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Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
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Release Nos. 33-11042; 34-94478; File No. S7-10-22 – The Enhancement and Standardization of Climate-Related Disclosures for Investors

Dear Madame Secretary

1 Overview

We are submitting this letter in response to the request of the Securities and Exchange Commission (the "**Commission**" or "**SEC**") for comments on the Commission's proposal to require registrants to provide certain climate-related information in their registration statements and annual reports (the "**SEC Proposal**" or the "**Proposed Rules**").

Linklaters LLP is an international law firm headquartered in the UK that regularly assists foreign private issuers in complying with their on-going SEC reporting obligations, and supports them in making climate-related and other sustainability disclosures. We support the Commission's efforts to provide investors with consistent, comparable and reliable information on climate change-related issues.

As the Commission is aware, however, many foreign private issuers are already required to make comprehensive climate-related disclosures in their home jurisdictions. For example, most companies with a listing on the London Stock Exchange must now disclose against the recommendations of the Task Force on Climate-Related Financial Disclosure ("**TCFD Recommendations**"). Furthermore, the UK reporting landscape continues to develop, with the recent publication of proposals to incorporate into law the sustainability disclosure standards being developed by the International Sustainability Standards Board ("**ISSB**"), which will provide an additional layer of climate change reporting with which companies listed on the London Stock Exchange will be required to comply.

For the reasons set out herein, and in order to foster greater harmonization and consistency of disclosure while managing the compliance burden on foreign private issuers already subject to one or more climate-related disclosure regimes, we believe the Commission should allow foreign private issuers subject to the climate-related disclosure requirements of an alternative reporting regime containing requirements deemed by the Commission to be substantially similar to the requirements of the Proposed Rules (once issued in final form), to satisfy their disclosure obligations by complying with that alternative reporting regime. We also propose that the climate-related sustainability disclosure standards being developed by the ISSB be deemed an acceptable alternative reporting regime with which foreign private issuers may comply in lieu of the Proposed Rules. We believe that this approach will significantly reduce the burden on foreign private issuers by sparing them the obligation to (i) map out the detailed and often immaterial ways in which the Proposed Rules and the ISSB's draft disclosure standards may differ, and (ii) make alterations to their disclosure across different markets in order to cater for the specifics of each reporting framework, thereby compromising the consistency of their disclosure across geographies.

2 There is already broad alignment between the Proposal Rules and the ISSB's draft disclosure standards

As the Commission has stated , the SEC Proposal is modeled on the TCFD Recommendations, which "have been widely accepted by issuers, investors, and other market participants,"[1] and have been "widely endorsed by U.S. companies and regulators and standard-setters around the world."[2]. Given this convergence around the TCFD Recommendations as a global standard for climate-related disclosures, many jurisdictions (including Canada, Hong Kong, Japan, New Zealand, Singapore and Switzerland) have mandated (or are in the process of mandating) TCFD aligned reporting under local law.

In the UK, reporting against the TCFD Recommendations is already required for most companies listed on the London Stock Exchange. In addition, the UK announced in 2021 a proposal for new Sustainability Disclosure Requirements which will require companies to report in accordance with the ISSB's disclosure standards once these are published in final form. In March 2022, the ISSB published a draft of its disclosure standards, which build upon the TCFD Recommendations as well as industry-based disclosure requirements from the Sustainability Accounting Standards Board. In due course, we understand the ISSB plans to expand its disclosure standards to cover a range of other sustainability-related topic areas. Against this backdrop, we note the recent communication from the ISSB confirming that the SEC has joined a group of jurisdictional representatives to establish dialogue for enhanced compatibility between the ISSB's draft disclosure standards and ongoing jurisdictional initiatives, including the SEC Proposal.

Among the ways in which the Proposed Rules and the ISSB's draft disclosure standards are broadly aligned, we note that both frameworks encapsulate the TCFD's "4 pillars" framework of governance; strategy; risk management; and metrics and targets, as discussed further below:

- **Governance:** Each of the SEC Proposal, the TCFD Recommendations and the ISSB's draft disclosure standards require disclosure of an organization's governance of climate-related risks. For all, this includes disclosures regarding the processes and frequency by which the company's Board of Directors and/or relevant board committees are informed of climate-related risks; whether climate-related risks are considered as a part of strategy; the Board's oversight of progress against climate-related targets or goals; and whether there are management positions responsible for climate-related risks.

[1] Proposal at 34.

[2] Proposal at 37.

- **Strategy:** Each of the SEC Proposal, the TCFD Recommendations and the ISSB's draft disclosure standards require disclosure of climate-related risks and the impact of those climate-related risks on the organization's business. For all, this includes disclosures relating to certain climate-related risks over the short, medium and long term (qualified in each case by a level of materiality); and disclosures relating to both physical and transition risks.

- **Risk management:** Each of the SEC Proposal, the TCFD Recommendations and the ISSB's draft disclosure standard require disclosure of the processes the organization has in place for identifying, assessing, and managing climate-related risks, including consideration of the relative significance or prioritization of climate-related risks in relation to other risks.

