



State of California
Office of the Attorney General

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June 14, 2021

VIA ELECTRONIC SUBMISSION

The Honorable Gary Gensler
Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Request for Public Input on Climate Change Disclosures

Dear Chair Gensler:

On behalf of the undersigned Attorneys General, we submit this letter in response to then-Acting Chair Allison Herren Lee's request for public input on current and potential Securities and Exchange Commission ("SEC") regulation of climate change disclosures.¹ We appreciate the opportunity to provide the SEC with our perspective on the need for comparable, specific, and mandatory climate-related disclosures from SEC-regulated firms. We believe that such disclosures, which are well within the SEC's authority to require, are essential not only to the SEC's mandate to protect investors but also to ensure efficient capital formation and allocation.

¹ Allison Herren Lee, Acting Chairperson, Sec. & Exch. Comm'n, *Public Input Welcomed on Climate Change Discl.* (Mar. 15, 2021), <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>. We intend to address Questions 1 (how best to regulate climate change disclosures), 3 (regarding industry-led standards), 7 (best approach to requiring climate change disclosures), 8 (disclosure of internal governance of climate-related disclosures), 12 (regarding comply-or-explain frameworks), and 14 (climate-related disclosures from private companies).

I. SUMMARY

Climate change is not a distant problem to be dealt with in the future; it is here, and it threatens the U.S. economy and its financial system.² Demand from institutional and retail investors for American companies to respond to the financial and other impacts of climate change has grown significantly over the last decade. Within the last month, shareholders ousted three members of ExxonMobil's board of directors in favor of three new members who intend to push the company to address climate change following a hotly contested proxy fight related to the financial risks of the company's poor climate change planning. In a similar vein, Chevron shareholders overwhelmingly passed a resolution demanding that the company reduce its carbon emissions, including from the use of its fossil fuel products.³

States have a deep interest in climate-related disclosures to ensure their citizens have adequate, accurate information about their investments—including college savings, life savings, pensions, and retirement accounts—that face exposure from companies experiencing climate risk. And states themselves are investors, with billions of dollars invested in U.S. securities through, for example, their pension programs.⁴ Transparency about whether and how companies are addressing and responding to climate change is also essential for the efficient allocation of capital to climate-resilient businesses.

But the SEC's current disclosure regime is not producing that transparency. Although SEC-regulated firms have always been required to disclose material information and not distribute misleading or false disclosures, many American companies make no climate-related disclosures, and a significant proportion have no plans to do so in the future. The disclosures that companies do make are often boilerplate and suggest that they are not thoroughly evaluating or disclosing their exposure to climate-related risks.

² Exec. Order No. 14,030, 86 Fed. Reg. 27967 (May 21, 2021) (economic and climate advisors must study climate risks and impacts on the American economy and develop a "climate-related financial risk strategy").

³ Chevron Corp., Current Report Pursuant to Section 13 or 15(d) of the Sec. Exch. Act of 1934 (Form 8-K) (May 28, 2021) (stockholder proposal to reduce Scope 3 emissions approved 60.7% to 39.3%); Rebecca Leber, *Why Big Oil Should Be Worried after a Day of Reckoning*, Vox.com (May 27, 2021).

⁴ Among the undersigned states, for example, Oregon has \$26.5 billion invested, New York has \$141 billion invested, and California has \$393.1 billion invested through their respective pension programs. See Ore. Inv. Council, *Ore. Pub. Emp. Ret. Fund Monthly Report* (Apr. 2021), <https://www.oregon.gov/treasury/invested-for-oregon/Documents/Invested-for-OR-Performance-and-Holdings/2021/OPERF-04302021.pdf>; N.Y. State & Local Retirement Sys., *2020 Comprehensive Annual Financial Report for Fiscal Year Ended Mar. 31, 2020* at 39 (Sept. 30, 2020); N.Y. City Comptroller, *Pension/Investment Mgmt.*, <https://comptroller.nyc.gov/services/financial-matters/pension/asset-allocation/> (Mar. 2021); Cal. Pub. Emp. Ret. Sys., *PERF Monthly Update*, <https://www.calpers.ca.gov/docs/perf-monthly-update.pdf> (Apr. 30, 2021); Cal. State Tchr. Ret. Sys., *Current Inv. Portfolio*, <https://www.calstrs.com/current-investment-portfolio> (Apr. 30, 2021).

And yet, investors clearly consider climate-related information material to their investment decisions. The SEC must take action to promote one of its founding purposes: “making available currently to the investing public, sufficient information concerning the management and financial condition of corporations on which the investor can intelligently act in making investments.”⁵ Consistent with that purpose, the SEC should mandate that companies provide detailed, meaningful disclosures related to the impacts of climate change on the company.

More specifically, the SEC should incorporate climate-related disclosure requirements into Regulation S-K and Regulation S-X as part of its “integrated disclosure” framework. Companies making exempt offerings under Regulation Crowdfunding and Regulation A should also provide tailored climate-related disclosures, possibly creating disclosure tiers tied to the size and industry of a company. For exempt offerings under Regulation D, the SEC should consider requiring companies to provide climate-related disclosures to all individual investors.

Requiring climate-related disclosures is well within the SEC’s statutory authority. Given the demand from investors for such disclosures, the significance of climate change risk to companies, and the importance of efficient capital allocation to climate-resilient companies, such disclosures are squarely in the public interest.

II. COMMENTS

A. States Have a Significant Interest in Requiring Robust Climate-Related Disclosures by SEC-Regulated Firms.

In addition to the physical and humanitarian toll that climate change is already taking on states, they face significant risks to their financial interests from climate change. States must tackle rising sea levels, increased and more severe storm activity, increased flooding, and increased and more severe wildfires.⁶ These physical threats have already and will continue to destroy property, to require significant insurance readjustments, and to disrupt supply chains used by businesses within each state.⁷ These physical impacts in turn impose heavy costs on state budgets as states must provide aid to their affected populations and endure reduced tax

⁵ *Stmt. of the Purposes of the Sec. & Exch. Comm’n, Accomps. up to Aug. 13, 1934, & Future Programs* 1 (Aug. 13, 1934), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1930/1934_08_13_Statement_of_Purp.pdf (“Statement of SEC Purposes”).

⁶ See EPA, *Climate Change Impacts by State*, <https://19january2017snapshot.epa.gov/climate-impacts/climate-change-impacts-state.html#:~:text=As%20our%20climate%20changes%2C%20every,water%20supplies%20in%20other%20states>. (last visited May 27, 2021); State Energy & Env’t Impact Ctr., *Follow the Leader: States Set Path to Accelerate U.S. Progress on Climate*, (Apr. 2021), https://www.law.nyu.edu/sites/default/files/FollowTheLeaders-StateImpactCenter_1.pdf.

⁷ See *Study: Climate Change Damages U.S. Econ., Increases Inequality*, EurekAlert! (June 29, 2017), https://eurekalert.org/pub_releases/2017-06/ru-scc062317.php.

income.⁸ Given these risks, states have a strong interest in the efficient allocation of capital to climate-resilient businesses and away from companies that continue with carbon-intensive practices.

The SEC should partner with states to increase climate-related disclosures from companies and to ensure that those disclosures are adequate, accurate, and transparent. States have a strong interest in protecting their investor populations and ensuring that retail investors have the information they want and need when making their investment decisions, as reflected in enforcement actions under state law to ensure that publicly traded companies adequately disclose risks associated with climate change.⁹

B. Climate Change Poses Significant Risks to SEC-Regulated Firms as Well as to United States and Global Financial Systems.

Climate change poses physical, transition, and liability risks to SEC-regulated firms. Collectively, those climate risks could damage and destabilize the United States economy—and with it, the value of investor holdings—if companies, regulators, and investors cannot effectively manage them.

1. SEC-Regulated Firms Face Physical, Transition, and Liability Risks from Climate Change.

Climate change poses physical risks to SEC-regulated firms, such as the impacts of extreme weather, heat waves, and sea level rise on physical infrastructure, which can be acute (e.g., catastrophic weather events) or chronic (e.g., precipitation changes, sea level rise,

⁸ Ryan Nunn, et al., *Ten Facts about the Econ. of Climate Change & Climate Pol’y*, Brookings Inst. (Oct. 23, 2019), <https://www.brookings.edu/research/ten-facts-about-the-economics-of-climate-change-and-climate-policy/> (“Climate change will affect agricultural productivity, mortality, crime, energy use, storm activity, and coastal inundation.”).

