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ATTORNEY GENERAL OF TEXAS

June 17, 2022

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Proposed Rule: "The Enhancement and Standardization of Climate-Related Disclosures for Investors." 87 Fed. Reg. 21334, File Number S7-10-22.

Dear Secretary Countryman:

The undersigned attorneys general and I write in opposition to the Securities and Exchange Commission's (SEC) proposed rulemaking titled "The Enhancement and Standardization of Climate-Related Disclosures for Investors." The SEC's Proposed Rule attempts to impose a host of burdensome and unnecessary "climate-related" disclosures that flagrantly exceed the SEC's delegated role of ensuring capital markets continue to function and that investors are provided timely, accurate, and material information. Instead, the Proposed Rule is a brazen attempt by the SEC to act as an environmental regulator despite the agency's prior admissions it lacks such authority. Not only is the SEC acting outside its authority and expertise, the Proposed Rule would do nothing to protect the environment or provide investors with reliable information on the financial value of companies registered with the SEC.

The SEC proposes a massive expansion of the SEC's regulations that will cost American businesses millions of dollars to collect and provide information regarding environmental metrics that are unfamiliar to most entrepreneurs or investors.

Specifically, the Proposed Rule will require registrants to conduct voluminous reporting on greenhouse gas (GHG) emissions and the minutiae of corporate governance of climate issues, regardless of whether the registrant operates in an environmentally sensitive industry or whether such matters have a material impact on the company's financial value. Such disclosures are unnecessary to fulfill the SEC's role in the proper function of the securities markets: to the extent there are material climate-related risks for SEC registrants, those risks are already covered by existing rules—as the SEC's own official guidance acknowledges. Indeed, the SEC has previously recognized that it lacks a statutory mandate to go further and issue climate-related regulations purely for the purpose of improving the environment. The Proposed Rule does not cite, and we are unaware of, any subsequent statutory change that has expanded the SEC's regulatory authority.

The host of new requirements in this Proposed Rule are motivated by a small number of environmental activists who seek to steer the economy away from fossil fuels and to impose controversial environmental, social, and governance (ESG) mandates. If such a policy is to be

pursued and such information is to be collected from all registrants because—like all human endeavors—they may have some marginal effect on the environment, there is a body constitutionally empowered to make that choice: Congress. By acting outside of its statutory authority, the SEC has usurped the role of the People’s elected representatives to set the United States’ policy on climate change.

Moreover, even by its own terms, the Proposed Rule is fundamentally flawed because it imposes requirements that are inherently speculative and will provide no benefit to investors in assessing the financial value of registrants based on the type of factual, core business information that the SEC was created to secure. Particularly problematic are provisions of the Proposed Rule that are not limited by materiality and thus risk larding up already voluminous securities filings with so much additional information that the resulting documents are useless. But even where limited by materiality, the Proposed Rule ignores the likelihood that specific types of climate-related risks cannot be predicted with a sufficient degree of certainty to make disclosures of those risks useful to investors. To satisfy the SEC’s proposed requirements and avoid the litigation risk of under-reporting allegations, registrants likely will over-predict the impact of climate-related events on their businesses or attribute all potential adverse weather events to climate change. This potentially would mislead investors about the nature and origin of risks to their investment.

Finally, the SEC has not conducted an adequate cost-benefit analysis. Because determining indirect GHG emissions and climate-related risks is inherently speculative and because other requirements are not anchored to materiality, there is little to no benefit in the SEC’s Proposed Rule. The costs for businesses, however, are enormous. The Proposed Rule is burdensome to registrants, redundant of the SEC’s existing rules, unlikely to produce reliable information, prohibitively expensive, unconstitutional, and beyond the SEC’s statutory authority.

Discussion

I. The SEC lacks statutory authority to issue climate-related regulations.

The Proposed Rule attempts a dramatic expansion of the SEC’s regulations.¹ It would constitute a vast expansion of the SEC’s regulatory authority into the operations and management decisions of American business. Following the Task Force on Climate-Related Financial Disclosure (TCFD) framework, it will require detailed disclosures on governance, strategy, risk management, and climate-related metrics that are not currently collected by most (if any) SEC registrants—particularly registrants in environmental industries that are not environmentally sensitive. The Proposed Rule will require an enormous amount of data collection to compile Scopes 1, 2, and 3 GHG emissions, as well as armies of “emissions attestation providers” to pore over the reams of emissions data.

The SEC’s newly claimed authority over GHG emissions and corporate governance of climate-related risks is beyond the agency’s expertise and exceeds the SEC’s statutory mandate to protect investors, facilitate capital formation, and foster fair, orderly, and efficient markets.

¹ The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (April 11, 2022) (hereinafter Proposed Rule).

Only Congress has the authority to expand the SEC's regulatory authority. Instead, it has chosen to leave regulation of GHG emissions with the Environmental Protection Agency (EPA).

a. The Proposed Rule attempts a dramatic expansion of the SEC's authority outside of its field of expertise without authorization from Congress.

The SEC relies on Sections 7, 10, 19(a), and 28 of the Securities Act of 1933 and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Securities Exchange Act of 1934 as the statutory authority for the Proposed Rule. The SEC relies specifically on authority to require disclosures necessary or appropriate “in the public interest” or “for the protection of investors.” *See, e.g.*, 15 U.S.C. §§ 77g(a)(1), 78m(a). In addition, when the SEC is engaged in rulemaking, it “shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.” *Id.* §§ 77b(b), 78c(f).

