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RE: [Release Nos.33-11042; 34-94478: **File No. S7-10-22**]

June 17, 2022

The Enhancement and Standardization of Climate-Related Disclosures for Investors

On behalf of millions of senior citizens represented by the 60 Plus Association, also known as the American Association of senior citizens, we wish to comment on the SEC's proposed rule above.

A significant proportion of senior citizens consider themselves "mainstream investors". We are an exploding proportion of the demographic associated with securities managed by retirement systems, life insurance companies, and ourselves. All seniors, including the millions reliant on social security, and those who do not own security interests are impacted by the policy actions of the Securities and Exchange Commission which have effects throughout the multi-trillion-dollar economy.

The **60 Plus Association** joined and wishes to highlight its support of two respective sets of foundational comments provided by the **Competitive Enterprise Institute (CEI)**. We appreciate the **CEI** establishing the magnitude and significance of how far the SEC has reached beyond its statutory mission regarding climate change disclosures and related risks. We agree with the Institute and others in the Congress and within

Governors' and State Treasurers' offices who have expressed the same view of the SEC's proposed excesses.

Given the uncertainty associated with changing climate risks, it is difficult to perceive how these proposals will work better at assessing climate change than existing market place forces and practices. They will increase "unnecessary burdens" upon both U.S. and Foreign companies as well as small businesses in the value chain of registrants who will receive mandates to report and keep records for "scope three" emissions.

Will technology innovations and breakthroughs be encouraged or discouraged as a result of enforcing these proposals? Combating climate change and maintaining the integrity and viability of retirement systems depends on innovation. Seniors should be able to trust the managements of the retirement systems they rely on. The inherent vision of Environmental, Social, and Governance these SEC proposals contain regarding climate risk appear to rely more on ideology than either science or "materiality" as conceived by these proposals.

The SEC should be more mindful of the fiduciary responsibilities of retirement system managers who rely on common sense and accepted Corporate Governance practices. Seniors have more trust in those who represent the Mainstream investors in retirement systems than the handful of Wall Street titans who are orchestrating the ESG movement. We further believe strongly the SEC does have a role in protecting 'main stream' investors such as ourselves.

Background notes:

- I. On February 3, 2020** the 60 Plus Association commented on a proposed rule, *Amendments to Exemptions from Proxy Rules for Proxy Voting Advice* [File Number S7-22-19].

Two points were made that are relevant to the SEC's consideration in imposing a Climate Risk regime on registrant companies and others who supply them.

The first was the need to consider senior citizens as a key aspect to its mission to protect mainstream investors by proxy rules for proxy voting advice. The proposal noted a singular letter the SEC received previously from Jim Martin, the Chairman of 60 Plus (Oct.5, 2018) which highlighted the growing importance of senior citizens as a group of mainstream investors whose retirement investments made with institutional investors and otherwise are a "material aspect of many shareholder proposals if "materially complete and accurate information" is to be a basis for a recommendation.

The value of information disclosed is perceived and evaluated differently as a result of generational differences. Disclosure requirements, including those regarding climate risks, should be mindful of these distinctions. In an environment of rapid technological innovation and divided ideological views, issues of materiality and fiduciary responsibility demand more attention and certainty than appears to be in the considerations supporting the SEC’s climate risk proposals.

The **second** point related to the applicability of the Paperwork Reduction Act (PRA) (44 USC3501et seq.)

The Commission identified the collection of information previously assigned the OMB Control number 3235-0059 as requiring review of a justification for changes.

60 Plus asserted its view that the whole of the proposed rulemaking was a “collection of information” within the scope of the PRA’s procedural and public protections.

The importance of this determination is due to the PRA’s key enforcement mechanism in its statutory scheme contained in **Section 3512 Public Protection**. That section reads:

- A. Notwithstanding any other provision of law, no person shall be subject to this chapter if the collection of information does not display a valid control number assigned by the Director (of OMB) in accordance with this chapter, or ii. The agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.
- B. The protection provided by this section may be raised in the form of a complete defense, bar or otherwise at any time during the agency administrative process or judicial action applicable thereto.

