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Submitted via email to: rule-comments@sec.gov

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

Re: File No. S7-10-22: The Enhancement and Standardization of Climate-Related Disclosures for Investors

Dear Chair Gensler:

I write to express my concerns regarding the scope and reach of the above-referenced proposal. While I write only on behalf of the Office of the Missouri Secretary of State's Securities Division, I believe several other states with their own unique circumstances share my view that the proposal goes far beyond the scope of the disclosure framework which is designed to protect investors from fraud. Instead, this proposal seeks to advance substantive social policy positions that exceed and are outside the legislative authority granted to the Securities and Exchange Commission. The proposal is brazenly political and unnecessary. It will actually harm investors by requiring added costs and risks to public companies while distracting them from their fiduciary duties to enhance investor returns.

I understand that some companies may make disclosures that are misleading or untrue; if they do that, we will pursue violations of the law and seek restitution and civil penalties. Existing substantive law and industry practices are sufficient to protect investors.

The proposal, however, goes beyond the disclosure of material factors. It implies value judgments about social issues under the guise of a disclosure rubric and requires the consideration of those factors. The proposal presumes to see into the future and assumes future consumer trends, investor demands, environmental outcomes and statutory changes. It requires companies to report greenhouse gas emissions from third party sources over which they may have little or no control and extrapolate the occurrence of unpredictable future events potentially requiring the use of predictive models and algorithms that can provide varying results of questionable accuracy and utility. None of this leads to a better informed investor making a decision they believe to be in their best interests.

For example, the proposal's disclosure of actual or potential climate related risks includes the disclosure of "physical risks." Companies will be required to consider and predict the potential for and likely harm from physical risks "such as wildfires, hurricanes, tornadoes, floods, and heatwaves." 87 Fed. Reg. 21334, 21349 (Apr. 11, 2022). The proposal further asserts that physical risks include chronic and acute risks to the business itself or to those with whom it does business. Indeed,

> "Acute risk" is defined as event-driven risks related to shorter-term extreme weather events, such as hurricanes, floods and tornadoes. "Chronic risks" is [sic] defined as those risks that the business may face as a result of longer term weather patterns and related effects, such as sustained higher temperatures, sea level rise, drought, and increased wildfires, as well as related effects such as decreased arability of farmland, decreased habitability of land, and decreased availability of fresh water."

Id. at 21349, 21350 (footnote omitted).

Although these occurrences cause harm and economic impact when they occur, predicting their potential future occurrence and likely impact on a company or its business associates with any degree of assurance seems a formidable, speculative task unlikely to provide consistent, reliable decision useful information. I do not believe requiring public companies to calculate the risks of future weather conditions to be realistic, any more than I can predict when and where the next Midwestern tornado will wreak havoc.

The proposal further requires the disclosure of "transition risks." These are

> risks associated with a potential transition to a less carbon intensive economy. These risks may arise from potential adoption of climate-related regulatory policies including those that may be necessary to achieve the national climate goals that may be or have been adopted in the United States or other countries; climate-related litigation; changing consumer, investor, and employee behavior and choices; changing demands of business partners; long-term shifts in market prices; technological challenges and opportunities, and other transitional impacts.

Id. at 21349 (footnote omitted).

This definition assumes changes that may not occur such as long term legislative and policy shifts based on climate change and consumer and employee behavioral shifts based on the same. These assumptions seem more about applying normative values than disclosing material facts that companies consider. None of this leads to a more informed investor, since it is all so speculative, particularly as it includes political changes.

To further compound the likely speculative nature of the endeavor, the disclosure of climate-related risks will extend to a company's value chain. "'Value chain' would mean the upstream and downstream activities related to a registrant's operations." *Id.*

These include the activities of other parties that provide goods or services to the company prior to production and those parties that provide some activity related to the product or service once it leaves the company. Thus, companies will have to consider and report climate-related activities for entities over which they have little or no control and potentially extremely limited information. (Downstream activities even include the consideration of end of life treatment of sold products, presumably even the consideration of disposal activities of consumers. 87 Fed. Reg. at 21349). Although there are significant issues surrounding the acquisition and reliability of the data, companies will be required to report it to give investors a "complete" picture, no matter how inaccurate or misleading that picture. This part of the proposal puts companies in an untenable position, for if their estimations are not correct, they are potentially subject to being accused of misleading investors. If they do not speculate about the impact of the activities of others, they may be accused of violating the law. None of this helps investors.

