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

Re: Enhancement and Standardization of Climate-Related Disclosures for Investors (S7-10-22)

Dear Ms. Countryman:

On behalf of the 30 undersigned law professors, all of whom teach and write on U.S. securities law and capital markets regulation, we welcome the opportunity to provide our views on the Commission’s recent proposal related to the enhancement and standardization of climate-related disclosures for investors (the “Proposal”). We focus on a single question—whether the Proposal is within the Commission’s rulemaking authority—and we unanimously answer this question in the affirmative. We base this conclusion on the analysis set out below. We do not all agree on the policy issues facing the Commission with respect to the optimal scope of environmental, social and governance (ESG) disclosure, including climate-related disclosure. But we all share the view that the Commission has ample, longstanding, and clear authority to promulgate disclosure rules in this area.

1. The Plain Text, Legislative History, and Judicial Interpretation of the Securities Laws Support the Commission’s Authority to Mandate Climate-Related Disclosures

The federal securities laws establish the Commission as the primary regulator of the capital markets, and Congress instructed the Commission, through those laws, to regulate the markets through an extensive disclosure regime for publicly traded companies. The Commission’s statutory authority over disclosure is broad. In 2018, then-Chairman Jay Clayton described the Commission’s disclosure system as “powerful, far reaching, dynamic and ever evolving” and noted that “[a]s stewards of this . . . system, a key responsibility of the SEC is to ensure that the mix of information companies provide to investors facilitates well-informed decision making.”¹

¹ Jay Clayton, Chairman, U.S. Sec. & Exch. Comm’n, Remarks at Meeting of the Investor Advisory Committee (Dec. 13, 2018), <https://bit.ly/3wV4UnB>.

Congress, in the original federal securities laws, the Securities Act of 1933 and the Securities Exchange Act of 1934, authorized the Commission to promulgate rules for registrant disclosure pursuant to broadly articulated delegations of authority. For example, Section 7 of the Securities Act identified categories of information required to be included in the registration statement for public offerings, as augmented by “such other information . . . as the Commission may by rules or regulation require as being necessary or appropriate in the public interest or for the protection of investors.”² Section 12 of the Exchange Act conditions trading on exchanges on disclosing “such information, in such detail, as to the [company] . . . as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors, in respect of the following: . . . the organization, financial structure, and nature of the business.”³ Section 13(a)(2) of the Exchange Act, which establishes the periodic reporting framework for public companies, requires companies to disclose information under rules the Commission “may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security . . . such annual reports . . . and such quarterly reports . . . as the Commission may prescribe.”⁴ Section 3(b) of the Exchange Act adds Commission authority to “define technical, trade, accounting, and other terms used [in the statute].”⁵ These are only some examples of Congress’ broad delegation to the Commission of the power to determine what disclosure is necessary or appropriate in the public interest, or for the protection of investors, or to promote fair dealing in securities traded on the U.S. capital markets.⁶

Moreover, Congress recognized that capital market regulation was essential, not just for investor protection, but to serve the broader interests of the U.S. economy. As a result, in 1996, Congress instructed the Commission in determining whether a disclosure requirement is necessary or appropriate to consider “whether the action will promote efficiency, competition, and capital formation.”⁷ This language reflects well-settled understanding that public company securities trade in efficient markets and that the prices of those securities incorporate relevant and accurate information generated through the Commission’s disclosure requirements and guaranteed through its liability regime. This regulatory scheme serves to protect investors, improve market efficiency, and ensure the productive allocation of capital.

We further note that the Commission’s disclosure authority extends not just to information relevant to investor trading decisions but also to information used by investors in connection with the exercise of their voting power. The Commission’s broad authority to regulate the proxy voting process, found in Section 14(a) of the Exchange Act, requires proxy

² Securities Act of 1933, 15 U.S.C. § 77g, § 7(a)(1).

³ Securities Exchange Act of 1934, 15 U.S.C. § 78l, § 12.

⁴ Securities Exchange Act of 1934, 15 U.S.C. § 78m(a)(1), § 13(a)(1).

⁵ Securities Exchange Act of 1934, 15 U.S.C. § 78c(b).

⁶ *See also* Sections 10 and 19(a) of the Securities Act; Sections 14, 15(d), and 23(a) of the Exchange Act. We note further that the Commission has established a related disclosure regime for investment funds and advisers pursuant to the Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq., and the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1, et seq.

⁷ Securities Act § 2(b); Exchange Act § 23(a)(2). Congress added a similar provision to the Investment Company Act of 1940 in 1999. 15 U.S.C. § 80a-2(c).

solicitations to be conducted in accordance with “such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”⁸ Shareholder voting on issues ranging from the election of directors to the approval of mergers is a critical governance tool, and the Commission’s disclosure requirements enable shareholders to exercise that voting power on an informed basis.

Courts have always interpreted the authorization to act as “necessary or appropriate in the public interest or for the protection of investors” as granting the Commission broad rulemaking authority. As summarized by the D.C. Circuit Court of Appeals in 1979, “the Commission has been vested by Congress with broad discretionary powers to promulgate (or not to promulgate) rules requiring disclosure of information beyond that specifically required by statute.”⁹ We note that no court has invalidated a Commission rule for overstepping the Commission’s disclosure authority despite the Commission’s active rulemaking spanning close to nine decades and despite the fact that, as is often the case with economic regulation, many of the Commission’s rules were initially resisted by the regulated entities and other interested parties.

Even a narrow reading of the legislative history of the original securities laws supports the Commission’s authority to pursue the Proposal because climate-related matters impact the most important aspect of any securities transaction—the price at which investors buy or sell—and Congress was focused on valuation matters, among others, when it adopted the Securities Act in 1933. Congress’ intent was to create an information-generating regime “designed to reach items of distribution profits, watered values, and hidden interests . . . [of] indispensable importance in appraising the soundness of a security,” which contains “items indispensable to any accurate judgment upon the value of the security.”¹⁰

It is important to consider the Proposal within the established legal context described above. The Commission’s proposal requires that issuers disclose climate-related information relevant to their business operations. This information includes, *inter alia*, qualitative disclosures about the issuer’s climate-related governance, risks and strategy, quantitative disclosure of Scopes 1 and 2 greenhouse gas emissions, and, if (and only if) an issuer has already elected to adopt transition plans or set targets, a summary of those. Notably, the Proposal does not mandate any operational changes with respect to climate. It does not require issuers to adopt particular governance structures to oversee climate risk, it does not require issuers to set carbon goals, and it does not demand that issuers implement a climate transition plan. Instead, it provides a standardized disclosure framework that allows investors and markets to value firms by ensuring

⁸ Exchange Act § 14(a). As a crucial part of the disclosure made in connection with the annual meeting at which directors are elected, shareholders are given an annual report, drawn from the issuer’s 10-K, which would contain the climate-related disclosure mandated by the proposed rules. This disclosure will allow investors to vote in a more informed manner.

