BIPARTISAN POLICY CENTER

June 13, 2022

Ms. Vanessa Countryman
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, DC 20549

Re: "The Enhancement and Standardization of Climate-Related Disclosures for Investors"
File Number: S7-10-22
Rel. Nos: 33-11042 and 34-94478

Dear Ms. Countryman,

The Bipartisan Policy Center ("BPC") is a Washington, DC-based think tank that actively fosters bipartisanship by combining the best ideas from both parties to promote health, security, and opportunity for all Americans. Our policy solutions are the product of informed deliberations by former elected and appointed officials, business and labor leaders, and academics and advocates who represent both sides of the political spectrum. BPC prioritizes one thing above all else: *getting things done*.

BPC has been at the forefront of climate policy for decades. The vast majority of Americans understand that the climate is changing and that something must be done to address its projected impacts. What that "something" is has become a hotly debated topic with passions running high on both sides. Therefore, understanding both sides of the political issue is paramount to any productive discussion. Crafting a bipartisan approach to climate policy may be one of the most challenging endeavors of our time. BPC believes that providing a forum for policymakers and thought leaders to work through these difficult issues is exceedingly important.

BPC appreciates the opportunity to comment on the Securities and Exchange Commission's ("SEC" or "Commission") March 21, 2022, proposed rule "The Enhancement and Standardization of Climate-Related Disclosures for Investors" ("Rule").[1] The proposed Rule requires registrants ("companies") to include certain climate-related disclosures in their registration statements and periodic reports.[2]

Commission Actions on Climate-related Disclosure

We applaud the Commission and SEC staff for all the hard work they have done to address climate-related risks. Given the gravity of global climate change this is no small task. It is worth acknowledging that even before Chairman Gary Gensler was confirmed, SEC staff was already diligently working on these important issues. Specifically, in addition to creating new positions and a Task Force to evaluate climate-related

[1] SEC *Release* "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (March 21, 2022, later conformed to the Federal Register versions) ("Proposal" or "Rule"); *available at* https://www.sec.gov/rules/proposed/2022/33-11042.pdf; *see also* the proposed Rule (Apr. 11, 2022), 87 FR 21334; *available at* https://www.federalregister.gov/documents/2022/04/11/2022-06342/the-enhancement-and-standardization-of-climate-related-disclosures-for-investors; *see also* SEC *Press Release* (Mar. 21, 2022), *available at* https://www.sec.gov/news/press-release/2022-46
[2] *Id*.

issues, on February 24, 2021, then-Acting Chair Allison Herren Lee requested SEC staff to review the 2010 guidance with the intent of updating and clarifying its recommendations.[3] A few weeks later on March 2, 2021, at his confirmation hearing, Gary Gensler importantly indicated that he would "always be grounded in the courts, the law, and economic analysis about *materiality*, [and] what reasonable investors are seeking when they make [investment] decisions …" (emphasis added).[4]

Rationale For the Proposed Rule

SEC Chair Gary Gensler has indicated a number of rationales for the proposed Rule. First is that the SEC's statutory authority provides that the Commission should regulate when "necessary or appropriate in the public interest or for the protection of investors."[5] Next, the Commission must evaluate proposals under their tripartite mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.[6] In claiming that the proposed Rule is based on the aforementioned authority, Chair Gensler argues that the proposed Rule is necessary "because climate-related risks have *present* financial consequences that investors in public companies consider in making investment and voting decisions" (emphasis added).[7] The present, as opposed to future, consequences are significant because they involve current risks to companies. The notion that climate-related risks have present consequences is based in part on the findings of a report from the Financial Stability Oversight Council ("FSOC"), of which the SEC is a member.[8] The Chair also argues that investors increasingly demand "consistent, comparable, and reliable" decision-useful information that is currently inadequate.[9] The investor demand is based, in large part, on the response to then-Acting Chair Allison Herren Lee's statement soliciting public comment on climate and ESG-related disclosure in March of 2021.[10] In fact, the proposed Rule is replete with references to some 600 unique comments received from that request.

Given the length of the nearly 500-page proposal, there are plenty of issues to discuss, and if the response to the March 2021 request for comment is any indication, the SEC will have hundreds of comments to evaluate over the next few months. Therefore, we wanted to be selective and focus on the issue of *Materiality*. We believe that it is not only fundamental to this proposed Rule, but also important to other disclosure-based rulemakings at the Commission.

