CENTER FOR CAPITAL MARKETS COMPETITIVENESS

TOM QUAADMAN
EXECUTIVE VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5540
tquaadman@uschamber.com

June 11, 2021

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F St NE
Washington, DC 20549

Re: Request for Information on Climate Change Disclosure

Dear Ms. Countryman:

The U.S. Chamber of Commerce ("the Chamber") appreciates the opportunity to share our views in response to the Securities and Exchange Commission's ("SEC" or "Commission" or "agency") request for information on climate change disclosure. We strongly believe that material risks should be disclosed so investors can have a fully informed and appropriate decision-making process.

The Chamber has been a leader in the conversation on environmental, social, and governance ("ESG") topics for nearly a decade, encouraging industries to work with investors on standards to meet investor interests and reflect the unique circumstances and contexts of industries and businesses. We have and continue to actively collaborate with our members and other stakeholders to promote practices, policies, and technology innovations across industry and government that address our shared climate challenges, particularly to quickly reduce greenhouse gas emissions to the lowest levels possible.

Public companies and investors together have played a crucial role in spurring the continued evolution of climate disclosures that has helped to provide investors with decision-useful information and helped mitigate risk. To accommodate the varying needs of investors and issuers in different industries, and to meet our shared climate priorities, the Chamber strongly believes that any SEC action on climate disclosures should be based upon market-driven disclosures that are rooted in the materiality standard and that are workable for companies of different sizes and industries.

The questions asked in this request for information about disclosure on climate change, specifically, and ESG issues more broadly, are challenging questions confronting market participants today. Certain aspects of ESG disclosure, especially those that address social issues

outside of climate, may be more subjective. Consideration of potential structural disclosure issues in the wider ESG context may also have broader ramifications that the SEC must take under consideration. Since its inception, the SEC has had an important three-part mission of protecting investors, maintaining fair, orderly and efficient markets, and facilitating capital formation. The SEC has created a global gold standard in these areas, but U.S. capital markets are increasingly facing stiff global competition. As the SEC considers moving forward on climate disclosure, or more ESG disclosures more broadly, it must do so through its well-defined tripartite mission and statutorily granted powers.

The SEC's mandatory disclosure regime, which is based upon the Supreme Court's longstanding definition of materiality under the federal securities laws, centers around ensuring that a reasonable investor has the decision-useful information needed to make investment decisions. Not all investors make decisions based on the same priorities; investors are not monolithic. U.S. issuers have contributed to the welfare of investors and the overall success of the U.S. capital markets by meeting investor demand for disclosure of material information, including on topics related to ESG. This has been accomplished through the materiality standard as defined by the Supreme Court. The SEC should continue, as it faithfully has, to adhere to that standard of materiality and the reasonable investor in shaping any new disclosure requirements. Furthermore, the materiality standard has proven to be flexible in addressing the evolving needs of investors.

Any new disclosure requirements should afford each issuer, in consultation with their investor base, adequate flexibility to adapt its disclosures to fit its industry, sector, and other company-specific facts and circumstances.

As the SEC reviews comments submitted to this request for information, and as the agency determines what actions to take related to climate disclosures, we believe there are three guideposts the Commission should keep in mind for any policy development and rulemakings:

1. **The longstanding materiality standard must continue to be at the core of corporate disclosure, as it serves as the bedrock for U.S. capital markets;**

2. **Disclosure mandates should not be prescriptive but, rather, should continue to be flexible so that disclosures respond to changes in facts, circumstances, risks, and other developments;**

3. **Companies should not be subject to undue liability exposure given what can be the inherently uncertain nature of many ESG-related disclosures.**

The Chamber and its membership look forward to a continued partnership with policymakers in crafting policy approaches to climate change and is ready to serve as a resource to the Commission as it advances its work on climate disclosure – and topics surrounding ESG more broadly – in future Commission action.

Guideposts for the SEC to Consider

The Chamber supports a pragmatic approach to corporate disclosure. To the extent that the SEC moves forward with a rulemaking related to mandatory climate disclosure, the Chamber recommends using the following three touchstones to guide the development of any rule.