⁹ *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1045 (1979). In related proceedings, the D.C. District Court stated unequivocally: “These statutes grant the SEC broad rulemaking authority. The language of the acts suggests that the SEC is empowered to exercise its informed discretion about which information will be required to be disclosed in the various corporate filings.” *Nat. Res. Def. Council, Inc. v. SEC*, 389 F. Supp. 689, 695 (D.D.C. 1974).

¹⁰ House Report on Securities Act, H.R. Rep. No. 85, 73d Cong., 1st Sess. 3 (1933).

that they can price in various factors, including climate-related risks, climate-related trends and uncertainties, and climate-related business opportunities.

Without standardization, investors lack the ability to assess the risk of greenwashing and other practices meant to conceal and confuse regarding these risks, trends, uncertainties, and opportunities.¹¹ There is extensive evidence that markets currently do not have sufficient information to price climate-related risk accurately,¹² even though climate-related matters may lead to significant write-downs.¹³ The Proposal therefore meets the need for a credibility-enhancing platform for issuers, from which investor expectations of honesty and fair dealing will follow. This is a considerable step forward from the current regulatory setting, which has led to confusing variations in what, if anything, is said about key environmental risks in both the short term and the long term, and which has made what little enforcement there is a matter of interpreting forward-looking regulatory mandates by “facts and circumstances” invocations of fraudulent concealment or the half-truth doctrine.¹⁴

The Proposal’s requirements are thus properly understood as core capital markets disclosure in the service of the statutory goals discussed above. Providing investors with the appropriate level of information, eliciting higher-quality information about risks and opportunities, and standardizing what is currently an uncoordinated universe of ESG disclosures increases confidence in the capital markets and bolsters investors’ willingness to supply capital by reducing knowledge gaps and asymmetries. The information provides value both to retail investors, who are important as suppliers of longer-term capital,¹⁵ as well as institutional intermediaries who are tasked with evaluating the ESG characteristics of portfolio companies in

¹¹ Standardized disclosure requirements offer issuers predictability in contrast to the uncertainty associated with a generic obligation to disclose all material climate-related information or the current landscape where existing requirements may create disclosure duties. Ultimately, standardization will contribute to compliance cost savings and mitigate legal uncertainty about what should be disclosed and how it should be presented. *See, e.g.*, Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L.J. 407, 443-52 (2018) (discussing the costs imposed on markets by unstandardized disclosures); Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L. J. 923 (2019) (analyzing problems associated with a voluntary disclosure system); George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 718-22 (2021) (highlighting the benefits of standardized ESG disclosure frameworks over open-ended, “principles-based” requirements).

¹² *See, e.g.*, Madison Condon, *Market Myopia’s Market Bubble*, 2022 UTAH L. REV. 63 (2022) (summarizing relevant evidence).

¹³ *See, e.g.*, Collin Eaton & Sarah McFarlane, *2020 Was One of the Worst-Ever Years for Oil Write-Downs*, WALL ST. J. (Dec. 27, 2020), <https://on.wsj.com/3MXL0iB> (“This year’s industrywide reappraisal is among its starkest ever because oil companies also face longer-term uncertainty over future demand for their main products amid the rise of electric cars, the proliferation of renewable energy and growing concern about the lasting impact of climate change.”); Alan Livsey, *Lex in Depth: The \$900bn Cost of ‘Stranded Energy Assets’*, FIN. TIMES (Feb. 4, 2020), <https://on.ft.com/3NHSDcN> (discussing estimates whereby between 50% and 80% of energy producers’ existing hydrocarbon reserves would need to be written off); Gregor Semieniuk et al., *Stranded Fossil-Fuel Assets Translate to Major Losses for Investors in Advanced Economies*, NATURE CLIMATE CHANGE (2022), <https://bit.ly/3wXrQCq> (estimating \$1.4 trillion in stranded assets and modeling that “[I]osses exceed equity . . . in 239 companies with a total debt of \$361 billion, leading to technical insolvencies”).

¹⁴ *See* Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 GEO. L.J. 967, 975-79 (2019).

¹⁵ *See, e.g.*, Alicia J. Davis, *A Requiem for the Retail Investor?*, 95 VA. L. REV. 1105, 1116-1120 (2009) (discussing the importance of retail investors to small and medium-sized enterprises due to their longer-term orientation).

order to convey those characteristics accurately to their customers.¹⁶ Climate-related disclosures would also reflect the business impacts of ongoing changes to the global regulatory landscape. Irrespective of one's views on these changes, most of them lie outside the control of U.S. regulators but still affect U.S. firms and their investors due to the design of our time-tested free market system. In light of these dynamics, it falls on the federal securities disclosure regime to facilitate the efficient allocation of capital and to promote capital formation by enabling investors to assess how companies will fare when faced with new challenges and new opportunities. As such, the Proposal fits within core SEC authority by giving investors insight into the amount and timing of cash flows that might be affected by climate or transition risks and allowing investors to evaluate companies' going concern value.

Finally, there is a related yet distinct point having to do with the promotion of competition, which has been part of the statutory framework since 1996.¹⁷ Sustainable finance has become a significant phenomenon in U.S. capital markets in recent years, which includes strong capital inflows into sustainable funds.¹⁸ Scholars disagree about the desirability of these developments.¹⁹ Regardless of one's normative stance, however, it is an uncontroversial proposition that competition for investor capital should not be based on misleading or incomplete information. And yet, ESG information today lacks consistency, comparability, and reliability despite the large pools of capital at stake.²⁰ Consequently, sustainable firms are unable to differentiate themselves from, and compete with, less sustainable firms.²¹ Separately, asset

¹⁶ Indeed, the Commission recently proposed rules that would increase the transparency obligations of funds and asset managers with respect to the climate-related risks of their products. *See* Investment Company Names, Release No. IC-34593 (May 25, 2022), <https://www.sec.gov/rules/proposed/2022/ic-34593.pdf>; Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, Release No. IA-6034; IC-34594 (May 25, 2022), <https://www.sec.gov/rules/proposed/2022/ia-6034.pdf>. In the absence of climate-related information provided by issuers as part of their SEC disclosures, it would be more difficult and costly for funds and asset managers to comply with these new regulatory obligations or meet the needs of their clients, many of whom are retail-type investors. *See* INVESTMENT COMPANY INSTITUTE, ICI BOARD UNANIMOUSLY CALLS FOR ENHANCED ESG DISCLOSURE BY CORPORATE ISSUERS (Dec. 7, 2020), https://www.ici.org/news-release/20_news_esg (“Fund managers require access to financially material ESG-related information from corporate issuers that is accurate, comparable, and timely.”).