- **Metrics and targets:** Each of the SEC Proposal, the TCFD Recommendations and the ISSB's climate-related disclosure standard require disclosure of certain metrics, targets and goals, including Scope 1 and Scope 2 greenhouse gas emissions. The TCFD "strongly encourages" all organizations to disclose Scope 3 emissions, while the ISSB's draft disclosure standards require Scope 3 disclosure, subject to certain exceptions.

  It is notable that neither the TCFD Recommendations nor the ISSB's draft disclosure standards discuss the concept of independent assurance of greenhouse gas emissions reporting, in contrast to the SEC Proposal which mandates independent assurance of Scope 1 and 2 greenhouse gas emissions. This is likely because both the TCFD Recommendations and the ISSB's draft disclosure standards are what is referred to as "soft law" standards which we would not ordinarily expect to be prescriptive on such matters. However, we anticipate that independent assurance requirements of the type mandated under the SEC Proposal are likely to be included in legislation currently under development in both the EU and UK, which is expected to implement the ISSB draft disclosure standards once they are issued in final form. We also note that a number of companies with a listing on the London Stock Exchange already provide independent attestation of their Scope 1 and 2 greenhouse gas emissions, with some companies even providing independent assurance over their Scope 3 emissions.

We believe that the broad alignment between the Proposed Rules and the ISSB's draft disclosure standards, in combination with the on-going cooperation between the SEC and the ISSB, supports our assertion that when issued in their final form, the ISSB's disclosure standards should be considered a comparable alternative reporting regime with which foreign private issuers may comply in lieu of the Proposed Rules.

3 There are some areas of divergence between the SEC Proposal and the TCFD Recommendations and ISSB draft disclosure standards

There are a number of requirements included in the SEC Proposal which do diverge from the requirements of the TCFD Recommendations and ISSB's draft disclosure standards. In certain circumstances, these divergences could lead to relatively minor but inconsistent reporting practices across geographies which will not promote the disclosure of consistent and comparable information. For example:

- the ISSB's draft disclosure standards require consideration and disclosure of climate-related opportunities in addition to risks, whereas the Proposed Rules require this only "if applicable";

- the Proposed Rules require registrants to describe scenario analysis if it is used, while the ISSB's draft disclosure standards require companies to use scenario analysis unless they are unable to do so;
- the Proposed Rules and the ISSB's draft disclosure standards include different requirements for assessing the "in-scope" and "out-of-scope" entities within the registrant's corporate group that must be captured by its emissions reporting; and
- the Proposed Rules require that the disclosure of physical risks includes the location of such risk at a ZIP code level.

For the purposes of this letter, we have also identified two of the more material areas of divergence that we believe are of particular concern to foreign private issuers who are already subject to climate-related disclosure standards in their home jurisdictions.

3.1 Identification of board members with climate change expertise

Because climate-related risks and the ways in which they can impact a business are complex, a wide range of skills, expertise and perspectives can be required to properly address them. The requirement to identify whether any board member has "expertise in climate-related risks" poses the risk that the remainder of a board will defer to the judgement of the designated "climate change expert" rather than engaging as a governing body as a whole with climate change matters. No single board member will necessarily be well-placed to analyze the impact of a particular climate-related risk on all aspects of a registrant's business, regardless of their past or current experience and expertise. The board as a whole should be educated on climate-related risks and opportunities or should be able to access relevant expertise.

In addition, by identifying an "expert" on the Board, a registrant may be unintentionally suggesting it is well-served in the area of climate change risk when in practice it will likely require a range of expert inputs to effectively oversee the identification and management of such risks.

Finally, the identification of a Board member with "expertise in climate-related risks" raises the possibility that such Board member will be subject to enhanced scrutiny and exposure to liability where climate-related disclosures in an SEC filing prove to be inaccurate.

Proposed alternative

The Commission should consider removing the requirement to disclose whether any member of the board of directors has "expertise in climate-related risks". As drafted, the Proposed Rules around governance already require registrants to disclose information about the governance body with oversight of climate-related risks and opportunities, including:

- the identity of the body responsible for oversight of climate-related risks and opportunities;
- how that responsibility for oversight is reflected in the entity's terms of reference, board mandates and other related policies; and
- how the body ensures that the appropriate skills and competencies are available at board level in relation to climate change matters.

This approach broadly aligns with the draft ISSB climate-related disclosure standard. Rather than focus on one or a small number of individuals, we think it will encourage registrants to maintain or ensure access to relevant climate change expertise across its governing bodies.

Should the Commission decide to retain the requirement to identify whether any board member has "expertise in climate-related risks", we would suggest the establishment of a safe harbor from the imposition of enhanced liability on such board members, similar to the safe harbor available to audit committee financial experts within the meaning of, and as mandated by, the Sarbanes-Oxley Act of 2002.

3.2 Note disclosure in the financial statements at a 1% materiality threshold

The SEC Proposal would compel a registrant to disclose the financial impacts of climate-related events and transition activities on the line items of its consolidated financial statements where the sum of the absolute values of all the impacts is more than 1% of the total line item for the relevant financial year. This is a significantly lower prescriptive materiality threshold than registrants would typically use for other disclosures (both within financial statements and elsewhere within SEC filings). It would require them to identify and quantify events which individually fall well below the 1% threshold in an effort to calculate their combined impact.

