

July 17, 2021

The Honorable Gary Gensler
Chair
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Response to Call for Public Input on Climate Change Disclosures

Dear Chair Gensler:

I appreciate this opportunity to respond to the request for public input on climate change disclosures. I offer my thoughts below.

Intro

In developing and implementing a climate financial risk disclosure regime, the SEC will need to decide:

- (1) if and how disclosure requirements should be tiered based on the size and/or type of registrant; and
- (2) if and how disclosure requirements should be phased in over time.¹

This memo begins with an assessment of how other climate disclosure regimes, as well as the SEC, have made use of tiering and phasing measures, followed by a series of options and recommendations for how the SEC might want to apply tiering and phasing measures in its own climate financial risk disclosure regime. The memo then closes with some additional points for consideration in this regard, including how to prevent phasing and tiering from becoming a form of obstruction and options for appropriately easing the disclosure burden to lessen resistance from registrants.

¹ These two areas of inquiry are drawn directly from two questions listed under “2.” in “Questions for Consideration” in Acting Chair Lee’s March 15, 2021 Public Statement *Public Input Welcomed on Climate Change Disclosures*: “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?” <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.

I. Tiering and phasing in other climate disclosure regimes and by the SEC more generally

IA. Tiered phasing by entity size and phasing by entity type

In considering if and how to apply tiering and phasing to its climate financial risk disclosure regime, the SEC can look to how other climate disclosure regimes have made use of tiering and phasing, as well as reflect on how the SEC already makes use of tiering and phasing more generally.

Among Task Force on Climate-Related Financial Disclosure (TCFD) regimes, the UK's is one of the most prominent examples of tiering and phasing. In particular, the UK's Joint Government-Regulator TCFD Taskforce has recommended a roadmap with four categories of entities, three of which have tiers unique to their category, that lays out by when each tier of each category should be required to comply with disclosure requirements over the 2021-2025 period.² For instance, the Taskforce recommends a size-based, tiered phase-in of listed companies, occupational pension schemes and entities falling under the single category of "asset managers, life insurers and [(Financial Conduct Authority)] FCA-regulated pension providers." The Taskforce also recommends that UK-registered companies and asset managers be introduced a year after banks, the first tier of occupational pension schemes (i.e., those with more than five billion pounds) and the first tier of listed companies (i.e., premium listed companies) are all introduced.

Although some of the UK Taskforce's recommendations may be based on more practical, jurisdictional concerns,³ others suggest a certain logic. Delaying the introduction of disclosure requirements for asset managers until one year after premium listed companies and the first tier of occupational pension schemes, for instance, may make it easier for asset managers to disclose climate

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933782/FINAL_TCFD_REPORT.pdf.

³ One reason for the distinction between asset managers, occupational pension schemes and banks is that they all fall under the jurisdiction of different UK financial regulators.

risk from their investment exposure to premium listed companies, as well as allow them to observe climate disclosure best practices from the country's largest occupational pension schemes. Similarly, delaying the introduction of UK-registered companies until one year after premium listed companies have already begun disclosing may allow private companies to observe best practices from some of the country's most well-resourced corporate entities before attempting to disclose themselves.

Climate disclosure regimes in the U.S. have also applied a tiered phase-in approach. After the National Association of Insurance Commissioners (NAIC) adopted the Insurer Climate Risk Disclosure Survey in 2010, California applied a tiered phase-in approach to its implementation. California began by administering the survey to only insurers that write more than \$500M in direct premiums in 2010, before lowering the threshold to \$300M in 2011 and then \$100M in 2013.⁴ Such a tiered phase-in approach to mandating climate financial risk disclosure requirements is well-founded – even the U.S. Commodity Futures Trading Commission recommended that, given the burdensome costs of climate financial risk disclosure, “financial regulators should consider whether smaller companies could be provided a longer period of time to provide their initial disclosure.”⁵

Finally, the SEC has already applied tiering and phasing measures in the implementation of other filing requirements. When requiring registrants to use the new reporting language format XBRL in 2018, for instance, the SEC applied a tiered phase-in approach, setting a compliance date of mid-2019 for large accelerated filers, of mid-2020 for accelerated filers and of mid-2021 for all other filers.⁶ The SEC can

⁴ <http://www.insurance.ca.gov/0250-insurers/0300-insurers/0100-applications/ClimateSurvey/>.

