Stanford Law School

Joseph A. Grundfest
W. A. Franke Professor of Law and Business, Emeritus
Senior Faculty, Rock Center for Corporate Governance

Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Tel 650 723.0458
grundfest@stanford.edu

October 9, 2023

Vanessa A. Countryman
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington D.C. 20549-1090
(duplicate via email to:
rule-comments@sec.gov)

Re: File Number S7-10-22
The Enhancement and Standardization of
Climate-Related Disclosures for Investors

Abstract: A year and a half has passed since the Commission issued these Proposed Rules. Significant regulatory, judicial, legislative, and litigation developments with material implications for these proceedings have transpired. Most notably, the European Union and the State of California will require Scope 1, 2, and 3 disclosures, with no materiality constraint, from the very large majority of major emitters regardless of whether the Commission adopts the Proposed Rules. Recent judicial opinions increase the risk that the Proposed Rules will be vacated if adopted as proposed. Provisions of the Inflation Reduction Act reinforce the argument that the EPA, not the SEC, has authority to mandate emission measurement.

These developments suggest that the Commission might prudently consider an alternative climate disclosure strategy. The Proposed Rules are of two types. Qualitative Rules call for analysis of global warming's effects, and of the effects of associated regulatory initiatives. The Commission should proceed to adopt the Qualitative Rules, but bifurcate them in a severable manner such that one set of disclosure rules is subject to a materiality condition, while a second set would have no such constraint. Clear severability compartmentalizes litigation risk and increases the probability that courts will uphold material qualitative disclosure requirements even if other requirements are vacated.

The proposed Quantitative Measurement Rules present an entirely different challenge. The Commission should not adopt those Rules in the proposed form because of the very substantial risk that they will be vacated for reaching beyond the Commission's statutory authority in a ruling that could have negative collateral consequences for the agency's larger disclosure agenda. The Commission should instead keep open for comment that part of the proceeding relating to the Quantitative Measurement Rules, but issue a supplemental notice of proposed rulemaking that would call upon registrants to disclose in SEC filings emissions data that are publicly disclosed pursuant to non-SEC disclosure requirements. The supplemental notice

should propose a new, simple filing form that allow for easy presentation of these already-public disclosures, at low cost to filers. The supplemental notice can inquire as to whether registrants should also provide good faith estimates of aggregate emissions in a manner that reduces the risk of double counting and facilitates investor understanding of the filer's aggregate emissions. The supplemental notice can also inquire as to whether quantitative disclosures should be subject to a carefully crafted litigation safe harbor that would allow the Commission and the Department of Justice to prosecute misrepresentations of quantitative disclosures, but that would, only to the extent permitted by statute, preclude private rights of action.

Mandatory emission rules imposed by domestic and foreign agencies other than the Commission now call for disclosures far more expansive than those contemplated by the Commission's Proposed Rules. Those requirements will reach the vast majority of major emitters registered with the Commission. By causing efficient aggregation and simple explanation of these multiple filings, all in a manner that promotes price efficiency and capital formation, the Commission would generate more expansive emission disclosure through SEC filings than will result if the Commission adopts its climate disclosure rules as proposed, even if those rules withstand judicial review. Investors are then better and more efficiently informed.

To over-intellectualize, this alternative strategy is Pareto superior to the Proposed Rules. It offers investors better information at lower cost to registrants with a higher probability of surviving judicial review.

Dear Madame Secretary:

Professor Joseph A. Grundfest submits this second comment in response to the Commission's request for comments in "The Enhancement and Standardization of Climate Related Disclosures for Investors," 87 Fed. Reg. 21334 (Apr. 11, 2022) (the "Proposed Rules").[1]

Significant regulatory, judicial, legislative, and litigation developments relating to the Proposed Rules have transpired in the year and a half since the Proposed Rules' April 2022 release. These developments suggest that the Commission can and should adapt its regulatory strategy with respect to the Proposed Rules in a manner that improves the quality of climate disclosures for investors, significantly reduces registrant compliance costs, and materially increases the probability that the Commission's rules withstand judicial scrutiny.

---

[1] I am the William A. Franke Professor of Law and Business at Stanford Law School (emeritus). I served as a Commissioner of the United States Securities and Exchange Commission from 1985 to 1990. The views expressed in this letter are mine alone, and do not necessarily reflect the views of Stanford University, or any other organization with which I am or have been affiliated. This second comment is an early version of a law review article currently in preparation tentatively titled "Pareto-Superior SEC Emissions Disclosure Strategies." My first comment letter relating to the Proposed Climate Rules is at https://www.sec.gov/comments/s7-10-22/s71022-20131386-301537.pdf

Recent Developments

Regulatory Developments. Multiple jurisdictions have adopted, or are in the process of adopting, mandatory climate disclosure rules that compel public disclosures far more expansive than those contemplated by even the most aggressive interpretation of the Commission's Proposed Rules. A comment letter submitted by Mr. Devon Wilson, a member of Stanford Law School's Class of 2023 (the "Wilson Letter")[2] catalogues these requirements in detail. The Wilson Letter also documents the validation standards applied to these disclosure requirements, and describes various forms of legal liability associated with these extant and emerging non-SEC disclosure regimes.

