



Grant & Eisenhofer P.A.

June 17, 2022

Secretary Vanessa A. Countryman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

RE: File No. S7-10-22, the Enhancement and Standardization of Climate-Related Disclosures for Investors

Dear Ms. Countryman:

We thank you for the opportunity to comment on the Commission’s recent proposal for the Enhancement and Standardization of Climate-Related Disclosures for Investors (the “Proposed Rule”). We represent the Grant & Eisenhofer ESG Institute (“ESG Institute”), a non-profit organization formed in 2017 with the mission of channeling its members’ legal and litigation skills to further investors’ ESG goals. We write to express our support for the Proposed Rule, as further detailed below.

I. Statement About the ESG Institute

The ESG Institute is a non-profit organization with the mission of using its members’ varied legal and litigation expertise and skills to further investors’ ESG goals. It was formed in response to the increasing investor demand for thought leadership and tangible action with regard to ESG goals.

The ESG Institute operates in a variety of fields including sustainability and fiduciary duty; climate change and securities law; corporate legal responsibility for companies acting in developing countries; and legal challenges to limit compensation. It is committed to identifying opportunities where its superior litigators can employ their skills and tools to further goals that promote sustainable investing.

The ESG Institute is affiliated with the renowned law firm, Grant & Eisenhofer, PA (“Grant & Eisenhofer”). Grant & Eisenhofer has a storied history and proven track record of arduously representing investors in large impact litigation against corporations and their management and directors engaged in fraudulent and other misconduct. The ESG Institute is a natural outgrowth of Grant & Eisenhofer’s dedication to investor interests. Indeed, even before the term “ESG” had made its way into the common parlance of sophisticated – and retail – investors, Grant & Eisenhofer was litigating against companies that had committed an array of environmental and social wrongdoings. For instance, in 2016, G&E represented a group of plaintiffs against Volkswagen, Audi, Porsche, and their U.S. subsidiaries for violations of a state air quality control act and deceptive trade practice act after the car companies installed “defeat

devices” designed to deceive controlled emissions testing which affected up to 600,000 diesel vehicles. In 2018, G&E obtained a \$90 million settlement, marking one of the largest derivative settlements ever, on behalf of a class of investors in the landmark #metoo action against Fox News founder and owner Rupert Murdoch in connection with the pervasive sexual misconduct of Roger Ailes and Bill O’Reilly. Also in 2018, G&E filed a shareholder class action complaint against BHP, the world’s largest diversified and mineral resources company, after one of its dams collapsed killing 19 people and causing irreparable harm to the environment, despite BHP’s countless assurances that it had mining safety practices and risk management in place. Although Grant & Eisenhofer’s work often overlaps in the ESG space, the firm believed that creating a more focused organization such as the ESG Institute would enable its members to hone its mission of achieving sustainable investing.

In 2021, the ESG Institute worked with the United Nations Principles for Responsible Investment (“PRI”) to develop standardized legal ESG clauses. The PRI is widely recognized as having led the movement on ESG investing, and is recognized internationally as a thought leader on related topics. The standardized legal ESG clauses that the ESG Institute developed are suggested clauses that asset managers might include in their investment management agreements (“IMAs”). They are featured in the PRI’s Investment Manager Appointment Guide. The intent underlying them is to empower asset owners in their selection, appointment and monitoring of investment managers, and that they might be considered when negotiating IMAs. Grant & Eisenhofer’s extensive experience representing large, sophisticated institutional investors who span the globe made the ESG Institute uniquely suited to assist in the development of these clauses. The ultimate goal of the standardized clauses is to enable asset owners to raise the bar on responsible investment.

Most recently, in 2022, the ESG Institute was enlisted by the International Corporate Governance Network (“ICGN”) and the Global Investors for Sustainability and Development Alliance (“GISD”) to prepare draft legal ESG clauses for use by asset owners and managers. Founded in 1995, ICGN was assembled by influential investors to advance good corporate governance and investor stewardship principles. The GISD was assembled by the United Nations (“UN”) in April 2019 for the primary purpose of achieving the UN’s 17 sustainable development goals (“SDGs”) by expanding long-term investments for sustainable development. The ICGN released the first Model Mandate (“Mandate”) in 2012. In light of the rapid developments and evolution in the sustainable investing arena, the ICGN and GISD thought it necessary to release a new, up-to-date version of the Mandate. G&E worked together with ICGN and GISD to draft the legal clauses featured in the new and improved Mandate which will be formally launched on June 22, 2022. The Mandate provides robust guidance on how to effectively incorporate the UN’s SDGs into investor stewardship activities by providing asset owners sample contract language and terms to consider when determining mandates with asset managers.