⁵ See Recommendation 7.4 - <https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>.

⁶ <https://www.sec.gov/news/press-release/2018-117>.

thus consider whether it can apply these tier categories, or others such as the emerging growth company status tier,⁷ to a climate financial risk disclosure regime.

IB. Tiering and phasing with an evolving standard of climate financial risk disclosure

In addition to deciding by when each entity type and tier should begin disclosing, the SEC can also consider applying an evolving standard of disclosure to determine how each entity type and tier should develop their climate financial risk analysis over time. A number of existing climate disclosure regimes have already made use of lower standards of disclosure when first implementing their programs or suggested a standard of disclosure whose burden grows over time as registrants improve their climate risk analysis capabilities. The SEC can look to these regimes when considering if and how to apply an evolving standard to phase in disclosure for certain type or size entities, and/or for certain types of risk analysis.

France and the UK have applied and recommended, respectively, various forms of lower standards for climate financial risk disclosure. Specifically, France offers two forms of lower disclosure standards in its Article 173. The first – ‘comply or explain’ – applies to all investors, allowing them to either comply with disclosure requirements or provide an explanation as to why they cannot comply with any particular disclosure requirements.⁸ The second is applied in a tiered fashion, exempting investors with a total balance sheet of less than five hundred million Euros from the detailed reporting requirements demanded of larger investors, allowing these smaller investors to instead provide merely a “general overview of how they integrate ESG factors.”⁹

Building off of France’s Article 173, the UK’s TCFD Taskforce suggests applying an evolving standard of disclosure (whose burden increases in size over time) to certain entities for certain

⁷ <https://www.sec.gov/smallbusiness/goingpublic/EGC>.

⁸ <https://www.unpri.org/download?ac=1421>.

⁹ Id.

especially difficult to disclose types of climate financial risk analysis. The Taskforce notes that for “some categories of organi[z]ation, it is anticipated that disclosure obligations will be introduced – at least initially – with some flexibility in the compliance basis to take account of known data limitations or other challenges.”¹⁰ The Taskforce elaborates that this flexibility may allow, for example, organizations to “provide a reasoned explanation if they have not made complete disclosure [or] ... alternatively, [make disclosures] on an ‘as far as able’ basis.”¹¹ The first standard appears to be similar to France’s ‘comply or explain’ standard. The Taskforce notes that the relevant regulator, the UK’s Financial Conduct Authority (FCA), is considering applying guidance to listed companies on “the limited circumstances in which the FCA would expect an issuer to provide an explanation, rather than make disclosures,”¹² suggesting that, unlike France’s approach, the UK may only apply this lower standard for disclosure to certain types of climate risk analysis rather than apply it unilaterally. The second standard appears to be more of a requirement for a good faith effort. The Taskforce notes that the relevant UK regulator, the Department for Work and Pensions (DWP), proposes to apply this lower standard to occupational pension schemes for only their disclosure “in relation to Scenario Analysis and Metrics & Targets,” while requiring compliance with all of the other TCFD recommendations in scope for occupational pension schemes.¹³ Here, the UK appears to be considering an evolving standard that, at least initially, will allow one category of entity to benefit from a lower standard for disclosure for an especially difficult to disclose type of climate financial risk analysis – scenario analysis.

Finally, the New York Department of Financial Services (DFS) appears to take a different approach from France and the UK in its guidance to insurers on climate risk disclosure. Instead of

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933782/FINAL_TCFD_REPORT.pdf.

¹¹ Id.

¹² Id.