⁹ For example, in 2007, the New York Attorney General’s Office investigated several companies that owned or proposed building coal-fired power plants on grounds that the companies had not disclosed material climate-related risks, resulting in settlement with three companies that required them to disclose financial risks associated with physical impacts from climate change, the financial risks associated with greenhouse gas regulation, litigation risks stemming from climate change harms, and strategic analysis of climate change risk and emissions management. *See Supp. Pet., Request for Interp. Guid. on Climate Risk Discl.*, File No. 4-547, 24-25 (Nov. 23, 2009). In 2018, the New York Attorney General sued Exxon Mobil Corporation based on ExxonMobil’s disclosures concerning the impact of climate change regulations on its future business. Many of those disclosures were themselves prompted by investors’ concerns about the issue. Press Release, N.Y. Att’y Gen., A.G. Underwood Files Lawsuit Against ExxonMobil for Defrauding Inv. Regarding Fin. Risk the Co. Faces from Climate Change Reg. (Oct. 24, 2018). In 2019, the Massachusetts Attorney General’s Office filed a lawsuit against ExxonMobil under the Massachusetts Consumer Protection Act for, *inter alia*, allegedly making deceptive disclosures to Massachusetts investors that misrepresent and fail to disclose the systemic and other climate risks that threaten the company’s business. *Commonwealth v. Exxon Mobil Corp.*, No. 1984-CV-03333-BLS1 (Mass. Super.)

heatwaves).¹⁰ These physical risks can affect economic activity both directly—flooding facilities, interrupting supply chains, parching farm fields, exhausting labor¹¹—and indirectly—increasing insurance premiums and costs of financing in geographically vulnerable areas.¹²

Investors' need for climate-related disclosures is pressing because material physical climate-related risks are beginning to undermine financial asset valuations.¹³ Climate-related weather events have already imposed more than \$600 billion in direct economic damages on U.S. companies since 2016,¹⁴ and climate change indicators show that temperatures are rising, flooding is occurring more frequently, and wildfire seasons are lengthening.¹⁵ Relevant to investors, the impact of physical weather events has required—and will continue to require—firms to make capital investments in new and hardened climate-resilient infrastructure or risk reducing long-term yields and creditworthiness.¹⁶

¹⁰ CFTC, Climate-Related Market Risk Subcomm. of the Market Risk Advisory Comm., *Managing Climate Risk in the U.S. Fin. Sys.* 11 (2020), <https://tinyurl.com/3bvpr7aa> (“CFTC Report”); Fin. Stability Bd. (“FSB”), *The Implications of Climate Change for Fin. Stability 1* (Nov. 23, 2020), <https://www.fsb.org/wp-content/uploads/P231120.pdf> (“FSB Stability Report”); Task Force on Climate-Related Fin. Discl. (“TCFD”), *Final Report: Recoms. of the Task Force on Climate-Related Fin. Discl.* 6, 10 (2017) (“TCFD Recommendations”), <https://tinyurl.com/5m9ncwa2>; Cong. Research Serv., *Climate Risk Discl. & the Sec. & Exch. Comm’n* 10 (2021), <https://crsreports.congress.gov/product/pdf/R/R46766> (“CRS Climate Risk Report”).

¹¹ CFTC Report at 13-19; see Ceres, *Addressing Climate Risk as a Sys. Risk: A Call to Action for U.S. Fin. Reguls.* 6 (2020), <https://tinyurl.com/uuv7v9zn> (“Ceres Systemic Risk Report”).

¹² See Madison Condon et al., *Mandating Discl. of Climate-Related Fin. Risk* 3 (2021), https://policyintegrity.org/files/publications/Mandating_Climate_Risk_Financial_Disclosures.pdf (“IPI Report”); FSB Stability Report at 1.

¹³ See e.g., Ravi Bansal et al., *Price of Long-Run Temperature Shifts in Cap. Mkts.* 28 (NBER Working Paper 22529, Aug. 2016) (“We show that even if the real effect of rising temperatures is deferred into the future...it leads to an immediate decline in wealth and equity valuations.”).

¹⁴ Nat’l Oceanic & Atmospheric Admin., *Billion-Dollar Weather & Climate Disasters*, Nat’l Ctrs. for Env’t Info. (2021), <https://www.ncdc.noaa.gov/billions/summary-stats>.

¹⁵ *Climate Change Indicators in the United States*, EPA, <https://www.epa.gov/climate-indicators> (last visited May 24, 2021); Christopher Flavelle, *Climate Change is Making Big Problems Bigger*, N.Y. Times (May 12, 2021), <https://www.nytimes.com/2021/05/12/climate/climate-change-epa.html>.

¹⁶ CFTC Report at 14, 19 (citing Andre Bertolotti, et al., *Climate Risk in the U.S. Elec. Util. Sector: A Case Study*, (2019), <http://dx.doi.org/10.2139/ssrn.3347746>; K. Maxwell, et al., *Impacts, Risks, & Adaptation in the United States: Fourth Nat’l Climate Assessment, Vol. II* (2018); U.S. Dep’t of Energy, *Transforming the Nation’s Elec. Sys.: The Second Installment of the Quadrennial Energy Rev.* (2017)).

Climate change also poses transition risks, which are the risks arising from shifts in policy, technology, market, and reputational changes as part of the move toward a low carbon economy.¹⁷ President Biden, for example, recently issued an executive order acknowledging “the global shift away from carbon-intensive energy sources and industrial processes,” which directs the development of a “comprehensive, Government-wide” climate risk financial strategy for a net-zero economy by 2050.¹⁸ This executive order reinforces the low carbon future signaled by the United States rejoining the Paris Agreement¹⁹ and the International Energy Agency’s dramatic net-zero transition framework,²⁰ among other developments. The executive order is consistent with broader trends of governments and markets increasingly pricing greenhouse gas emissions; regulating existing products and services; substituting existing products with lower-emission alternatives; shifting consumer choices away from fossil fuel products and services; and increasing scrutiny of carbon-intensive sectors.²¹

For investors, these trends risk increasing costs to companies, reduced demand for high emission products and services, diminished available capital, and may trigger asset re-pricing, write-offs, and impairments, as well as early retirement of existing facilities—all of which is likely to impact firm valuations.²² As with physical risks, how SEC-regulated firms adjust their businesses to transition risks will impact the value of the firms’ existing assets and may undermine their financial condition today.²³ Investors need to understand how firms are exposed to such transition risks either to demand returns commensurate with their risk exposure or to invest elsewhere.

As companies work—or fail—to manage physical and transition risks, they also face litigation risk from consumer protection authorities, shareholders, and other economic stakeholders.²⁴ Irrespective of economic sector, companies that fail to adapt to, mitigate, or

¹⁷ CFTC Report at 11, 19; TCFD Recommendations at 5-6, 10; *see generally* Int’l Energy Agency (“IEA”), *Net Zero by 2050: A Roadmap for the Global Energy Sector* (May 18, 2021), <https://tinyurl.com/525jshcp> (“IEA Roadmap Report”) (proposing policy targets for the transition to a net-zero economy).

¹⁸ Exec. Order No. 14,030.

¹⁹ Antony J. Blinken, *The United States Officially Rejoins the Paris Agmt.*, U.S. Dep’t of State (Feb. 19, 2021), <https://www.state.gov/the-united-states-officially-rejoins-the-paris-agreement/>.

²⁰ *See generally* IEA Roadmap Report.

²¹ TCFD Recommendations at 5-6.

²² *Id.* at 10, Table 1.

²³ *See, e.g.*, CFTC Report at 20 (citing Roman Mendeleevitch et al., *The Death Spiral of Coal in the U.S.: Will Changes in U.S. Pol’y Turn the Tide?*, 19 *Climate Pol’y* 1310 (2019)); Russell Gold, *PG&E: The First Climate-Change Bankr., Probably Not the Last*, *Wall St. J.* (Jan. 18, 2019), <https://www.wsj.com/articles/pg-e-wildfires-and-the-first-climate-change-bankruptcy-11547820006>; *see also* Steve Mufson, *Inside a Cal. Util.: Mandatory Blackouts Amid Wildfire Threats & Bankr.*, *Wash. Post* (Dec. 21, 2019), <https://tinyurl.com/hpydtz4c>.

