

**Committee on Securities Law
of the Business Law Section of the
Maryland State Bar Association**

June 14, 2021

VIA E-MAIL AT RULE-COMMENTS@SEC.GOV

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

Re: March 15, 2021 Commissioner Lee's Public Statement Welcoming Public
Input on Climate Change Disclosures (the "Statement")

Dear Chair Gensler:

This letter expresses the views of the Committee on Securities Law (the "Committee") of the Business Law Section of the Maryland State Bar Association ("MSBA") with respect to the above-referenced Statement, which solicited feedback from the public with respect to the Securities and Exchange Commission's (the "Commission") evaluation of the Commission's disclosure rules with respect to climate change disclosure. The membership of the Committee consists of securities practitioners who are members of the MSBA and includes lawyers in private practice, business, and government. The Business Law Section and the Board of Governors of the MSBA have not taken a position on the matters discussed herein, and individual members of the MSBA and the Committee, and their associated firms or companies, may not necessarily concur with the views expressed in this letter.

In considering any rules regarding climate change disclosure, we urge the Commission to limit any such disclosure requirements to those consistent with its mission of investor protection, facilitating capital formation, and maintaining fair, orderly, and efficient markets, and that are grounded in the well-established concept of materiality. In that regard, it is a bedrock of the concept of materiality that information is not "material" solely because it is something investors might like to know.¹ We understand, as noted in the Statement, that "investor demand for ... disclosure of information about ... climate change risks, impacts, and opportunity has grown dramatically" since the Commission issued its

¹ E.g. *Milton v. Van Dorn Co.*, 961F.2d 965 (1stCir. 1992) ("[t]he mere fact that an investor might find information interesting or desirable is not sufficient to satisfy the materiality requirement").

interpretive release regarding climate change disclosures in 2010. There seems to be a popular misunderstanding, however, that if investors want to see this information, it is by definition material. As you are well aware, however, this analysis is not so simple. Importantly, while investors may be clamoring for this information, it appears that they often do not do so in their capacity as *investors* but rather as consumers, activists, or because they simply care about creating a sustainable economy; such persons often misunderstand the Commission's role and mandate in asserting that it should require climate-related disclosure, and their assertions in this regard are generally divorced entirely from the concepts of materiality and investor protection.² While often framed in the language of disclosure that "investors" need to make "investment decisions" as well as "materiality," it is hard to deny that a strong undercurrent running through this debate is the overall concern regarding climate change and its impact on our planet, society, and human beings generally.³

In this regard, it may be appropriate to require disclosure about how climate change or government actions to combat the issue impacts a registrant's business, risk profile, prospects, business planning, and similar matters may be material. If so, the inclusion of disclosure addressing the viability of the business assuming a transition to a low-carbon economy and how the registrant addresses or intends to address these matters, may be appropriate. We believe that disclosure regarding the impact a registrant itself may have on climate change (i.e., contribution to climate change, greenhouse gas emissions), what the registrant is doing to reduce its carbon footprint, or whether the registrant's operations will be carbon-free or carbon-neutral by a certain date, absent any government mandates or costs to the registrant in this regard (and then only to the extent such disclosure would be material), on the other hand, would not be appropriate. This information is not material to investors in their capacity *as investors*. In other words, we do not believe that there is "a substantial

² E.g., Comment letter of Wendy Alberg in response to the Statement, June 4, 2021 ("It is the SEC's job to keep corporations from hiding their contribution to the climate crisis and environmental destruction or from lying to the public about their role. Corporations also need to be honest about what they're doing to stop climate change ..."); comment letter of Margaret Kidd in response to the Statement, June 4, 2020 ("It is the job of the SEC to uphold the essential practice of transparency regarding corporate contributions to the climate crisis and environmental destruction or from lying to the public about their role"); comment letter of Rush Sheets in response to the Statement, June 1, 2021 ("The warming of our planet is not just something we all have to bear in silence accepting whatever the corporations do. We have a right to a planet that is fit for our children, grand children [sic] and beyond to live").