¹³ Id.

suggesting a standard that allows for limited nondisclosure, DFS offers guidance that insurers can initially engage in less sophisticated, easier to perform climate financial risk analysis that increases in complexity and difficulty over time. Specifically, DFS describes an evolving standard for disclosure that moves from a “qualitative assessment [...] based on simple models and a small set of risk factors [...] to] a quantitative assessment rely[ing] on sophisticated models and a broader set of risk factors.”¹⁴ The SEC can consider combining aspects of the UK Taskforce’s recommendations and DFS’ guidance in applying an evolving standard that phases in disclosure of certain especially difficult to perform types of risk analysis for certain type and/or tier entities.

In reflecting on the above standards of disclosure, the SEC can consider applying some of the logic and reasoning of different aspects from each regime but should forgo a direct application of France’s ‘comply or explain’ standard to registrants. As the UN-supported international network of investors Principles for Responsible Investment (PRI) called out in its report, there is “no further guidance or agreement about the expectation of what would be a satisfactory explanation for non-compliance” in France’s Article 173.¹⁵ Additionally, as TCFD’s recommendations are already quite broad,¹⁶ how hard is it really for registrants to comply with these high-level principles? Moreover, although there is some evidence that even France’s “loosely defined carbon reporting standards may be enough to get a real effect on investment decisions,”¹⁷ regulators report that compliance has been relatively low¹⁸ and international nonprofit subject matter experts describe the quality of the climate

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https://www.dfs.ny.gov/system/files/documents/2021/03/proposed_ins_climate_guidance_2021_public_comment_1.pdf.

¹⁵ <https://www.unpri.org/download?ac=1421>.

¹⁶ <https://assets.bbhub.io/company/sites/60/2020/10/FINAL-2017-TCFD-Report-11052018.pdf>.

¹⁷ https://www.banque-france.fr/sites/default/files/medias/documents/wp800_0.pdf.

¹⁸ Id. “an official monitoring exercise conducted jointly by the French ministries (for Environment and Finance) and supervisory authorities (ACPR [Autorité de Contrôle Prudentiel et de Résolution] and AMF [Autorité des Marchés Financiers]) in charge finds that only a half of the 48 largest institutions publish at least some information on all required dimensions of the mandatory disclosure (ACPR et al., 2019).”

disclosure analysis from France's law as "disappointing," noting a "lack of transparency on methodologies and results" that they find "unsatisfactory."¹⁹ Rather than apply 'comply or explain,' the SEC can consider applying an evolving standard more similar to that described by New York DFS' guidance in a manner more similar to that suggested by the UK's TCFD Taskforce, that is, to only specific type and/or size entities for only some especially difficult to disclose types of risk analysis.

To the extent that the SEC prefers to apply an evolving standard that begins by requiring more simple, general climate financial risk analysis that increases in complexity and specificity over time, the SEC can consider aligning its future, more detailed requirements for climate financial risk analysis with what is likely to become the international standard. In particular, the International Financial Reporting Standards (IFRS) Foundation has announced its intentions to develop an international sustainability standards board,²⁰ which could fill in the details of TCFD's high level principles for climate disclosure. There is already strong support from the UK for international standards from the IFRS Foundation,²¹ and there is likely to be strong support in other major economies given the support and influence that the IFRS Foundation has traditionally had from and in a number of the world's largest economies.²² Moreover, the International Organization of Securities Commissions has announced both its recognition of the "urgent need for globally consistent, comparable, and reliable sustainability disclosure standards" and its commitment to "working with the IFRS Foundation Trustees and other stakeholders to advance these priorities."²³ Even Acting Director of the Division of Corporate Finance at the SEC John Coates has

¹⁹ <https://www.i4ce.org/wp-core/wp-content/uploads/2018/11/1210-I4CE2949-PC59-Article173-nov18-VA.pdf>.

²⁰ <https://www.ifrs.org/news-and-events/news/2021/02/trustees-announce-next-steps-in-response-to-broad-demand-for-global-sustainability-standards/>.

²¹ <https://www.gov.uk/government/publications/joint-statement-of-support-for-ifrs-foundation-consultation-on-sustainability-reporting>.