²⁴ *Id.* at 5, 10; *see Guilty by Emission*, *Economist* (Sept. 17, 2020), <https://www.economist.com/special-report/2020/09/17/guilty-by-emission>.

disclose climate risks may face legal and regulatory liability for environmental or financial harms.²⁵ Absent clear disclosures regarding climate risks and climate mitigation plans, investors cannot evaluate how litigation risks will impact their investments.

The energy and utility sectors provide stark examples of these risks because they are carbon-intensive industries with climate-sensitive operations that are struggling to adapt to a net-zero future. Oil and gas companies already face physical risks: they have suffered billions of dollars of damage in their Gulf Coast operations as a result of severe weather events, damage that is likely to grow as climate change continues.²⁶ But those physical risks are coupled with significant transition risks: researchers, investors, regulators, and even industry leaders are coalescing around the goal of a “huge decline in the use of fossil fuels” to avoid climate catastrophe.²⁷ Impending climate regulations in pursuit of that goal may result in “stranded” oil and gas reserves that are economically infeasible to develop because of the resulting increases in costs for using fossil fuels.²⁸

²⁵ FSB Stability Report at 16; *see generally* Lisa Benjamin, *The Road to Paris Runs Through Del.: Climate Litig. & Dirs. ’ Duties*, 2020 Utah L. Rev. 313 (2020).

²⁶ IPI Report at 5 (citing Council on Foreign Rels., *Impact of Climate Risk on the Energy Sys.: Exam’g the Fin., Sec., & Tech. Dimensions* (2019), <https://tinyurl.com/cre4zmce>; Roger R. Grenier et al., *Quantifying the Impact from Climate Change on U.S. Hurricane Risk* (2020), <https://tinyurl.com/cr4864wz>); CFTC Report at 14 (citing Bertolotti, et al.; Maxwell, et al.).

²⁷ IEA Roadmap Report at 18, 101-02; *see, e.g.*, Ceres Systemic Risk Report; Carbon Tracker Initiative, *The Speed of the Energy Trans’n* (2019), <https://carbontracker.org/reports/speed-of-the-energy-transition/>; *see, e.g.*, Letter from Larry Fink, Chief Exec. Officer, BlackRock, to CEOs (2021), <https://www.blackrock.com/us/individual/2021-larry-fink-ceo-letter>; *About*, Climate Action 100+, <https://www.climateaction100.org/about/> (last visited May 24, 2021); *Home*, Net Zero Asset Mgrs., <https://www.netzeroassetmanagers.org/> (last visited May 27, 2021); CFTC Report; TCFD Recommendations; CRS Climate Risk Report.

²⁸ CFTC Report at 19 (citing Hal Harvey et al., *Designing Climate Sols.: A Pol’y Guide for Low-Carbon Energy* (2018)). One estimate suggests that stranded assets will cost corporations—and investors—between \$250 billion and \$1.2 trillion. IEA Insights Report at 100; *see also* Philipp Krueger et al., *The Import. of Climate Risks for Instit. Invs.* 32 (ECGI Working Paper 610, 2019) (summarizing research suggesting stranded assets “are a particularly significant risk for investors”).

Despite these trends, oil and gas companies still maintain in climate risk disclosures and in publicly available statements that fossil fuel demand will remain steady or grow. *See, e.g.*, Am. Petrol. Inst., *API Statement On IEA Report On Pathway To Net-Zero By 2050* (May 18, 2021), <https://tinyurl.com/4b63aer8> (“Scenarios where demand is projected to outstrip supply could deepen energy poverty, and stifle innovation and progress... Any pathway to net zero must include continue innovation and use of natural gas and oil...”); ExxonMobil, *Energy & Carbon Summary* (2021), <https://tinyurl.com/3y6e9ndt> (“Under most third-party scenarios that meet the objectives of the Paris Agreement, oil and natural gas continue to play a significant role.”).

As these physical and transition risks manifest, oil and gas companies already face potential obstacles to low-cost debt, insurance, and hedging instruments. The S&P Global Ratings, for example, revised its oil and gas industry risk profile from “intermediate” to “moderately high” because of “growing risks from energy transition due to climate change and carbon/[greenhouse gas] emissions, weak industry profitability, and greater expected volatility in hydrocarbon fundamentals.”²⁹ Financial institutions, in turn, are likely to attempt to shift the increased risk from oil and gas companies out of their portfolios, which is likely to result in interruptions to such companies’ operations, ability to raise capital, hedge their risks, and—critically for investors—deliver returns on investment.³⁰

Utility companies likewise face significant physical and transition risks. As evidenced by the failure of the Texas utility system during a historic winter storm³¹ and the Camp Wildfire in California resulting in part from climate-change-fueled heat and dryness, climate change is already putting utility companies’ infrastructure in peril.³² Because damage to utility company infrastructure has a significant impact on individuals, including risks to their health and safety,³³ these companies also face liability risks as a result of the impact from climate change.³⁴ Indeed, investor outlook on this sector has begun to decline as a result of its exposure to climate risk.³⁵

The hazards that energy and utility sectors already face from climate change drive home the need for all companies to disclose to investors their physical, transition, and liability risks and their planning in the context of climate change.

²⁹ Tom DiChristopher, *S&P Global Ratings Downgrades ExxonMobil, Chevron, ConocoPhillips*, S&P Global Market Intelligence (Feb. 12, 2021), <https://tinyurl.com/3ru6vmar>.

³⁰ CFTC Report at 27; FSB Report at 19; Carol Davenport, *Climate Change Poses Major Risks to Fin. Mkts., Regulator Warns*, N.Y. Times (June 11, 2019), <https://www.nytimes.com/2019/06/11/climate/climate-financial-market-risk.html>.

³¹ Veronica Penney, *How Tex. Power Generation Failed During the Storm, in Charts*, N.Y. Times (Feb. 19, 2021), <https://nyti.ms/3bqEHCo> (“How Texas’ Power Generation Failed”).

³² Joseph Serna & Taryn Luna, *PG&E Power Lines Caused Cal.’s Deadliest Fire, Investigators Conclude*, L.A. Times (May 15, 2019), <https://www.latimes.com/local/lanow/la-me-paradise-camp-fire-cal-fire-20190515-story.html>

³³ Takashi Hatakeyama, *The Growing Econ. Cost of Wildfires*, S&P Global Market Intelligence, Jan. 28, 2021 (<https://www.spglobal.com/marketintelligence/en/news-insights/blog/the-growing-economic-cost-of-wildfires>) (“The Growing Economic Cost of Wildfires”); Camila Domonoske, *The Power Is Back On In Tex. Now Comes The Recovery, & It Won’t Be Cheap*, NPR (Feb. 27, 2021), <https://www.npr.org/2021/02/27/970877890/the-power-is-back-on-in-texas-now-comes-the-recovery-and-it-wont-be-cheap>.

³⁴ See e.g., Dale Kasler, *Invs. Flee as PG&E Faces Scrutiny over Cause of Camp Fire, The Sacramento Bee* (Nov. 12, 2018), <https://www.sacbee.com/news/california/fires/article221535305.html>.

³⁵ *Id.*; *PG&E Corp. & Subsid. Outlooks Revised to Negative On Adverse Wildfire Conditions; ‘BB-’ Ratings Affirmed*, S&P Global (Sept. 16, 2020), <https://disclosure.spglobal.com/ratings/en/regulatory/article/-/view/type/HTML/id/2514530>;

2. U.S. and Global Financial Systems—and the Investors that Rely on Those Systems’ Stability—Face Systemic Risks from Climate Change.