The grants of rulemaking authority cited by the SEC do not support its entry into the field of climate change. Section 19(a) of the 1933 Act and 23(a) of the 1934 Act expressly limit the SEC to rulemakings to carry out other provisions of these acts. *Id.* §§ 77s(a), 78w(a)(1).

The use of the phrases “in the public interest” and “for the protection of investors” in these sections must be read within their statutory context. The Supreme Court has explained, “the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general welfare. Rather, these words take meaning from the purposes of the regulatory legislation.” *Nat’l Ass’n for Advancement of Colored People v. Fed. Power Comm’n*, 425 U.S. 662, 669 (1976).

In passing and subsequently amending the Securities Act of 1933 and the Securities Exchange Act of 1934, Congress has consistently been focused “on the capital market of the enterprise system: the sale of securities to raise capital for profit-making purposes, the exchanges on which securities are traded, and the need for regulation to prevent fraud and to protect the interest of investors.” *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849 (1975); *see also, e.g., Lawson v. FMR LLC*, 571 U.S. 429, 434-35 (2014) (“The Sarbanes-Oxley Act of 2002 . . . aims ‘to prevent and punish corporate and criminal fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions.’”) (quoting S. Rep. No. 107-46, p. 2 (2002)); *id.* at 447 (noting that it is “common ground” that Congress formulated “the Sarbanes-Oxley Act as one means to ward off another Enron debacle.”). The phrases “in the public interest” and “for the protection of shareholders”—as used in their statutory context—relate to a registrant’s financial value and core business information necessary to protect investors. And “[a]lthough agency determinations within the scope of delegated authority are entitled to deference, it is fundamental ‘that an agency may not bootstrap itself into an area in which it has no jurisdiction.’” [Adams Fruit Co., Inc. v. Barrett](#), 494 U.S. 638, 650, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990) (quoting [Federal Maritime Comm’n v. Seatrain Lines, Inc.](#), 411 U.S. 726, 745 (1973)).

In addition, as Commissioner Peirce cautioned, the SEC lacks expertise in climate science

and policy.² Such expertise is necessary not only to write appropriate regulations regarding climate-change regulations but also to evaluate the myriad of data and analysis that will be produced under the proposed GHG reporting scheme, including the methodology, significant inputs, and significant assumptions used to calculate GHG emissions;³ the validity of estimates and ranges used to calculate Scope 3 GHG emissions;⁴ and the qualifications of GHG emissions attestation providers.⁵ The SEC implicitly assumes that investors will benefit from this technical information the agency itself lacks the expertise to evaluate. Such an assumption is entirely without basis. Moreover, it does not authorize the SEC to expand its reach from the financial to the environmental sphere, nor is it entitled to deference. The Supreme Court has stated repeatedly that an agency's effort to regulate matters beyond its expertise is an indicator that the regulation is beyond the agency's statutory authority. *E.g.*, *King v. Burwell*, 576 U.S. 473, 486 (2015) (observing it is unlikely Congress intended to delegate decisions concerning the availability of tax credits on the federal healthcare exchange "to the IRS which has no expertise in crafting health insurance policy of this sort."). The SEC's attempted entry into the field of climate-change regulation without the necessary expertise is a clear indicator that it is acting beyond its statutory authority.

b. The Proposed Rule runs afoul of the major questions doctrine.

The SEC's lacks authority to promulgate the Proposed Rule under the major questions doctrine, which prohibits agencies from exploiting ambiguous language in a statute to greatly expand their regulatory authority. Congress does not use ambiguous language to delegate to agencies the authority to regulate a "significant portion of the American economy." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [courts] typically greet its announcement with a measure of skepticism." *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014).

For example, the Supreme Court recently invoked the doctrine in a challenge to the Occupational Safety and Health Administration's (OSHA) mandatory COVID-19 vaccination rule. Expressing doubt over the statutory authority for OSHA's unprecedented vaccine mandate, the Court explained that "[w]e expect Congress to speak clearly when authorizing an agency to exercise power of vast economic and political significance." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam) (citation omitted).

The expansive authority over the economy claimed by the Proposed Rule is no more clearly provided in the SEC's authorizing statutes than the vaccine mandate was authorized by OSHA. When Congress wants a federal agency to enter into the field of climate change, it provides so expressly, as evidenced by the EPA's mandate to collect data on GHG emissions

² SEC, [Statement of Commissioner Hester M. Peirce, March 21, 2022](#) ("[W]hile the existence of anthropogenic climate change itself is not particularly contentious, how best to measure and solve the problem remains in dispute. The Commission, which is not expert in these matters, will be drawn into these disputes as it reviews, for example, the climate models and assumptions underlying companies' metrics and disclosures about progress toward meeting climate targets.").

³ Proposed Rule at 21,469 (proposed 17 C.F.R. § 229.1504(e)(1)).

⁴ *Id.* (proposed 17 C.F.R. § 229.1504(e)(4)).

⁵ Proposed Rule at 21,470 (proposed 17 C.F.R. § 229.1505(b)).

discussed below.⁶ Congress also spoke clearly when it sought to expand the SEC’s authority by requiring disclosures on conflict minerals under the Dodd-Frank Act.⁷ There is no comparable grant of rulemaking authority for climate change.