²² As IFRS Foundation Trustee Teresa Ko notes: "To date, over 140 jurisdictions require the use of IFRS Standards by all or most publicly-listed companies, and a further 12 jurisdictions permit their use." <https://www.ifrs.org/news-and-events/news/2020/10/hope-for-a-new-paradigm-sustainability-reporting/>.

²³ <https://www.iosco.org/news/pdf/IOSCONEWS594.pdf>.

described the IFRS Foundation’s work in this regard as “promising.”²⁴ The SEC should accordingly keep the IFRS Foundation’s sustainability standards board in mind as a destination for phasing in a more detailed set of climate financial risk disclosure requirements.

II. Recommendations and potential options for phasing and tiering

IIA. Mandate start date

2023 is a reasonable mandate start date for registrants to begin complying with disclosure requirements and there are potential market risks to delaying this start date. After more than a decade since TCFD first released its guidelines for voluntary disclosure and the SEC released its guidance regarding disclosure related to climate change, companies have already had significant exposure to these concepts. One to two years’ additional time is likely long enough for many large business entities to start formally complying with disclosure requirements. In fact, many large business entities are already facing significant pressure to comply with disclosure requirements, such as from their investors, prompting many of them to start developing these disclosure processes internally even without a regulatory mandate.²⁵ To the extent that certain business entities acting in good faith still need more time to comply with disclosing certain especially difficult to perform types of risk analysis, other phasing and tiering frameworks, including in combination with the aforementioned evolving standards of disclosure, can be considered.

The extraordinary pressures already facing businesses to comply with disclosure requirements also speaks to potential market risks from a delayed mandate start date for U.S. entities. There is

²⁴ https://www.sec.gov/news/public-statement/coates-esg-disclosure-keeping-pace-031121?utm_medium=email&utm_source=govdelivery.

²⁵ Based on discussions with a senior corporate accountant.

significant support among global financial regulator thought leaders²⁶ for 2023 as the mandate start date.²⁷ To the extent that other countries join France and adopt 2023 as a mandate start date or begin even earlier, such as the UK which has proposed 2021 as a mandate start date for some UK entities,²⁸ U.S. entities not implementing adequate methods of disclosure risk increasingly losing out on, for instance, financing from banks subject to foreign disclosure regimes.²⁹ U.S. entities that do not adequately comply with disclosure requirements may also increasingly risk receiving poor credit ratings from credit rating agencies subject to regulations such as the European Union's Regulation 1060/2009, which requires credit rating agencies to consider some ESG factors as material to their financial disclosures.³⁰

Finally, to the extent that certain size and type entities find certain kinds of climate financial risk analysis too burdensome to be disclosed, these can be phased in over time.

IIB. Tiered phase-in of scenario analysis

The SEC should consider applying a tiered phase-in of scenario analysis. As noted in the 2019 TCFD Status report, disclosure of “resilience of strategy and scenario analysis remains low ... [given that] companies have found this recommended disclosure to be one of the most challenging to implement.”³¹ Indeed, even some of the most well-financed, sophisticated and dedicated companies are still having to outsource from expensive, top accounting and consulting firms to perform scenario analysis.³² As such, it

²⁶ Including former Governor of the Bank of England Mark Carney, Former Chairman of the Bank of Israel Jacob A. Frenkel, Former Chairman and CEO of Citibank William R. Rhodes and Former Chair of the U.S. Federal Reserve as well as current U.S. Secretary of the Treasury Janet Yellen.

²⁷ https://group30.org/images/uploads/publications/G30_Mainstreaming_the_Transition_to_a_Net-Zero_Economy_2.pdf.

²⁸ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933782/FI_NAL_TCFD_REPORT.pdf.

²⁹ [The Role of Accounting and Auditing in Addressing Climate Change - Center for American Progress](https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2020-sustainable-finance-strategy-consultation-document_en.pdf).

³⁰ https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2020-sustainable-finance-strategy-consultation-document_en.pdf.

³¹ <https://assets.bbhub.io/company/sites/60/2020/10/2019-TCFD-Status-Report-FINAL-0531191.pdf>.