Materiality has been part of an ongoing discussion at BPC's Corporate Governance and ESG Program. We briefly addressed materiality in our submitted comments in response to then-Acting Chair Allison Herren

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[3] Then-Acting Chair Allison Herren Lee, "Statement on the Review of Climate-Related Disclosure" (Feb. 24, 2021); *available at* https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure
[4] Senate Banking Committee Confirmation Hearing of Gary Gensler (Mar. 2, 2021); (Statements found at 00:45:47), *available at* https://www.c-span.org/video/?509429-1/sec-chair-cfpb-director-confirmation-hearing; *See also* https://www.banking.senate.gov/hearings/02/22/2021/nomination-hearing
[5] *See*, e.g., §7 of the Securities Act [15 U.S.C. 77g] and §§ 12, 13, and 15 of the Exchange Act [15 U.S.C. 78l, 78m, and 78o].
[6] SEC, *What We Do* (modified Nov. 22, 2021); *available at* https://www.sec.gov/about/what-we-do; *see also See* Securities Act of 1933 (15 U.S.C. §§77a *et seq.*) and Securities Exchange Act of 1934 (15 U.S.C. §78a *et seq.)*
[7] Proposal, *supra* note 1, at 9.
[8] Financial Stability Oversight Council (FSOC), Report on Climate-Related Financial Risk (Oct. 2021), *available at* https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf (Discusses the effect climate-related risks pose to the U.S. Economy, though stops short of declaring it a "systemic risk.").
[9] Proposal, *supra* note 1, at 7.
[10] Then-Acting Chair Allison Herren Lee, Statement "Public Input Welcomed on Climate Disclosure" (Mar. 15, 2021); *available at* https://www.sec.gov/news/public-statement/lee-climate-change-disclosures

Lee's 2021 request.[11] As Materiality became a topic discussed more and more on Capitol Hill, BPC decided to further that discussion by convening an October 28, 2021 event specifically focused on materiality by two leading academic voices on the topic.[12] Then, after the release of the proposed Rule, in March of 2022, BPC hosted another event on April 7, 2022, discussing various aspects of the proposed Rule including materiality.[13] As a result of the discussions from these events, we are respectfully submitting the following comments to the Commission.

Background on Materiality

As you are aware, the last time the Commission addressed climate-related risk on a broad-based level was its release of the 2010 interpretive guidance ("2010 guidance").[14] The 2010 guidance specifically applied climate-related risk disclosure to what is known as Regulation S-K ("Reg. S-K").[15] Reg. S-K is the foundation of the existing framework for determining what nonfinancial information should be disclosed by companies to the SEC.[16] Since its drafting in 1977, Reg. S-K has been updated numerous times as various disclosure issues were addressed by the SEC both on their own and through Congressional action.[17] By the time Reg. S-K was finalized, the issue of what type of information had to be disclosed had already been litigated numerous times and the SEC had already been using their own materiality standard.[18] The seminal case involving the materiality standard was the 1976 Supreme Court case *TSC Industries vs. Northway*.[19] Justice Marshall's unanimous[20] opinion has probably been cited more than any other case involving disclosure. The Court held that a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important …."[21] The Court restated the standard holding that "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[22] The SEC has codified, recognized, cited, and used both the "substantial likelihood" and "total mix" language from the *TSC Industry Case* and its progeny multiple times.[23] Though like with most rulings, its application is where

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[11] BPC comment in response to then-Acting Chair Allison Herren Lee, March 15, 2021 Statement "Public Input Welcomed on Climate Disclosure" (Jun. 11, 2021); *available at* https://www.sec.gov/comments/climate-disclosure/cll12-8911531-244352.pdf

[12] BPC event "Do We Need to Rethink Materiality" (Oct. 28, 2021) (Panel discussion with Professors: Jill Fisch, University of Pennsylvania Carey Law School and Amanda Rose, Vanderbilt University Law School); *available at* https://bipartisanpolicy.org/event/do-we-need-to-rethink-materiality/ ; *see also* Timothy Doyle, BPC Blog "What is Materiality" (Oct. 27, 2021); *available at* https://bipartisanpolicy.org/explainer/what-is-materiality/

[13] BPC event "Corporations and Climate: Potential Impacts of the SEC's Proposed New Rule" (Apr. 7, 2022)(Discussion with former SEC Commissioner Troy Paredes); *available at* https://bipartisanpolicy.org/event/corporations-and-climate-potential-impacts-of-the-secs-proposed-new-rule/

[14] *See "*Commission Guidance Regarding Disclosure Related to Climate Change," ("2010 guidance") (Feb. 8, 2010); *available at* https://www.sec.gov/rules/interp/2010/33-9106.pdf

[15] *See id.*

[16] *See id* (Analysis of climate-related disclosure under Items 101 (Description of Business; 103 Legal Proceedings; 105 (Risk Factors); and revised 303 (Management's Discussion & Analysis).

[17] *See* "Adoption of Disclosure Regulation and Amendments of Disclosure Forms and Rules," Release No. 33-5893 (Dec. 23, 1977); 42 FR 65554 (Dec. 30, 1977).

[18] *See* TSC Industry, Inc. v. Northway, Inc., 426 U.S. 438 (1976) ("TSC Industry").

[19] *Id.*

[20] Justice Stevens took no part in the case or decision.