Left unmanaged, the climate-related risks that SEC-regulated firms and industries face may combine to produce shocks at sub-systemic and systemic levels that will ultimately hurt investors.³⁶ Although it is true that the threats from climate change may not conform to a particular timeline, there is a significant probability that the risks will steadily increase until reaching “tipping points” that then trigger abrupt, severe, and even catastrophic changes to financial and social systems. These threats to societal and financial market stability could disrupt liquidity, financial market utilities, and cornerstone financial institutions.³⁷

While we do not yet know the precise sequencing of climate change impacts, the magnitude of those impacts—when they occur—will be large. Climate change impacts could affect a “wide variety” of economic sectors and geographies “in a highly correlated manner”³⁸ to great consequence: rising baseline temperatures may decrease the United States’ annual gross domestic product (GDP) anywhere from 1.9% to 10.5%.³⁹ Where portfolio values decrease as the GDP decreases, investors will feel the impact.⁴⁰

Investors must have access to disclosures that allow them to accurately price climate risks to avoid these impacts on their portfolios. While financial markets are just beginning to price obvious risks in the most imminently impacted sectors,⁴¹ climate risks are generally underpriced—to the extent they are priced in at all.⁴² This market inefficiency overvalues assets

³⁶ Economic sectors, geographic regions, or asset classes most vulnerable to climate change, particularly those with “less movable and capital-intensive infrastructure,” may experience sub-systemic shocks before the wider financial system experiences climate-related failures. FSB Report at 8; *see* CFTC Report at 27 (explaining that worsening physical risks in the agriculture and real estate industries may reduce their access to lending and insurance). Systemic risks are those risks that investors cannot manage through portfolio diversification because they pervade all financial sectors. IPI Report at 28-29 (citing John C. Coffee Jr., *The Future of Discl.: ESG, Common Ownership, & Sys. Risk, Euro. Corp. Governance Instit. Law* 10-11 (ECGI Working Paper No. 541/2020, 2020)). Environmental externalities and their attendant systemic risks threaten economic growth, thereby harming investors, the holdings of which are generally diversified across the economy. *See* Principles for Resp. Inv. (PRI) & UNEPFI, *Universal Ownership: Why Env’l Externalities Matter to Instit. Invs.* 28-30 (2011) (“Universal Ownership Report”).

³⁷ CFTC Report at 26, 28-30; Ceres Systemic Risk Report at 3.

³⁸ FSB Report at 3.

³⁹ Matthew E. Kahn et al., *Long-Term Macroecon. Effect of Climate Change: A Cross-Country Analysis* 5-6 (NBER Working Paper 26167, 2019), https://www.nber.org/system/files/working_papers/w26167/w26167.pdf.

⁴⁰ Universal Ownership Report at 32.

⁴¹ PGIM, *Weathering Climate Change: Opportunities & Risks in An Altered Inv. Landscape* 21 (2021) (“PGIM Report”).

⁴² *See e.g.*, Krueger et al. at 30 (finding “an aggregate investor belief of climate risk underpricing”); Harrison Hong et al., *Climate Risks & Mkt. Efficiency*, 208 J. of Econ. 265

at risk and leaves room for dramatic asset repricing that could devastate investor portfolios. And the economy is more likely to experience systemic shocks when the market lacks sufficient information to accurately price in climate risk.⁴³ Information that allows the market to efficiently price climate risks is critical to investor protection.

C. The SEC’s Current Disclosure Regime Has Not Resulted in Adequate Climate-Related Disclosures.

Although current law requires companies to disclose material climate risks, decision-useful climate-related disclosures have been lacking.⁴⁴ In 2010, in response to petitions filed by state officials and sustainable investor advocacy groups, the SEC issued guidance to regulated firms on the disclosure of climate-related information under the SEC’s current disclosure regulations.⁴⁵ That guidance—the 2010 Commission Guidance Regarding Disclosure Related to Climate Change (“2010 Guidance”)—implicitly assumed that the current principles-based disclosure regimen would ensure that investors received adequate information about firms’ climate-related risks.⁴⁶

In the ensuing decade, however, it has become clear that public companies are not making sufficient climate-related disclosures.⁴⁷ According to the 2020 Status Report from the Task Force on Climate-Related Financial Disclosures (“TCFD”), at most, one-third of public companies studied in the report are disclosing climate-related metrics and targets.⁴⁸ That same report revealed that less than 50% of the public companies studied in the TCFD’s report made any climate-related disclosures at all.⁴⁹ North American companies, in particular, were among the least likely to have made climate-related disclosures.⁵⁰ To the extent companies made such

(finding that “food stock prices underreact[] to climate-change risks”); Kumar et al. at 16 (finding that stock markets are underreacting to firms’ climate sensitivity in study of stock sensitivity to abnormal temperature changes); PGIM Report at 21 (“[T]he market for US residential mortgages often fails to incorporate well-understood climate risks.”).

⁴³ CFTC Report at 26.

⁴⁴ 17 C.F.R. Part 229; 17 C.F.R. § 240.12b-20.

⁴⁵ Comm’n Guidance Regarding Discl. Related to Climate Change, 75 Fed. Reg. 6289, 6295-97 (published Feb. 8, 2010) (“2010 Guidance”).

⁴⁶ A “principles-based” approach to disclosure affords company management significant discretion to determine what information is material to investors. “Prescriptive” disclosures, in contrast, are information that all companies must provide, regardless of management’s particular determination of materiality. See William Hinman, Dir. Div. of Corp. Fin., Sec. & Exch. Comm’n, The Regul. of Corp. Fin. – A Principles-Based Approach (Nov. 18, 2020).

⁴⁷ See Section II.D.1 *infra*.

⁴⁸ TCFD, 2020 Status Report 11 (Oct. 2020), <https://www.fsb.org/wp-content/uploads/P291020-1.pdf> (“TCFD 2020 Status Report”).

⁴⁹ *Id.*

⁵⁰ *Id.* at 14.

disclosures, the report found they did so primarily in standalone sustainability reports, not in their securities filings.⁵¹

A 2019 survey of members of the Society for Corporate Governance underscores the TCFD's findings. In that survey, 25% of the surveyed companies indicated they had no plans to make climate-related risk disclosures.⁵² Another 34% of the companies reported that they had just started assessing their climate-related risks and would need another year before they could begin making disclosures.⁵³ And a 2018 Government Accountability Office report on the effect of the 2010 Guidance found significant variation in the climate-related disclosures in large public companies' annual filings: specifically, disclosures appeared in different parts of the filings; some of the filings included "only a few mentions of climate-related disclosures"; and some of the companies used only boilerplate language to discuss climate-related issues.⁵⁴ Where climate risks threaten 89% of the S&P Global 1200 market capitalization, most companies' risk management and disclosure plans do not align with their environmental and economic reality.⁵⁵

Investors have likewise identified the current regime's failure to produce meaningful climate-related disclosures. While a 2020 survey of U.S. institutional investors revealed that 40% of professional investment managers incorporate climate risks in their investment analyses, of the remaining 60% of professional investment managers, nearly all of them reported not considering such risks because they lacked measurement tools⁵⁶—a common refrain from investors.⁵⁷

The dearth of climate-related disclosures may be attributable the management of companies in industries not intuitively associated with carbon emissions being unaware of—or

⁵¹ *Id.* at 12.

⁵² Richard Mahoney, Diane Gargiulo, *The State of Climate Risk Discl.: A Survey of U.S. Cos.* 6 (2019), https://www.dfinsolutions.com/sites/default/files/documents/2019-10/TCFD_II_Climate_Disclosure_V10_revisedFINAL.pdf.

⁵³ *Id.*

⁵⁴ U.S. Gov. Accountability Off., *Climate-Related Risks: SEC Has Taken Steps to Clarify Discl. Req.* 18-19 (Feb. 2018), <https://www.gao.gov/assets/gao-18-188.pdf> ("GAO SEC Report").

⁵⁵ Sustainability Acct. Stds. Bd., *Climate Risk Tech. Bull.* 8 (2021), <https://www.sasb.org/wp-content/uploads/2021/05/Climate-Risk-Technical-Bulletin2021-042821.pdf>.

⁵⁶ CFA Inst., *Future of Sustainability in Inv. Mgmt.: From Ideas to Reality* 41 (2020), <https://tinyurl.com/u8fp8nsb>.