³² Based on discussions with a senior corporate accountant.

is unrealistic to expect that many medium and small-sized companies would be able to develop these capabilities inhouse or afford the services of outside professional service organizations.

Still, the difficulty of performing scenario analysis should not stop large companies from beginning to disclose scenario analysis by the recommended mandate start date of 2023. In discussing disclosure of scenario analysis in its 2020 TCFD report, Citigroup admitted, for instance, that climate “data availability, accessibility, and suitability for financial risk analysis, as well as climate risk modeling capabilities ... [are] still nascent and evolving,” and that Citigroup “performed a short-term carbon pricing scenario analysis in collaboration with [consultancy] Oliver Wyman.”³³ Citi nonetheless “does not believe it is prudent to wait until such resources are fully formed and available to begin the climate risk integration process” for scenario analysis.³⁴

The SEC should thus consider phasing in the required disclosure of scenario analysis by tier, beginning with large accelerated filers in the first year – 2023 – followed by accelerated filers in the second year – 2024 – and all other filers in the third year – 2025. This could allow accelerated filers and all other filers to observe best practices before attempting to complete their own scenario analysis. They could even, for instance, perhaps in conjunction with the SEC or another entity, use disclosure of scenario analysis methods from large accelerated filers to develop a standard set of estimates and assumptions to apply to their own climate scenario analyses. Such a standard set of estimates could not only further help to ease the cost burden for these registrants in performing scenario analysis, but also allow them to avoid divulging any confidential information in coming up with their estimates, a major concern of companies – the 2019 TCFD Status Report survey noted that 46% of company participants found disclosing assumptions “difficult because they include confidential business information.”³⁵

³³ <https://www.citigroup.com/citi/sustainability/data/finance-for-a-climate-resilient-future-2.pdf?ieNocache=323>.

³⁴ Id.

³⁵ <https://assets.bbhub.io/company/sites/60/2020/10/2019-TCFD-Status-Report-FINAL-0531191.pdf>.

A standard set of estimates and assumptions could potentially even allow accounting and consulting firms to offer less customized, more general and affordable climate scenario analysis support to ease the initial burden of disclosure for accelerated and all other filers. The SEC should take care, however, to make sure that support from these third parties does not turn into overreliance. The Institute for Climate Economics noted that, under France’s Article 173, for instance, French “companies often tend to rely heavily on service providers” such that “no real changes are made to management practices,” frustrating one of the objectives of the law.³⁶ In particular, the Institute cited a “poor understanding of analyses conducted by service providers” as a “barrier to their integration into company strategy.”³⁷ The SEC should therefore take care to not just require risk disclosure from registrants, for which they can rely on outside parties without fully understanding the risks themselves, but also require disclosure of how registrants are integrating their understanding of these risks into company strategy.

IIC. Evolving standard for scenario analysis

To the extent that registrants still find it too burdensome to begin disclosing scenario analysis, even with a tiered phase-in approach, or to the extent that the SEC deems it appropriate to also mandate disclosure of at least some form of scenario analysis by accelerated and other filers in 2023, the SEC has significant flexibility to apply an evolving standard to ease their disclosure burden.

Although, as mentioned above, many companies report scenario analysis to be one of the most challenging aspects of the TCFD recommendations, TCFD guidance actually allows for a fair amount of discretion to significantly ease the burden of performing scenario analysis. In particular, the 2017 TCFD Technical Supplement *The Use of Scenario Analysis in Disclosure of Climate-Related Risks and*

³⁶ <https://www.i4ce.org/wp-core/wp-content/uploads/2018/11/1210-I4CE2949-PC59-Article173-nov18-VA.pdf>.

³⁷ Id.