In the past, the SEC itself recognized that a “specific congressional mandate” is necessary to adopt rules addressing environmental concerns.⁸ The SEC has also recognized that its authority over disclosures relates to “financial information in the narrow sense only.”⁹ But the SEC now proposes to reverse course and adopt a host of climate-related rules that will impose an enormous regulatory burden on American businesses without any express legislative mandate. Congress has not provided the SEC with authority for this new regulatory venture, and the SEC does not justify the about-face from authority over financial information in the “narrow sense” to the unprecedented breadth required for its Proposed Rule.

II. If interpreted to justify the Proposed Rule, the 1933 Act and 1934 Act would grant an unconstitutional delegation of legislative authority to the SEC.

If the grants of rulemaking authority in the 1933 Act and the 1934 Act could be extended to the SEC’s Proposed Rule, those statutes would violate the separation of powers set out in the U.S. Constitution and the non-delegation doctrine. Under Article 1, Section 1, of the Constitution “[a]ll legislative power herein granted shall be vested in a Congress of the United States.” Congress may delegate legislative authority to another branch only if it provides an intelligible principle by which the recipient can exercise it. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). A valid delegation of legislative authority leaves the agency to merely “fill up the details” of a congressional policy judgment. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

The 1933 Act and 1934 Act were designed to regulate securities exchanges and to prevent inequitable and unfair practices in securities markets. To aid in this effort, Congress authorized SEC to adopt rules governing an integrated disclosure system. Rulemaking on SEC-required registration statements and annual reports is clearly a legislative act that governs the legal right, duties, and relations of private parties. The SEC relies on authority throughout these acts to issue regulations “necessary or appropriate in the public interest” or “for the protection of investors.” *See, e.g.*, 15 U.S.C. §§ 77g(a)(1), 78m(a).¹⁰ Traditionally, the SEC has read this language—as it should—in their statutory context to refer to disclosures regarding the financial health of registrants and the capital markets. However, the SEC’s attempted entry into the field of climate change is an entirely new direction for the agency based on the Biden administration’s preferences regarding climate change and promoting a “green” economy.

If the grants of authority “in the public interest” or “for the protection of investors” are broad

⁶ See discussion pp. 13-14.

⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, PL 111-203, tit. XV, § 1502, 111th Cong., 2d Sess., 124 Stat 1376, 2213, (July 21, 2010).

⁸ Business and Financial Disclosure Required by Regulation S–K, 81 Fed. Reg. 23,916, 23,970 (April 22, 2016).

⁹ *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1039 (D.C. Cir. 1979).

¹⁰ *Id.* at 21,335.

enough to support rulemaking on environmental policy, they are not limited by any meaningful, intelligible principle from Congress. Nor does the Proposed Rule simply fill in details of a definite congressional policy judgment. Such open-ended authority is similar to the unconstitutional delegation of authority in the 1934 Act that allowed the SEC to determine whether it would bring an enforcement proceeding in-house with no opportunity for a jury trial. *Jarkesy v. SEC*, No. 20-61007, 2022 WL 1563613, at *11 (5th Cir. May 18, 2022). As the Fifth Circuit explained, “[i]f the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution.” *Id.*

III. The Proposed Rule is burdensome for registrants and does not apply the factors required for SEC rulemaking.

The new disclosures that are not limited by the materiality principle will result in the production of voluminous materials that are irrelevant to assessing the financial value of a company. The new disclosures that are limited by materiality are already covered under existing rules. Together, the SEC proposes an enormous burden on registrants and has not properly applied the statutory factors required for SEC rulemaking.

a. The proposed disclosures that lack a materiality limitation will require voluminous materials that are irrelevant to investors.

The SEC’s Proposed Rule includes numerous new disclosures for registrants, including certain climate-related metrics;¹¹ the board’s oversight of climate-related risks;¹² management’s role in assessing and managing climate-related risks;¹³ the resilience of the registrant’s business strategy in light of potential future changes in climate-related risks;¹⁴ any processes the registrant has for identifying, assessing, and managing climate-related risks;¹⁵ the integration of these processes into the registrant’s overall risk management system or process;¹⁶ any targets or goals related to the reduction of GHG emissions,¹⁷ and the registrant’s GHG emissions under Scopes 1 and 2.¹⁸ Registrants must disclose *all* of this information regardless of industry or whether it is material.

Without a materiality limitation, these disclosures will swell SEC filings with information that few investors consider relevant. As Commissioner Peirce explained, there is a clear link between materiality of information and its relevance to the financial return of an investment.¹⁹ Registrants are best able to conduct the fact-intensive inquiry to determine whether they face material climate-related risks. Without requiring materiality, the proposed climate-change requirements are simply the SEC using the process of disclosure to impose the Biden administration’s policy preferences regarding climate change on every publicly listed company in the country.

¹¹ Proposed Rule at 21,464 (proposed 17 C.F.R. § 210.14-02).

¹² *Id.* at 21,467 (proposed 17 C.F.R. § 229.1501(a)(1)).

¹³ *Id.* at 21,467 (proposed 17 C.F.R. § 229.1501(b)(1)).

¹⁴ *Id.* at 21,468 (proposed 17 C.F.R. § 229.1502(f)).