⁵⁷ See Amir Amel-Zadeh, *The Materiality of Climate Risk* 30 (Mar. 2019), <https://ssrn.com/abstract=3295184> (chief challenges to incorporating climate risks into investment analyses included "quantify[ing] the opportunities and risks" (59% of investors) and "lack of disclosure from companies" (50% of investors)); PRI, Comment Letter on Mgmt's Discussion & Analysis, Selected Fin. Data, & Suppl. Fin. Info. (Apr. 28, 2020), <https://www.sec.gov/comments/s7-01-20/s70120-7124479-216018.pdf> ("Signatories to the PRI consistently voice the lack of access to consistent, comparable information on ESG factors is a barrier to their efforts to integrate ESG factors into their investment decisions effectively.").

even ignoring—risks to their businesses from climate change. Implicit in the 2010 Guidance is the assumption that management would know, for example, whether company property was vulnerable to severe weather or how many tons of greenhouse gases the company or its supply chain emitted.⁵⁸ But the lack of substantive climate-related disclosures from a majority of U.S. companies suggests that many companies either have not studied the issue and therefore may not know what, if any, climate-related disclosures they need to make, or have not disclosed what they know. The fact that only 30% of Fortune 500 companies “have delivered a significant climate milestone [such as becoming carbon neutral by a particular date] or are publicly committed to do so by 2030” underscores that a majority of public companies are failing to publicly reckon with the likely impact of climate change on their businesses.⁵⁹

Despite claims to the contrary,⁶⁰ this evidence shows that the current disclosure regime does not sufficiently prompt SEC-regulated firms to make required disclosures related to climate risks. The past decade has been an experiment in whether current regulations suffice to ensure investors get the information they want and need about companies’ climate risks. The results are clear: it does not.⁶¹ The SEC should go further.

D. The SEC Should Require that SEC-Regulated Firms Make Climate-Related Disclosures

The time has come for the SEC to mandate that SEC-regulated firms—whether public or private—assess climate-related risks affecting their businesses and disclose that information to investors. Investors need standardized and sufficiently specific disclosures provided to them in connection with both public and private companies.

1. Ample Evidence Shows that Investors Consider Climate-Related Disclosures Material to Investment Decisions.

More than a decade of intensive and escalating investor engagement on climate issues; the growing market for climate-related risk data; the growing popularity of environmental, social, and governance (“ESG”) funds; and investors’ insistence on disclosure climate-related risk information together clearly communicate that meaningful climate-related disclosures are material to investment decisions.

⁵⁸ 2010 Guidance, 75 Fed. Reg. at 6295-97.

⁵⁹ Nat. Cap. Partners, Response Required, <https://www.naturalcapitalpartners.com/news-resources/response-required> (Oct. 6, 2020).

⁶⁰ See Hester Peirce, Comm’r, Sec. & Exch. Comm’n, *Rethinking Global ESG Metrics* (Apr. 14, 2021), <https://www.sec.gov/news/public-statement/rethinking-global-esg-metrics>; Hester Peirce, Comm’r, Sec. & Exch. Comm’n, *Werewolves of Change: Remarks before the ISDA Deriv. Trading Forum on Regul. Change* (Apr. 28, 2021), <https://www.sec.gov/news/speech/werewolves-of-change>.

⁶¹ See CFTC Report at 94 (“The quality of climate disclosure in the United States by issuers largely remains inadequate for the needs of investors.”).

a. Investor Choice and Engagement Confirm That Climate Risks Are Material to Investment Decisions.

Investors are increasingly choosing to invest in funds guided by ESG strategies, which demonstrates that environmental concerns are material to their decision-making. Between 2018 and 2020, U.S.-domiciled assets managed using ESG strategies increased by 42% and now total over \$17 trillion, which accounts for 33% of professionally managed assets in the United States.⁶² As of 2019, 75% of global retail and institutional investors reported that they apply ESG principles to at least 25% of their portfolios.⁶³ More than 80% of U.S. individual investors “believe that corporate ESG practices can potentially lead to higher profitability.”⁶⁴ It is therefore no surprise that financial service providers predict that ESG-mandated investing will grow.⁶⁵

Investor engagement with companies on climate change risks also demonstrates the materiality of these risks. Since 2017, over 570 investors, “responsible for over \$54 trillion in assets under management,” have joined the Climate Action 100+, a group dedicated to “engaging companies on improving climate change governance, cutting emissions and strengthening climate-related financial disclosures.”⁶⁶ And investors are acting on these pledges. Investors “sent a signal that the world will shift away from using oil and gas” by recently electing to ExxonMobil’s board of directors three new members who campaigned, in part, on the sitting board’s failure to address climate risks.⁶⁷ Institutional investor BlackRock backed these candidates because “demand for fossil fuels may decline rapidly in the coming decades,” and the current board’s failure to acknowledge and prepare for that possibility “has the potential to

⁶² Forum for Sustainable & Resp. Inv., *2020 Report on U.S. Sustainable & Impact Inv. Trends* (2020), https://www.ussif.org/files/Trends/2020_Trends_Highlights_OnePager.pdf.

⁶³ Sean Collis & Kristen Sullivan, *Advancing ESG Inv.: A Holistic Approach for Inv. Mgmt Firms*, Harv. L. School Forum on Corp. Gov. (Mar. 11, 2020), <https://tinyurl.com/vahuxfy8>.

⁶⁴ Morgan Stanley Inst. For Sustainable Inv., *Sustainable Signals: Indiv. Inv. Interest Driven by Impact, Conviction & Choice 2* (2019), <https://tinyurl.com/tzjut9ts>.

⁶⁵ Collis & Sullivan; see *Wells Fargo: Invs. Want More Info. on Sustainable Inv.*, Wells Fargo Newsroom (Apr. 16, 2020), <https://tinyurl.com/yanhak5s> (predicting ESG funds will account for as much as 50% of all managed assets by 2025).

⁶⁶ *About*, Climate Action 100+, <https://www.climateaction100.org/about/> (last visited May 24, 2021).

⁶⁷ Pippa Stevens, *Activist Firm Engine No. 1 Claims Third Exxon Bd. Seat*, CNBC (Jun. 2, 2021), <https://www.cnbc.com/2021/06/02/activist-firm-engine-no-1-claims-third-exxon-board-seat.html>; Camila Domonoske, *A Tiny Fund Has Scored A Historic Win Against ExxonMobil Over the Future of Oil*, NPR (May 26, 2021), <https://www.npr.org/2021/05/26/1000448553/tiny-fund-scores-historic-win-in-battle-against-exxonmobil-over-future-of-oil?origin=NOTIFY>.

undermine the company’s long-term financial sustainability.”⁶⁸ Retail investors share these concerns—a 2021 proxy season investor sentiment survey found that 41% of respondents were “most interested in voicing their opinion” on environmental issues.⁶⁹

b. Investor Survey Responses and Regulatory Comments Confirm that Climate Risks Are Material to Investment Decisions.

Investors are also communicating to researchers and financial service providers that climate risks are material to their investment decisions. In a 2016 Oxford University survey, 73.5% of institutional investors believed “climate change poses a material risk to the companies in their portfolio.”⁷⁰ Consistent with these results, EY reported that 73% of investors surveyed in 2020 “will devote considerable time and attention to evaluating” physical risks when making investment decisions, and 71% of investors surveyed said the same of transition risks.⁷¹ The materiality of climate risk to investors is not new: a 2018 survey of institutional investors revealed that more than half of respondents incorporated climate risks into their analyses in the preceding five years, while a significant minority (21%) began incorporating climate risks into their analyses more than ten years ago.⁷²

Investors are also telling regulators that climate risks are material to their investment decisions.⁷³ A 2020 GAO survey confirmed that “investors...use ESG disclosures to monitor companies’ management of ESG risks, inform their vote at shareholder meetings, or make stock

⁶⁸ BlackRock, *Vote Bulletin: ExxonMobil Corp.* 3 (May 26, 2021), <https://www.blackrock.com/corporate/literature/press-release/blk-vote-bulletin-exxon-may-2021.pdf>.

⁶⁹ Broadridge Fin. Sols., Inc., *From the Retail Trading Frenzy to Growing ESG Trends, What Will Be in Proxy Season 2021?*, PR Newswire (May 3, 2021), <https://tinyurl.com/y32kmvwu>.

⁷⁰ Amel-Zadeh, et al at 27.

⁷¹ EY, *How Will ESG Performance Shape Your Future?* (Jul. 2020), <https://tinyurl.com/4tjzhphp>.