Opportunities offers that organizations “just beginning to use scenario analysis may choose to start with qualitative scenario narratives or storylines.” The Supplement further elaborates that as “an organization gains experience with qualitative scenario analysis, the scenarios and associated analysis of development paths can use quantitative information to illustrate potential pathways and outcomes.”³⁸ KPMG Partner and Co-Head of Climate Risk and Decarbonisation Strategy (in the UK) Bridget Beal further elaborates that, given how broad this TCFD guidance is, companies could even begin their scenario analysis with something as simple as a literature review and mostly limit their analysis to a qualitative assessment, for instance, of how climate risk would affect demand for their products or services.³⁹ Beal also cautions that, without at least some scenario analysis, it may be hard for companies to perform any meaningful climate disclosure at all.⁴⁰ Still, the SEC should take care to balance its concerns for easing the disclosure burden of scenario analysis for registrants with satisfying investor demand for data that is transparent and comparable.⁴¹ The SEC can accordingly consider whether or not it would make sense to mandate some form of especially light scenario analysis from accelerated filers in year 1 (2023), depending on the extent to which such a light form of scenario analysis would be transparent and comparable enough to satisfy investor demand.

IID. Tiering by industry type for scope 3 emissions

The SEC should consider tiering by industry type for scope 3 emissions.

On the one hand, methods for disclosing scope 3 emissions are currently quite limited. Notably, the U.S. Commodities Futures Trading Commission recommends that regulators start by requiring listed companies to disclose scope 1 and 2 emissions, and only require the disclosure of scope 3 emissions as

³⁸ <https://assets.bbhub.io/company/sites/60/2020/10/FINAL-TCFD-Technical-Supplement-062917.pdf>.

³⁹ April 2021 Climate Disclosure Standards Board roundtable on UK mandatory climate related financial disclosures <https://www.youtube.com/watch?v=zt7Xr6HCJ2c&t=2274s>.

⁴⁰ Id.

⁴¹ A securities law academic noted that the limit on easing the disclosure burden is making sure that the disclosed risk is still transparent and comparable enough to be of use to investors.

“reliable transition risk metrics and consistent methodologies for scope 3 emissions are developed.”⁴²

On the other hand, investor demand for disclosure of scope 3 emissions of at least the most carbon-intensive industries is already quite high.⁴³ Moreover, without requiring disclosure of scope 3 emissions, the SEC runs the risk that registrants may simply remove their carbon-heavy assets from their balance sheets, offloading them to private parties, but still rely on them for their business models. It will thus be important for the SEC to take a balanced approach, requiring disclosure of scope 3 emissions to the extent that a registrant making good faith efforts can comply.

Among registrants making good faith efforts to disclose scope 3 emissions, those from the purchased goods and services and financing and investment industry sectors face the most difficulty disclosing.⁴⁴ The SEC can address this concern by developing a lower-burden standard for disclosure of scope 3 emissions for just these industries by including such a standard in the SEC Division of Corporate Finance’s industry guides for these sectors.⁴⁵ The SEC can also consider granting “no action letters”⁴⁶ to offer relief to any particular company or group of companies from a particular industry that sincerely find it too difficult to disclose certain aspects of their scope 3 emissions, including because of data limitations from supply chains outside the U.S.

⁴² See Recommendation 7.6. <https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>.

⁴³ BlackRock, for instance, states that companies “in carbon-intensive industries should also disclose scope 3 emissions.” <https://www.blackrock.com/corporate/literature/publication/blk-commentary-climate-risk-and-energy-transition.pdf>.

⁴⁴ Based on discussions with a senior corporate accountant.

⁴⁵ <https://www.sec.gov/files/industryguides.pdf>. <https://www.sec.gov/page/corpfin-section-landing>.

⁴⁶ <https://www.investor.gov/introduction-investing/investing-basics/glossary/no-action-letters>.