The Wilson Letter documents that many non-SEC disclosure regimes mandate Scope 1, 2, and 3 emission disclosures with no materiality qualification and that these requirements generally have extraterritorial effect: entities that are subject to a jurisdiction's disclosure obligations, for example, because they do a sufficient amount of business in the European Union or in California, must disclose global emissions data, not just emissions in the jurisdiction that imposes the disclosure obligation.

The European Union's emission disclosure rules are notable in this regard. They require extensive, detailed emissions disclosures, including Scope 1, 2, and 3 data, with no materiality qualification, by a very large number of registrants who also report to the Commission.[3] The world's largest emitters, and just about any registrant with more than minor operations in the European Union, will therefore be required to make disclosures that are far more expansive than the Commission has proposed. Emission rules adopted or proposed by the United Kingdom, Canada, China, Japan, Hong Kong, Singapore, and India create additional disclosure requirements that can also compel extensive emissions measurement and public disclosure by SEC registrants with foreign operations.[4]

Domestically, California's legislature has adopted, and its governor has announced his intention to sign, legislation that would also require mandatory measurement and disclosure of Scope 1, 2, and 3 emissions, with no materiality condition, by all companies "doing business" in California" and that have total gross revenues of at least $1 billion. More than 500 companies will likely be subject to this provision. Covered companies must report Scope 1, 2, and 3 emissions, with no materiality qualification. Scope 1 and 2 disclosures

---

[2] https://www.sec.gov/comments/s7-10-22/s71022-255859-594402.pdf

[3] Wilson Letter, Comparative Analysis at 9, 20, 21. See also Cooley Alert, EU Adopts Long-Awaited Mandatory ESG Reporting Standards, Aug. 11, 2023("The [EU] standards are notable for their breadth and granularity, going well beyond the reporting requirements in other mandatory and voluntary ESG reporting frameworks.") Available at https://www.cooley.com/news/insight/2023/2023-08-11-eu-adopts-long-awaited-mandatory-esg-reporting-standards?utm_campaign=0811_23_env_euadopts_alert_&utm_medium=email&utm_source=pardot

[4] https://www.sec.gov/comments/s7-10-22/s71022-255859-594402.pdf, passim.

begin in 2026 for FY 2025, and annually thereafter. Scope 3 disclosures begin in 2027 for FY 2026, and annually thereafter. Disclosures must conform to GHG Protocol Standards developed by the World Resources Institute and the World Business Council for Sustainable Development. Covered companies are required to obtain assurances from independent third-party providers. Fines of up to $500,000 apply for failures to comply. New York is considering substantially similar legislation

Activity is also pending on the federal front. Pending amendments to the Federal Acquisition Rules ("FAR") have received far less attention than they deserve. Those amendments would require disclosure of Scope 1, 2, and 3 emissions by all businesses receiving more than $50 million in federal contract funds, as well as Scope 1 and 2 data from all businesses receiving at least $7.5 million in federal contract funds. These emissions disclosures are again not conditioned on materiality.[5] These FAR proposals will capture many registrants who do even a small amount of business with the federal government but are not sufficiently present in foreign jurisdictions to trigger foreign reporting requirements.

These disclosures all supplement public reports already made to the Environmental Protection Agency through its Greenhouse Gas Reporting Program. That regime already captures more than 85 percent of greenhouse gas emissions generated by point sources located in the United States and has been operational since 2011.[6] Reporting facilities submit data describing emissions of "CO_2, Methane (CH4), Nitrous oxide (N_2O); Hydrofluorocarbons (HFCs), sulfur hexafluoride (SF_6), perfluorinated compounds (PFCs), and other fluorinated gases," which are then also converted to measure CO_2 equivalents.[7]

These non-SEC disclosure requirements require more expansive climate disclosures than the regime contemplated by the Proposed Rules.[8] Surveys suggest that corporations

---

[5] *Id.,* at 10.

[6] Congressional Research Service, EPA's Greenhouse Gas Reporting Program, updated March 2l, 2023, available at: https://sgp.fas.org/crs/misc/IF11754.pdf (viewed Oct. 3, 2023)

[7] *Id.*

[8] California's disclosure rules "go further than the Securities and Exchange Commission's (SEC's) proposed climate disclosure rule." Latham & Watkins, California Passes GHG Emissions Reporting and Climate- Related Financial Risk Legislation (Sept. 21, 2023) available at https://www.lw.com/en/offices/admin/upload/SiteAttachments/California-Passes-GHG-Emissions-Reporting-and-Climate-Related-Financial-Risk-Legislation.pdf; Rochelle Toplensky, *Stock Exchange Regulators Back Global Climate-Reporting Rules*, Wall Street Journal (July 25, 2023 2:57 PM), https://www.wsj.com/articles/stock-exchange-regulators-back-global-climate-reporting-rules-35ce71b9?mod=article_inline. ("The SEC is completing its own set of requirements for U.S.-listed companies which are expected to come in the second half of this year and to require less disclosure than the ISSB's recommendations. Meanwhile, the EU's new standards require more information from both EU-based companies and some international businesses with local operations."); Rochelle Toplensky, *Why ESG Ratings Are All Over the Map*, Wall Street Journal (Aug. 17, 2023 10:00 AM), https://www.wsj.com/finance/investing/esg-ratings-f569f60e?page=1 ("Efforts have been made to align the various climate-reporting standards, but differences are expected to remain. The International Sustainability

currently appear more focused on complying with the EU emissions regulations than the Commission's potential disclosure requirements.[9] Muscular climate disclosures will therefore occur even if the Commission never adopts any of the Proposed Rules. Consistent with this view, Chairman Gensler recently observed that "more than half of very large multinational companies already provide climate risk disclosures because of EU regulations."[10]