³ E.g., Comment letter of Duane Roberts, Director of Equities, DANA Investment Advisors in response to the Statement, June 7, 2021 ("we urge the SEC to further consider the interconnections between climate change, racial justice, and human rights, since the worst impacts of climate change are often borne by low-income communities and communities of color. These disproportionate impacts contribute to social inequities, with negative consequences on the economy.").

likelihood” that this kind of disclosure “would [be] viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”⁴

We do not doubt that there are a number of investors that desire to invest solely in companies that are not significantly contributing to climate change, and that such investors require climate-related information about issuers in order to do so. Rather, we posit that this information is desired not in their capacity as a *reasonable* investor – i.e., based on one’s economic interest with respect to an investment or potential investment, but in connection with their desire to ensure that they are supporting companies whose values are consistent with their own. As we have noted, we believe that many persons that are insisting that the Commission implement such a disclosure regime clearly want registrants to have to disclose this information for reasons entirely unrelated to investor protection. Namely, they want to ensure a sustainable planet and are trying to stop the worst effects of climate change before it is too late to do so.⁵

The above-referenced climate and environmental goals may indeed be worthy, and we take no issue with them in this letter. Our point is simply that requiring registrants to make climate change disclosures that go beyond the well-understood concept of materiality are beyond the Commission’s mission and authority. To the extent that companies should disclose their own emissions or take other action to combat climate change, it is up to Congress to enact rules requiring them to do so. The Commission, however, should not implement rules that exceed its authority simply because Congress refuses to do so, no matter how important the issue may be viewed.

We have watched with dismay as, over time, the Commission and the federal securities laws have become increasingly politicized and misused as tools

⁴ *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

⁵ See, e.g., Comment letter of Dan Chu, Executive Director, Sierra Club Foundation, in response to the Statement, June 3, 2021 (“We encourage the SEC to act with a sense of urgency. The sooner we have greater transparency on how issuers are managing their material climate risk and ESG issues, the faster investors can take action to help accelerate our response to the climate crisis.”); and Jay Fishman, *NYU Conference Panel Addresses ESG Disclosure Best Practices*, Securities Regulation Daily, Wolters Kluwer (April 30, 2021) (“[Marcin] Kacperczyk[, a finance professor at Imperial College London,] declared that on climate change, the SEC must do something now about company carbon emissions because there is no time to wait.”) As noted above, the Committee consists of persons who have largely dedicated their careers to the practice of securities law; the Committee’s Chair and Vice Chair are former Commission staffers. The Committee obviously believes in the work of the Commission and that the Commission’s work and mission are extremely important. The idea that persons using terms like “urgent” and “no time to wait” are talking primarily about the need to get information to investors so they can make informed investment and voting decisions, however, is, frankly, ludicrous.

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to address political and social goals unrelated to investor protection, capital formation, and the maintenance of fair, orderly, and efficient markets. The Committee has noted, in previous comment letters to the Commission, the inappropriateness of using the federal securities laws' disclosure regime to address political and social goals, such as through the conflict minerals rules and pay-ratio disclosure. In those cases, however, the requirement to create such new disclosure requirements were imposed on the Commission through legislation. While legislators without a firm understanding of the purpose and operation of the federal securities laws misusing them this way is unfortunate, it would be much worse for the Commission itself to start down this path. Regardless of the importance of addressing climate change, disclosure untethered to materiality with respect to what a reasonable investor would consider material as an *investor* is not within the Commission's purview. When considering any new disclosure requirements with respect to climate, or ESG (environmental, social, and governance) matters in general, we urge the Commission to ensure that any such requirements are consistent with the Commission's mission and purpose and do not stray beyond it.

We appreciate the Commission's consideration of the foregoing comments.

Very truly yours,

*Committee on Securities Law of the Business Law
Section of the Maryland State Bar Association*


Penny Somer-Greif, Chair


Gregory T. Lawrence, Vice-Chair