¹⁵ *Id.* (proposed 17 C.F.R. § 229.1503(a)).

¹⁶ *Id.* (proposed 17 C.F.R. § 229.1503(b)).

¹⁷ *Id.* at 21,471 (proposed 17 C.F.R. 229.1506).

¹⁸ *Id.* at 21,468 (proposed 17 C.F.R. § 229.1504(a)-(b)).

¹⁹ SEC, [Statement of Commissioner Hester M. Peirce](#).

The SEC has not shown how these requirements meaningfully protect investors or promote efficiency, competition, and capital formation. Specifically, the SEC has not considered how burdening registrants with a host of disclosure requirements—whether or not the information is material—will stifle competition and discourage capital formation by increasing barriers to operating as public companies. Nor has the SEC shown how investors will be protected by the disclosure of non-material aspects of a company’s climate-change governance.

These requirements are about using the SEC’s regulatory authority to steer the economy away from fossil fuels, reduce GHG emissions, and pursue climate-related goals. The role of the SEC, however, is not to mandate the social causes favored by one group of investors (or political administration). It is to protect the average investors who are primarily interested in the financial value of companies regulated by the SEC. Disclosure of information that is not material does nothing to serve that role. Accomplishing a climate agenda is not the SEC’s job.

b. Existing SEC rules require disclosure of material climate-related risks to the extent they are material to the financial health of registrants.

For the Proposed Rule to require disclosure of material climate-related risks is unnecessary and duplicative, as existing SEC rules already require disclosing such risks. Commissioner Peirce explained how material climate-related risks to registrants are responsive to the SEC’s existing disclosure requirements.²⁰

In 2010, the SEC issued guidance on this very point. In its guidance, the SEC found that the same climate-related risks outlined in the Proposed Rule already are covered under Regulation S–K, including:

- existing or pending legislation or regulation related to climate change;²¹
- new climate-related opportunities, legal, technological, and scientific developments related to climate change that may impact demand or competition for goods and services;²² and
- significant physical effects of climate change, such as effects on the severity of weather, sea levels, the arability of farmland, and water availability and quality.²³

According to Commissioner Peirce, registrants routinely disclose climate-related information

²⁰ SEC, [Statement of Commissioner Hester M. Peirce](#).

²¹ SEC Guidance Regarding Disclosure Related to Climate Change, Rel. No. 33-9106, 75 Fed. Reg. 6,290 (Feb. 8, 2010).

²² *Id.* at 6,296.

²³ *Id.* at 6,297.

in their SEC filings pursuant to this guidance.²⁴ In the Proposed Rule, the SEC also acknowledges the increase in such disclosures.²⁵

To justify its expansive Proposed Rule, the SEC asserts that disclosures of climate-related risks under the current framework vary in content, detail, and location, including variation in the depth and specificity of disclosures.²⁶ The SEC finds such disclosures inadequate because some investors demand more detailed information about the effects of climate change on a registrant's business and more information about how registrants have addressed climate-related risks.²⁷

But varied disclosures by some registrants or demand for certain types of information by some investors does not justify requiring information that is not material. Varied disclosures by registrants under the current framework reflects the reality that climate change does not affect every company equally. Moreover, as Commissioner Peirce notes, corporate sustainability reports are not always directed toward investors to begin with. Rather, these reports have a much larger audience of non-investor stakeholders.²⁸ If current disclosures on *material* climate-based risks do not provide sufficient depth or specificity, that suggests a problem with compliance with existing rules. It does not provide a rationale for the SEC to embark on a whole new set of climate-specific disclosure rules. Likewise, as discussed below, demand by some subset of investors is not a valid reason for the SEC to impose the Proposed Rule. The SEC's cited justifications do not contemplate any principled limit, much less the limits of the SEC's delegated authority, to the extent they require registrants to disclose information without regard to materiality.

c. The Proposed Rule is based on the ESG demands of certain activists, not the needs of the average American investor.

These new disclosures originate with a handful of firms that seek to mandate their social preferences as part of corporate governance.²⁹ Because these institutions manage other people's money, it is unclear whether their ESG advocacy is prompted by their beneficiaries' concerns, or their own priorities. The aims of these groups include "facilitating the flow of private capital needed to finance the net-zero transition" and engaging with companies to "reduce emissions across the value chain."³⁰ But this does not reflect a majority consensus among the investing public: according to a January 2022 Pew Research survey, Americans' top policy priority is strengthening the U.S. economy. Only 42% said dealing with climate change was a top priority.³¹

²⁴ SEC, [Statement of Commissioner Hester M. Peirce](#).

²⁵ Proposed Rulemaking at 21,339 ("Since 2010, disclosures related to climate change have generally increased.").

²⁶ *Id.* at 21,339.

²⁷ *Id.* at 21,337.

²⁸ SEC, [Statement of Commissioner Hester M. Peirce](#).

²⁹ Proposed Rulemaking at 21,340 (stating that "[s]everal major institutional investors, which collectively have trillions of dollars in investments under management, have demanded climate-related information from the companies in which they invest.").

³⁰ *Id.* at 2.