It also bears emphasis that many jurisdictions can amend their rules more rapidly than the Commission. Consider the timeline for this rulemaking. From inception, this rulemaking process already stretches over two years and is still incomplete. The rule's effectiveness will be delayed many more years if it is stayed on appeal. Rapid adaptations of climate reporting rules in response to changed market or scientific conditions are thus more likely to emerge from sources other than the Commission's slow rulemaking process.

Accordingly, even if the Commission never adopts the Proposed Climate Rules, investors will soon receive a flood of emissions-related information generated by other foreign and domestic regimes. This simple observation suggests that the Commission can and should adopt an alternative regulatory strategy that integrates non-SEC disclosure requirements with the Commission's traditional efficiency-enhancing, search-cost-reducing approach to disclosure. This alternative approach can provide superior information to investors at lower cost to registrants while improving the probability that the proposed rules withstand judicial review.

Legislative Developments. Two obscure provisions of the Inflation Reduction Act of 2023, read in conjunction with the Supreme Court's opinions in *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Daniel,* 439 U.S. 551 (1979) ("*Daniel*") and *Marine Bank v. Weaver,* 455 U.S. 551 (1982) ("*Marine Bank*"), have significant potential implications for the Proposed Climate Rules. *Daniel* held that defined benefit pension plans invested entirely in the stock market were not securities subject to Commission regulation, even though plan assets were clearly securities regulated by the Commission. The court reached this result, in part, because the Employee Retirement Income Security Act of 1974 more clearly vests authority over those pension plans with the Department of Labor, not with the SEC. *Daniel*, 439 U.S. at 569. *Marine Bank* held that neither a certificate of deposit purchased from a federally regulated bank nor the pledge of such instrument constituted a security under federal law, in part because of the existence of

---

Standards Board's framework, for example, includes requirements to report so-called Scope 3 emissions in the supply chain and material information on climate-related risks and opportunities. The SEC is expected to require less information than the ISSB's recommendations, while the EU's new standards will require more disclosure from both EU-based companies and some international businesses with local operations.")

[9] Amanda Iacone, US Companies Say They'll Be Ready for Green Reporting Rules, Bloomberg Law, Aug. 22, 2023.

[10] David Hood, Gensler "Welcomes" Input from Congress, Public on Climate Rules, Bloomberg Law, July 27, 2023 (quoting SEC Chairman Gary Gensler).

an alternate regulatory regime governed by "the federal banking laws." *Marine Bank*, 455 U.S. at 559.

Section 114 of the Clean Air Act of 1970 vests authority in the Administrator of the Environmental Protection Agency to promulgate rules requiring public disclosure of greenhouse gas emissions. The EPA exercised this authority to create its Greenhouse Gas Reporting Program, a public website that captures more than 85 percent of five different forms of greenhouse gas emissions generated in the United States.[11] The website describes these emissions by point source, type of emissions, CO_2 equivalents and ownership, provided the emissions exceed 25,000 tons of CO_2 equivalents per year.[12]

The Supreme Court's logic in *Daniel*s and *Marine Bank* maps a clear path for courts to hold that the Commission lacks authority to require the measurement and consequent disclosure of greenhouse gas emissions because Congress has more clearly delegated that authority to the EPA through the Clean Air Act. This logic operates without any need to invoke the major questions doctrine. Indeed, even if one concludes that the federal securities laws, read in isolation, authorize the Commission to mandate emissions measurement and disclosure, the reality is that the federal securities laws are not read in isolation.[13] They exist as part of a much larger corpus of federal law, and courts do not ignore other statutes that inform the allocation of regulatory authority. The EPA also has greater expertise in measuring and analyzing greenhouse gas emissions. That fact reinforces the conclusion that Congress would rationally intend that the EPA, not the SEC, control an emission measurement and disclosure regime.

Sections 60110 and 60111 of the Inflation Reduction Act of 2022, (P.L. 117-169) reinforce that conclusion. Section 60111 provides $5 million to the EPA for Greenhouse Gas Corporate Reporting, funding designed to "carry out a program that helps enhance standardization and transparency of corporate climate action commitments and plans to reduce greenhouse gas emissions."[14] Congress could have so funded the SEC, but did not.

---

[11] Congressional Research Service, *supra*, note 6.