Additionally, this speculative information will be required to be considered and disclosed, when material, on a short, medium, and long-term basis. *See, e.g.*, 87 Fed. Reg. at 21351. The proposal recognizes the conjectural nature of this endeavor and, therefore, promotes the use of climate modeling tools and consulting firms to obtain a simulacrum of factual information. The proposal "recognize[s] that determining the likely future impacts on a registrant's business may be difficult for some registrants." *Id.* at 21352. Although the proposal assures that climate modelling has been successful, that is a far cry from producing reliable, accurate, and material information. It does not acknowledge that many climate change issues are in dispute, and that causation is not a settled issue. Companies have a fiduciary duty to seek profits on behalf of their shareholders. This proposal impedes their efforts to do so with no benefit other than a "feel good" moment here or there.

These examples demonstrate that the proposal does something other than provide investors with meaningful decision-making information. And it encroaches upon regulatory areas delegated to other entities, is outside agency expertise, and exceeds the SEC's statutory authority.

"Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam). To support the proposal, the SEC invokes its "broad authority to promulgate disclosure rules that are in the public interest or for the protection of investors and that promote efficiency, competition and capital formation." 87 Fed. Reg. at 21340. Although a broad mandate, it is not limitless. As discussed above, many of the proposed disclosures are speculative in nature and of questionable comparative value for investors. Rather than increase efficiency, the proposal will require companies to develop a complex process of subjective analysis of dubious worth. Rather than promote competition, the proposal frontloads winners and losers, favoring those companies and industries that can advantageously showcase their business model within the framework of these questionable disclosures. That is not the proper role of government. Finally, rather than promote capital formation, the requirement of consideration and disclosure of many of these items—likely a costly

and complex endeavor—may discourage many companies from going public or lead them to go private. Thus, the proposal will have serious consequences.

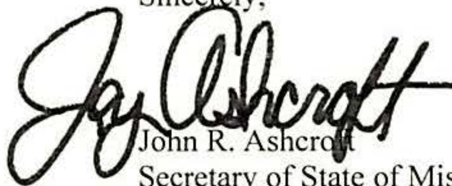
More importantly, the proposal exceeds the SEC's statutory authority. Consider *Chamber of Com. of United States of Am. v. United States Dep't of Lab.*, 885 F.3d 360 (5th Cir. 2018), where the Department of Labor unsuccessfully attempted to expand the scope and application of the term "fiduciary" to include single sales transactions. The Fifth Circuit concluded that the agency's interpretation ran afoul the text and structure of ERISA and thus the agency acted outside the authority given to it by Congress. While agencies can interpret the law, they cannot "rewrite" it. *Id.* at 373. They also cannot read dramatic departures from traditional policies into ambiguous terms because Congress does not "hide elephants in mouse holes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

Similarly, if, as contemplated by the proposal, Congress had intended the protection of investors and the promotion of capital formation to support disclosure of uncertain and unknown future climate events—as well as effects arising from the activities of unrelated third parties—Congress would have spoken clearly.

But Congress didn't. Instead, the proposal represents an unprecedented interpretation of the SEC's authority. That alone makes the proposal suspect. *See Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy," courts "typically greet its announcement with a measure of skepticism" because they "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast "economic and political significance") (cleaned up). This gross expansion of the SEC's authority would also "deal a severe blow to the Constitution's separation of powers." *Id.* at 327.

To be sure, while I support companies asserting environmental positions be required to do so truthfully, as well as the requirement that all companies disclose material information in a fair and reliable manner, this proposal does not achieve that objective. It is a brazen political act, and does not aid in capital formation or advance our goal of protecting investors from fraud.

Sincerely,



John R. Ashcroft
Secretary of State of Missouri