¹⁷ *See supra* note 7 and accompanying text. For an expanded discussion of the relevance of competition to Commission rulemaking on ESG disclosure, see George S. Georgiev, Comment Letter to the SEC on Climate Change and Other ESG Disclosure, at 7-11 (June 22, 2021), <https://ssrn.com/id=3874186>.

¹⁸ According to Morningstar, the number of sustainable open-end and exchange-traded funds available to U.S. investors increased to 534 in 2021, up 36% from 2020. Sustainable funds attracted a record \$69.2 billion in net flows in 2021, a 35% increase over the previous record set in 2020, and the total assets under management invested in sustainable funds stood at \$357 billion at the end of 2021, more than four times the amount in 2018. *See* MORNINGSTAR, SUSTAINABLE FUNDS U.S. LANDSCAPE REPORT (Jan. 31, 2022). Evidence suggests that climate-related considerations represent an important vector of competition in capital markets. *See, e.g.,* ERNST & YOUNG, SUSTAINABLE INVESTING: THE MILLENNIAL INVESTOR (2017), <https://go.ey.com/3NnZ6Kb>.

¹⁹ *See, e.g.,* Cynthia A. Williams & Donna M. Nagy, *ESG and Climate Change Blind Spots: Turning the Corner on SEC Disclosure*, 99 TEX. L. REV. 1453 (2021) (offering a positive assessment of ESG-driven investment); Lucian Bebchuk & Roberto Tallaria, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020) (expressing skepticism about ESG-driven investment).

²⁰ *See, e.g.,* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM (2020).

managers cannot effectively compete with one another to assemble high-performing funds, including but not limited to sustainability-focused funds, that meet investor preferences. When investors and asset managers rely on incomplete and low-quality data, often coming from third-party providers, this has distortive effects on competition, market efficiency, capital formation, and the overall integrity of U.S. capital markets.²² These problems fall squarely within the Commission’s rulemaking authority, which justifies the Commission’s present effort to address them through the Proposal on climate-related disclosure.

2. The Statutory Framework Requires the Commission to Adjust and Update the Content of the Disclosure Regime in Response to the Evolution of the Economy and Markets

The Commission’s integrated disclosure regime as it exists today traces its origins directly to Schedule A of the Securities Act of 1933, which has never been amended or repealed by Congress. Schedule A represents a detailed initial template: it prescribes 32 categories of information, both general and highly specific, that are required to be included in Commission-filed registration statements.²³ Congress delegated power to the Commission to waive some of the requirements of Schedule A, and, importantly, to mandate disclosure of “such other information, and . . . such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.”²⁴ The Commission has mandated such disclosures on a wide variety of topics over the course of its 88-year history, without challenge to its authority. The Commission has consistently exercised its delegated authority to adjust the disclosure regime—both by adding to and subtracting from the initial topics Congress put forward in 1933—to account for the evolution of the economy and financial markets.

Regulation S-K, which is currently used for the preparation of not only Commission-filed registration statements but also for registrants’ annual and quarterly reports, can be traced back directly to Schedule A. Regulation S-X, which contains disclosure requirements for information

²¹ Investment and fund inclusion/exclusion decisions are by their nature comparative, so a higher-quality firm cannot stand apart (and reap the corresponding benefits) unless other firms also report baseline ESG data. Suppliers of capital, such as banks, have made their own climate-related commitments to limit financed emissions. Poor or misleading emissions reporting, therefore, can be expected to limit firms’ access to credit. See Samantha Ross, *The Role of Accounting and Auditing in Addressing Climate Change*, CTR. FOR AM. PROG. (Mar. 1, 2021), <https://ampr.gs/3axzImV>.

²² Since major capital market jurisdictions outside the United States have been acting more swiftly on climate-related disclosure, these problems have implications for the competitive standing of U.S. capital markets. See, e.g., Frédéric Louis, WilmerHale, *ESG: The EU’s Agenda for 2022 – What You Need to Know* (Feb. 10, 2022), <https://bit.ly/3aioeTU>. The EU’s highly visible leadership on climate disclosure issues should not eclipse the fact that all other major developed markets are making swift progress. See Joanna Treacy et al., K&L Gates, *ESG Regulatory Developments in the UK, Japan, and Hong Kong* (Jan. 14, 2022), <https://bit.ly/3PQjISk> (“Regulators in the United Kingdom and Hong Kong are sending a clear message that compliance with ESG disclosure requirements is important, and that greenwashing will not be tolerated. Asset managers have been warned and now need to take action. The Japanese regulator also seems not far behind.”).

²³ Securities Act of 1933, Schedule A, 48 Stat. 88 (1933).

²⁴ Securities Act §7(a)(1).

presented in financial statements, contains many highly detailed disclosure rubrics and checklists, which have been promulgated through iterative amendments in consultation with investors.

Because Schedule A reflects Congress' initial template for the disclosure regime, its design is instructive on three points that are relevant to climate-related disclosure rulemaking. First, even though Congress was aware of the concept of materiality, it did not impose a materiality constraint, either for Schedule A as a whole, or for the type of "other information" the Commission is expressly authorized to require.²⁵ Second, Congress deemed it appropriate to require disclosure of information about specific contracts and remuneration arrangements involving amounts that were not financially significant when viewed in isolation.²⁶ Third, Congress calibrated Schedule A to the particular risks of the time and was not deterred from requiring disclosure simply because a problem was not exclusively an investor protection problem or because it had high public salience.²⁷

Relying on its delegated power, the Commission has in Regulations S-K and S-X built out a detailed disclosure regime aimed at protecting investors and the capital markets. As the economy and financial markets have grown in size and complexity, the Commission has continuously updated the disclosure framework. This process of iterative modernization has included the scaling back of certain disclosure requirements.²⁸ For the same reasons, the Commission has also expanded the disclosure regime to cover a number of matters that are not expressly addressed by Schedule A or subsequent acts of Congress. These matters include executive compensation, related-party transactions, asset-backed securities, and various technical industry-specific items.²⁹ During the tenure of Chairman Jay Clayton, the Commission recognized that economic changes warrant a specific disclosure requirement in the area of human

²⁵ Congress was aware of the concept of materiality, since a few of the items it included in Schedule A are qualified by materiality (e.g., "material contract"), but most others are not, and neither is Schedule A as a whole.