[12] *Id.*

[13] Many leading commentaries supporting the Commission's legal authority to adopt emissions measurement and disclosure requirements fail even to mention the existence of the Clean Air Act, or to analyze its implications for the Commission's authority. Their conclusions that the Commission has authority to adopt emissions measurement and disclosure mandates are therefore fragile at best or simply error attributable to incompleteness. *See, e.g.,* Comment Letter of Securities Law Scholars on the SEC's Authority to Pursue Climate-Related Disclosure, June 6, 2022, https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf ; The CLS Blue Sky Blog, "Will It Float?: The Legitimacy of the SEC's Authority for Climate Risk Disclosures," James D. Cox, March 29, 2022, https://clsbluesky.law.columbia.edu/2022/03/29/will-it-float-the-legitimacy-of-the- secs-authority-for-climate-risk-disclosures/.

[14] United States Senate, INFLATION REDUCTION ACT ENVIRONMENT AND PUBLIC WORKS COMMITTEE TITLE SECTION BY SECTION**,** Aug. 5, 2022, at 3, Available at https://www.epw.senate.gov/public/_cache/files/2/d/2d016619-4da6-4de8-bcb0-

Section 60110 provides for $25 million in EPA funding for Enforcement Technology and Public Information.[15] This funding will help disseminate information gathered with funding provided by Section 60110. Again, this funding could have been provided to the SEC, but was not.

Members of Congress have also expressed concern regarding the pending climate rules, their scope, potential for imposing costs on registrants, and the Commission's authority. These concerns have inspired legislative proposals that could affect the Commission's agenda far more broadly than through the operation of the Proposed Climate Rules. For example, H.R. 4790 the Guiding Uniform and Responsible Disclosure Requirements and Information Limits (GUARDRAIL) Act proposes to amend both the Securities Act of 1933 and the Securities Exchange Act of 1934 to limit the Commission's disclosure authority in future rulemakings to matters that are material.

Although H.R. 4790 is unlikely to become law in this Congress, the simple fact that such expansive legislation has material traction even within one party does not bode well for bipartisan support for the Commission's agenda on a prospective basis. Political considerations therefore also favor the Commission considering a more modulated set of rules that impose fewer costs on registrants, provide investors with even more expansive disclosures, and have a better chance of surviving judicial review.

Judicial Developments. *West Virginia v. EPA*, 597 U.S. __ (2022) invokes the major questions doctrine in holding that the agency "lacks authority under the Clean Air Act to impose emission caps by shifting electricity production from higher emitting to lower emitting producers."[16] The major questions doctrine is again invoked in *Biden v. Nebraska*, 600 U.S. ____ (2023) to invalidate a debt relief plan that would have forgiven approximately $430 billion in federal student loans.

Numerous commenters observe that the Court's increasing reliance on the major questions doctrine does not bode well for the Commission's climate rules.[17] Others simply

ccf3cb4c2ce7/DD41003E0B5A96743AC9629F128CC821.08-05-2022-epw-inflation-reduction-act-section-by-section.pdf

[15] "This section provides $25 million for EPA's enforcement technology and public information. Of these funds, this section provides $18 million to update the Integrated Compliance Information System and any associated systems, necessary information technology infrastructure, or public access software tools to ensure access to compliance data and related information…." United States Senate, INFLATION REDUCTION ACT ENVIRONMENT AND PUBLIC WORKS COMMITTEE TITLE SECTION BY SECTION, Aug. 5, 2022, at 3. Available at https://www.epw.senate.gov/public/_cache/files/2/d/2d016619-4da6-4de8-bcb0-ccf3cb4c2ce7/DD41003E0B5A96743AC9629F128CC821.08-05-2022-epw-inflation-reduction-act-section-by-section.pdf

[16] John C. Coffee, Jr., Hillary A. Sale and Charles R. Whitehead, Securities Regulation: Cases and Materials (14th ed. 2023) Recent Updates and Analyses of Hypothetical Problems, at 7.

[17] See, e.g., Davis, Polk and Wardwell, A basic primer on the major questions doctrine, July 14, 2022, available at: https://www.davispolk.com/insights/client-update/basic-primer-major-questions-doctrine ("The major

observe that "whether the [Commission's new climate rules] are within the SEC's authority remains an open question following *West Virginia*."[18]

The proper scope, interpretation, and application of the major questions doctrine is, however, not an easy question, and is a fair topic for debate. The resolution of that question could, however, be irrelevant in the context of challenges to the Proposed Rules because, as explained, *Daniel* and *Marine Bank*, among other cases, map a path by which the courts can vacate the Proposed Climate Rules' Scope 1, 2, and 3 emissions measurement and disclosure requirements without ever invoking the major questions doctrine.

A more fundamental judicial challenge to the Proposed Rules lurks in the Supreme Court's grant of *certiorari* in *Loper Bright Enterprises v. Raimundo,* a case that can cause reconsideration of the *Chevron* doctrine. To oversimply, *Chevron* holds that courts should defer to a federal agency's reasonable interpretation of an ambiguous enabling statute. *Chevron* plays a central role in the Commission's ability to interpret federal securities law in a manner that supports its authority to compel climate-related disclosures.