⁷² Krueger et al. at 17.

⁷³ See e.g., FCLT Global, Comment Letter on Fin. Factors in Selecting Plan Inv. Amending “Inv. Duties” (July 15, 2020), <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AB95/00050.pdf> (“estimating risks such as climate change...is critical to making investment decisions,” and that such risks are “material risks” that “prudent fiduciaries must consider”); see also Deloitte & Touche LLP, Comment Letter on Mgmt’s Discussion & Analysis, Selected Fin. Data, & Suppl. Fin. Info. (Apr. 28, 2020) (“We have observed an increasing emphasis by investor and company management on [ESG] disclosures.”). Major financial institutions subject to systemic climate risks agree—State Street Chairman and CEO Ronald P. O’Hanley stated, “climate change is a material risk that investors must consider in their analysis,” and that “incorporating climate change risk into companies’ strategic planning is critical to long-term value and performance.” Letter from Ronald P. O’Hanley, Chief Exec. Officer, State Street Global Advisors, to Sen. Elizabeth Warren (Feb. 12, 2020).

purchasing decisions.”⁷⁴ Investors also complained that more ESG disclosures are necessary “to address gaps and inconsistencies in companies disclosures that limit their usefulness.”⁷⁵ It is therefore no surprise that investors have already requested that the SEC mandate climate disclosures,⁷⁶ and SEC Commissioner Allison Herren Lee acknowledged that “investors, the arbiters of materiality, have been overwhelmingly clear in their views that climate risk and other ESG matters are material to their investment and voting decisions.”⁷⁷ Where investor behavior so clearly demonstrates that investors consider climate risks material, the SEC should heed these calls for decision-useful climate-related disclosures.

2. Standardized Climate-Related Disclosures Should Be Mandatory for All SEC-Regulated Firms.

The SEC asked about the best way to regulate climate-related disclosures (Question 1); the SEC should make such disclosures mandatory. The absence of a requirement that companies make standardized climate-related disclosures means that investors who want to incorporate climate change risks into their investment decisions may not have sufficient information. The lack of information from companies means that investors are likely to seek the information they need from other sources.⁷⁸ While wealthy and institutional investors may have access to expensive third-party generated data about climate risks,⁷⁹ average retail investors do not.

⁷⁴ Gov’t Accountability Off., *Discl. of Env’l, Soc., & Governance Factors & Options to Enhance Them* (Jul. 2020), <https://www.gao.gov/assets/gao-20-530.pdf>.

⁷⁵ *Id.*

⁷⁶ See Prof. Cynthia A. Williams, Osler Chair in Bus. L., Osgood Hall L. Sch., & Prof. Jill E. Fisch, Saul A. Fox Disting. Prof. of Bus. L., Univ. of Penn. L. Sch., Comments on Request for Rulemaking on Env’l, Soc., & Governance (ESG) Discl. (Oct. 2018), <https://www.sec.gov/rules/petitions/2018/petn4-730.pdf>

⁷⁷ See Allison Herren Lee, Comm’r, Sec. & Exch. Comm’n, *Keynote Remarks at the 2021 ESG Discl. Priorities Event, Living in a Material World: Myths & Misconceptions About “Materiality”* (May 24, 2021), <https://www.sec.gov/news/speech/lee-living-material-world-052421>.

⁷⁸ See CFA Inst., *Env’l, Soc. & Governance (ESG) Survey 12* (2017) (73% of respondents got ESG information from “public information,” and 66% from “third party research”; 63% got ESG information from “reports and statements from the company.”)

⁷⁹ See Betty Moy Huber, Michael Comstock, *ESG Reports & Ratings: What They Are, Why They Matter*, Harv. L. Sch. Forum on Corp. Governance (July 27, 2017), <https://corpgov.law.harvard.edu/2017/07/27/esg-reports-and-ratings-what-they-are-why-they-matter/>.

And retail investors run the risk of obtaining information from unreliable sources⁸⁰ or being the victims of fraud.⁸¹

The significant risks accompanying climate change, coupled with the substantial, and growing, investor demand for climate-related disclosures by companies weigh in favor of the SEC's mandating that all SEC-regulated firms—regardless of industry—disclose at least certain minimum risks (as detailed in our accompanying appendix) from climate change.⁸² Only by making disclosures mandatory for all regulated companies can the SEC ensure that they measure how climate change is currently affecting, and in the future is expected to affect, their operations.

“Comply-or-explain” frameworks, in which companies are required to comply with climate-related disclosures or explain why they cannot, and industry-led disclosure regimes, in which companies collaborate with investors and “other industry participants,” (see Questions 3, 12), are insufficient. Such frameworks tend to perpetuate the status quo, with some companies considering and accounting for climate risks and others failing to do so. In a “comply-or-explain” framework, for example, companies that do not believe they face risks from climate change (regardless of their basis for that position) can continue to provide that explanation for their failure to study—and disclose—climate-related information.⁸³ Similarly, reliance on

⁸⁰ See Insikt Group, *The Price of Influence: Disinformation in the Private Sector* (Sept. 30, 2019), [https://www.recordedfuture.com/disinformation-service-campaigns/\(detailing-how-cybercriminals-will-produce-both-positive-and-negative-disinformation-campaigns-for-payment\)](https://www.recordedfuture.com/disinformation-service-campaigns/(detailing-how-cybercriminals-will-produce-both-positive-and-negative-disinformation-campaigns-for-payment)).

⁸¹ See, e.g., Press Release, Dept. of Justice, Two Men Sentenced to Prison for Their Roles in an Inv. Fraud Scheme Targeting Elderly Victims (Jan. 24, 2020) (investment scam involving electric cars); Press Release, Dept. of Justice, CEO of Sec. Co. Charged with Multimillion-Dollar Stock & Carbon Credit Fraud (Nov. 20, 2019) (sale of fraudulent “carbon credits”); Press Release, Dept. of Justice, Father & Son Convicted of Multimillion-Dollar Inv. Fraud Scheme (Mar. 11, 2019) (claims of technology to convert garbage into ethanol).

⁸² Although there are industries where the physical and transitional risks from climate change are already apparent, such as energy and agriculture sectors, many other industries also have exposure to climate risks, like technology companies. See, e.g., Off. of Energy Efficiency & Renewable Energy, *Data Centers & Servers*, <https://www.energy.gov/eere/buildings/data-centers-and-servers> (last visited May 27, 2021) (“Data centers are one of the most energy intensive building types, consuming 10 to 50 times the energy per floor space of a typical commercial office building” and “account for approximately 2% of the total U.S. electricity use.”); Christopher Cole, et al, *Crypto's Enviro Costs Present Challenges for Cos.*, Law360.com (May 21, 2021) (cryptocurrency industry “consumes approximately 130 terawatt-hours annually,” which is equivalent to Argentina’s annual consumption).

⁸³ Cf., Usha Rodrigues, Mike Stegemoller, *Placebo Ethics: A Study in Secs. Discl. Arbitrage*, 96 Va. L. R. 1, 64 (2010) (Section 406’s ethics code waiver provision permits companies to “delay revealing the more unsavory related-party transactions by disclosing them only in year-end proxies, where they can be buried in the rubble of sundry disclosures”; instead, SEC should “require immediate disclosure of related-party transactions involving the CEO,

industry-led standards could lead to weak disclosures, given that companies may have different incentives than the SEC. And both comply-or-explain and industry-led standards run the risk that companies' consideration of their climate risks will be based on assumptions – rather than facts – about their exposure to such risks.

3. Climate-Related Disclosures Should Be Standardized, Specific, and Capable of Being Used for Decision Making.

The SEC should require that all SEC-regulated firms provide uniform and specific climate-related disclosures. By requiring businesses to provide standardized amounts and types of climate-related information, investors will have data that will help them more effectively allocate their capital.

The SEC should adopt standards that include specific metrics and particularized details about firms' risks, including the scenarios and assumptions that companies employ in evaluating their risks from climate change. Too often, companies' risk disclosures consist of boilerplate language with insufficient details about present risks and concerns about future risks.⁸⁴ Requiring companies to report specific metrics and details will push them to study and measure their climate change risks and will provide investors with essential information about where to invest their capital. Mandating that companies provide the assumptions and scenarios underlying their measurements will improve transparency and allow investors to understand their methodology.