Activist investors undoubtedly have the right to use their dollars to foster the growth of “green” technology—but they do not have the right to require others to subsidize that cost. As Professor Lawrence A. Cunningham has explained, that is precisely what asset managers are doing: they are interested in using climate-friendly voting and engagement as a marketing device for a certain subset of investors, but they cannot afford to incur substantial new costs to do so.³² The SEC’s Proposed Rule would require publicly traded companies to bear the cost of producing and standardizing climate-related information for the benefit of these activist investors.³³ Such disclosures also create more business for the industry of proxy advisors who assign ESG ratings and sell services to companies to improve their rating.³⁴

These requirements are about using the SEC’s regulatory authority to steer the economy away from fossil fuels and advance other climate-related goals of activist investors. The Proposed Rule does not reflect the interests of many Main Street investors who are saving for their retirement, and are primarily interested in the financial value of companies regulated by the SEC. Indeed, the Proposed Rule mentions retail investors only once.³⁵

The role of the SEC, however, is not to mandate the social causes favored by one or another group of investors. It is to protect the average investors who are saving for their retirement and are primarily interested in the financial value of companies regulated by the SEC. The disclosures are simply an imposition of the Biden administration’s desire for registrants to be “doing more” about climate change. They will serve only to create voluminous information at enormous expense that is not needed for investors to assess a company’s financial value. Other investors would surely like to see disclosures on other causes they are interested in. And nearly every social or political cause has some impact on the economy. As Commissioner Peirce pointed out, such an approach has no principled limit.³⁶ Limited investor demand for ESG regulations should not cause the SEC to stray from its core mission of protecting investors and markets in disregard of the appropriate scope of its congressionally delegated role.

IV. The Proposed Rule will not produce consistent and reliable information for investors.

The Proposed Rule is also flawed because the requirements to disclose climate-related risks, climate-related metrics, and GHG emissions (particularly as to Scope 3) will not produce consistent and reliable information for investors. The SEC does not show how registrants can reliably identify climate-related risks specific to their business. The data supporting financial impacts from climate change is inconclusive. Reporting Scope 3 GHG emissions is intended to be voluntary under the GHG Protocol and does not produce consistent, comparable results. Moreover, GHG reporting is also unnecessary given EPA’s comprehensive GHG emissions reporting program.

³² Lawrence A. Cunningham, Professor of Law, George Washington University, [Comment on behalf of 22 professors of law and finance](#) (Apr. 25, 2022), at 4-5.

³³ *Id.*

³⁴ *Id.* at 5.

³⁵ Proposed Rule at 21,439.

³⁶ *Id.*

a. The SEC has not shown that registrants can forecast climate-related risks for their businesses and operations.

Under the Proposed Rule, registrants must describe any short, medium, or long-term climate-related risks reasonably likely to have a material impact on the registrant’s business or consolidated financial statements.³⁷ Registrants must also describe the actual and potential impacts of any climate-related risks;³⁸ describe whether and how such impacts are considered as part of the registrant’s business strategy, financial planning, and capital allocation;³⁹ and provide a narrative discussion of whether and how any such risks have affected or are reasonably likely to affect the registrant’s consolidated financial statements.⁴⁰

The definition of a “climate-related risk” is expansive. It includes the actual or potential negative impacts of climate-related conditions and events on a registrant’s consolidated financial statements, business operations, or value chains, as a whole.⁴¹ Climate-related risks also include both physical and transition risks.⁴² Physical risks include both acute risks and chronic risks to the registrant’s business operations or the operations of those with whom it does business.⁴³ Acute risks are event-driven and may relate to shorter term extreme weather events, such as hurricanes, floods, and tornadoes, among other events.⁴⁴ Chronic risks include weather patterns and related effects, such as sustained higher temperatures, sea level rise, drought, and increased wildfires, as well as related effects such as decreased arability of farmland, decreased habitability of land, and decreased availability of fresh water.⁴⁵

These risks are uncertain and, in many cases, impossible to forecast—particularly for companies that are not in climate-sensitive industries. Start with transition risks. The expansive definition of transition risks will require registrants to predict regulatory and technological changes.⁴⁶ Regulatory risks are tied to a host of factors that cannot be accurately predicted. For example, the SEC highlights the impact of the Paris Agreement.⁴⁷ But the commitments set out in the Paris Agreement “often just exist on paper.”⁴⁸ Many pledges are not yet backed up by concrete policies, making it difficult for registrants to predict what regulatory risks to their financial health may materialize and when.⁴⁹ This is only further complicated for registrants with international operations. According to a report from the National Director of Intelligence, despite pledges, only a few countries have enshrined Paris Agreement targets into law or have detailed plans on how to reach them.⁵⁰ China, for

³⁷ Proposed Rule at 21,467 (proposed 17 C.F.R. § 229.1502(a)).

³⁸ *Id.* (proposed 17 C.F.R. § 229.1502(b)).

³⁹ *Id.* (proposed 17 C.F.R. § 229.1502(c)).

⁴⁰ *Id.* (proposed 17 C.F.R. § 229.1502(d)).

⁴¹ *Id.* at 21,465 (proposed 17 C.F.R. § 229.1500(c)).

⁴² *Id.*

⁴³ *Id.* (proposed 17 C.F.R. § 229.1500(c)(1)).

⁴⁴ *Id.* (proposed 17 C.F.R. § 229.1500(c)(2)).

⁴⁵ *Id.* at 21,466 (proposed 17 C.F.R. § 229.1500(c)(3)).