Several Supreme Court justices have long expressed skepticism over the *Chevron* Doctrine, and there is significant concern that the Court will, in *Loper Bright*, overturn or sharply limit *Chevron.* Narrowing *Chevron* can only compound the significant litigation risk already generated by the Proposed Climate Rules. Any appeal of the Climate Rules will almost certainly reach the Supreme Court after *Loper Bright* is decided. The Climate Rules could then be adjudicated by the Supreme Court under a new, narrower form of deference. The risk also exists that, given the pace of appellate litigation, a Court of Appeals will retain jurisdiction over an appeal of the Climate Rules in a manner that allows it to apply the new, post-*Loper Bright* standard of deference, if any, to its review of the Climate Rules. Neither result increases the probability that the Climate Rules survive judicial review.

Litigation Developments. Registrants have significant concern that the new Climate Rules will generate multiple forms of additional litigation risk. Private parties can file traditional securities claims alleging defective climate disclosures. They could also file state law derivative claims, and claims arising under state consumer deception laws. Litigation in foreign jurisdictions is also possible. This private party risk is in addition to potential exposure to Commission and Department of Justice enforcement proceedings. Indeed, the Commission has increased its enforcement efforts addressing climate-related misrepresentations in a manner that contributes to registrant concern over litigation risk.[19]

---

questions doctrine could be used to challenge a variety of ambitious agency actions, such as the SEC's proposed climate risk disclosure rule.").

[18] Coffee, et al, *supra* note 17 at 7.

[19] See, e.g., Patrick Temple-West and Madison Darbyshire, SC Lawyers Subpoena Fund Managers Over ESG Disclosures, Financial Times, August 14, 2023.

Registrants concerned over increased litigation exposure will rationally oppose the Climate Rules for that reason alone. Their legitimate concern is not that registrants will in fact misrepresent climate-related information and properly be held to account for defective disclosures. It is, instead, that some private party plaintiffs can have a rational incentive to capitalize on uncertainty and ambiguity in this emerging area of disclosure policy in order to advance social or political agendas through securities and corporate litigation.

Litigation risk also rationally deters registrants from making voluntary climate-related disclosures and commitments. As commenters observe, the Commission's Proposed Climate Rules impose potentially expensive, litigation-prone Scope 3 disclosure requirements if registrants make voluntary commitments related to Scope 3 emissions. This approach to voluntary climate disclosures cannot act as an inducement for voluntarism.

For all these reasons, the Commission should consider alternative regulatory strategies that generate high-quality climate disclosures through strategies that control litigation risk and that do not deter voluntary disclosure and climate-related commitments. The Commission's current Proposed Climate Rules do not optimally attain those objectives.

An Alternative Regulatory Strategy

Addressing the risks generated by these recent developments can help the Commission reach a superior regulatory outcome through an Alternative Strategy that: (1) provides investors significantly better information in a manner that reduces investor search costs and enhances efficient price formation; (2) materially reduces filer compliance costs; and (3) has a significantly higher probability of withstanding judicial scrutiny.[20]

The Alternative Strategy distinguishes "Qualitative Rules" from "Quantitative Measurement Rules." Qualitative Rules call on registrants to analyze implications of climate change, and related regulatory developments, on the registrant's business. Those rules do not require that the registrant independently measure or quantify any physical metric related to emissions. In contrast, Quantitative Measurement Rules require that registrants engage in measurement activities and then report those metrics on SEC filings. Requirements to measure and report Scope 1, 2, or 3 emissions are Quantitative Measurement Rules.

The Alternative Strategy proposes three steps.

Step 1: Bifurcate the Qualitative and Quantitative Measurement Rules. The Alternative Strategy suggests that the Commission bifurcate the Qualitative from the

[20] *State Farm v. Natural Resources Defense Council, Inc*., 463 U.S. 29, 48 (1983), can be interpreted to require that the Commission consider the alternatives described by this Alternative Strategy, and explain why this Alternative Strategy was not adopted. The requirement that agencies consider regulatory alternatives does not "impose additional procedural requirements upon an agency," 463 U.S. at 50, and is part of the process of determining whether an agency has acted in an arbitrary and capricious manner. *Id.*

Quantitative Measurement Rules. The Commission would then promptly adopt the Qualitative Rules but delay consideration of the Quantitative Measurement Rules as described below.

Step 2: Adopt the Qualitative Rules in Severable Form. The Qualitative Rules should be further bifurcated so that some disclosures are subject to a materiality qualifier while others call for sub-material information, but only in a manner consistent with the Commission's statutory authority. The materiality constraint should track the courts' traditional definition of materiality. See, e.g., *TSC Industries, Inc. v. Northway, Inc*., 426 U.S. 438 (1976). The Commission should disclaim any reliance on notions of "double materiality" or other concepts broader than the traditional judicial definition.[21]

The Commission should exercise care to adopt these rules in a manner that causes reviewing courts to respect the severability of rules subject to a materiality condition from rules that are not so constrained.[22] Severability clarifies that if Qualitative Rules not subject to a materiality constraint are, for any reason, vacated or stayed, the material Qualitative Rules nonetheless take effect.

Step 3: Repropose the Quantitative Measurement Rules. The newly fashioned Quantitative Measurement Rules are designed to reduce investor search costs and filer compliance costs in a manner that promotes efficient capital formation, and that enhances the probability that the rules are neither vacated nor stayed. These objectives are well within the agency's statutory remit. There are no other objectives. In particular, the new rules never require that any filer make any measurements or public disclosure that they are not already making because of other regulatory requirements, or voluntarily. The new rules merely call for efficient aggregation and curation of information that filers are already disclosing in other venues.

