

December 7, 2021

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

Re: Response to Call for Public Input on Climate Change Disclosures from Commissioner Allison Herren Lee

Dear Chair Gensler,

We write to you on behalf of the Investors and Indigenous Peoples Working Group (IIPWG), a coalition of investors and others working for decades to forward the human rights of Indigenous Peoples through the capital markets. The signatories of this letter represent a cross section of investors and Indigenous organizations and represent the views of our broader coalition.

We are writing this letter to provide input on your forthcoming rule proposal related to climate change and ESG disclosures, as previewed by the Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions¹ published by the U.S. Securities and Exchange Commission (SEC) and by the March 2021 request for public comment on climate disclosures.² We urge the SEC to require disclosures about material risks related to Indigenous Peoples' and tribal peoples' land rights where they are directly or indirectly impacted by listed companies' operations.³

The rights of Indigenous Peoples are relevant to the considered disclosures for a number of reasons. First, Indigenous Peoples reside around the globe, including the areas that are the central operational environment of many corporations, specifically in the extractive, energy production and transmission, and agricultural sectors. Potential risk for investors arises from the failure to obtain the free, prior, and informed consent (FPIC) of Indigenous Peoples. Risk also stems from the failure to account for the self-determined priorities of Indigenous Peoples, which can generate significant social conflict with impacted Indigenous Peoples. Social conflict can generate material legal, political, reputational, and operational risks to companies and investors alike. Indigenous Peoples' land rights and human rights, and the centrality of those

¹ Securities and Exchange Commission Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions. Office of Information and Regulatory Affairs (11 June 2021). See RIN 3235-AM87. Available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AM87>.

² Public Input Welcomed on Climate Change Disclosures (15 March 2021). Available at: <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.

³ This letter follows closely the letter sent by 22 climate, environment, public interest, racial justice, and Indigenous rights organizations on June 14th, 2021. Available at: <https://amazonwatch.org/assets/files/2021-06-14-sec-esg-risk-comment-letter-indigenous-rights.pdf>.

rights to environmental and climate protection, overlap and should be integrated into the SEC's disclosure requirements across all three pieces of the ESG landscape, a landscape on which investors themselves are increasingly affirming that they base investment decisions.⁴ The risks described in this letter comprise one of the most significant unaddressed gaps in the current regulatory environment. We also note the U.S. in 2010 endorsed the United Nations Declaration on the Rights of Indigenous Peoples.⁵ Therefore the SEC's enhanced disclosure requirements are another way our government can uphold its commitment. The following provides several central examples.

Environment

Indigenous Peoples are critical actors in the fight against climate change and the mitigating of its detrimental impacts. Countless publications by academic and other research institutions support this argument. For example, the UN Intergovernmental Panel on Climate Change's (IPCC) recent reports have acknowledged with "high confidence" that adaptation efforts benefit from the inclusion of local and Indigenous knowledge.⁶ Furthermore, according to the "Yale Climate Connection," Indigenous and Tribal Peoples are critical to forest conservation and climate stability. Additional studies show that ancestral lands and land under title by Indigenous Peoples are the most biodiverse and best conserved on the planet.⁷ These studies and many others demonstrate that any disregard of the land rights of Indigenous Peoples by corporations helps contribute to environmental degradation, climate change, social conflict, and violence. These factors, in turn, can have a negative impact on business operations, and on investors. For Indigenous Peoples, environmental health and human health are deeply intertwined, with community cohesion, spiritual and cultural practices, language, traditions, and food security being equally vital.⁸ The impacts of corporate actions on the environment have long lasting effects on the lives, cultural practices, and livelihoods of Indigenous populations.