⁴⁶ *Id.* (proposed 17 C.F.R. §§ 229.1500(c)(4)).

⁴⁷ Proposed Rule at 21,354.

⁴⁸ Brad Plumer & Nadja Popovich, “[Yes, There Had Been Progress on Climate. No, It’s Not Nearly Enough](#),” THE NEW YORK TIMES (Oct. 25, 2021).

⁴⁹ *Id.*

⁵⁰ Office of the Director of National Intelligence, [National Intelligence Estimate on Climate Change](#)

example, loosened its restrictions on coal production in 2021 and continues to fund coal plants, despite its carbon reduction targets.⁵¹ Congress has tried to pass legislation to require climate risk disclosure but has been unsuccessful.⁵² Given the uncertainty on a divisive issue like climate change, the SEC has not explained how a registrant might go about predicting the course of related regulatory or technological advancements.

The requirement to disclose physical risks fares no better. Under the Proposed Rule, registrants would have to not only predict the likelihood of a specific type of event—such as a tornado or hurricane—resulting from climate change. They would also have to predict the likelihood of such an event occurring at a particular time and place where they do business or have operations. The SEC has not shown that such calculations are possible under current scientific methods with the degree of confidence required to provide information sufficiently reliable for investors to make investment decisions.

Indeed, according to the Columbia University Climate School, there are substantial limitations on the science of climate attribution—the study of determining the severity or likelihood of a particular event happening under the influence of elevated GHG levels.⁵³ The Climate School notes that climate attribution models “are limited by what scientists still do not know about the relationship between different components in the atmospheric system that climate change can alter in unpredictable ways.”⁵⁴ Because of the difficulty in isolating the impact of climate change on many types of complex weather events and predicting such an event at a particular location, registrants may resort to over-predicting climate-related events. Alternatively, registrants may simply shortcut the analysis by attributing the risk of *all* catastrophic or weather-related risks to climate change. The SEC apparently failed to consider this and similar reports in the Proposed Rule, blithely requiring attribution without considering the ability of investors—at any cost—to provide accurate information.

Among the requirements for “Climate-related metrics,” the SEC proposes to require disclosure of “the impact of severe weather events and other natural conditions, such as flooding, drought, wildfires, extreme temperatures, and sea level rise on any relevant line items in the registrant’s consolidated financial statements”⁵⁵ Here, the SEC appears to assume that all “severe weather events” and other threatening conditions are generally attributable to climate change. But this is certainly not the case. Flooding, droughts, wildfires, and the like are all naturally occurring events that pose a risk to businesses even without elevated GHGs in the atmosphere. Requiring registrants to classify naturally occurring threats as “climate-related” is misleading to investors.

(Oct. 21, 2021).

⁵¹ Jun Du, [China’s Energy Crisis Shows Just How Hard It Will Be to Reach Net Zero](#), THE CONVERSATION (Oct. 8, 2021). See also Sha Hua and Phred Dvorak, [China’s Ambitious Climate Goals Collide With Reality, Hampering Global Efforts](#), THE WALL STREET JOURNAL (Oct. 27, 2021); Somini Sengupta, [China Doubles Down on Coal](#), THE NEW YORK TIMES (Apr. 19, 2022).

⁵² See H.R. 3623, *Climate Risk Disclosure Act of 2019*; H.R. 2570, *Climate Risk Disclosure Act of 2021*.

⁵³ Columbia Climate School, [Attribution Science: Linking Climate Change to Extreme Weather](#) (Oct. 4, 2021).

⁵⁴ *Id.*

⁵⁵ Proposed Rule at 21,464 (proposed 17 C.F.R. § 210.14-02(c)).

b. Contrary to the SEC’s claim, the financial consequences of climate change for businesses are not well documented.

The SEC again demonstrates that it did not consider the limitations of contemporary climate science, particularly as to attribution, when it contends that “climate-related risks on both individual businesses and financial systems as a whole are well documented.”⁵⁶ To the contrary, the data relied upon by the SEC do not establish any particularized risks or financial consequences from climate change. The National Oceanic and Atmospheric Administration (NOAA) data on billion-dollar weather and climate statistics is simply a list of weather-related disasters from 1980 to 2021.⁵⁷ The list does not indicate which of those disasters, if any, were caused by or influenced by climate change. Indeed, on the same website, NOAA acknowledges that there are other significant factors that drive the increasing financial impact of severe weather, such as increased population and development in areas vulnerable to extreme weather—a limitation SEC appears not to have considered.⁵⁸

Likewise, the SEC relies on several reports to establish the risk of climate-related events on the economy, but none of these documents show that there are sufficient data on such risks. The SEC relies heavily on the Financial Stability Oversight Council’s (FSOC) Report on Climate-Related Risk.⁵⁹ But the FSOC Report acknowledges that “[r]esearchers and firms are still learning which data may be most relevant for climate-related financial risk analysis.”⁶⁰ The report notes that, for example, “climate change may impact shipping and other infrastructure such as ports, railways, and highways. *This type of comprehensive data on potential physical impacts is generally not readily available or easy to collect.*”⁶¹

The same is true of the report by the Financial Stability Board (FSB) on Implications of Climate Change for Financial Stability.⁶² The report points to data on increasing losses from natural catastrophic events, but as with the FSOC report, it does not identify concrete financial impacts from climate-related events. Rather, the FSB report points to the *lack* of data on this issue: “Estimates of the impact of physical risks on financial assets vary considerably. All are based on a number of assumptions and subject to numerous sources of uncertainty.”⁶³

In sum, for the Proposed Rule to require disclosure of climate-related risks reasonably likely to have a material impact on a registrant’s business or financial statements will not produce reliable information for investors. The financial impacts of climate change are not well known. Transition risks depend on the uncertain direction of the political process and technology. And without careful attribution analysis—which likely is impossible under

⁵⁶ *Id.* at 21,336.