In response to the SEC's inquiry about internal governance disclosures (Question 8), the SEC should also require companies to provide details about their climate-related internal governance with an emphasis on how it affects their risks from, and anticipated impacts on, climate change because that information is important for investors in making their capital allocation decisions. For example, investors are likely to want to know whether companies use similar internal governance processes for their climate-related disclosures as they do for their financial statement disclosures, or whether companies are employing more or less stringent oversight.⁸⁵

Likewise, investors need to understand how companies, especially those in carbon-intensive industries, are implementing their risk management strategies. For instance, while utilities have publicly expressed their enthusiasm for this transition, their actual planning and activities often reflect a failure to adequately account for a net-zero transition and to make concrete efforts to decarbonize.⁸⁶ A recent analysis revealed that, of 19 electric utilities'

CFO, and CAO on the theory that Section 406 was reasonable in presuming that investors want to know about these transactions immediately.”).

⁸⁴ GAO SEC Report.

⁸⁵ TCFD Recommendations at iv (TCFD expectation is that climate-related disclosures will undergo same governance process as financial statements).

⁸⁶ David Pomerantz & Matt Kasper, *Many U.S. Elect. Util. Plan Slow Decarbonization over Next Decade, Out of Sync with Biden Plan*, Energy & Pol'y Inst. (Dec. 1, 2020), <https://www.energyandpolicy.org/utilities-carbon-goal-biden-climate-plan/>; see also David Abel, *After Passing a Landmark Climate Law, Mass. Offs. Now Face the Hard Part: How to Wean the*

executive compensation policies, only one incentivized reducing emissions; some utilities' policies were in fact directly contradictory with an emissions reduction goal.⁸⁷ Requiring companies to disclose their climate-related governance policies would provide a clear record of how firms' decarbonization strategies, or lack thereof, are managed.

Although at this time we are not advocating for a particular standard for climate-related disclosures, we have provided in an appendix to this letter some examples of the kind of specific, detailed information that the SEC should consider in a climate-related disclosure regime.

4. For Public Companies, the SEC Should Require Climate-Related Disclosures to Be Integrated into Filings Under Regulation S-K and Regulation S-X.

In answer to the SEC's inquiry about the best approach for requiring climate-related disclosures (*see* Question 7), the SEC should incorporate mandatory climate-related disclosures into Regulation S-K ("Reg S-K") and Regulation S-X ("Reg S-X"). The purpose of Reg S-K and Reg S-X is to ensure that investors have information that "is material to an investment or voting decision."⁸⁸ As detailed earlier, investors already consider information about climate-related risks to be material to their investment and voting decisions; Reg S-K and Reg S-X accordingly are appropriate locations for climate-related disclosure requirements.

Both Reg S-K and Reg S-X are part of the SEC's "integrated disclosures" framework, which is an effort to centralize disclosures into the two regulations that other rules and regulations can then reference.⁸⁹ Given the importance that investors have already attached to climate-related information, mandatory disclosures of such information should appear in the various registration statements and ongoing reports that reference Reg S-K and Reg S-X. As a result, investors would have a single document to reference that includes all of a company's disclosures, and public firms can continue to reference just the two regulations when determining their disclosure requirements.⁹⁰

State Off Fossil Fuels, Boston Globe (Apr. 6, 2021), <https://www.bostonglobe.com/2021/04/06/science/after-passing-landmark-climate-law-mass-officials-now-face-hard-part-how-wean-itself-off-fossil-fuels/> (describing local gas utility presentation urging fight against electrification).

⁸⁷ Joe Smyth & David Pomerantz, *Major Invs. Find Elec. Util. Are Not on Track to Meet Decarbonization Goals*, Energy & Pol'y Inst. (Mar. 23, 2021), <https://www.energyandpolicy.org/investors-utility-decarbonization/>.

⁸⁸ *See* Sec. & Exch. Comm'n Staff, *Report on Review of Discl. Reqs. in Reg. S-K* 93 (Dec. 2013) ("Report on Reg S-K").

⁸⁹ 17 C.F.R. § 229.10(a); 17 C.F.R. § 210.1-01. Regulation S-K also applies to going-private transactions, tender offer statements, and "any other documents required to be filed under the Exchange Act, to the extent provided in the forms and rules under that Act." 17 C.F.R. § 229.10(a)(2). Regulation S-X also applies to registration statements and shareholder reports under the Investment Company Act of 1940. 17 C.F.R. § 210.1-01(a)(2).

⁹⁰ *See* Report on Reg. S-K at 8.

5. The SEC Should Also Adopt Climate-Related Disclosure Requirements for SEC-Regulated Firms Making Exempt Offerings.

In response to the SEC’s inquiry regarding climate-related disclosures for private companies (Question 14), the SEC should also direct firms that undertake exempt securities offerings to provide climate-related disclosures. Based on currently available (albeit likely incomplete) data, the private offerings market dwarfs the public market, with exempt offerings totaling \$3 trillion in 2017, as compared to \$1.5 trillion in registered offerings.⁹¹ Failure by the SEC to impose any requirements on companies issuing exempt securities—especially large companies with many investors—could undermine the benefits of mandatory disclosures made by publicly-traded companies by not affording investors with critical information necessary to bring about efficient capital allocation.

For many types of exempt offerings, the SEC already requires SEC-regulated firms to provide investors with certain disclosures. For example, exempt offerings under Regulation Crowdfunding (“Reg CF”) and Regulation A (“Reg A”) must include certain offering information that is filed with the SEC and made available to potential and current investors.⁹² The SEC should add climate-related information to these exempt offering disclosures. Given the potential disparity in the sizes of publicly traded companies and firms that undertake Reg A and Reg CF offerings, the SEC could base the type and extent of climate-related disclosures on the size of the firm and the industry in which the firm operates, with larger firms and firms in riskier and more heavily impacted industries required to make more extensive disclosures.⁹³

The SEC should also address climate-related disclosures as part of a broader review of and amendments to Regulation D (“Reg D”). Reg D, which permits companies to make exempt offerings to “accredited investors” and a limited number of unaccredited investors, exposes millions of retail investors to exempt offerings that currently have no disclosure requirements so long as those investors meet the wealth or income thresholds the SEC set in 1982.⁹⁴ The SEC should extend Reg D’s disclosure requirements for unaccredited investors to all individual investors, whether accredited or unaccredited.⁹⁵ Because those disclosure requirements in turn refer to Form 1-A (as used in Reg A filings) and to Regulation S-K, the SEC’s addition of climate-related disclosures to Reg A/Form 1-A and to Reg S-K/Form S-1 would provide a pathway for that requirement to apply to disclosures for individual investors.

More generally, beginning to require climate disclosures for exempt offerings would aid in balancing the playing field between public and private offerings with respect to disclosure

⁹¹ Sec. & Exch. Comm’n, Div. of Econ. & Risk Analysis, *Cap. Raising in the U.S.: An Analysis of the Mkt. for Unregistered Secs. Offerings, 2009-2017* 7 (Aug. 2018).

⁹² 17 C.F.R. §§ 227.201, 227.202 (Reg CF initial and ongoing disclosure requirements); 17 C.F.R. §§ 230.252, 230.253 (Reg A offering statement and offering circular requirements).

⁹³ The SEC could also consider tiers of climate-related disclosures under Reg S-K and Reg S-X for publicly listed companies based on firm size and industry.

⁹⁴ Concept Release on Harmonization of Secs. Offering Exemptions, 84 Fed. Reg. 30460, 30471 (June 26, 2019).