This opportunity for more efficient pricing and capital formation arises because of the proliferation of mandated non-SEC emissions disclosures, including EU, California, and EPA requirements, and potentially many more. Investors already spend millions in efforts to track, estimate, and aggregate emissions disclosure data generated by multiple sources. Investors will clearly benefit from the Commission's creation of a single, highly reliable point of reference that cleanly aggregates and explains disparate emissions disclosures. Issuers will also benefit. They have incentives to track competitors' emissions to benchmark

---

[21] For a discussion of double materiality, *see, e.g.,* Deloitte, The Challenge of Double Materiality Sustainability Reporting at a Crossroad (2023) available at https://www2.deloitte.com/cn/en/pages/hot-topics/topics/climate-and-sustainability/dcca/thought-leadership/the-challenge-of-double-materiality.html

[22] For a discussion of the mechanics of severability clauses and their potential benefits, see Charles W. Tyler and E. Donald Elliott, Administrative Severability Clauses, 124 Yale L. J. 2286 (2015)("Severability clauses can help administrative agencies minimize the damage caused by judicial review and can make the regulatory environment more efficient, participatory, and predictable.")

their own performance. A single point of reference thereby also reduces issuers' search costs while again promoting efficient pricing in publicly traded securities markets.

The Commission should therefore keep open for comment that part of the proceeding relating to the Quantitative Measurement Rules, but issue a supplemental notice of proposed rulemaking that would call upon registrants to disclose in SEC filings emissions data that are already publicly disclosed pursuant to non-SEC disclosure requirements, such as EU, California, or EPA requirements, but in an aggregating format that reduces investor and issuer search costs alike. Such a disclosure regime might contemplate the filing of additional exhibits; the creation of novel, simplifying forms; the provision of good faith estimates of global emissions; and a carefully crafted litigation safe harbor.

Exhibits. The supplemental notice might propose that registrants attach as an exhibit to the annual report on Form 10-K, or its equivalent, a list of the filer's most recent submissions to any regulatory authority that requires Scope 1, Scope 2, Scope 3, or equivalent disclosures, as well as copies of those filings, or links to those filings. This requirement guarantees investors access to a single, credible, easily validated site that aggregates every filer's mandatory emissions disclosures. No investor will have to search multiple sites, or guess as to the jurisdictions that require mandatory emissions filings from any issuer. The Commission might also propose that voluntary disclosures be included in these exhibits.

To promote more timely updating of this database, the Commission might also propose amending Form 8-K to require that emissions disclosures mandated by other regulators, or that are voluntarily provided, be linked or attached as exhibits to a Form 8-K to be filed within four business days of the public disclosure of that information.

Forms. The Commission might also propose a new, simple, tabular form that allows for easily aggregated presentation of data already disclosed in filings with other regulators, or that is voluntarily provided. The form could be based either on formats used by the EU or California, or on formats used by the EPA when collecting and presenting emissions data, or on formats developed by the Commission to be even more informative to investors and easy for filers to complete. Reliance on the EPA format and conversion rules has the benefit of relying on a structure already approved by US regulators, whereas relying on the EU and California formats would have the benefit of greater standardization. The proposed supplemental rulemaking could present multiple different potential formats for aggregating data and request comment as to the optimal reporting formats for purposes of SEC filings.

One possible and very simple format would present a table in which there is a row for each jurisdiction in which the filer makes a mandatory report of emissions data (e.g., a row for EU disclosures, a row for California disclosures, and a row for EPA disclosures). There would be columns for Scope 1, Scope 2, Scope 3, and other disclosures reported by the filer in each jurisdiction. The Commission might also require prompt updating of this table in conjunction with Form 8-K filings that update emissions disclosures.

Good Faith Aggregate Estimates. The EPA's Greenhouse Gas Reporting Program describes a methodology for aggregating multiple forms of emissions into CO_2 equivalents.[23] The supplemental proposal could request comment on a rule that calls for filers to report a good faith estimate of single, global CO_2 – equivalent metric for Scopes 1, 2, and 3. That metric might incorporate by reference the EPA's established methodology, or allow any other methodology that the filers reasonably believes is appropriate and that is adequately explained in its filing.

Materiality and Severability. The proposed rulemaking could further ask whether these additional Quantitative Disclosures should be required only when the issuer reasonably determines that the disclosures are material, and whether separate, severable rules should be structured to call for material and less-than-material disclosures.