We believe this requirement risks over-stating the importance of matters that may be of little or no consequence for a business. The establishment of a fixed percentage as a proxy for materiality appears to differ from the approach articulated in SEC Accounting Bulletin 99 ("**SAB 99**"). This notes that "*The staff has no objection to…a "rule of thumb" as an initial step in assessing materiality. But…it cannot appropriately be used as a substitute for a full analysis of all relevant considerations. Materiality concerns the significance of an item to users of a registrant's financial statements. A matter is "material" if there is a substantial likelihood that a reasonable person would consider it important.*"

The Proposed Rules would likely have the effect of forcing registrants to significantly expand the scope of their internal controls to identify events that would fall below standard materiality thresholds for the preparation of financial statements. It would also likely require independent auditors to adjust their procedures to test the accuracy of these disclosures when issuing their audit opinion, which would impose an additional layer of scrutiny on what may be essentially immaterial matters for a registrant.

We are also concerned that climate-related data of the type that the Proposed Rules contemplate for inclusion in a note to a registrant's audited financial statements is often subject to significant uncertainties and assumptions that may be lost when subject to detailed numerical quantification without further context. The identification of matters that are "climate related" or "transition activities" is subjective. Specific activities may be undertaken by companies for a range of complex reasons, of which climate change or the need to transition is only one.

We believe there is a significant risk that the Proposed Rules in this regard will increase costs and burdens on registrants without producing consistent, comparable and reliable – and therefore decision-useful – information on climate-related matters. We also believe that it is likely to be very challenging for many registrants to implement the necessary internal control framework to collect relevant data in time for first reporting under the Proposed Rules.

Proposed alternative

We suggest the Commission amend the requirements of Item 303 of Regulation S-K: “Management’s Discussion and Analysis of Financial Condition and Results of Operations” and Item 5 of Form 20-F: “Operating and Financial Review and Prospects” to require registrants to provide a discussion of the impact of climate related matters on the registrant’s financial position. By using standard methods for making materiality determinations registrants can be required to quantify those matters that have had a material impact on their business as a whole. Registrants would also be able to provide as much narrative detail as is necessary to explain the complexities of particular events or matters, in order to position them within the right context to be best understood by investors.

4 Proposed exemption for foreign private issuers reporting against ISSB sustainability disclosure standards

Based on the broad alignment of the Proposed Rules with the ISSB’s draft disclosure standards, but in light of the inevitable inconsistencies that will exist between these two regimes (both at the outset and as the two regimes develop over time), we urge the Commission to consider revising the Proposed Rules to provide that foreign private issuers subject to the climate-related disclosure requirements of an alternative reporting regime with requirements deemed by the Commission to be substantially similar to the requirements of the Proposed Rules (such as the ISSB’s draft disclosure standards) may satisfy their disclosure obligations by complying with that alternative reporting regime.

In response to certain of the SEC’s specific requests for comment, we would recommend as follows:

- *Comment Request 184*: If we adopt an alternative reporting provision, should we specify certain minimum standards that the alternative reporting regime must meet in order to be recognized and, if so, what standards?

  Instead of requiring that an alternative reporting regime maintain certain prescribed minimum standards, the Commission could articulate the minimum standards with which a foreign private issuer must comply in order to report in compliance with an alternative reporting regime. For example, were the ISSB standards to be implemented in such a way as not to require independent attestation of Scope 1 and Scope 2 greenhouse gas emissions, the Commission could make it a condition of complying with ISSB standards in lieu of the SEC Proposal that the registrant provide an independent attestation of its Scope 1 and Scope 2 greenhouse gas emissions. In this way, the SEC can ensure that the most material elements of the Proposed Rules will be satisfied by all registrants, while not imposing on foreign private issuers subject to multiple regulatory regimes the burden of mapping out all of the nuanced and less material differences that might exist between the Proposed Rules and such alternative reporting regime.

- *Comment Request 187*: If we adopt an alternative reporting provision, should we require a registrant using that system to: (i) State in the filing that it is relying on this alternative reporting provision; (ii) Identify the alternative reporting regime for which the climate-related disclosure was prepared; and (iii) Identify the exhibit number of the filing where the alternative disclosure can be found;

We believe that a registrant publishing disclosure in compliance with an alternative reporting regime could be required to state in its filing that it is relying on this alternative reporting regime, identify the relevant alternative reporting regime for which its climate-related disclosure was prepared and identify the exhibit number of the filing where the alternative disclosure can be found

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We would be pleased to respond to any enquiries regarding this letter or our views on the Proposal generally. Please contact Mike Bienenfeld (*email* [redacted]) or Rachel Barrett (*email* [redacted]), if you would like to discuss any of these matters. We thank the Commission in advance for considering our and others' comments on the Proposed Rules.

Yours sincerely,

/s/ Michael Z. Bienenfeld
/s/ Rachel Barrett

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