The importance of climate related disclosures has already been acknowledged by the SEC. In June 2021, a press release announcing the SEC's Annual Regulatory Agenda stated that climate risk is ranked as "notable."⁹ In September 2021, the SEC noted gaps in the climate reporting practices of corporations, specifically with regards to issues that have material

⁴ Business Wire, "ESG Investing Reaches Critical Mass; Ongoing Momentum Depends on What's Driving the Demand, Finds Natixis Investment Managers Survey," (22 April 2021). Available at: <https://www.businesswire.com/news/home/20210422005347/en/ESG-Investing-Reaches-Critical-Mass-OngoingMomentum-Depend-s-on-What's-Driving-the-Demand-Finds-Natixis-Investment-Managers-Survey>.

⁵The White House, Office of the Press Secretary. "Remarks by the President at the White House Tribal Nations Conference". (December 16, 2010). Available at: <https://obamawhitehouse.archives.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>

⁶ Bob Henson, "Key takeaways from the new IPCC report", Yale Climate Connection (August 9, 2021). Available at: <https://yaleclimateconnections.org/2021/08/key-takeaways-from-the-new-ipcc-report/>

⁷ Frontiers in Ecology and the Environment, "Importance of Indigenous Peoples' Lands For the Conservation of Intact Forest Landscapes," (January 6, 2020), Available at: <https://esajournals.onlinelibrary.wiley.com/doi/full/10.1002/fee.2148>.

⁸ Ibid.

⁹ SEC website. "SEC Announces Annual Regulatory Agenda". (June 11, 2021). Available at: <https://www.sec.gov/news/press-release/2021-99>

implications for investors.¹⁰ In an effort to address these gaps, companies might be required to disclose: “Material litigation risks related to environmental issues.” The Sample Letter released by the SEC¹¹ highlights the fact that the SEC expects registrants to provide disclosure about material impacts of climate change on the business, financial condition, and results of operations of the registrant, such as policy and regulatory changes that could impose operational and compliance burdens, market trends that may alter business opportunities, credit risks, or technological changes.

Social

Indigenous Peoples enjoy a deeply intimate and integral relationship with their environments. They have unique ways of relating with the land, and they live and subsist in ways that are often misunderstood and disrespected by outside entities - and thus often don't have access to the decision-making table. This unique connection, the right of Indigenous Peoples to self-determination, and their right to “own, use, develop and control the lands, territories and resources” have been firmly and widely acknowledged by international law.¹² When these rights are not respected or adequately protected, many Indigenous leaders use the courts, corporate engagement, and other strategies to protect their resources.¹³ In many cases, on-the-ground campaigns are formed as a last line of defense of territories.

Corporate lack of respect for Indigenous rights has resulted in project delays, cancellations, and heavy financial losses for the companies involved.¹⁴ There are countless examples from around the globe of how social risk became a material risk for investors after not being appropriately addressed and disclosed by the company. One case is the Dakota Access Pipeline (DAPL), which was built underneath the Missouri river disregarding that the Standing Rock Sioux Tribe had not given its free, prior, and informed consent.¹⁵ The forwarding

¹⁰ Benjamin Bain, “SEC Finds Gaps in Climate Change Disclosures in Annual Reports”, Bloomberg. (September 22, 2021). Available at: <https://www.bloomberg.com/news/articles/2021-09-22/sec-finds-gaps-in-climate-change-disclosures-in-annual-reports>

¹¹ SEC website. “Sample Letter to Companies Regarding Climate Change Disclosures” (September 2021). Available at: https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures?utm_medium=email&utm_source=govdelivery

¹² The United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295 at Article 10 (Oct. 2, 2007). Available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

¹³ When Indigenous Peoples defend their land rights they are often threatened, attacked, and even killed. According to data collected by Global Witness between 2002 and 2019, over 2,000 environmental defenders have been murdered defending their rights to their land and the environment. The Front Line Defenders Global Analysis 2020 Report identified that a further 220 land, environmental or Indigenous and tribal peoples' rights defenders were killed in 2020, and 26% of those killed were defenders of Indigenous and tribal peoples' rights. Front Line Defenders has recorded the killing of 327 Indigenous and tribal peoples' rights defenders since 2017. Many more have faced threats, physical attacks, smear campaigns, and judicial harassment. Impunity for these attacks is the norm. For further information visit: https://www.frontlinedefenders.org/sites/default/files/flf_global_analysis_2020.pdf.