A Litigation Safe Harbor. Issuers are already exposed to substantial liability for emissions disclosures. The EU, California, and EPA rules each have distinct validation requirements and each exposes filers to additional liability in the event emissions are mismeasured, misreported, or not timely furnished. Questions therefore reasonably arise as to the marginal costs and benefits of creating yet another layer of litigation risk based on federal securities law, when substantial alternative enforcement regimes exist. To explore these trade-offs the Commission could propose for comment creating a litigation safe harbor that would allow the Commission and the Department of Justice to pursue claims based on material misrepresentations and omissions relating to some or all climate disclosures, but that would constrain private party litigation. The Commission could, among other possibilities, explore restrictions that limit private party litigation when the private right arises because of rulemaking authority delegated to the Commission, or when the private right is implied. More aggressively, the Commission could explore exercising its authority under Sections 28 of the Securities Act[24] and Section 36 of the Exchange Act[25] to restrict express private rights of action. The Commission has never before sought to limit private rights of action that

---

[23] *See* https://www.epa.gov/sites/default/files/2017-12/documents/subpartcmethodologiesfactsheet.pdf. For additional discussion of conversion factors see: https://ecometrica.com/assets/GHGs-CO2-CO2e-and-Carbon-What-Do-These-Mean-v2.1.pdf

[24] Section 28 states in its entirety: "The Commission, by rule or regulation, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this subchapter or of any rule or regulation issued under this subchapter, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors." 15 U.S. Code § 77z–3 - General exemptive authority.

[25] Section 36 is, for rulemaking purposes, functionally equivalent to Securities Act Section 28, and states in pertinent part: (1) … the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this chapter or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. 15 U.S. Code § 78mm - General exemptive authority.

would otherwise arise under the law, whether exercising its general exemptive authority or applying any other rationale. Any suggestion that the Commission take this step is sure to be controversial.[26] Severability of any such provision should therefore also be considered.

None of this even remotely suggests that filers should or will face no litigation exposure because of material misrepresentations or omissions of climate-related information. Filers will face civil liability in SEC enforcement actions. Sufficiently egregious violations can be criminally prosecuted by the Department of Justice. Filers will also be subject to separate validation and litigation exposure pursuant to rules established by independent authorities that require emissions disclosures. In light of these multiple levels of litigation exposure, and cognizant of the significant controversy surrounding climate disclosures, careful examination of the marginal costs and benefits of private party litigation seems warranted.

Put another way, private party litigation is frequently recognized as a valuable supplement to Commission enforcement authority. But climate disclosures are subject to distinct enforcement regimes that do not apply to non-climate disclosures. Climate disclosures also raise broader policy sensibilities not implicated by other forms of defective disclosure. The standard trope regarding the value of private enforcement therefore does not apply with equal force to climate disclosures. The supplemental notice can constructively explore litigation-related alternatives to the standard private litigation enforcement regime.

Benefits of the Alternative Strategy

The Alternative Strategy generates multiple benefits over the Proposed Rules.

Better Disclosure, Enhanced Informational Efficiency, and Improved Capital Formation. The Alternative Strategy reduces investor and filer search costs while promoting comparability and standardization and providing Scope 3 data not otherwise generated by the Proposed Rules. The Alternative Strategy thereby incorporates more information into securities prices at lower cost and in a manner consistent with the semi-strong form of the efficient market hypothesis,[27] all while promoting efficient capital formation.

The Alternative Strategy could also call for a good faith estimate of global aggregate CO_2 emissions. This simple metric is not contemplated by the current proposal, and could generate additional informational and pricing efficiencies.

[26] For the first discussion of this possibility *see* Joseph A. Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission's Authority*, 107 Harvard L. Rev. 961 (1994).

[27] *See generally*, Ronald J. Gilson and Reinier H. Kraakman, The Mechanisms of Market Efficiency, 70 Va. L. Rev. 549 (1984).

The combination of reduced search costs, expanded Scope 3 disclosures, and good faith aggregation estimates strongly support the proposition that investors would rationally prefer the Alternative Strategy to the current Proposed Rules, even if those rules are ever upheld by the courts -- a proposition that is far from certain.

Reduced Compliance Costs. The Alternative Strategy dramatically reduces filing costs. No registrant ever has to make any measurement or disclosure that is not otherwise required by a non-SEC regulatory regime. The costs imposed by the Alternative Rules are exceedingly minor, if not trivial, in the scheme of mandatory disclosures regimes. Registrants might file exhibits of materials already publicly disclosed to other regulatory agencies, and could complete a simple table that aggregates and conforms disclosures already made by the registrant. Filers could generate a good faith aggregate emissions estimate that implements a pre-specified formula that requires no independent measurement, or they could apply and explain any other reasonable measurement technique they think appropriate. These additional disclosures could be sheltered by a carefully crafted litigation safe harbor.

Superior Cost Benefit Ratio. Because the Alternative Strategy generates greater benefits with lower compliance costs than the Pending Rule, it has a superior cost-benefit ratio.

Reduced Commission Litigation Risk. The litigation risk associated with the Alternative Strategy is far lower than the risk generated by the Proposed Rules. Regarding the pending Qualitative Rules, the failure to propose a severable materiality constraint raises the risk that much of the proposal might be unnecessarily vacated if a reviewing court concludes that a materiality constraint is required. With respect to the currently pending Quantitative Measurement Rules, the Commission skates on thin ice to suggest that it, not the EPA, has authority to require measurement and concomitant disclosure of emissions data.