²⁶ For example, Schedule A, which is still on the books, requires the disclosure of any contract with a public utility company that provides for the "giving or receiving of technical or financial advice or service (if such contract may involve a charge to any party thereto at a rate in excess of \$2,500 per year)." This threshold amount translates to only \$52,500 in 2022. The Commission has used its discretion to drop this entire disclosure provision. Schedule A also requires disclosure of "the remuneration, paid or estimated to be paid, by the issuer . . . to . . . its officers and other persons, naming them whenever such remuneration exceeded \$25,000 during any such year." This threshold amount translates to \$525,000 in 2022. The Commission has, once again, exercised its discretion and does not require public companies to name all employees earning more than half a million dollars.

²⁷ Public utilities during the 1930s employed pyramid structures and various business practices that harmed both investors and the broader economy, which is why Schedule A included public utilities contracts as a matter to be disclosed.

²⁸ For example, the Commission no longer requires registration statements to include disclosure of certain outdated items in Schedule A. *See supra* note 26. In 2019, the Commission vastly reduced the information required to be disclosed in connection with material contracts, determining that the benefits from those disclosures were outweighed by the costs. *See* Cydney Posner, *SEC's Amendments to Simplify Disclosure for Public Companies*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 9, 2019), <https://bit.ly/3lSubtn>.

²⁹ *See* Georgiev, *Human Capital Management*, *supra* note 11, at 714-18.

capital management (HCM), and it adopted this new disclosure provision without a Congressional mandate.³⁰

In addition to formal disclosure rules, the Commission has also developed a practice of providing real-time disclosure guidance for the benefit of investors and registrants, which in most cases results in substantially enhanced disclosure. For example, the Commission has provided detailed guidance on disclosure relating to “Year 2000” (Y2K) risks,³¹ the impact of the Eurozone crisis and Brexit,³² and, most recently, the Covid-19 pandemic and Russia’s war on Ukraine.³³ The Commission’s disclosure policies have responded to market developments, and at no time has Congress legislatively overridden these new or enhanced disclosure requirements.

It should be emphasized that if Congress had objected to the Commission’s approach, it could have easily intervened. Congress has amended the Securities Act and the Exchange Act on multiple occasions since the 1930s,³⁴ so it has had ample opportunity to reconsider the broad authority it delegated for disclosure-based rules, or to constrain the Commission’s power to require disclosures about new topics. It has not found it necessary to do so.³⁵ As the D.C. Circuit

³⁰ See Jay Clayton, Chairman, U.S. Sec. & Exch. Comm’n, Modernizing the Framework for Business, Legal Proceedings and Risk Factor Disclosures (Aug. 26, 2020), <https://bit.ly/3GS8YJD> (“From a modernization standpoint, today, human capital accounts for and drives long-term business value in many companies much more so than it did 30 years ago. Today’s [new] rules reflect that important and multifaceted shift in our domestic and global economy.”); see also Jay Clayton, Chairman, U.S. Sec. & Exch. Comm’n, Remarks at Meeting of Investor Advisory Committee (Mar 28, 2019), <https://bit.ly/3t51w8x> (noting that “the historical approach of disclosing only the costs of compensation and benefits often is not enough to fully understand the value and impact of human capital on the performance and future prospects of an organization”). All five commissioners agreed on the materiality of human capital matters and supported enhanced disclosure in this area, despite some disagreement about the format of the new disclosure requirement, which resulted in a split vote. See Georgiev, *Human Capital Management*, *supra* note 11, at 682, 714 (discussing objections of Commissioners Lee and Crenshaw). It is worth noting that both the House and the Senate had been contemplating HCM disclosure mandates since early 2019 (*see id.*, at 683-85), but no one argued that the Commission was required to await congressional authorization before proceeding with or finalizing its own rulemaking; such an argument is similarly misplaced in the context of the current Proposal.

³¹ See U.S. Sec. & Exch. Comm’n, Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences by Public Companies, Investment Advisers, Investment Companies, and Municipal Securities Issuers, 63 Fed. Reg. 41,394 (Aug. 4, 1998).

³² See U.S. Sec. & Exch. Comm’n, Div. of Corp. Fin, CF Disclosure Guidance: Topic No. 4: European Sovereign Debt Exposure (Jan. 6, 2012), <https://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic4.htm> (providing extensive guidance on disclosure of Eurozone crisis impacts); Tatyana Shumsky, *SEC Calls For More Detailed Disclosure on Brexit Impact*, WALL ST. J. (Nov. 12, 2018), <https://on.wsj.com/3PLs4W3> (reporting that “[the SEC] is sharpening its focus on corporate disclosures about the risks associated with the U.K.’s exit from the European Union” and quoting Chairman Jay Clayton’s opinion that “the potential impact of Brexit has been understated” and that “companies [should] be looking at this closely and sharing their views with the investment community”).

³³ See U.S. SEC. & EXCH. COMM’N, COVID-19 (last modified: Jan. 8, 2021), <https://www.sec.gov/corpfin/corporation-finance-covid-19> (listing 15 guidance documents, statements, and interpretations by the Commission in connection with the Covid-19 crisis); U.S. Sec. & Exch. Comm’n, Div. of Corp. Fin, Sample Letter to Companies Regarding Disclosures Pertaining to Russia’s Invasion of Ukraine and Related Supply Chain Issues (May 3, 2022), <https://www.sec.gov/corpfin/sample-letter-companies-pertaining-to-ukraine>.

³⁴ See, e.g., Usha Rodrigues, *Dictation and Delegation in Securities Regulation*, 92 IND. L.J. 453 (2017) (chronicling amendments to securities laws and the pluralism in Congress’ approaches to new regulation).