[21] TSC Industry, *supra* note 18, at 449 (The holding applied to a decision on voting. The same rationale was used to extend its application to a decision to buy, sell, or hold a security in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

[22] *Id.*

[23] Proposal, *supra* note 1, at 64 (Fn. 209 Citing 17 CFR 240.12b-2, under the Exchange Act, definitions "The term

difficulty sometimes arises. As such, in explaining the application of these two standards, the Court found that materiality "may be characterized as a mixed question of law and fact" and it should only be found as a matter of law if "reasonable minds cannot differ on the question of materiality."[24] This last point is of particular importance given the attempt in 2021 to pass a Sense of Congress that climate-related risks are *de facto* material.[25] BPC summarized in a blog post the arguments of the bill finding that its passage by merely one vote exemplifies that reasonable minds can and do differ on the role of materiality and furthermore that vigorous debate will likely continue on the parameters of disclosure.[26]

The significance of referencing this language is to stress the importance of incorporating materiality into the proposed Rule. While the SEC is not obligated to include a materiality requirement to its disclosure, it is required to give a rational basis for its proposed disclosure. As such, the Commission should consider a more robust explanation of their statutory authority for imposing such a "game changing" disclosure framework. Adding a materiality "qualifier" to the entirety of the proposed Rule would help insulate it from the potential and likely legal challenges that it did not take into consideration whether the rule will promote efficiency, competition, and capital formation and is therefore "arbitrary and capricious."[27] While the Commission has no specific authority to require disclosure because it's material, companies are also under no obligation to disclosure something unless there is a duty to disclose it. As a result, historically materiality has been used to bridge the gap between broad statutory language and specific disclosure requirements. Materiality as a qualifier allows the Commission to address new disclosure issues without over burdening companies with disclosing endless amounts of information that any given investor finds relevant, and investors being overwhelmed by an "avalanche" of data.[28] While there clearly may be times when nonmaterial data is required, without Congressional direction, the Commission should hold itself to a higher standard to justify that requirement. This is especially true when the nature of the disclosure involves a subject matter that is outside the inherent expertise of the Commission and staff. In the past when the Commission has required disclosure outside their expertise it has been at the direction of Congress. SEC staff is more than capable of understanding the issues from a disclosure perspective and the Commission is certainly capable of hiring knowledgeable staff with backgrounds in climate-related issues to assist in disclosure as has been suggested by FSOC and the Administration. However, this Rule appears to

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'material,' when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered."); *see also* 17 CFR 230.405 (Under the Securities Act, definitions "The term material, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered"); *see also* Proposal at 166 (SEC's discussion of applying the materiality standard to Scope 3 emissions).

[24] *See* TSC Industry, *supra* note 18, at 448.

[25] Corporate Governance Improvement and Investor Protection Act of 2021 (H.R. 1187 was a large omnibus bill that had numerous disclosure provisions in over ten titles.) (Jun. 16, 2021); *available at* https://www.congress.gov/bill/117th-congress/house-bill/1187/actions

[26] Timothy M. Doyle, BPC Blog "'Disclosure Act' (H.R. 1187): What it Means for the SEC and Other Stakeholders" (Aug. 25, 2021) ("The bill would have required the SEC to mandate disclosing information on *political expenditures; pay ratios of certain employees; climate risk; tax havens; workforce demographics; workplace harassment; cyber security; board diversity; and forced labor*. Proponents of the legislation argued investors need more ESG (including climate-related risk) information to make sound investment decisions. Opponents argued that under the existing regulations and *materiality* standard the types of information listed are already required to be disclosed if the information is material to a reasonable investor."); *available at* https://bipartisanpolicy.org/blog/disclosure-act/

[27] 15 U.S.C. §78c(f) and §§78w(a)(2) and 80a– 2(c); *see also* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011); see also Am. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166, 177 (D.C. Cir. 2010).

[28] TSC Industry, supra note 18, at 449-450.

go much further than mere disclosure and to the extent that it does, the Commission risks having its statutory authority challenged. We believe that including a materiality qualifier may be the most prudent action to safeguard a successful legal challenge to the final Rule.

While maybe too simplistic of a solution for some, given the complexity of corporate disclosure and how and when materiality is applied, this standard has withstood the test of time. In writing the *TSC* opinion, Justice Marshall seemed to understand the parameters of such a simple rule, but also understood there would be "close calls." Important for the application of this proposed Rule, the SEC specifically referenced Justice Marshall's language acknowledging that "doubts as to the critical nature of information misstated or omitted [would] be commonplace"[29] and the decision should favor disclosure in such cases as the securities laws are meant to "protect investors."[30] However, the Court also explained that the deference to disclosure is based in part on the fact that companies would have "control" of the information in addition to the afforded protection of the securities law.[31] This issue of control is particularly important in the subsequent discussion of Scope 3 emissions, which by definition are outside the control of the company.