In contrast, the quantitative disclosure rules contemplated by the Alternative Strategy rely on far more modest and traditional assertions of agency authority. The agency has, for decades, required the organized presentation of information that is otherwise in the public domain. Consider, for example, requirements that registrants disclose the composition of their boards of directors and the formatted compensation of those directors, or that registrants describe their capital structures, or that registrants disclose litigation-related developments. All those disclosures call for the organized and summarized recitation of information that is otherwise in the public domain. All those disclosures are easily and non-controversially supported by the observation that they reduce search costs and are informationally efficient. The Alternative Rule’s rationale regarding quantitative climate disclosure is no different and is consistent with a large body of pre-existing disclosure requirements that call for the organized presentation of material already in the public domain.

Put another way, there is nothing new or statutorily aggressive about a requirement that a publicly traded firm present information that is otherwise in the public domain, but is difficult and expensive for investors to process, in a format that is easier for investors to process and that therefore promotes price efficiency and capital formation.

The independent measurement and disclosure obligations contemplated by the current version of the Proposed Rules are not, however, as modest. They rely on novel and aggressive assertions that the SEC, not the EPA, has authority to require emissions measurement. That proposition is unlikely to withstand judicial scrutiny in the current environment. Significant aspects of the Proposed Rules are also more susceptible of challenge under the Major Questions doctrine, the Administrative Procedures Act, and a reformulated *Chevron* test. Reducing litigation risk for the Commission on a prospective basis is an important feature of the Alternative Strategy.

Calendar Risk. Concern is expressed that delays inherent in a supplemental rulemaking process create a risk that the supplemental rules cannot be adopted during this presidential term, or that they are adopted so late in the term that the Congressional Review Act can undo the rulemaking.[28] These concerns attract o55at least four responses.

First, this concern assumes that the next administration opposes the supplemental rulemaking. This is hardly a foregone conclusion. Indeed, many sister agencies are embarked on substantial regulatory and litigation initiatives likely to be reversed if the next Administration's policy views differ substantially from this Administration's. If those sister agencies are willing to continue with their agendas, while facing a calendar identical to the Commission's, there is no rational reason for the Commission to recede into regulatory hibernation for an extended term.

Second, resource allocation can mitigate calendar risk. The Commission has a long list of rulemakings in process, each of which consumes resources. If climate disclosure is sufficiently important to the agency, the Commission can reallocate resources from other initiatives. The extent of the delay inherent in the Alternative Strategy therefore reflets, in part, the agency's value judgment.

Third, something is better than nothing. A rulemaking that assumes the Commission has authority to compel emissions measurement is unlikely to withstand judicial scrutiny. Moving quickly to adopt a rule that never takes effect accomplishes nothing.

Fourth, adopting a rule that risks being vacated because of aggressive administrative overreach can backfire. Overly aggressive interpretations of SEC authority can, in the current judicial environment, generate precedents that apply language with strong adverse collateral consequences for other SEC rulemakings, and for the agency's larger disclosure regime. Accordingly, there is downside risk that reaches beyond the climate rules if the Commission proceeds to adopt the rules as currently proposed.

[28] Jesse Westbrook, A Way Forward on SEC Climate Rules? An Ex-Commissioner Makes His Pitch, Capitol Account, Sept. 23, 2023 ("[c]ommissioners are keenly aware that they are running out of time to get things done") available at: https://www.capitolaccountdc.com/p/a-way-forward-on-sec-climate-rule.

Calendar considerations should therefore not deter the Commission from implementing the Alternative Strategy. Moving forward thoughtfully but expeditiously with a supplemental proposal may be the most credible path to obtaining climate disclosures that reduce investor search costs, expand climate disclosure, reducs registrant compliance cost, and promotes efficient price formation in a manner consistent with the agency's delegated authority.

Reciprocity. Some observers suggest that jurisdictions like the EU or California might modify their disclosure requirements to accept SEC-mandated disclosures, or other mandated disclosures, in lieu of local requirements. This proposition is improbable in the extreme. The dominant alternative regimes require Scope 3 disclosures of all covered entities. A covered entity subject to SEC disclosure requirements would then be able to structure its disclosures to avoid Scope 3 measurement simply by limiting its voluntary disclosures and commitments. This would create an asymmetric privilege for entities subject to SEC disclosure requirements. Competitors not subject to SEC disclosure rules would be sure to lobby against this form of exemption. Environmental activists would lobby against this form of reciprocity. More fundamentally, however, non-SEC regulators who have already required unconditional disclosure of Scope 3 emissions will not take comfort in the SEC's comparatively weak Scope 3 disclosure requirement. They would be troubled by the fact that the largest entities subject to their regulation are also among those most likely to be registered with the SEC and therefore among those best able to avoid Scope 3 disclosures.

Conclusion

For the reasons stated above, the Commission should consider implementing the Alternative Strategy in lieu of currently pending climate disclosure proposals.

Sincerely,

Joseph A. Grundfest
The William A. Franke Professor of
Law and Business, Emeritus
Stanford Law School
Stanford, CA 94305

Cc: Hon. Gary Gensler, Chair
Hon. Hester M. Peirce, Commissioner
Hon. Caroline A. Crenshaw, Commissioner
Hon. Mark T. Uyeda, Commissioner
Hon. Jaime Lizárraga, Commissioner