³⁵ To the contrary, Congress has emphasized the importance of agency delegation with respect to disclosure matters. For example, in hearings in the 1970s following the collapse of the Penn Central railway, Congress criticized the Interstate Commerce Commission (ICC), which had authority over the securities of common carriers pursuant to an

has explained, “[r]ather than casting disclosure rules in stone, [the 1933] Congress *opted to rely on the discretion and expertise* of the SEC for a determination of what types of additional disclosure would be desirable.”³⁶ The court further noted that “[t]he Commission’s task [is] a peculiarly difficult one, requiring it to find a path between the views of the parties to the rulemaking polarized in support of the broadest disclosure or in opposition to any disclosure, to interpret novel statutory commands, and to make decisions against the background of rapidly changing conditions.”³⁷ Indeed, Congress delegated the task of keeping up with the rapid evolution of financial markets and of regulating those markets to a specialized agency—the Commission—precisely because the task at hand is a “difficult one.”

The significance of climate-related information to the capital markets and participants in those markets highlights the distinctive role for the Commission in overseeing this disclosure. This role is not diminished by the existence of a multitude of administrative agencies that also have the power to issue disclosure requirements. For example, the Internal Revenue Service requires companies to disclose information about their financial condition including their profits and expenses, the Occupational Safety and Health Administration requires employers to disclose information about workplace safety, the Equal Employment Opportunity Commission requires disclosure of workforce demographic data, and the Environmental Protection Agency requires companies to disclose information about their environmental impact.³⁸ In many cases these disclosures cover similar subject matter to that required in securities filings, but as these examples illustrate, the disclosures are directed to different audiences and serve different regulatory goals.

Nor is the Commission’s disclosure authority in some way constrained because of its limited technical expertise with respect to climate-related matters. The Commission has decades-long experience handling disclosures on technical topics. Moreover, as in other areas, the Commission’s Proposal draws upon the technical expertise of outside experts. The history of drawing upon outside expertise to formulate capital market disclosure requirements dates back to the 1930s when the Commission, rather than developing a set of internal metrics for financial disclosure, drew upon the technical framework established by FASB’s predecessors. Similarly, although the Commission is not an energy regulator, it drew up a specialized disclosure framework for oil and gas extraction activities in the 1970s (with help from expert groups, much

exemption in the original Securities Act, for failing to promulgate appropriate disclosure requirements. The Report on the hearings noted: “More than thirty-seven years later, the ICC has continued to ignore the Congressional mandate of Schedule A and has negligently failed to promulgate one single informational requirement for inclusion in a prospectus covering securities of rail and motor carriers.” *See* House of Representatives, Special Subcommittee on Investigations, “Inadequacies of Protections for Investors in Penn Central and Other ICC Regulated Companies” (July 27, 1971). Congress repealed the relevant exemption in 1976 and placed common carriers under the Commission’s disclosure jurisdiction. *See* Section 308, Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 31 (Feb. 5, 1976) (amending Section 3(a)(6) of the Securities Act).

³⁶ *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1045 (1979) (emphasis added).

³⁷ *Id.*, at 1057. As part of the same proceedings, the D.C. District Court urged the Commission to “develop a [factual] record” and “imaginatively exercise its authority and expertise.” *See Nat. Res. Def. Council, Inc. v. SEC*, 389 F. Supp. 689, 695 (D.D.C. 1974).

³⁸ *See, e.g.*, The OSHA Hazard Communication Standard, 29 CFR 1910.1200; U.S. Equal Emp. Opportunity Comm’n, Form EEO-1; Environmental Protection Agency, Emissions & Generation Resource Integrated Database (eGRID).

like it has done here), and it has administered this framework successfully since then.³⁹ As the composition of the economy has changed, the Commission has had to develop some expertise in cybersecurity disclosure, tech disclosure, and in other specialized areas. Similarly here, the Commission's proposal draws on technical frameworks for financially material disclosure developed by expert groups such as the Task Force on Climate-Related Financial Disclosures (TCFD) and the Greenhouse Gas Protocol.⁴⁰ In line with the Commission's historical approach, the Proposal simply requires disclosure and does not seek to establish substantive operational requirements: The Commission is not setting GHG emission limits, calculating carbon trading prices, drawing up climate transition plans, or setting climate resilience standards for businesses. The Commission is cognizant of the appropriate role of disclosure as a regulatory tool and it is not aiming to address climate change any more than it was trying to solve a geopolitical crisis (Russia's war on Ukraine) or a global health crisis (the Covid-19 pandemic) when it required public companies, for the benefit of investors and markets, to disclose the risks and operational and financial impacts of these critical events.

To be sure, mandatory disclosure by public companies can *also* be relevant to stakeholders beyond direct investors. An issuer's financial condition is relevant to its customers, its suppliers, and its employees. Investors in one issuer may glean valuable insight from examining the securities disclosures of its peers, while investors in the private markets may benefit from the information released by public companies. Mandated disclosure has always resulted in positive externalities. Cybersecurity information is of interest to customers (in addition to investors), information about the unfolding Covid-19 pandemic was of interest to employees (in addition to investors), and so on. But this Proposal stands solidly on investor and marketplace protection and any collateral benefits for other stakeholders would be a bonus for the public interest. Indeed, during the Covid-19 crisis, the Republican-appointed leadership of the Commission spoke approvingly of the collateral benefits of investor-facing disclosure for society.⁴¹

³⁹ See Modernization of Oil and Gas Reporting, Securities Act Release No. 33-8995, Exchange Act Release No. 59192, 74 Fed. Reg. 2158, 2159 (Jan. 14, 2009) (discussing the history of the oil and gas disclosure framework).

⁴⁰ The TCFD is an independent organization comprised exclusively of capital market participants and their professional advisors and created at the behest of the Financial Stability Board (FSB). The FSB was established in 2009 to, inter alia, "assess vulnerabilities affecting the global financial system," and includes among its members the SEC, the Board of Governors of the Federal Reserve System, and the U.S. Department of the Treasury. See FINANCIAL STABILITY BOARD, MEMBERS OF THE FSB, <https://bit.ly/3sY8U5x>. The Greenhouse Gas Protocol accounting standards for disclosing greenhouse gas (GHG) emissions have been developed for over 20 years with input from industry associations, civil society experts, the World Business Council for Sustainable Development, and the World Resources Institute. See Greenhouse Gas Protocol, www.ghgprotocol.org (stating that 92% of Fortune 500 companies that report on their GHG emissions to voluntary data repository CDP do so according to the GHG Protocol).