1. **The longstanding materiality standard must continue to be at the core of corporate disclosure, as it serves as the bedrock for U.S. capital markets.**

For more than eight decades, materiality has been the cornerstone of the public company disclosure regime under the federal securities laws. The materiality standard serves as a constant, regardless of who chairs the SEC, which party occupies the White House, or other political or policy shifts. Materiality underpins the U.S. capital markets and has long been used to ensure that federal securities regulation fulfills its tripartite mission.

The materiality standard as defined by the Supreme Court in its *TSC Industries, Inc. v. Northway, Inc.* ("*TSC*") decision is the lodestar of the public company disclosure regime.[1,2] The longstanding materiality standard – namely, what is important to a reasonable investor focused on investment returns – has instilled in investors and issuers alike a confidence in the relevancy of information that promotes market efficiency, competition, liquidity, and price discovery. The Court explained that in formulating a materiality standard, it sought to avoid a scenario in which investors would be overwhelmed "in an avalanche of trivial information – a result that is hardly conducive to informed decision-making."[3] To preserve issuer and investor confidence in the reliability of information used for that decision-making, and to safeguard an important investor protection, the materiality standard must continue to serve as the cornerstone for disclosure in U.S. capital markets. The formulation of reasonableness helps ensure that what is disclosed is tied to advancing the goals of the federal securities laws, as reflected in the SEC's mission.

The Supreme Court's traditional materiality standard should, as it historically has, be the benchmark that the SEC uses when considering crafting new disclosure obligations on reporting companies; the federal securities laws should not be used to mandate that public companies disclose information that does not pass this test. The agency should continue to defer to the materiality threshold to help continue to prevent securities from becoming politicized, which could foster market disruption and regulatory uncertainty that could be detrimental to everyday investors. In addition, the materiality standard can also help the agency avoid imposing unwarranted costs and burdens in collecting and reporting information if it is not material to a

[1] U.S. Chamber of Commerce, "Essential Information: Modernizing our Corporate Disclosure System." Winter 2017. Pg. 3.
[2] Senate Banking Committee Nomination Hearing. March 2, 2021. In response to Senator Toomey's Questions for the Record, SEC Chair Gary Gensler acknowledged the Supreme Court's definition of materiality and stated: "If confirmed, materiality will guide my decisions as SEC Chair related to disclosure requirements under the federal securities laws." Pg. 9.
[3] 426 U.S. 438 (1976).

company. The materiality standard also allows for information to be tailored for evolving investor needs.

Indeed, companies already disclose a range of ESG information in accordance with the SEC's existing disclosure requirements. For example, Regulation S-K Item 101, Description of Business, requires disclosure about the effect of existing or probable government regulations on a business, which would include matters such as the costs to purchase allowances under a "cap and trade" system or for facility improvements to reduce emissions if that were material for a company. Item 103, Legal Proceedings, requires disclosure of administrative or judicial proceedings under laws or regulations primarily for the purpose of protecting the environment. Item 303, Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A"), requires disclosure of material trends or uncertainties that are expected to have a material favorable or unfavorable impact on the company, and this requires discussion of both risks and opportunities related to matters such as climate change that can decrease demand for carbon-intensive goods or increase demand for other types of goods that facilitate decarbonization. And Item 105, Risk Factors, requires disclosure of any material factors that make an investment in a company speculative or risky, and to the extent material for a particular company this would encompass risks related to the physical impact of climate change, such as the direct impact on facilities or operations due to rising sea levels and the indirect operational and financial impact on a company's operations due to decreased demand for products or services as a result of warmer temperatures. These disclosure requirements demonstrate that companies are already required to disclose material ESG information under current law. To the extent that there is concern companies are not adequately disclosing material climate-related information, the SEC could provide issuers updated or additional interpretive guidance regarding potential disclosure topics and considerations to keep in mind as they identify potentially material climate-related information.

Preserving the materiality standard will continue to ensure issuer and investor confidence in the relevancy of information that promotes market efficiency, competition, liquidity, and price discovery.

2. Disclosure mandates should not be prescriptive but, rather, should continue to be flexible so that disclosures respond to changes in facts, circumstances, risks, and other developments.