Another area of concern was one which the Commission expressed directly to the Supreme Court when deciding the case. The Commission argued that there was a need to strike a balance between adequate disclosure on the one hand and having too low a standard for disclosure on the other.[32] In agreeing with the SEC, the Court found that "some information is of such dubious significance that insistence on its disclosure may accomplish *more harm* than good" (emphasis added).[33] The Court continued that too low a bar would result in an "avalanche of trivial information" that may be harmful to investors.[34] Given the breadth of the proposed Rule, and the involvement of the SEC at the time of the decision, it may be helpful for the Commission to address this concern. Namely, when does the data sought become too overwhelming for the reasonable investor? The Commission indicates through the proposed Rule that institutional investors are asking for more data and have the resources to analyze it, however, at what cost will this large amount of data affect the ability of individual investors to make sound investment decisions? In the end, *all* investors will bear the cost of enhanced disclosure.

It is also worth mentioning that the benefits of a materiality qualifier have been recognized by other organizations. For example, the Commission's Investor Advisory Committee recommended, as referenced in the proposed Rule, that "the Commission take action to ensure investors have the *material*, comparable, consistent information about climate and other ESG matters that they need to make investment and voting decisions" (emphasis added).[35] In addition, the Commission cites that the proposed Rule is modeled on the recommendations from the Task Force on Climate-Related Financial Disclosures ("TCFD").[36] Specifically noteworthy is that the TCFD's disclosure framework is based on the evaluation of "*material* climate-related risks and opportunities" (emphasis added).[37] The Commission also references the International

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[29] *Id; see also* TSC Industry, *supra* note 18, at 448 (Citing Mills v. Electric Auto-Lite Co., 396 U. S. 375, 381 (1970).
[30] *Id.* TSC Industry at 448.
[31] *See id*.
[32] *Id* at 449 Fn. 10 (SEC filed an Amicus Brief with the U.S. Supreme Court).
[33] *Id* at 448-9.
[34] *Id*.
[35] Proposal, *supra* note 1, at 28-29.
[36] Proposal, *supra* note 1, at 37-39; *see also* TCFD' s final report and recommendations, p.14 (2017) (TCFD framework include eleven recommendations including four top level: Governance; Strategy; Risk Management; and Metrics & Targets); *available at* https://www.fsb-tcfd.org/wp-content/uploads/2017/06/FINAL-TCFD-Report-062817.pdf
[37] Proposal, *supra* note 1, at 39 (While TCFD's definition of materiality is broader than that which is used in the U.S. for SEC disclosure purposes, it is of note that there is a materiality analysis required in determining disclosure. One

Sustainability Standards Board ("ISSB") which recently put out for discussion its proposed disclosure standards. The ISSB's proposed standards require companies to "provide all *material* information related to significant sustainability matters that are relevant to investors' decision-making, including thematic and industry-based requirements (emphasis added)."[38] The importance of materiality was reinforced by the Value Reporting Foundation's ("VRF") recent comment to the Commission on the proposed Rule.[39] While TCFD, VRF, and presumably the ISSB, have a broader definition of materiality, they nonetheless have a materiality qualifier as part of their disclosure frameworks.[40]

Commission's Proposed Rule

The SEC's nonfinancial disclosure requirements have historically been principles-based coupled with a materiality qualifier unless otherwise justified. While a rules-based prescriptive approach is not unheard of, the Commission usually provides a reasoned explanation of why the former would be ineffective and why materiality was either altered or removed entirely from the disclosure analysis. While the proposed Rule references materiality almost 200 times, it appears that when looking at each section of the proposed Rule, there is minimal explanation for its absence or alteration in certain cases. Instead, the Commission appears to argue that prescriptive rules are necessary because certain investors demand the data in a format that is "consistent, comparable, and reliable." While an important concern for some investors and an admirable goal overall, the Commission must be prudent and adequately justify requiring data without a materiality qualifier.

Governance

§1501 of the proposed Rule requires companies disclose their board's oversight and management's role and process for evaluating climate-related risk.[41] Given the growing importance of climate-related issues the Commission has likely seen an increased disclosure of this type of information under current regulations. Therefore, while a description of these requirements might lend itself to a traditional prescriptive disclosure, the proposed Rule demands more than just disclosure. The proposed Rule requires granular data about the day-to-day functions of the management and the inner workings of the board. While a subset of investors may well want this information, the Commission has an obligation to explain their authority to require this type of additional information that appears to be outside the traditional scope of disclosure. The Commission should also explain the costs and benefits to all investors and why a materiality qualifier would prevent reasonable investors from obtaining the requisite information to make a sound investment decision. Given the expansive request of non-traditional disclosure material, the Commission should strongly consider including a materiality qualifier for disclosure.

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presumes that the SEC will be applying the U.S. definition in their disclosure framework.).