¹⁴ John Ruggie, who led the development of the UN Guiding Principles on Business and Human Rights, told Business Ethics that “for a world-class mining operation...there's a cost somewhere between \$20 million to \$30 million a week for operational disruptions by communities.” There are opportunity costs, financial costs, legal costs and reputational costs. Michael Connor, “Business and Human Rights: Interview with John Ruggie”, Business Ethics. (October 30, 2011). Available at <https://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>.

¹⁵ Linda Ferrer, “Standing Rock Sioux Defend Their Water, Lands, in Fight Against Dakota Access Pipeline” Cultural survival (August 29, 2016). Available at: <https://www.culturalsurvival.org/news/standing-rock-sioux-defend-their-water-lands-fight-against-dakota-access-pipeline>

corporation, Energy Transfer Partners' (ETP) reporting concerning the DAPL project was silent or exclusively positive until the publication of its third quarterly report on November 9, 2016. Then the company acknowledged that "protests and legal actions against DAPL have caused construction delays and may further delay the completion of the pipeline project." By this time, social pressure had been mounting for months but there is evidence that the company knew of these risks long before disclosing them to investors. All of this information was available to investors through media reports and other publicly-available sources, but none of it was disclosed in ETP's securities filings until November 9, 2016.¹⁶

The same is now happening in Anishinaabe territory with the Line 3 oil pipeline, which runs Canadian tar sands through the United States.¹⁷ The construction and operation of these pipelines have proceeded without the Anishinaabe's consent and the pipelines threaten their lands, waters, resources, and ways of life. The resulting opposition from the Indigenous Peoples directly impacted by these developments have generated social costs that become material business risks. First Peoples Worldwide's 2018 case study showed that DAPL's project cost inflated from \$3.8 billion to over \$12 billion from divestment and other factors, and litigation remains ongoing.¹⁸ With respect to Line 3, Enbridge itself has been ensnared in tribal, state, and federal litigation, alongside near constant protests and direct action by Indigenous Water Protectors.¹⁹

Governance

Corporate governance risks arise in cases with discrepancies between corporations' stated commitments to human rights and their actions and impacts. Corporations sometimes align project standards with the domestic legislation and regulatory regime, even where those standards do not meet the threshold of protections for Indigenous Peoples that are anchored in international law.²⁰ On the other hand, corporations often openly disregard the land rights and other human rights of Indigenous Peoples by failing to recognize their sovereign status or in other cases, their existence. In the most extreme cases, when social conflict erupts as a result of these failures, operational risks can result in investors losing their entire stake when a project

¹⁶ Carla F. Fredericks et al. Social Cost and Material Loss: The Dakota Access Pipeline. First Peoples Worldwide. (2018). Available at:

https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf

¹⁷ Rob Capriccioso (2021). United Nations committee asks U.S. to investigate possible Line 3 treaty violations. Tribunal Business News

<https://tribalbusinessnews.com/sections/sovereignty/13609-united-nations-committee-asks-u-s-to-investigate-possible-line-3-treaty-violations>

¹⁸ Carla F. Fredericks et al. Social Cost and Material Loss: The Dakota Access Pipeline. First Peoples Worldwide. (2018). Available at:

https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf

¹⁹ Emilie Karrick Surrusco. Tribes Defend Minnesota Waterways From Dangerous Line 3 Pipeline. EarthJustice. (2021). Available at:

<https://earthjustice.org/blog/2021-march/tribes-defend-minnesota-waterways-from-dangerous-line-3-pipeline>

²⁰ Relying on domestic legislation is often inadequate to fully respect the rights of Indigenous Peoples as domestic regimes rarely account for the full breadth of Indigenous Peoples' rights as enumerated in international mechanisms. Similarly, and as a result, corporate reliance on domestic regimes is inadequate to fully understand the totality of risk when contemplating business operations on and near Indigenous Peoples lands, territories or resources.

is canceled. This has already happened to a series of companies including Occidental Petroleum, Talisman (now part of Repsol), and GeoPark that have attempted to explore and drill for oil in Block 64 in Peru.²¹

With all the risk categories noted above, companies may encounter reputational, legal, political, and operational risks- which are material risks for investors.