⁴¹ See Jay Clayton, Chairman & William Hinman, Dir., Div. of Corp. Fin., U.S. Sec. & Exch. Comm'n, The Importance of Disclosure—For Investors, Markets and Our Fight Against COVID-19 (Apr. 8, 2020), <https://bit.ly/3z9smjx> ("High quality disclosure will not only provide benefits to investors and companies, it also will enhance valuable communication and coordination across our economy—including between the public and private sectors—as together we pursue the fight against COVID-19. This transparency can foster confidence in countless specific instances, for example, between a supplier and a manufacturer as well as between an investor and a company, which in combination will benefit all.").

3. The Proposal is Consistent with the Commission’s Exercise of Its Statutory Authority in the Area of Environmental and Climate-Related Disclosure for Over 50 Years

The Proposal does not take the capital market disclosure regime into uncharted territory because the Commission has focused on environmental issues facing businesses for over five decades. Importantly, market and business developments have, over time, changed both the importance of environmental disclosures and the practicality of requiring those disclosures. When the Commission first considered petitions for specialized environmental disclosure in 1975, it found that there was “no uniform method by which the environmental effects of corporate practices [could] be described.”⁴² In the past 47 years, the market has developed widely accepted frameworks for describing those effects, largely in response to investor demands for such information and largely through the concerted efforts of mainstream investors. Similarly, shareholder proposals seeking environmental disclosures receive unprecedented levels of support, particularly recently, either through a formal vote,⁴³ or by way of a settlement.⁴⁴

In line with its “dynamic and ever evolving” approach to disclosure discussed above,⁴⁵ and as environmental and climate issues have grown in complexity and magnitude over time (due to economic growth, globalization, substantive regulation, and the ever-changing nature of economic activity), the Commission has periodically updated its rules and provided registrants with additional guidance. The following overview highlights just some of the Commission’s extensive work in this area.⁴⁶

⁴² Commission Conclusions and Rulemaking Proposals, Securities Act Release No. 5627, Exchange Act Release No. 11733, 8 S.E.C. Docket 73 (Oct. 14, 1975).

⁴³ Kosmas Papadopoulos, ISS Analytics, *The Long View: U.S. Proxy Voting Trends on E&S Issues from 2000 to 2018* (Jan. 31, 2019) (concluding that “[t]he most significant change in investors’ voting behavior pertains to environmental and social issues, as these proposals are earning record levels of support in recent years”), <https://bit.ly/3wVp8OZ>; IR Magazine, *Majority Support for E&S Proposals Almost Doubles in U.S.* (Oct. 26, 2021), <https://bit.ly/3PMS6rY> (noting “monumental change in investor focus toward ESG risks and opportunities”). During the 2022 proxy season, more than 89% of shareholders of Boeing Inc. voted in favor of a climate-related disclosure report, and more than 75% of shareholders of Dominion Energy Inc. voted in favor of a report on the risk of stranded natural gas assets. See, e.g., Corbin Hiar, *Dominion Shareholders Pass Resolution on Stranded Assets*, CLIMATEWIRE (May 12, 2022), <https://bit.ly/3z9qRSq>.

⁴⁴ Because issuers can and frequently do agree to undertake shareholder advocates’ requested actions or disclosures voluntarily when they view a proposal as likely to receive majority support, reported statistics on proposals that go to a vote systematically understate the level of shareholder support. See, e.g., Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 297 (2016) (observing that “[t]he Rule 14a-8 regime itself . . . may actually channel social and environmental activism toward settlement”). Expert analysis found that the number of proposals withdrawn due to settlement in 2021 increased substantially over 2020. See Marc Treviño, et al., Sullivan & Cromwell LLP, *2021 Proxy Season Review: Shareholder Proposals on Environmental Matters* (Aug. 11, 2021), <https://bit.ly/3z5TDU3> (observing that 70 of 115 environmental proposals were withdrawn in 2021 and that “major proponents rarely settled with companies unless the company committed to take actions towards the specified environmental goals or at least adopted their disclosure-based demand”).

⁴⁵ See *supra* note 1 (statement of Chairman Jay Clayton) & discussion in Part 2.

⁴⁶ We understand that the history of Commission rulemaking in this area will be explored in greater detail in a forthcoming letter on the subject from former Commission officials and others.

The Commission's long history of requiring environmental disclosures dates back to the Nixon Administration when, in a 1971 release, the Commission "called attention to the requirements" under the Securities Act and the Exchange Act "for disclosure of legal proceedings and a description of the registrant's business as these requirements relate to material matters involving the environment and civil rights."⁴⁷ In 1973, the Commission mandated disclosure of *all* environmental proceedings by a governmental authority, and of environmental proceedings not involving a governmental authority that meet certain specified conditions, and in 1976 the Commission required disclosure about capital expenditures relating to environmental compliance.⁴⁸ The Commission continued to recalibrate its disclosure requirements with respect to environmental information over time and made adjustments to Regulation S-K in 1981 and 1982.⁴⁹ In parallel, the Commission and accounting standard-setters developed detailed rules on the treatment of contingent environmental liabilities,⁵⁰ as well as rules about disclosure and accrual of environmental obligations upon future asset retirement.⁵¹ The Commission's MD&A releases have also made reference to environmental matters.⁵² Of particular note, in 1993 the Commission issued Staff Accounting Bulletin 92, which addressed accounting and disclosures relating to environmental loss contingencies.⁵³ The existence of extensive financial disclosure rules and guidance related to environmental matters has been overlooked as part of efforts to portray the Commission's Proposal as unprecedented.

More recently, in 2010, the Commission provided additional guidance on climate-change developments that could be required to be disclosed under Commission rules. Noting that legislation, regulation, international accords, business trends, and physical impacts of climate change could all affect a registrant's operations or results, the guidance "remind[ed] companies of their obligations under existing federal securities laws" as well as "to consider climate change and its consequences as they prepare documents to be filed with us and provided to investors."⁵⁴ The Commission grounded this requirement in several existing provisions of Regulation S-K,

⁴⁷ Disclosures Pertaining to Matters Involving the Environment and Civil Rights, Release Nos. 33-5170, 34-9252, 36 Fed. Reg. 13,989, 13989 (July 29, 1971).

