choose from any number of competing frameworks, this will simply increase the ambiguity of whether a particular filer is adequately complying with the SEC's requirements. Such ambiguity not only raises compliance costs, but also makes it more difficult for companies to accurately predict their regulatory risks.

Question 5

What are the advantages and disadvantages of rules that incorporate or draw on existing frameworks, such as, for example, those developed by the Task Force on Climate-Related Financial Disclosures (TCFD), the Sustainability Accounting Standards Board (SASB), and the Climate Disclosure Standards Board (CDSB)? Are there any specific frameworks that the Commission should consider? If so, which frameworks and why?

[22] *See* Brookings Institution, Elaine Kamarck, The Challenging Politics of Climate Change (2019).

[23] *See* BlackRock, Inc., Towards a Common Language for Sustainable Investing (2020), https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-towards-a-common-language-for-sustainable-investing-january-2020.pdf.

Response:

We recommend that the Commission require mandatory disclosure of all eleven of the TCFD's recommended disclosures, as detailed in their July 2017 Final Report, for all filers. The TCFD is composed of a wide array of diverse preparers and regulators of financial statements, and engaged in an intensive deliberative process taking into account views from a diverse group of stakeholders. Any attempt by the Commission to recreate this process to develop its own disclosure requirements would be an unnecessary reinvention of the wheel that would only further delay implementation of new requirements.

Although every existing framework has its benefits and drawbacks, the TCFD's framework stands out because of its universality, flexibility, and ease of implementation. The TCFD's eleven recommended disclosures are industry-agnostic and are thus relevant to all filers. They also represent an excellent balance between the need to provide concrete metrices (*e.g.,* Scope 1, 2, and 3 emissions), as well as important qualitative assessments (e.g., discussion of the risks and opportunities).

The attractiveness of the TCFD's disclosure framework is evidenced by the accelerating rate of its voluntary adoption. According to the TCFD's 2020 Status Report, more than 1,500 organizations globally have already expressed support for the TCFD framework.[24] There is also strong investor demand for adoption of the TCFD recommended disclosures. Many organizations of investors, including one group with assets over $47 trillion under management, has called for the world's largest GHG emitters to adopt the TCFD's recommended disclosures.[25] The TCFD framework is also quickly becoming the most widely adopted disclosure framework by international financial regulators. More than 110 regulators and governmental entities have expressed support for TCFD, including, inter alia, the governments of Canada, France, Japan, and the United Kingdom, which recently sought public consultation on newly proposed regulations that would require UK companies to align with TCFD.[26]

Ultimately, we believe that the TCFD's recommended disclosures by themselves are not sufficient to fully inform investors about companies' climate risks and, importantly, the strategies that companies are adopting to manage climate risk. To that end, we recommend in this response not only the adoption of the eleven disclosures recommended by the TCFD, but also mandatory disclosure of companies' Paris-aligned strategies. However, the TCFD's framework serves as a model starting point for mandatory disclosure, and should be wholly adopted by the SEC for all filers.

---

[24] *See* Task Force on Climate-related Financial Disclosures, 2020 Status Report.
[25] *Id.*
[26] *Id.*

Question 7

What is the best approach for requiring climate-related disclosures? For example, should any such disclosures be incorporated into existing rules such as Regulation S-K or Regulation S-X, or should a new regulation devoted entirely to climate risks, opportunities, and impacts be promulgated? Should any such disclosures be filed with or furnished to the Commission?

Response:

In order to effectively protect investors, facilitate efficient capital flows, and improve the pricing of securities, climate-related disclosures must be presented in a manner easily accessible to investors. Moreover, these disclosures must be standardized in order to allow investors to easily compare and contrast companies' climate-related disclosures with their peers and competitors. Finally, the disclosures must be consolidated in a single publication so as to reduce the potential for confusing, incomplete, or contradictory disclosures.

To meet the goals of adequate and effective disclosure, the SEC should adopt all of the disclosure requirements proposed in this Response as part of the requirements of Regulation S-K and Regulation S-X. Incorporating these requirements into pre-existing regulations provide a number of benefits. First, investors and companies are already familiar with the contours and requirements of these Regulations, thereby reducing the regulatory burden of complying with a newly promulgated regulation. Second, adopting the TCFD's recommended disclosures as requirements of Regulation S-K and Regulation S-X ensure that all of this material climate information is consolidated into a company's periodic SEC filings, rather than spread out among a wide variety of sources. Amending these Regulations, rather than adopting a new stand-alone regulation on ESG disclosures, is also consistent with the principle that climate-related disclosure is core to business operations and not merely an auxiliary disclosure requirement.