II. General Statement of Support for the Proposed Rule

The ESG Institute strongly supports the SEC’s efforts to develop new rules that will enhance transparency and assist investors in their quest to choose sustainable investments. The ESG Institute agrees with the SEC that investor demand for ESG-oriented investors has grown exponentially, and alongside that growth comes increasing demand for more thorough disclosures

regarding ESG factors. The investing community is increasingly recognizing the long-term benefits to investors from investing in corporations that use their resources sustainably.

The record increasing inflows into ESG funds the past several years is a direct reflection of the ever-growing investor interest in ESG-conscious companies. For more than a decade, shareholder activists have submitted proposals to energy companies such as BP, Exxon Mobil, and Occidental Petroleum, to name a few, demanding that they report climate-related risks in their public filings. A Harvard Business Review study revealed that this shareholder activism on S&P 500 companies actually does induce companies to willingly disclose climate-related risks as evidenced by the fact that the extent of such climate-related disclosures increased by roughly 4.6% for each shareholder proposal submitted. Further, that the Global Sustainable Investment Association recently estimated that one in three dollars managed globally is an ESG-related asset is an apt reflection of this grassroots shareholder activism. What is more, Bloomberg estimates that global ESG assets will reach \$41 trillion by the end of 2022 and \$53 trillion by 2025. Investor interest in ESG funds is only continuing to grow and the SEC's Proposed Rule will help satisfy shareholder demands for transparent reporting practices.

The ESG Institute also recognizes that the "E" in ESG – environmental concerns, and more recently, concerns growing out of climate change – has often served as the immediate impetus that alerts investors to the benefits of sustainable investment. Therefore, the ESG Institute understands, and supports, the SEC's efforts to focus its initial round of rules on new disclosures that are targeted at specific risks associated with climate change. However, the ESG Institute – and increasingly large numbers of sophisticated investors – are committed to goals that fall within the "S" and "G" realms within the ESG umbrella. Specifically, there is investor appetite to learn more about issuers' efforts to ensuring diversity within the workplace; to fostering a collegial working environment that is free from sexual and other types of harassment; to maintaining supply chains are free from forced and child labor; to structuring compensation schemes that are competitive yet fair, and that encourage success among all the ranks; to providing a safe and healthy working environment; and to supporting its employees in such a manner so that they are able to contribute meaningful impact to society through their full, healthy, and productive lives. Thus, while the ESG Institute applauds the SEC for taking this first, very important step in requiring new climate-related disclosures, it also has hope that this will serve as a launching pad for a broader array of disclosures.

III. Summary of ESG Institute’s Understanding of New Disclosures

The Proposed Rule proposes climate-related disclosures that generally fall into two categories: Article 14 of Regulation S-X Climate Related Disclosures (S. 210.14-01 and S210.14-02) (“Regulation S-X Disclosures”) and Subpart 220.1500 Climate Related Disclosures (S. 229.1500-1507) (“Regulation S-K Disclosures”). The ESG Institute’s understanding of these two categories is summarized below:

Regulation S-X Climate Related Disclosures

The new Regulation S-X climate-related disclosures will require a registrant to disclose as follows: (i) financial impacts of severe weather events and other natural conditions; (ii) financial impacts related to activities employed to reduce greenhouse gas (“GHG”) emissions or otherwise mitigate risks from GHG emissions; (iii) expenditures to mitigate risks of severe weather events and other natural conditions; (iv) expenditures related to transition activities; (v) financial estimates and assumptions impacted by transition activities; (vi) impact of identified climate-related risks; and (vii) impact of climate-related opportunities.

Regulation S-K Climate Related Disclosures

The new Regulation S-K climate related disclosures will require a registrant to disclose as follows: (i) the board of directors’ oversight of climate-related risks; (ii) management’s role in assessing and managing climate-related risks; (iii) any climate-related risks reasonably likely to have a material impact on the registrant . . . which may manifest over the short, medium and long term; (iv) the actual and potential impacts of any climate-related risks including on the registrant’s business operations, products or services, suppliers and others in its value chain, activities to mitigate risks, expenditures for research and development; (v) a narrative discussion of whether and how any climate-related risks identified are reasonably likely to affect the registrant’s consolidated financial statements; (vi) information about a registrant’s internal carbon price, if one is maintained; (vii) resilience of registrant’s business strategy in light of potential future changes in climate-related risks; (viii) processes the registrant has for identifying, assessing, and managing climate-related risks; and (ix) if the registrant has adopted a transition plan as part of its climate-related risk management strategy, provide details about the plan.