⁴⁸ See Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, Release No. 5627 (Oct. 14, 1975), 40 Fed. Reg. 51659, 51663 (Nov. 6, 1975) (summarizing disclosure provisions adopted in 1973); Conclusions and Final Action on Rulemaking Proposals Relating to Environmental Disclosure, Release No. 33-5704 (May 6, 1976), 41 Fed. Reg. 21632 (May 27, 1976).

⁴⁹ See generally Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (presenting an historical discussion).

⁵⁰ Financial Accounting Standards Board, Statement of Financial Standards No. 5: Accounting for Contingencies (1975); Statement of Position 96-1: Environmental Remediation Liabilities (American Institute of Certified Public Accountants, 1996); SEC Staff Accounting Bulletin, Release, No. 92, 58 Fed. Reg. 32,843 (June 14, 1993).

⁵¹ Financial Accounting Standards Board, Statement of Financial Standards No. 143: Accounting for Asset Retirement Obligations (June 2001); Financial Accounting Standards Board Interpretation No. 47: Accounting for Conditional Asset Retirement Obligations – An Interpretation of FASB Statement No. 143 (March 2005).

⁵² See, e.g., Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities Act Release No. 6835, Exchange Act Release No. 26831, Investment Company Act Release No. 16,961, 54 Fed. Reg. 22,427, 22,430 (May 24, 1989).

⁵³ SEC Staff Accounting Bulletin, Release, No. 92, 58 Fed. Reg. 32,843 (June 14, 1993).

⁵⁴ Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106, 34-61469, FR-82 (Feb. 8, 2010).

including the MD&A (Item 303), the required disclosure of legal proceedings (Item 103), and the section on risk factors (Items 105 and 503).

Notably, no one in 2010 argued that the Commission lacked authority to mandate climate-related disclosure, or that climate change was a novel (or, even less plausibly, illegitimate) subject matter for the disclosure regime. A contemporaneous analysis of the Commission's 2010 guidance and of critics' reactions published by one prominent corporate law scholar concluded that "the requirement that firms discuss climate change is not new," that "[a]ffected corporations already know that they need to provide climate change-related disclosure," that "[c]orporate lawyers already know how to write such disclosures," and that "claims that these disclosures will be 'silly' or will produce a 'massive subsidy to charlatans' are overstated."⁵⁵ These observations from 2010 are equally valid with respect to the Commission's 2022 Proposal.

In summary, the Commission's long history of requiring registrants to include environmental disclosures in their filings refutes claims that the current Proposal constitutes a "drastic change in authority"⁵⁶ and "is outside of its historical purview."⁵⁷ To the contrary, the Proposal reflects regulatory power that the Commission has exercised consistently—and without legislative override—since the 1930s with regard to disclosure generally and since the 1970s for environmental disclosures. Moreover, while the Proposal applies to capital market participants, as does all disclosure, it can hardly be said to involve major questions about regulating the economy in the command-and-control sense in which the Supreme Court has spoken about regulation.

4. The Federal Securities Laws Do Not Impose a Materiality Constraint on the Commission's Authority to Promulgate Climate-Related Disclosure Requirements

The role of materiality in Commission disclosure rulemaking is complex and often misunderstood. As a foundational matter, we emphasize that nothing in the federal securities statutes or in judicial precedent, including Supreme Court precedent, imposes a materiality constraint on Commission rulemaking, or requires the Commission to incorporate materiality qualifiers in the language of specific disclosure rules.⁵⁸

⁵⁵ See Stephen M. Bainbridge, *The SEC's New Climate Control Disclosure Guidance: "Nonsense on Stilts"?*, PROFESSORBAINBRIDGE.COM (Jan. 28, 2010) (summarizing and assessing commentary on the 2010 climate guidance, and noting further that the [principles-based] guidance might muddy the water so climate disclosures would become less rather than more informative for investors), <https://www.professorbainbridge.com/professorbainbridgecom/2010/01/climate-control-disclosure.html> (last visited: May 29, 2022).

⁵⁶ Comment Letter from Senators Kevin Cramer and Shelly Moore Capito and 17 Other Members of the U.S. Senate at 1 (Apr. 5, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20122544-278541.pdf>.

⁵⁷ Comment Letter from Representatives Ted Budd and Ralph Norman and 38 Other Members of the U.S. House of Representatives at 2 (Apr. 11, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20123081-279409.pdf>.

⁵⁸ As noted above, Congress did not qualify the original disclosure template, Schedule A, by materiality, even though it was aware of the concept of materiality.

Debates about ESG disclosure rules often reference the Supreme Court’s classic articulation of materiality in *TSC Industries v. Northway* and *Basic v. Levinson*.⁵⁹ A crucial first step in understanding these cases is that they deal with whether or not an issuer, at some specified point in the past, had a legal duty to disclose particular information, under a particular set of circumstances and in light of the applicable regulatory framework.⁶⁰ In other words, the Supreme Court’s materiality test applies to an *ex post liability determination* by a court or another adjudicatory body, not to an *ex ante policy choice* by a regulator. In stark contrast, when it engages in disclosure rulemaking, the Commission is making *ex ante* policy choices. Unsurprisingly, then, neither *TSC Industries*, nor *Basic*, nor any other Supreme Court case touches on or limits the types of information the Commission is empowered to require when it promulgates disclosure rules.

The existing confusion on this point is understandable, at least to a certain degree. Materiality is a complex concept that fulfills several different functions in securities law.⁶¹ The Commission has referenced the Supreme Court’s succinct articulation of materiality with some frequency for the sake of consistency, and many existing disclosure requirements expressly incorporate a materiality test.⁶² Notably, even in these cases, however, the Commission has not left firms to struggle with the Supreme Court’s elegant-yet-economical articulation of materiality. Instead, the Commission has supplied extensive guidance on how firms are to go about making the often-difficult materiality judgments. Over the years, some of this guidance has been general in character,⁶³ and some of it has been more topic-specific.⁶⁴ Notably, a subset of

⁵⁹ See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (defining materiality in the context of a proxy fraud action under Rule 14a-9); *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (adopting the *TSC Industries* materiality formulation in the context of securities fraud actions under Rule 10b-5).