The inclusion of these disclosure requirements in pre-existing Regulations also has important enforcement consequences. As the United States Court of Appeals for the Second Circuit has recognized, failure to comply with the disclosure requirements of Regulation S-K can give rise to liability in private lawsuits brought under Section 10(b) of the Securities and Exchange Act of 1934.[27] These lawsuits have traditionally focused on alleged omissions in SEC filings; private plaintiffs have successfully

[27] *See Stratte-McClure v. Morgan Stanley*, 2015 WL 136312 (2d Cir. Jan 12, 2015); *but see In re NVIDIA Corp. Securities Litigation*, 768 F.3d 1046 (9th Cir. 2014) (creating circuit split by holding that Regulation S-K violations do not automatically establish breaches of SEC Rule 10b5-1).

litigated under Section 10(b) when alleging that companies failed to accurately disclosure "known trends or uncertainties" known to management.[28]

As discussed more fully in response to Question 10, *infra*, private securities litigation remains a major component of the enforcement scheme for federal securities law disclosure requirements. Enacting new climate disclosure requirements as amendments to Regulation S-K will allow private plaintiffs to hold corporations and their executives accountable for insufficient or misleading disclosures.

Question 10

How should disclosures under any such standards be enforced or assessed? For example, what are the advantages and disadvantages of making disclosures subject to audit or another form of assurance? If there is an audit or assurance process or requirement, what organization(s) should perform such tasks? What relationship should the Commission or other existing bodies have to such tasks? What assurance framework should the Commission consider requiring or permitting?

Response:

New climate disclosure obligations are only effective if they are enforceable. We recommend a three-pronged approach to enforceability: (1) the creation of a new Office of Environmental, Social, and Governance Issues; (2) independent, third-party oversight from audit firms and credit ratings agencies; and (3) focused efforts to promote private litigation aimed to hold bad actors accountable for false or misleading disclosures. All three of these prongs are necessary components of any truly enforceable climate disclosure framework.

> *SEC Enforcement* — While we applaud the recent creation of the Climate and ESG Task Force within the Division of Enforcement, we believe that this initiative is insufficient to adequately address the agency-level enforcement of new climate disclosures. Accordingly, we recommend that the Commission commit additional resources towards the creation of a new Office of ESG Issues. Such an Office would draw on the resources of the current Task Force, as well as resources from, *inter alia*, the Division of Corporate Finance, the Division of Economic and Risk Analysis, the Office of Investor Education & Advocacy, the Office of Credit Ratings, and the Office of the Whistleblower. Expanding the Task Force beyond just the Division of Enforcement will ensure a

[28] *See Panther Partners v. Ikanos Communications*, 681 F.3d 114 (2d Cir. May 25, 2012).

more cohesive approach to identifying, prioritizing, and addressing deficient climate disclosures.

Third-Party Assurance — In addition to agency-level enforcement efforts, any new rulemaking on climate change disclosures should address the vital role played by third-party institutions such as independent auditors, credit ratings agencies, and investment banks. These financial 'gatekeepers' should serve as backstops to ensuring the reliability and consistency of climate reporting. For example, the Commission should require that all eleven of the TCFD recommended disclosures be included in the third-party assurance work by auditors; this information should also be subject to auditor certification in the same way as current non-GAAP financial measures. The Commission must also provide more robust oversight of credit ratings agencies, specifically with regard to their inclusion in and assessment of climate-related risks when issuing credit ratings. The failure of CRAs to assess climate risks, due in part to a lack of expertise in this area, is a major hurdle to adequate climate risk disclosure.

Private Litigation — Private plaintiffs play an important role in the enforcement of federal securities law by bringing claims against companies and their executives for false, misleading, or omitted material information. Such claims, such as those under Section 10(b) of the Securities Exchange Act of 1934 and Sections 11 and 12(a)(2) of the Securities Act of 1933, hold violators accountable and create material litigation risk that serves a deterrent. The Commission can take a wide array of steps to promote private litigation, including the recommendations found elsewhere in this Report to require management certifications of climate disclosures and impose climate disclosure obligations under Regulation S-K and Regulation S-X. In addition, the Commission should provide additional funding for the Office of the Whistleblower (or a newly created Office of ESG Issues), for the creation of a new ESG whistleblower hub and reporting hotline.

Ultimately, additional enforcement capabilities such as expansion of private rights of action by Congress may be necessary to adequately ensure the accuracy of climate reporting. But, by adopting these recommendations and focusing on this three-pronged enforcement approach, the Commission can make substantial progress in providing investors with robust and accurate climate information.

Question 11

Should the Commission consider other measures to ensure the reliability of climate-related disclosures? Should the Commission, for example, consider whether management's annual report on internal control over financial reporting and related requirements should be updated to ensure sufficient analysis of controls around climate reporting? Should the Commission consider requiring a certification by the CEO, CFO, or other corporate officer relating to climate disclosures?

Response:

Adequate internal controls are a necessary component of ensuring fulsome climate disclosure. We therefore recommend that the SEC mandate that management's annual report on internal controls over financial reporting include new requirements to ensure sufficient analysis of controls around climate reporting. Such a requirement would strengthen the reliability of climate disclosures and encourage companies to more thoroughly examine internal processes surrounding risk management, disclosure review, and climate business strategies.