[38] ISSB FAQ, "How will the ISSB's standards approach materiality"; *available at* https://www.ifrs.org/groups/international-sustainability-standards-board/issb-frequently-asked-questions/

[39] *See* Janine Guillot, CEO Value Reporting Foundation (VRF) Comment on the Enhancement and Standardization of Climate-Related Disclosures for Investors (May 06, 2022) (VRF, formerly SASB, will merge with ISSB in 2022); available at https://www.sec.gov/comments/s7-10-22/s71022-20127884-289400.pdf

[40] The VFR, at least when they referred to themselves as SASB, used a materiality standard based on the SEC's historic definition of materiality. However, the TCFD and presumably the ISSB look at materiality not only from how the human environment affects a company, but also how a company's action affects the human environment. This is typically referred to as "double" materiality.

[41] Proposal, *supra* note 1, §1501.

Strategy

§1502 of the proposed Rule requires disclosing risks and opportunities likely to have a material impact.[42] While the Commission includes a materiality qualifier as to its impact, the Rule then instructs, in a rather detailed way, how a company is to evaluate those identified risks over the short-, medium-, and long-term including an analysis of physical and transition risks.[43] From a practical point of view, it would seem unlikely that a company would go through the expense of a detailed impact analysis and not then disclose its findings regardless if the impacts are found to be material. The Rule in essence proposes creating a data set that by almost any definition could be argued is de facto material. Even if a company determined the risks were not material, the prospects of litigation would ensure almost universal disclosure.

As an alternative, the Commission should consider updating the 2010 Guidance that specifically addresses disclosure of strategy if there is a showing that companies are not providing this data already under the Reg. S-K Items. If a company determines that those risks and opportunities do not have a material impact, then requiring them to do an analysis for the short-, medium-, and long-term may well incur costs that are not justified by the benefits of the proposed requirement. Keeping the proposal as drafted also will likely bring legal challenges claiming the Commission is inserting their own assessment of an issue i.e., the effects of climate impacts above that of a company's board and management.[44] Given that strategic planning is a fundamental role for management and the board, the Commission should make clear that a materiality qualifier applies.

Risk Management

§1503 of the proposed Rule requires that a company describe the processes used to identify, assess, and manage climate-related risks including any "transition" plan.[45] The Commission justifies this additional level of "granular data" by claiming that investors could use it to better understand how a company identifies, evaluates, and addresses climate-related risks. The Rule also requires not only what a company's potential transition might be, but also what should be included in the plan from a short-, medium-, or long-term target or goal perspective.

Unfortunately, the Commission does not explain why existing Reg. S-K Items 105 (Risk Factors) and 303 (MD&A) are inadequate in capturing this data. Moreover, the Commission does not explain what the limits, if any, may be to requiring "granular" data on *all* risks a company must identify, evaluate, and address in their operational and strategic planning. The Rule requires granularly how risks are evaluated, actions the company may or may not take, and even how a company makes a materiality determination, all of which seem to require information beyond the Commission's authority for the proposed Rule. While "forward looking" information must be weighed by the probability of the event happening against its magnitude, that assessment should continue to be done by the company and not the Commission.[46]

Therefore, the Commission should strongly consider reverting back to the existing regulation and more clearly evaluate why their provisions are insufficient to produce decision-useful information on a

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[42] Proposal, *supra* note 1, §1502.
[43] Proposal, *supra* note 1, §1502.
[44] *E.g., See* Delaware Code Ann. Title 8 Corp., Ch 1. Gen. Corp. Law, Sub. IV "Directors and Officers"; *available at* https://delcode.delaware.gov/title8/c001/sc04/index.html
[45] Proposal, *supra* note 1, §1503.
[46] *See* Basic, Inc. v. Levinson, 485 U.S. 224 (1988).

company's climate-related risks. As previously indicated, to help insulate the proposed Rule from unnecessary legal challenges, the Commission should reaffirm the materiality qualifier and update the 2010 guidance to address any realized deficiencies in the data disclosed. Assessing risk may be one of the most important duties of a company's board and management, understanding that they have made an assessment is decision-useful information for investors to know. However, boards and management must be allowed to fulfill their fiduciary duties. It is reasonable to ensure that boards and management do a risk analysis. However, the Commission likely oversteps their authority when the mandate how companies do that analysis and more importantly the conclusion they *should* draw.

GHG Emissions Metrics

§1504 of the proposed Rule requires disclosure of Scope emissions under certain circumstances and specifically the disclosure of Scope 1 & 2 in almost all cases.[47] The Commission argues that this prescriptive requirement is included because investors claim GHG emissions are in fact material and that without mandatory disclosure there would be a lack of "consistency, comparability, and reliability."[48] In addition, the Commission justifies the Rule because "several institutional investors" commented that investors need Scope 1 & 2 emissions data because of its use in net-zero commitments and other investment decisions.[49] The Commission should better explain why the disclosure of scope emissions through the EPA's disclosure framework are insufficient. Further, the Commission should clearly articulate and include in the proposed Rule's text, how materiality applies to Scope 3 emissions.