⁶⁰ Because questions of materiality require “delicate assessments of the inferences a ‘reasonable [investor]’ would draw from a given set of facts and the significance of those inferences to him,” *TSC Indus.*, 426 U.S. at 450, these questions are usually for a jury to decide. As an exception to this principle, when matters “are so obviously unimportant to an investor that reasonable minds cannot differ on the question of materiality, the court may rule them immaterial as a matter of law.” See *Recupito v. Prudential Sec., Inc.*, 112 F. Supp. 2d 449, 454 (D. Md. 2000) (quoting *Klein v. Gen. Nutrition Cos.*, 186 F.3d 338, 342 (3d Cir. 1999)). Applying this logic, then, to suggest that materiality bars the Commission from adopting climate-related disclosure rules would be to suggest that climate-related information is “so obviously unimportant to an investor that reasonable minds cannot differ on the question of materiality.” Notwithstanding the range of views about the desirability of climate-related disclosure, the available factual record does not support such a conclusion.

⁶¹ See, e.g., George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602, 620–25 (2017); see also Georgiev, *Human Capital Management*, *supra* note 11, at 714–23 (discussing materiality in the context of ESG disclosure).

⁶² Examples of rules qualified by materiality include Item 103 of Regulation S-K (requiring disclosure of “material pending legal proceedings”) and Item 303 of Regulation S-K (requiring disclosure of matters that have had a “material impact” on reported operations or are reasonably likely to have such an impact on future operations). Examples of rules not qualified by materiality include, among others, Item 401 of Regulation S-K (requiring disclosure of specified information about directors, executive officers, promoters, and control persons) and Item 402(c)(1) of Regulation S-K (requiring disclosure of the salary, bonus, stock awards, stock option awards, and other specified elements of executive compensation without subjecting the elements or the amounts involved to a materiality test).

⁶³ For example, Staff Accounting Bulletin 99 provides extensive guidance on “qualitative materiality.” SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150 (Aug. 19, 1999).

existing disclosure items are not qualified by materiality, reflecting a policy judgment—and, we emphasize, a judgment the Commission has always been free to make—that particularized materiality testing at the disclosure stage is unwarranted because, for example, it may be impractical or costly for registrants, because it may be susceptible to abuse, or because the underlying information is basic in nature.

It is instructive that none of the hundreds of disclosure rules the Commission has promulgated since the 1930s has been challenged in court on materiality grounds; this corpus includes many rules adopted pursuant to the Commission’s broad delegated authority (rather than prescriptive Congressional mandates),⁶⁵ as well as various rules on environmental and climate matters.⁶⁶ When the D.C. Circuit has struck down Commission rules, it has been for reasons such as failure to carry out adequate cost-benefit analysis, and never due to a finding that the challenged rule lacked materiality.⁶⁷ Importantly, the D.C. Circuit has refused to link the cost-benefit analysis requirement to an assessment of materiality.⁶⁸ The closest the D.C. Circuit has come to considering materiality in the context of Commission disclosure rulemaking has been to suggest that the Commission is entitled to deference in its determination on the materiality (or lack thereof) of particular topics.⁶⁹

* * *

Based on the analysis presented in this letter, it is our view that the Commission’s Proposal contemplates disclosure requirements that are consistent with close to nine decades of regulatory practice at the federal level and with statutory authority dating back to 1933 that has

⁶⁴ See, e.g., Management’s Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities Act Release No. 6835, Exchange Act Release No. 26831, Investment Company Act Release No. 16,961, 54 Fed. Reg. 22,427, 22,430 (May 24, 1989) (providing guidance on materiality judgments for forward-looking financial information under Item 303 of Regulation S-K); Commission Guidance Regarding Management’s Discussion and Analysis of Financial Condition and Results of Operations, Securities Act Release No. 8350, Exchange Act Release No. 48960, 68 Fed. Reg. 75,056 (Dec. 29, 2003) (providing supplemental guidance on key topics and summarizing prior guidance since 1980).

⁶⁵ See, e.g., Asset-Backed Securities Disclosure and Registration, Securities Act Release No. 33-9638, Exchange Act Release No. 72982, 79 Fed. Reg. 57,184, 57,186 (Sept. 24, 2014) (adopting new rules because “the financial crisis highlighted that investors and other participants in the securitization market did not have the necessary information and time to be able to fully assess the risks underlying asset-backed securities and did not value asset-backed securities properly or accurately”); Executive Compensation and Related Person Disclosure, Exchange Act Release No. 54302A (Aug. 29, 2006), 71 Fed. Reg. 53,158 (Sept. 8, 2006).

⁶⁶ See discussion in Part 3 *supra*.

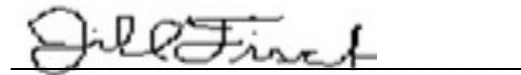
⁶⁷ See, e.g., *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); *Chamber of Com. v. SEC*, 412 F.3d 133 (D.C. Cir. 2005).

⁶⁸ See *id.* This argument has been made in the academic context but has failed to gain traction. See, e.g., J.W. Verret, *The Securities Exchange Act Is a Material Girl, Living in a Material World*, 3 HARV. BUS. L. REV. 453 (2013) (suggesting that cost-benefit analysis should incorporate a formal assessment of materiality).

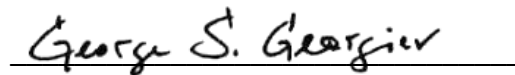
⁶⁹ During the 1970s, the Natural Resources Defense Council challenged the Commission’s refusal to pursue disclosure rulemaking in response to its petition, which the Commission had justified on the grounds that the non-disclosed information was not material; the D.C. Circuit sided with the Commission. See *Nat. Res. Def. Council, Inc., v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979). We note, of course, that the Commission is not bound by a policy judgment it made during the 1970s, and that the economy, market fundamentals, investor preferences, and other factors have changed since then.

been repeatedly reaffirmed by Congress and the courts. Accordingly, we are unanimous in our conclusion that the Commission has the statutory authority to promulgate climate-related disclosure rules of the kind currently under consideration.⁷⁰ We appreciate the opportunity to submit these comments and would be happy to discuss any of the points raised herein at your convenience.

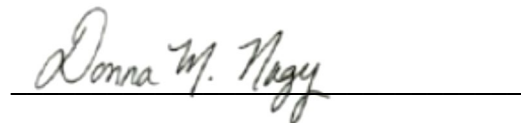
Sincerely yours,



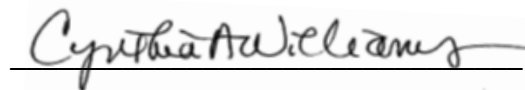
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⁷⁰ Our conclusion regarding the Commission's statutory authority is unanimous and all signatories concur with the letter's principal arguments. As is customary for letters of this kind, signatories are not necessarily attesting to each individual statement contained in this letter.

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