⁹⁵ 17 C.F.R. § 230.502(b)(2).

requirements, thus providing more private companies with an incentive to move into the public markets. The SEC should amend Form D to require companies to certify that they provided the requisite disclosures, with a failure to so certify or to file a Form D resulting in an inability to use Reg D as an exemption in the future.⁹⁶ An increase in public market participation by companies in turn is likely to aid retail investors in growing their wealth.⁹⁷

6. The SEC Has the Authority to Impose Mandatory Climate-Related Disclosures.

The SEC has statutory authority to require that both publicly traded and private companies that issue securities make climate-related disclosures. “The SEC...was necessarily given very broad discretion to promulgate rules governing corporate disclosures,” which “is evident from the language in the various statutory grants of rulemaking authority.” *Nat. Res. Defense Council, Inc. v. Sec. & Exch. Comm’n*, 606 F.2d 1031, 1050 (D.C. Cir. 1979). The Securities Act and the Exchange Act both authorize the SEC to require disclosures from companies “in the public interest and for the protection of investors.”⁹⁸ Mandatory climate-related disclosures satisfy both of these rationales.⁹⁹

As described above, climate change poses significant risks to U.S. and global economies and their respective financial systems. Increasing transparency of these risks for investors who allocate capital to these companies is critical for the public interest. Mandatory climate-related disclosures are also essential for investor protection, including the many ordinary Americans whose retirement savings are largely investment-based. Institutional investors may be able to obtain data from third parties about companies’ climate-related risks, but those third-party

⁹⁶ See Amends. to Regul. D, Form D & Rule 156, 78 Fed. Reg. 44,806, 44,806 (proposed July 24, 2013).

⁹⁷ See Michael Wursthorn, Gregory Zuckerman, *Fewer Listed Cos.: Is that Good or Bad for Stock Mkts.?*, Wall St. J. (Jan. 4, 2018), <https://www.wsj.com/articles/fewer-listed-companies-is-that-good-or-bad-for-stock-markets-1515100040>; Christine Idzelis, *The Consequences of Shrinking Public Mkts.*, Instit. Inv. (Aug. 17, 2020), <https://www.institutionalinvestor.com/article/b1mzjxcn6m777t/The-Consequences-of-Shrinking-Public-Markets>.

⁹⁸ 15 U.S.C. § 77g (a)(1); 15 U.S.C. § 77c(b)(4); 15 U.S.C. § 78m(a); 15 U.S.C. § 78o(d).

⁹⁹ The Attorney General of West Virginia argues that mandatory climate-related disclosures would violate the First Amendment. Letter from Patrick Morissey, W.V. Att’y Gen., to Allison Herren Lee, Comm’r, Sec. & Exch. Comm’n (Mar. 25, 2021), <https://www.sec.gov/comments/climate-disclosure/c112-8563794-230748.pdf>. Not so. These regulations, which address “factual and uncontroversial” commercial speech, would be subject to the standard set in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). *Zauderer* permits this type of regulation, so long as it is not “unjustified or unduly burdensome.” *Id.* As noted at length, mandatory climate-related disclosures are not only justified but are necessary for investors. The SEC surely can craft standards that are not unduly burdensome, given the importance of such information to investors and the U.S. economy and financial system.

analytics are largely out of reach for retail investors. Retail and institutional investors increasingly consider climate-related information critical to investment and voting decisions.

Requiring companies to disclose climate-related information is entirely consistent with the SEC's practice, since its inception nearly 90 years ago. From the creation of the SEC with the passage of the Exchange Act in 1934, one of the Commission's major purposes has been to ensure that investors receive material, accurate, adequate information for their investment decisions.¹⁰⁰ Mandatory climate-related disclosures are the next step in pursuing that goal.

III. CONCLUSION

Under its statutory authority to require disclosures "in the public interest" and "for the protection of investors," the SEC should mandate that both public and private companies provide specific, standardized climate-related disclosures as part of their securities filings. That transparency is what investors are demanding; the SEC should heed these demands.

Sincerely,



ROB BONTA
California Attorney General



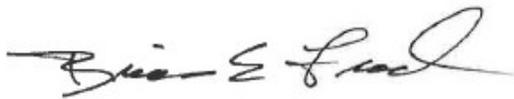
WILLIAM TONG
Connecticut Attorney General



KATHLEEN JENNINGS
Delaware Attorney General



KWAME RAOUL
Illinois Attorney General



BRIAN E. FROSH
Maryland Attorney General



MAURA HEALEY
Massachusetts Attorney General

¹⁰⁰ Statement of SEC Purposes at 1 (One of the SEC's two purposes "is directed toward making available currently to the investing public, sufficient information concerning the management and financial condition of corporations on which the investor can intelligently act in making investments.").



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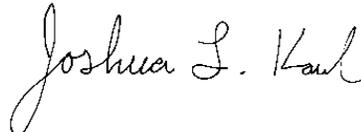
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APPENDIX - PROPOSED REQUIRED CLIMATE RISK DISCLOSURES

We outline below some examples of the types of information that the SEC should consider requiring disclosure of related to climate risk.

1. SEC-Regulated Firms Should Be Required to Make Annual Disclosures of Their Greenhouse Gas Emissions and Any Plans to Address Their Emissions.

As part of their annual filings with the SEC, registrants should be required to disclose calculations of several categories of greenhouse gas emissions: (1) Scope 1 emissions (direct emissions by the company); (2) Scope 2 emissions (indirect emissions from purchased energy); and (3) Scope 3 emissions (emissions indirectly impacted by the company in its value chain, the contours of which should be subject to further SEC guidance).¹⁰¹

Registrants should disclose the basis for their calculations (including key metrics and methodologies) and any certification from a third-party auditor detailing the results of any audit.

Registrants should also disclose a detailed analysis of any plans to reduce their greenhouse gas emissions, their quantitative targets for emissions reduction, and how those targets will be met. Registrants should disclose the metrics and methodologies used in this analysis.

2. Registrants Should Be Required to Analyze and Disclose the Potential Impacts of Climate Change and Climate Change Regulation.

Registrants should be required to assess and disclose the potential impacts on their businesses of physical risks from climate change (e.g., flooding exacerbated by sea level rise or extreme weather) and from transition risks (e.g., any regulations to address climate change). Their disclosure, made in the registrants' annual SEC filings, should include:

- i. Analysis of the impact to the registrants if regulations are imposed to maintain global temperature increases below 1.5 degrees Celsius, and any other analysis the company has done of likely climate regulation or climate change impact, including any assumed carbon prices used in the companies' planning¹⁰²;
- ii. How these analyses inform the companies' planning;
- iii. Whether and how the companies' business operations are resilient (e.g., have developed plans to relocate vulnerable operations or build in redundancy to minimize disruption if impacted by flooding, severe weather, etc.);

¹⁰¹ "Emissions are a prime driver of rising global temperatures and, as such, are a key focal point of policy, regulatory, market, and technology responses to limit climate change. As a result, organizations with significant emissions are likely to be impacted more significantly by transition risk than other organizations. In addition, current or future constraints on emissions, either directly by emission restrictions or indirectly through carbon budgets, may impact organizations financially." TCFD Recommendations at 22 n.39.

¹⁰² Scenario analysis is a key point in the TCFD's recommendations, which include explanations about how firms should approach such analyses. TCFD Recommendation at 25-30.

- iv. The implications for the companies' capital allocation, research and development focus, costs and revenues, operations, assets (including reserves), and finances of climate change, including systemic risks to financial markets, and of climate change regulations; and
- v. The input parameters, assumptions and analytical choices used, including selected time frames and assumptions about possible technology that the company intends to use in its response to climate change impacts.

3. Registrants Should Be Required to Disclose Corporate Governance and Risk Management as They Pertain to Climate Change.

Finally, the required disclosures should include the companies' processes to identify, assess, and manage climate-change related risks, and describe how those processes are integrated into the companies' overall risk management. This disclosure should detail the role of the boards of directors including:

- i. The method and frequency by which the board is informed about climate change issues;
- ii. Whether and how the board considers climate change in making or overseeing decisions on strategy, risk management, budgeting, business planning, performance objectives, capital expenditures, acquisitions, and investments;
- iii. The method and frequency by which the board monitors the company's progress in meeting its climate-related targets; and
- iv. Which board members are responsible for the oversight of climate change-related issues.

This disclosure should also detail the role of management in handling climate change-related risks including:

- i. The processes by which the company's management is informed of and addresses climate change-related issues;
- ii. The processes by which the company's management oversees the completion and application of the various climate change-related scenario analyses;
- iii. Whether company performance on climate change-related initiatives is incorporated into executive compensation; and
- iv. Which management personnel are responsible for handling climate change-related issues, and whether and how those persons report to the company's board.

Disclosures should be made within a company's audited financials for those registrants required to produce audited financials annually.