⁵⁷ Proposed Rule at 21,336 n. 10 (citing NOAA, National Center for Environmental Information, *Billion Dollar Weather and Climate Disasters: Summary Stats* (3rd Quarter Release 2021)).

⁵⁸ NOAA, [Billion-Dollar Disasters: Calculating the Costs 7 things to know about NCEI's U.S. Billion-Dollar Disasters data](#).

⁵⁹ Proposed Rule at 21,336.

⁶⁰ FSOC, Report on Climate-Related Financial Risk 2021 at 50.

⁶¹ *Id.* at 57 (emphasis added).

⁶² Proposed Rule at 21,336 n.12.

⁶³ FSB, [The Implications of Climate Change for Financial Stability](#) (23 Nov., 2020) at 6.

current science—the disclosure of physical risk may conflate climate-related risks with the risk of severe weather and catastrophic events generally.

c. GHG emissions reporting is not necessary and cannot be reliably calculated.

The Proposed Rule as to Scope 1, 2, and 3 GHG emissions goes beyond the GHG reporting required by the EPA. The SEC does not explain why EPA’s comprehensive reporting program is inadequate, much less why SEC is an appropriate agency to require more expansive reporting. In addition, the proposed requirement for Scope 3 GHG emissions will not produce reliable information for investors. The reliability of Scope 3 emissions has not been firmly established. The requirement to disclose GHG emissions is, therefore, unreasonably broad. To the extent SEC has any legitimate reason to require any GHG reporting, it appears not to have properly considered less burdensome alternatives to the unlimited scope in the Proposed Rule.

Unlike the SEC, the EPA has a statutory mandate to collect GHG emissions data. Pursuant to 2008 legislation,⁶⁴ EPA established the Greenhouse Gas Reporting Program.⁶⁵ The program requires reporting from facilities in nearly all categories of direct emissions sources, suppliers of certain fuels, and CO₂ injection sites in the United States.⁶⁶ With its expertise in the field of air emissions, EPA carefully calibrated the scope of reportable emissions under this program to balance the interest of complete and accurate emissions data against the burden of reporting insignificant sources that are numerous and widely distributed throughout the economy.⁶⁷ As a result, EPA’s program contains certain thresholds for reporting GHG emissions.⁶⁸ In addition, EPA’s program does not require the reporting of indirect emissions designated as Scope 2 and 3 under the Proposed Rule.⁶⁹ Nevertheless, according to EPA, over 8,000 facilities are covered in the program, which accounts for 85-90 percent of U.S. GHG emissions.⁷⁰ The SEC’s Proposed Rule is in this respect broader even than EPA requirements, which appropriately use thresholds and limited scope of emissions reporting for GHG emissions.

The reliability of Scope 3 GHG emissions reporting is also doubtful, which makes inclusion of statements about Scope 3 potentially harmful to the very investors whom the SEC is supposed to protect. Pursuant to the GHG Protocol adopted by the SEC,⁷¹ Scope 3 will require

⁶⁴ Consolidated Appropriations Act, 2008, Division F, Title II, Pub. L. No. 110-161, 121 Stat. 1844, 2124-28 (2008).

⁶⁵ Congressional Research Service, [EPA’s Greenhouse Gas Reporting Program](#). The EPA’s program is codified at title 40, part 98 of the Code of Federal Regulations.

⁶⁶ *Id.*

⁶⁷ See EPA, Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,260, 56,271 (Oct. 30, 2009) (discussing EPA’s rationale for setting GHG reporting thresholds).

⁶⁸ See 40 C.F.R. § 98.2(a) (establishing a reporting threshold of 25,000 metric tons CO₂e or more per year in combined emission from certain source categories).

⁶⁹ See *id.* § 98.1(a); see also Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. at 56,288 (“The final rule does not require facilities to report their electricity purchases or indirect emissions from electricity consumption.”).

⁷⁰ EPA, [GHGRP Reported Data](#).

⁷¹ Proposed Rule at 21,345 (“We have based our proposed GHG emissions disclosure requirement primarily on the GHG Protocol’s concept of scopes and related methodology.”).

registrants to gather information from a vast array of sources, including data on the transportation, distribution, processing, use, and end-of-life treatment of a registrant's goods.⁷² The GHG Protocol acknowledges that “[w]hile data availability and reliability may influence which scope 3 activities are included in the inventory, it is accepted that data accuracy may be lower.”⁷³ Thus, under the GHG Protocol, Scope 3 emissions reporting is considered voluntary.⁷⁴ The GHG Protocol further recognizes that “[s]ince companies have discretion over which categories they choose to report, scope 3 may not lend itself well to comparisons across companies.”⁷⁵ But establishing a standard for comparison across companies was one of the SEC's key aims in the Proposed Rule.⁷⁶ The GHG Protocol does not support reliance on Scope 3 emissions.