1. EPA Disclosure of Scope Emissions

The Commission acknowledges that GHG emissions are already disclosed through the EPA's GHG Reporting Program.[50] In fact, 85-90% of U.S. GHG emissions are captured with detailed disclosure from the largest emitters.[51] However, the Commission claims that the data collected via the EPA reporting program is insufficient because it is at the "facility-level" and not at the company level.[52] Further the Commission argues that the disclosed data does not facilitate a "clean disaggregation across different scopes of emissions."[53] As a result, the disclosed data could be difficult for investors to evaluate on a company by company basis, though the Commission acknowledges that each company is matched to each facility.[54] Lastly, the Commission assumes costs will be less because some companies "already have in place certain processes and systems to measure and disclose their emissions."[55]

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[47] Proposal, *supra* note 1, §1504.
[48] Proposal, *supra* note 1, at 162.
[49] Proposal, *supra* note 1, at 157-8.
[50] *See* 40 CFR Part 98 (2022); *see also* EPA, "EPA Fact Sheet: Greenhouse Gases Reporting Program Implementation" (2013); *available at* https://www.epa.gov/sites/default/files/2014-09/documents/ghgrp-overview-factsheet.pdf
[51] *See* CRS report "EPA's Greenhous Gas Reporting Program" (Nov. 16, 2021); available at https://sgp.fas.org/crs/misc/IF11754.pdf
[52] Proposal, *supra* note 1, at 353. (The "reporting requirements of the EPA's program and the resulting data are different and more suited to the purpose of building a national inventory of GHG emissions rather than allowing investors to assess emissions-related risks to individual registrants.").
[53] Proposal, *supra* note 1, at 311.
[54] Proposal, *supra* note 1, at 354. ("While each facility is matched to its parent company, this company may not be the entity registered with the SEC and thus of interest to investors.").
[55] Proposal, *supra* note 1, at 313.

While the Commission claims requiring the additional information, in a different format, and in granular specification, is needed to help investors understand the information and will have limited costs because some companies already collect the data, what the proposed Rule appears to inadvertently do is create more confusion for investors trying to determine a company's emissions profile and will most certainly add to the costs in obtaining the information of those currently collecting the relevant data and a significant cost to those that don't already do so. The Commission argues that having disclosure information in two separate locations increases the likelihood that the public with learn about the information. This of course makes logical sense provided the information is the same in both locations. Here the Commission is creating a different disclosure framework for the same information i.e., emissions data. The Commission should strongly consider using a cross-reference system to the EPA's Reporting Framework. Thereby a company who currently reports under the EPA's disclosure system could continue to do so and reference their disclosure if material.

2. Materiality for Scope 3

Presuming a final rule will not merely incorporate the EPA's collection of GHG emissions as a cross-reference to the disclosure data sought and given the difficulty and costliness of obtaining Scope 3 emissions, the Commission should better clarify the materiality qualifier. The proposed Rule requires that Scope 3 emissions, if material, must be disclosed, excluding "smaller reporting" companies with some exceptions.[56] If, however, a company determines that their Scope 3 emissions are not material, they should explain that determination.[57] While the Commission does provide some accommodations including a phase-in, fourth quarter estimates, and a safe harbor, this particular requirement will be one of the most burdensome and costly for companies.

As for the materiality of Scope 3 disclosure, the Commission appears to go out of its way to restate the previously discussed Commission's and Supreme Court's definition of materiality. We applaud the Commission for including materiality in this section of the proposed Rule. However, we are concerned with the Commission's argument that disclosing only Scope 1 & 2 could be misleading and that a commonly used quantitative threshold of 40% may not be enough. Further, the Commission argues that the capital markets have already begun to assign financial value to the Scope 3 metric. In addition, the Commission also discusses how numerous commenters believe Scope 3 is de facto material including Commissioner Allison Herren Lee who expressed this sentiment in her "concurring" statement when the Rule was released. It seems that the Commission applies a materiality qualifier, but that that qualifier may ultimately have no practical use.

Unfortunately, the framework described in the Commission's commentary to the proposed Rule sets the inevitable conflict between companies and certain investors that will likely result in litigation. From a litigation perspective, it is worth mentioning that the Commission rightly references that doubts in a materiality analysis should be tilted in favor of disclosure. However, the Supreme Court reference had two parts to it. The first dealt with "doubts," while the second part dealt with "control." Specifically, that the doubt should be resolved in favor of disclosure because the law was intended to protect the investor, but also because the companies would presumably have possession or control over the information sought.[58]

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[56] Proposal, *supra* note 1, §1504.
[57] *Id*.
[58] Proposal, *supra* note 1, at 162; *also*, TSC Industry, *supra* note 18, at 448 ("Doubts as to the critical nature of information misstated or omitted will be commonplace. And particularly in view of the prophylactic purpose of the Rule *and the fact that the content of the proxy statement is within management's control*, it is appropriate that these

One of the biggest concerns about requiring Scope 3 emissions is the fact that the data is *not controlled or possessed* by the disclosing company.