60 plus further observed: Given that collections of information are valid for only three years and must be reviewed and approved again using the same criteria, determining the applicability of the PRA is central to how the Commission will accomplish its responsibility to periodically review and justify disclosure rules.

To date, and some 2 and a quarter years later, (to 60 Plus’s best knowledge) the proxy rule proposals have not been finalized in a final rulemaking. Neither has approval for a validly assigned OMB control number been assigned to the respective collection of information. [OMB Control number 3235-0059]

From the perspective of 60 Plus, the Proxy Rules for Proxy Voting Advice are in a state of abeyance and confusion, despite Chairman Gensler’s public statement of June 1, 2021 directing the SEC staff to consider whether to recommend further regulatory action regarding proxy voting advice. How this inaction relates to the SEC’s consideration of its breathtaking proposals for disclosing climate change risks is unknown to us. We believe “mainstream” investors, particularly those who rely on well managed and transparent retirement systems, free of conflict of interests among proxy advisors, deserve better.

II. **On June 14, 2021,** The 60 Plus Association commented on Commissioner Lee’s request for comments on how to best regulate climate change disclosures generally.

We repeated the two key points we had made in the Proxy proposed rules. We believe these two points are even more relevant for the SEC’s broader proposals for climate change disclosures, reporting, and recordkeeping to regulate climate change risk assessments.

First, the climate change disclosures on risk and the information provided impact seniors differently than younger persons, and disproportionately to seniors with a shorter life span and different quality of life needs about changing material risks, uncertainties, impacts and opportunities through time. These differences are accentuated with the pressures of inflation on gas, food, and other prices.

The concepts of materiality and fiduciary responsibilities play differently for investors who are seniors. What roles the SEC is authorized by Congress to undertake in mandating voluntary or required ESG disclosures should explicitly recognize the different generational stakes seniors have from younger people in addressing the information needs of seniors and protecting the integrity of the marketplace for securities.

The value of information disclosed and made available is perceived and evaluated differently as a result of generational differences. All the SEC disclosure mandates, including those related to ESG objectives should be keenly mindful of the distinctions in the rapidly changing technological environment within we now find ourselves.

In addition, the SEC should be mindful of the global environment in which these disclosure proposals will operate if enacted. Can we reasonably expect Chinese companies who operate in our security markets to be honest and play by the rules? Or

will they seek advantage? How do seniors benefit from the inability of the SEC to ensure a level playing field?

Consider as well that these proposals will likely impose over a billion dollars or more of paperwork and other regulatory compliance costs annually. These hidden taxes, if you will, are likely to have an uneven and unfair burden on American based companies and American consumers who will have these expenses passed on to them. Again, in an inflationary period where seniors are impacted disproportionately, this consideration merits closer scrutiny than it has received in these proposals.

Second, the Paperwork Reduction Act (PRA) (44 USC3501 *et seq.*) is applicable to nearly all SEC disclosure, reporting, recordkeeping, or labelling mandates, required or voluntary.

Since 1942 the SEC has been within the scope of the Federal Reports Act, and its successor statutes the 1980 Paperwork Reduction Act, and the 1995 Paperwork Reduction Act. ⁱ

The statutory scheme establishes a government-wide structure, processes to enable the management of information resources management which engage the public as an information resource, and procedural protections for the public embodied in the Public Protection section 44 USC 35 which begins “*Notwithstanding any provision of law...*” and inhibits collections of information which are illegally promulgated under the terms of the Act and do not display a validly assigned control number.

Independent agencies such as the SEC are to follow the law, justify their collections of information specifically contained in rules or outside notice and comment rulemaking, (such as guidance documents which effectively sponsor voluntary or involuntary collections of information), and subject their justification for public comment and Executive Office approval. Should they disagree with a disapproval they may vote to override and report to Congress? This is the mechanism that Congress established first in 1980 to ensure the independent integrity of independent regulatory bodies.