Requiring companies to disclose this unreliable information puts registrants in a liability catch-22: if a company voluntarily includes a disclosure and its stock price drops, it may face liability for an allegedly misleading disclosure; if damage from an unforeseen hurricane results in a stock price drop, it might face a derivative suit for insufficient disclosure of risk. Errors are inevitable when the metrics are unreliable, subjecting companies to litigation exposure regardless of their efforts to comply with the Proposed Rule.

The Proposed Rule acknowledges the difficulties in gathering Scope 3 emissions data by allowing for estimates and ranges,⁷⁷ allowing proxy data to fill information gaps,⁷⁸ and by creating a safe harbor from liability for these calculations.⁷⁹ But with so many allowances and reliance on third parties, the value of Scope 3 emissions reporting for investors is questionable. Again, the Proposed Rule requiring disclosure of GHG emissions is more about activists' preferences for GHG sustainability goals⁸⁰ than it is about specific, concrete risks or the financial value of registrants.

V. The SEC has not adequately weighed the costs and benefits.

The SEC has not conducted an effective cost-benefits analysis. It has severely over-estimated the benefits of the Proposed Rule and failed to quantify those alleged benefits. The SEC claims the Proposed Rule will result in comparable, consistent, and reliable disclosures with respect to climate-related risks.⁸¹ However, as shown above, these predicted benefits are unlikely to materialize. Because of the difficulty in forecasting climate-related risks, the required disclosure of these risks will not provide reliable information for investors. And as

⁷² *Id.* at 21,466 (proposed 17 C.F.R. § 229.1500(r)(2)).

⁷³ [Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard](#), (Mar. 2004) at 31.

⁷⁴ *Id.* at 29 (“Scope 3 is optional, but it provides an opportunity to be innovative in GHG management.”)

⁷⁵ *Id.*

⁷⁶ Proposed Rule at 21,337 (“Consistent, comparable, and reliable disclosures on the material climate-related risks companies face would serve both investors and capital markets.”).

⁷⁷ *Id.* at 21,469 (proposed 17 C.F.R. § 229.1504(e)(4)).

⁷⁸ *Id.* (proposed 17 C.F.R. 229.1504(e)(7)).

⁷⁹ *Id.* (proposed 17 C.F.R. § 229.1504(f)).

⁸⁰ *Id.* at 21,376 (noting that “investors and financial institutions are working to reduce the GHG emissions of companies in their portfolios or of their counterparties and need GHG emissions data to evaluate the progress made regarding their net zero commitments.”).

⁸¹ Proposed Rule at 21,429.

the GHG Protocol recognizes,⁸² Scope 3 GHG emissions reporting does not produce comparable data across companies. As for the disclosures that do not contain a materiality requirement, such as corporate governance of climate-related risks, these disclosures will benefit few investors but simply clog SEC disclosures and extraneous information that few (if any) investors will be willing to read or able to profitably use. The SEC has also failed to quantify these claimed benefits, which makes it impossible to effectively weigh against the enormous cost.

The SEC also claims that investors are expected to benefit from a common location of the new climate disclosures in a separately captioned section of registration statements and annual reports.⁸³ But this is a minimal benefit, as the SEC seems to acknowledge that the information is already in current disclosures. If anything, it may make filings difficult to compare across years—as well as across registrants. The SEC expects that by filing climate-related information rather than furnishing it to investors informally, registrants will be incentivized to provide more reliable information and avoid so-called “greenwashing.”⁸⁴ But requiring such information from registrants to be filed does not solve the reliability issues raised in this letter. Nor has the SEC quantified these benefits.

Collectively, these problems pose significant limitations on the value of the Proposed Rule. Given the SEC’s estimated average annual costs of compliance to each registrant in the first six years at about half a million dollars,⁸⁵ with additional costs for registrants required to include assurance on GHG emissions,⁸⁶ as well as indirect costs,⁸⁷ the cost-benefit analysis tilts heavily toward costs. The Proposed Rule is expensive for SEC registrants and will produce little if anything in terms of useful information about the financial value of companies under the SEC’s jurisdiction. This rulemaking is more about directing corporate policy in directions favored by the SEC than it is about providing essential financial information to investors. The SEC should not adopt the rules proposed under this rulemaking.

Respectfully Submitted,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

Ken Paxton
Attorney General of Texas

⁸² [Greenhouse Gas Protocol](#), at 29.

⁸³ Proposed Rule at 21,429.

⁸⁴ *Id.*

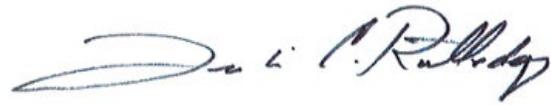
⁸⁵ Proposed Rule at 21,439.

⁸⁶ *Id.* at 21,442.

⁸⁷ *Id.* at 21,443.



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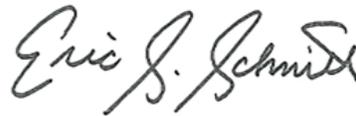
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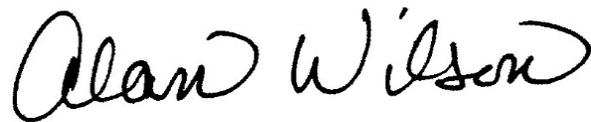
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