While the Commission gives a lot of reasons why a company "might" find Scope 3 emissions to be material, they give scant reasons for how the benefits of requiring its disclosure outweigh what will likely be an extraordinarily costly process. If the intent of the Commission is to indirectly reduce the materiality qualifier to something other than what it is supposed to be, the Commission should clearly explain that rationale. To avoid creating compliance confusion, the Commission should clearly establish a materiality qualifier in the text of the regulation. Overall, the Commission should strongly consider the concept of "control" in deciding how or if data is to be disclosed.

Attestation

§1505 of the proposed Rule requires attestation for a company's Scope 1 & 2 emissions, thereby equating climate emissions with other financial data for disclosure purposes.[59] The Commission has not adequately explained why it is necessary to equate Scope emissions with other financial data. While emissions data is no doubt important for companies to evaluate, especially those that are large emitters, attesting or certifying this data as accurate is far more costly than with financial data because the market for emissions is not at all well-developed. This makes the reliability of emissions data all the more questionable and increases the likelihood that it will confuse more than help investors make sound investment decisions. Further, there is of course already existing statutory and regulatory protections to ensure data released is not false or misleading that may make requiring attestation unnecessary. Therefore, until the attestation market for emissions is more fully developed and reporting less costly, the prudent action would be for SEC staff to monitor company disclosures and public statements for consistent disclosure, and ultimately defer to Congress to address whether attestation of this data is necessary given its inherent uncertainty.

Targets and Goals

§1506 of the proposed Rule requires including existing company targets and goals.[60] While many companies already disclose this information, the Rule goes well beyond mere disclosure. The Rule requires granular detail including their scope, measurements, time horizons, baselines, interim goals, and how the company plans to achieve them.[61] Setting targets and goals is among the basic duties and responsibilities of managing and overseeing the strategic and day-to-day operations of a company. Developing targets and goals may ultimately be management driven or even shareholder driven, but requiring its disclosure should at least have a materiality qualifier. Here, if disclosure is to be required, the Commission needs to better articulate why more than mere disclosure is necessary to accomplish their rationale for the proposed Rule and why a materiality qualifier is not appropriate.

Financial Statement Instructions & Metrics

§§210.14-01 and 02 of the proposed Rule requires a company to provide climate-related impacts and to separately disclose the aggregate amount of expenditures expensed and capitalized costs incurred.[62] The

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doubts be resolved in favor of those the statute is designed to protect" (emphasis added).

[59] Proposal, *supra* note 1, §1505.

[60] *Id.* §1506.

[61] *Id.*

[62] Proposal, *supra* note 1, §210.14-02(b).

impacts, expenditures, and capitalized costs disclosed are in relation to severe weather, transition activities, climate-related risk, and opportunities.[63] The Commission claims that disclosure of this climate-related data through a company's consolidated financial statement is necessary to provide "additional transparency" in the financial statement and "insight" into the "nature" of the disclosing company.[64] However, instead of applying a traditional materiality qualifier, the Commission adopts a one percent threshold test for determining materiality.[65] The Commission's rationale is that it has used a one percent threshold in the past. However, the Commission does not distinguish that the past examples cited involve reliable numbers in calculating the threshold and that the data contemplated in the Rule involves inherently unreliable numbers.[66] The Commission should adequately explain why it chose a one percent threshold to determine disclosure. Similar to materiality qualifier applied to Scope 3 emission, having a threshold set this low almost makes the threshold itself pointless.

Also, while the Commission references the role of the Financial Accounting Standards Board ("FASB") to create the standards used as Generally Accepted Accounting Principles ("GAAP"), it does not adequately explain why it is not working with FASB to create those standards using a materiality qualifier on climate-related disclosures. The Commission acknowledges that existing accounting standards would elicit climate-related disclosures and that FASB is recognized as the "designated independent financial accounting standard setter" for public trades companies.[67] What the Commission does not appear to adequately explain is that while FASB recommends including a materiality analysis in determining whether ESG and climate-related issues are to be disclosed, the proposed Rule does not include a materiality qualifier.[68] FASB argues that when applying issues, such as climate-related risks, to current accounting standards a company should evaluate how those *material* issues effect the financial statement similarly to how they would with other material issues (emphasis added).[69] The Commission should explain why it is proposing this Rule without consultation with FASB and why unlike FASB it does not put a materiality qualifier on the information to be disclosed.