Regulation S-K also requires the registrant to provide specific information about its Scope 1, Scope 2 and Scope 3 GHG emissions. Scope 1 GHG emissions are direct emissions from operations that are owned and controlled by a registrant. Scope 2 GHG emissions are indirect emissions from the generation of purchased or acquired electricity, steam, heat or cooling consumed by operations of the registrant. And Scope 3 GHG emissions are indirect GHG emissions occurring in the upstream or downstream activities of a registrant’s value chain. The Proposed Rule requires registrants to quantify its Scope 1, Scope 2 and Scope 3 GHG emissions according to a methodology of the registrant’s choice, which must also be described in detail.

IV. Support of Specific Provisions

We now address certain aspects of the Proposed Rule that are particularly germane to the ESG Institute and its clients. Please note that failure to address a feature of the Proposed Rule does not indicate assent or disagreement with that feature.

Specifically, the ESG Institute wishes to express its support for the following aspects of the Proposed Rule: (1) civil liability under the Securities Act and the Exchange Act for failing to make accurate disclosures in compliance with the Proposed Rule; and (2) the requirement that Smaller Reporting Companies (“SRC”) as defined in Item 10(f)(1) of Regulation S-K as a company that: (i) has public float of less than \$250 million; or (ii) has less than \$100 million in annual revenues and: (a) no public float; or (b) public float of less than \$700 million, also be subject to the new disclosure requirements.

A. Civil Liability Under Section 18 of the Exchange Act and Section 11 of the Securities Act

The Proposed Rule proposes to treat the proposed climate-related disclosures “as filed.” The effect of this is that registrants could be subject to potential liability under Section 18 of the Exchange Act and also Section 11 of the Securities Act, to the extent the climate-related disclosures are included or incorporated by reference in a Securities Act registration statement.

The SEC has asked for comment on whether this provision should stand. The ESG Institute believes that registrants should be subject to liability for both their Regulation S-X and their Regulation S-K disclosures.

The ESG Institute has previously argued that holding companies liable for ESG transgressions under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350, would enhance corporate compliance with foreign and domestic law, and with their own ESG-related goals. *See* Brief for the Grant & Eisenhofer ESG Institute as Amicus Curiae Supporting Respondents, *Nestlé USA, Inc. v. Doe I*, 593 U.S. ___ (2021).. Specifically, in its brief, the ESG Institute urged that half-hearted corporate promises to achieve environmental or social goals are referred to as “greenwashing” and have little practical effect. The possibility of corporate liability under the ATS, however, would enhance the possibility that corporations will act responsibly.

The same is true in the regime of the corporate securities laws. Given the rise of investor interest in funding and trusting companies that adhere to ESG-related goals, there has been intense pressure on companies to portray themselves in a positive ESG-light. This pressure can lead even the most well-intentioned actors to provide incomplete or misleading data and information that has not been subject to the serious scrutiny required to guarantee its accuracy. Indeed, one of the underlying rationales driving the SEC’s derivation of the Proposed Rule is investor demand for reliable climate-related information. The possibility of liability for providing inaccurate or fraudulent information would deter companies that might be tempted to engage in greenwashing or whitewashing.

As the SEC points out in its commentary, traditional materiality standards apply, and registrants could invoke the PSLRA's safe harbor exemptions to protect themselves from liability for forward looking statements.

B. Registrants Subject to the Climate Related Disclosure Rules

The Proposed Rule applies to SRCs which are defined as those with total assets of under \$5 million and which are engaged in an offering of securities that does not exceed \$5 million. To lessen the burden on SRCs, the Proposed Rule would provide a lengthy transition period for compliance which would begin in fiscal year 2025, and would not require disclosure of Scope 3 emissions, which require quantification and disclosure of various metrics associated with upstream and downstream GHG in a business's enterprise.

The ESG Institute supports a requirement that SRCs disclose largely the same information as larger registrants concerning their impact on climate change, including Scope 1 and Scope 2 GHG, as well as associated risks. The ESG Institute believes that more stringent climate-related disclosure requirements at all levels are crucial for achieving investor transparency and that such will help investors not only assess a company's climate and environmental risks, but also its overall health. More often than not, ESG considerations are interconnected. Corporate governance deficiencies may impact environmental risks and vice versa. For instance, climate-specific disclosures regarding a company's supply chain inefficiencies resulting in excessive energy usage may indicate that some sort of fraudulent activity is permeating the board or management. Thus, regardless of a company's size or status, the ESG Institute believes that SRCs should be held to the same rigorous standards as larger reporting companies when it comes to climate-related disclosures, albeit, on a proportional scale. For these reasons, the ESG Institute is a staunch advocate of all registrants publicly disclosing climate-related risks as such information is telling of a company's overall performance and wellbeing and thus material to investors.

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We thank you again for the opportunity to express our support for the Proposed Rule, and for your consideration.

Sincerely,

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