Similarly, we recommend that, for all of the new disclosure requirements recommended in this Response, companies be required to include certifications of this information from both the CEO and CFO or their equivalents. These certifications should be required in SOX 302 management certification letters.[29] The rationale for requiring this certification is two-fold. First, requiring the certification of financials provides increased management-level visibility for climate-related disclosure issues. By ensuring that management actively review their companies' climate-related disclosures, the certification requirement will also help bolster the development of business strategies that incorporate climate issues. The direct involvement of management will also help improve the accuracy and adequacy of disclosures, providing better information for investors.

This certification requirement will also bolster the enforceability of climate disclosure obligations. Certifications enhance the likelihood of personal liability for executives of companies who mislead or omit required climate information. Specifically, such management certifications may serve as evidence of the element scienter in fraud-based claims asserted by the Commission or by private plaintiffs.[30] By requiring management certification of climate disclosures, the SEC will provide additional incentives for executives to take these disclosure obligations seriously.

[29] *See* Securities and Exchange Commission, Release Nos. 33-8124, et. al., Certification of Disclosure in Companies' Quarterly and Annual Reports (2002).
[30] *See, e.g., In re ProQuest Securities Litigation*, 527 F. Supp. 2d 728, 733-34 (E.D. Mich. 2007).

Question 12

What are the advantages and disadvantages of a "comply or explain" framework for climate change that would permit registrants to either comply with, or if they do not comply, explain why they have not complied with the disclosure rules? How should this work? Should "comply or explain" apply to all climate change disclosures or just select ones, and why?

Response:

The adoption of a "comply or explain" approach to the application of new disclosure requirements would be a mistake. Investors have made it clear that they want detailed climate change-related information for all companies across all industries. Likewise, research indicates that climate issues are material across industries[31], as well as systemically.[32] Adopting a "comply or explain" approach merely provides an excuse for companies to delay disclosure of material information; disputes over materiality will result in a waste of investors' time and money, and will undermine the effectiveness of regulatory enforcement. This approach would ultimately lead to slower implementation, lower quality disclosures, a higher proportion of misleading 'greenwashing', and increased uncertainty for companies, investors, and consumers.

Question 13

How should the Commission craft rules that elicit meaningful discussion of the registrant's views on its climate-related risks and opportunities? What are the advantages and disadvantages of requiring disclosed metrics to be accompanied with a sustainability disclosure and analysis section similar to the current Management's Discussion and Analysis of Financial Condition and Results of Operations?

Response:

As previously described, the SEC should require mandatory compliance with the TCFD's eleven recommended disclosures. In addition, we recommend that the Commission require a separate sustainability and analysis section contained within the current Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A").

---

[31] *See, e.g.,* Mckinsey Global Institute, Climate Risk and Response: Physical Hazards and Socioeconomic Impacts (2020).

[32] *See, e.g.,* Ceres, Addressing Climate as a Systemic Risk: A Call To Action For U.S. Financial Regulators (2020).

This section should require all filers to describe how their business operations and strategies either align with or hinder the goals of the Paris Agreement. Specifically, companies should be required to disclose whether its strategy, in addition to its scope 1-3 emissions, is aligned with the goal of limiting global warming to 2^{o} C. Companies should also be required to disclose the methodology and assumptions used in conducting this analysis.

This analysis should be situated within the MD&A, not separate from it, to indicate the inherent financial materiality of climate-related risks and opportunities. The purpose of this requirement would be to (1) ensure investors have the adequate information needed to evaluate a company's business strategy in light of climate risks; and (2) create a record of how companies are aligning (or failing to align) their business strategies with the goals of the Paris Agreement so that corporate decision-makers can be held accountable for meeting the obligations of their fiduciary duties to investors.

Requiring that filers directly disclose their Paris-aligned strategies within the MD&A sections also helps alleviate a common problem currently faced by investors—the lack of a consolidated location for ESG disclosures. Although many corporate decision-makers may currently discuss these issues in varied public forms (e.g., sustainability statements, websites, public conferences), requiring a specific disclosure within the MD&A provides increased accountability for management and increased visibility for investors.

Question 15

In addition to climate-related disclosure, the staff is evaluating a range of disclosure issues under the heading of environmental, social, and governance, or ESG, matters. Should climate-related requirements be one component of a broader ESG disclosure framework? How should the Commission craft climate-related disclosure requirements that would complement a broader ESG disclosure standard? How do climate-related disclosure issues relate to the broader spectrum of ESG disclosure issues?

Response:

Although climate change presents massive risks to corporations and the global economy, it is by no means the only important or material facet of ESG issues that deserves attention from the SEC. Many other issues, such as human rights, diversity, health and safety, political lobbying and donations, and the preservation of biodiversity are equally deserving of enhanced disclosure.[33] We join with the many organizations who are providing comments on these topics in response to the Commission's Request for Public Input.

Respectfully Submitted,

Douglas Ruley

Americas Director

[redacted]

www.clientearth.org

Tyler Highful

Attorney, Climate Finance

[redacted]

www.clientearth.org

[33] *See, e.g.,* The Economics of Biodiversity: The Dasgupta Review (2021).