III. Additional points for consideration

IIIA. How to prevent phasing and tiering from becoming a form of obstruction

In considering the aforementioned phasing and tiering measures, the SEC must also contend with the risk that these measures become a form of obstruction. In particular, there is a risk that phasing and tiering measures intended to offer a temporary exemption turn into a permanent exemption due to lobbying by special interests. The emerging growth company status, for instance, is one example of a measure that was originally intended to temporarily ease the burden of new filing requirements for smaller companies but that, due to lobbying, ultimately turned into a permanent exemption.⁴⁷

To address this risk, the SEC can consider strategies to insulate the implementation of its climate financial risk disclosure regime from political pressure. One strategy would be to assign the responsibility of implementing its climate financial risk disclosure regime to a third party, similar to the way the SEC has placed the Financial Accounting Standards Board (FASB) in charge of establishing financial accounting and reporting standards. One such possibility would be for the SEC to designate SASB, which has already expressed strong interest,⁴⁸ as the third-party, FASB-like entity in charge of implementing a climate financial risk disclosure regime. Notably, however, even FASB has occasionally been susceptible to political pressure in the past, such as in 1993 when it dropped its new stock option accounting rule after facing severe political blowback from Congress.⁴⁹ A third party entity in charge of implementing a climate financial risk disclosure regime, although somewhat insulated, will similarly not be immune to political pressure.

⁴⁷ According to discussions with a former senior government securities lawyer.

⁴⁸ <https://www.sec.gov/comments/climate-disclosure/cl12-8819945-238161.pdf>.

⁴⁹ <https://www.pbs.org/wgbh/pages/frontline/shows/regulation/congress/>. Conversation with a former senior government securities lawyer.

Another strategy for the SEC to consider is to work with stock exchanges to approve any new listing requirements which mandate listed companies disclose climate financial risk analysis. For instance, in December of 2020, NASDAQ proposed a new rule to require its listed companies to disclose information about board diversity.⁵⁰ NASDAQ and other exchanges could propose and implement similar rules for climate financial risk disclosure.

IIIB. Options for appropriately easing the disclosure burden to lessen resistance from registrants⁵¹

There are several options for the SEC to consider to appropriately ease the disclosure burden and lessen resistance from registrants.

The SEC should allow registrants to be free from private right of action, while still allowing SEC action, for the first one to two years of implementation. Litigation is a significant concern for U.S. companies.⁵² It will take some time to clarify the meaning of new climate financial risk disclosure requirements, including how traditional legal concepts such as “materiality” apply. Offering a one-to-two-year exemption to phase-in the application of private right of action to a new climate financial risk disclosure regime is an appropriate way to address such a concern from registrants.⁵³

Another way to appropriately address registrants’ litigation concerns is to offer enhanced legal protections. As climate financial risk analysis requires performing an especially complex set of forecasting, the SEC should strongly consider applying the statutory safe harbor for forward-looking statements – 15 U.S. Code § 78u–5.

Finally, there is significant pressure from registrants for the SEC to keep climate financial risk analysis outside of financial statements and to allow the analysis to be “furnished” rather than “filed,”

⁵⁰ <https://www.gibsondunn.com/nasdaq-proposes-new-board-diversity-rules/>.

⁵¹ A number of these options came up in discussions with a securities law academic, among others.

⁵² https://www.cdsb.net/sites/default/files/tcfd_preparedness_report_final.pdf.

⁵³ According to a conversation with a securities law academic.

such as was allowed by the SEC's disclosure rule for "Conflict Minerals."⁵⁴ In particular, registrants may be concerned that including climate financial risk analysis would bog down 10Ks and 10Qs. But it is worth asking – to what extent is this a legitimate concern, versus to what extent are 10Ks and 10Qs often read using hyperlinks, the "ctrl-f" function and machine-learning programs anyway, such that further bogging them down would not be a major concern? To the extent that the SEC believes this is a legitimate concern, the SEC can allow registrants to move some of the detail of their climate financial risk analysis outside of financial statements to a supplemental report. At the very least, even if the SEC decides that registrants can disclose their climate financial risk analysis entirely outside of their financial statements, the SEC should make sure registrants offer investors and the public comparable, historical data on their climate financial risk analysis.⁵⁵

Sincerely,

Jesse Lazarus

J.D. Candidate (2022)

Stanford Law School

⁵⁴ <https://www.sec.gov/rules/final/2012/34-67716.pdf>.

⁵⁵ A securities law academic stressed how important it was that climate financial risk disclosure analysis satisfy this base standard.