The PRA requires 3 year “Sunset” reviews of federally sponsored collections of information. When Congress last considered this comprehensive Sunset requirement in 1995 the legislation explicitly included disclosure requirements and federally sponsored collections of information for third party use. The law passed without a single dissent on roll call votes in both bodies.

Conclusion:

60 Plus' comments on The March 21, 2022 SEC proposal to enhance and standardize climate related disclosures represents the fourth occasion in the past three years in which we have communicated to SEC officials concerning the importance of SEC proposed policies to senior citizens who are "mainstream" investors with vital stakes in the securities markets. We have summarized the comments on two of those occasions in the background notes to these comments.

We remain concerned for the reasons cited that the role of senior citizens are not being adequately considered. On behalf of millions of senior citizens, we view that concern more of a "realpolitik" reality than a special interest group pleading. We conclude that the SEC is not acting in our best interest. Mainstream investors are as important, if not more so, than a handful of Wall street elites with a lot of money who together with unelected professional bureaucrats think they know better about climate risks and their relation to retirement systems. Trillions of dollars are involved in retirement systems alone.

We also remain convinced the **SEC is not following the law** in regards to their responsibilities under the Paperwork Reduction Act. We note that 32 United States Senators wrote Chair Gary Gensler on June 10, 2022 requesting he rescind the rule given the negative impact the proposal would have on the agricultural industry.

Among other reasons the Senators cited their concern that the SEC had not done its proper due diligence in meeting their responsibilities under provisions of the PRA and the Regulatory Flexibility Act. 44 USC Section 3506 (c) (1) (A) (iv) of the PRA is specifically cited.

The provisions of Section 3506 are part of the PRA's statutory scheme which requires the Agency to justify the "necessity", rather than the "reasonableness" in accord with the standard of review of Section 3508, *Determination of necessity for information* which is intended to determine whether the collection of information by the agency is necessary for the proper performance of the functions of the agency.

This provision tests the agency's justification that their proposal is within their statutory authority. If not, it is not deemed needed for the proper performance of the functions of the agency. An established principle during the 42 year history of the PRA is that agencies shall not sponsor the collection of information as those terms are defined by the PRA unless they are authorized by statute to do so. Final review of that question, after public comment has been solicited, rests in the Executive office of the President.

Again, should the SEC disagree with an Executive disapproval, the Commission may vote to override the decision and report to Congress.

In addition, the SEC's over reach of its authority could trigger the Congress to invoke the Congressional Review Act to obtain a Congressional vote of disapproval. Even in the face of a Presidential veto such votes can support appropriate restrictions on appropriations to the SEC.

The proposed rules cites 10 changes to collections of information contained in the proposed rule. Ten forms and their 10 associated control numbers are listed. Eight of the 10 forms have not as yet been approved or assigned valid control numbers according to public records. Form 20-F and Form 6-K display Control numbers which expire in November of 2024 and November of 2023 respectively. Since these approved assignments occurred prior to the proposed rules publication, it is unknown whether the information changes display validly assigned control numbers.

The SEC is not presenting a coherent, understandable, or workable set of collections of information that respondents to these disclosure, reporting, or recordkeeping requirements will be able to reliably fulfill. They lack practical utility. The Public, consistent with the intent of the Paperwork Reduction Act's Public Section should be protected from the excesses this rulemaking is proposing. Present practices and information in the private market place are a better way to encourage ESG goals.

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ⁱ Robert Coakley, A Board of Director of the 60 plus Association contributed and is a signer of these comments. He was involved in the legislative deliberations and enactment of the 1980, 1986, and 1995 Paperwork Reduction Acts during the Carter, Reagan, and Clinton Administrations. He is familiar with the Act's statutory scheme and provisions as well as the corresponding regulation at 5CFR Part 1320.

Thee 60 Plus Association is a 30-year-old nonpartisan organization working for death tax repeal, saving Social Security and Medicare, affordable prescription drugs, lowering energy costs and other issues featuring a less government, less taxes approach as well as a strict adherence to the Constitution. 60 Plus calls on support from over 5 million activists.