In the current regulatory environment, companies operating in areas where Indigenous People live have often proved that **many of these risks often remain unknown to investors until they result in material losses.** The way to protect investors, in accordance with the SEC's core mission, includes thorough integration of disclosures regarding the risks related to Indigenous Peoples' land rights and human rights where they are directly or indirectly impacted by the issuers' business models and/or specific projects. It is important to avoid "siloeing" this set of concerns, as a full mainstreaming of an Indigenous lens into ESG disclosures is necessary to adequately address business risk as well as opportunity.

Finally, we affirm our support in the example set of disclosures called for in the letter sent to the SEC on June 14, 2021, from twenty-two climate, environment, public interest, racial justice, and Indigenous rights organizations.²² The letter called on the SEC to require all companies to document, for their direct operations as well as direct and indirect suppliers, the following information:

- A. How their business model involves issues of Indigenous and/or tribal peoples' rights, including through their supply chains, contractors and subcontractors, finance, etc.;
- B. The names of any and all Indigenous and/or tribal peoples whose territories (both legally recognized as well as any territories currently under request of legal recognition) in any way overlap with operations or would be directly impacted by them, for example by downstream pollution from oil drilling waste products;
- C. Any and all land rights grievances or complaints filed by local communities in the company's areas of operations (for a comparable example, see Land Conflict Watch in India or Environmental Justice Atlas), the company's response, and statements from complainants on how they assess the response;
- D. Description of any open processes in which the issuer is seeking to consult with or obtain the consent of Indigenous or tribal peoples that would be impacted by a planned or in-process activity by the issuer, subsidiary, or supplier;

²¹ Matthew Smith, OilPrice.com, "Will Peru's Crisis Torn Oil Industry Ever Recover?" (September . 2021). Available at: <https://oilprice.com/Energy/Crude-Oil/Will-Perus-Crisis-Torn-Oil-Industry-Ever-Recover.html>.

²² See the full letter here: <https://amazonwatch.org/assets/files/2021-06-14-sec-esg-risk-comment-letter-indigenous-rights.pdf>.

- E. List of any and all consultation processes carried out in the past reporting year, including information on what entity carried out the consultation, and if consent was obtained, how the impacted Indigenous peoples expressed that consent;
- F. List of any and all legal processes in U.S. and/or foreign jurisdictions related to land rights disputes, consultation or consent processes, or other Indigenous rights matters; and
- G. A list of any and all projects undertaken by the issuer or subsidiaries that require the relocation of Indigenous and/or tribal communities, including any and all compensation, monetary or otherwise, provided in exchange for relocation.

We trust these insights will be useful for your deliberations and would request a call to discuss this submission further. Thank you for your consideration of these concerns.

Sincerely,

- Boston Common Asset Management
- Seventh Generation Interfaith Coalition for Responsible Investment
- Responsible Investing Solutions
- The Nathan Cummings Foundation
- Adasina Social Capital
- Oneida Trust Enrollment Committee, Oneida Nation
- Domini Impact Investments, LLC
- Mercy Investment Services
- United Church Funds
- Natural Investments

Partners:

- Susana Sandoval - Human Rights Commissioner, United Nations Permanent Forum for Indigenous Peoples; Wanbli Oyate Woapiya

Cc (via email) - Commissioner Hester M. Peirce; Commissioner Elad L. Roisman;
Commissioner Allison Herren Lee; Commissioner Caroline A. Crenshaw.