"Consistency, Comparability, and Reliability"

The SEC repeatedly argues throughout the proposal that the Rule is needed to bring "consistent, comparable, and reliable" information to investors. While almost always said in tandem, it is worth discussing these terms separately as they have distinct meanings. First, the inference is a lack of "consistency," which goes to the heart of the issue of disclosing material information. If materiality is truly still a foundational principle of disclosure, then using it will undoubtedly lead to different i.e., inconsistent

[63] *Id.* §210.14-02(b); *see also* §§210.14-02(c); (d); (i); and (j).
[64] Proposal, *supra* note 1, at 126.
[65] Proposal, *supra* note 1, §210.14-02(b).
[66] *See* Proposal, *supra* note 1, at 121, fn. 347.
[67] Proposal, *supra* note 1, at 111 (Citing Fn. 316 "The Commission has broad authority to set accounting standards and principles. See, e.g., 15 U.S.C. 77s; 15 U.S.C. 7218(c); and Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Release No. 33-8221 (Apr. 25, 2003) [68 FR 23333 (May 1, 2003)], at 23334.").
[68] *See* FASB Staff Educational Paper, "Intersection of Environmental, Social, and Governance Matters with Financial Accounting Standards" ("FASB Paper (2021)")(Mar. 19, 2021); *available at* https://www.fasb.org/Page/ShowPdf?path=FASB_Staff_ESG_Educational_Paper_FINAL.pdf&title=FASB+Staff+Educational+Paper-Intersection+of+Environmental%2C; *see also* SEC's "Financial Reporting Manual" (Sept. 27, 2019); *available at* https://www.sec.gov/corpfin/cf-manual; *see also*, section 19(a) of the Securities Act of 1933, 15USC 77s(a), and section 13(b)(1) of the Securities Exchange Act of 1934, 15 USC 78m(b)(1).
[69] FASB Paper (2021), *supra* note 69, at 1.

data being disclosed by various companies and sectors. As such, determining what is and is not material does and will change over time depending on many different factors. Consistency therefore should not be judged by what is disclosed, but rather by the process used to determine how information is disclosed.

The Commission also cites “comparability” which is certainly a laudable goal. The argument here is that climate-related data is confusingly dispersed throughout a company’s public engagement i.e., sustainability reports and other public statements. However, the Commission does not adequately explain that the information disclosed in these non-official filings are typically produced for stakeholders other than shareholders. Further, companies are still liable for material inconsistencies between these different forms of public disclosure and that which is officially filed with the SEC. Arguing that a company should disclose *all* public information in one location, regardless of materiality, would render a company’s 10-K reports unmanageable for even some of the most sophisticated investors. In fact, the courts have repeatedly addressed this overload of information and its negative impact on investors.

Lastly, the Commission cites the goal of obtaining “reliable” information. However, one presumes that if the information is material, a company is required to give some assurance that it is accurate and therefore reliable. In fact, there is a long history of legal precedent protecting investors from unreliable or misleading information and statements. This includes not only what is disclosed, but rather also what is omitted. In the proposed Rule, the Commission doesn’t adequately explain why the current disclosure framework and legal protection against unreliable information is flawed. The whole purpose of having a disclosure framework built on the principle of materiality is so that investors do not necessarily have *all* conceivable information, but rather have the material information necessary to make informed investment decisions.

While ensuring “consistent, comparable, and reliable” information is an important goal, it should not override the goal of providing a balanced disclosure of material information that is decision useful and not that which confuses or overwhelms investors in making sound investment decisions.

Recommendations Summary & Conclusion

We strongly support the notion that *material* climate-related risks must be disclosed by companies. We recommend the Commission use a materiality qualifier throughout the proposed Rule so as to maintain the balance of information that investors need to make informed investment decisions. To the extent that the Commission chooses to remove materiality as a qualifier, we strongly recommend that they provide a robust explanation for doing so.

We strongly support the Commission further developing their cost-benefit analysis of the Rule especially in those sections that go beyond mere disclosure and even more so when disclosure involves subject matter outside the inherent expertise of the SEC.

We support the Commission’s original intent to update the 2010 guidance to help provide material information that is more “consistent, comparable, and reliable” so that investors have decision-useful information in deciding how best to allocate their capital.

We strongly support the idea that the Commission incorporate by reference the disclosure companies are making under the EPA’s GHG Reporting Program. To the extent that companies do not disclose through the program, we suggest a materiality qualifier be included.

We also encourage the Commission to acknowledge the fiduciary duty of boards in overseeing management decisions and management in directing the day-to-day operations of a company. We are concerned that the more the proposed Rule requires information outside of the traditional disclosure framework, the more likely that the final Rule will be successfully challenged in court.

Overall, the Commission should continue to strive to ensure a balance of disclosed information so that investors are adequately informed and disclosing companies have certainty in the process.

In concluding, we appreciate the opportunity to submit comments on this incredibly important topic and look forward to working with your team in any way that might be helpful.

Sincerely,

Timothy M. Doyle

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