The Chamber recognizes the increased interest in disclosure related to ESG information and has encouraged companies to develop good disclosure practices around ESG.[4] The number of companies that voluntarily publish annual sustainability reports has grown significantly, reflected in the fact that more than 90% of S&P 500 Index companies publish such reports,[5] over

[4] U.S. Chamber of Commerce, U.S. Chamber of Commerce Foundation, "Project for Growth, Opportunity & Innovation: ESG Reporting Best Practices." Fall 2019. Pg. 2.
[5] Governance and Accountability Institute, "90% of S&P 500 Index Companies Publish Sustainability Reports in 2019, G&A Announces in its Latest Annual 2020 Flash Report." July 16, 2020.

a four-fold increase in the past decade. Notably, a number of companies also publish standalone climate reports. It should be noted that sustainability, climate, and other voluntary reports are used by companies to communicate with a variety of stakeholders in addition to investors. Companies have demonstrated that flexibility and adaptability have allowed them to respond effectively to market and other external interest in ESG information, which can vary significantly by industry, company, business model, geography, and customer and investor bases.

It is deeply important for disclosure regimes to remain flexible and for companies to be able to respond in a manner that is suited to their individual circumstances, as well as to what is most useful to investors. Currently, companies can evaluate and adapt the additional climate information they provide based on the interests of sector-specific and individual company investors. This approach has allowed climate-related reporting to evolve over time. Information that might have been expected of a company twenty years ago may not be the same information that is asked of a company today. Likewise, information that is of interest to investors today may not be the same information that investors may find informative in making investment decisions twenty years from now. Further, information that may be relevant to evaluating one company might not be informative when evaluating another company, and in fact could be misleading if required to be reported by companies for which that information is not material.

In practice, companies have been able to wield flexibility in reporting the information it and its investors have deemed relevant without overwhelming investors with information that is not useful when it comes to understanding that company. For instance, some technology companies have gravitated toward using one slate of disclosure mechanisms to serve as a guide for identifying what climate-related information is material to them and what additional information to disclose. This differs from the approach other industries, like the energy and electric power sectors, have employed; they have tended to gravitate toward a different slate of disclosure mechanisms that are better suited to their industries.[6] These industry-focused reporting practices have provided precision in the ability of issuers to disclose information sought after by interested investors.

As the SEC considers further action on climate disclosures, it should continue to recognize the variability of investor interest and issuer practices across industries and companies, avoiding prescriptive mandates that do not allow for changes in facts, circumstances, risks, and other developments. The breadth of these issues emphasizes the importance of a flexible disclosure regime designed to elicit decision-useful information on a company- and industry-specific basis. Pursuing a more prescriptive set of disclosure mandates could ultimately result in a disclosure system that does not provide investors with relevant information related to climate and other ESG information and could inundate investors with disclosures that obfuscate what is truly material.

---

[6] U.S. Chamber of Commerce, U.S. Chamber of Commerce Foundation, "Corporate Sustainability Reporting: Past, Present, Future." November 2018. Pg. 19.

The adoption of a climate disclosure regime based upon a principles-based approach would allow the SEC to preserve the flexibility of issuers to respond to their business and industry circumstances while maintaining consultations with their investor base to provide material information. This is an important template for the potential disclosure of other ESG issues and avoids a one size fits all disclosure that could prove to be counterproductive for investor protection, capital formation and competition.

3. Companies should not be subject to undue liability exposure given what can be the inherently uncertain nature of many ESG-related disclosures.

The Chamber has recommended that companies make sustainability information easy for users to find, such as through dedicated ESG disclosure web pages and links.[7] To accomplish this objective, additional sustainability-related information exceeding what is material need not be incorporated into SEC filings, nor, should sustainability information be required as part of an SEC filing if it is not material to a reasonable investor, as discussed above.

Disclosing climate-related information outside of SEC filings has become commonplace. Companies have employed two main pathways for doing so. Many companies have opted to publish stand-alone corporate sustainability or climate reports and make that information available on their websites, while some companies have chosen to combine financial and sustainability reporting through integrated reports. Both methods have become accepted practices for issuers and have generally satisfied the interests of investors looking to consider climate-related factors without a mandate to file additional information with the SEC.

Accordingly, if the SEC were to adopt a rule mandating disclosure of climate-related information, the SEC should allow that information to be "furnished" and not "filed." Companies who voluntarily disclose climate-related information already do so with an existing obligation not to make materially misleading statements, and therefore there is not a practical justification to subject that information to additional legal liability. Moreover, companies may choose not to set more ambitious climate commitments if legal liability continues to expand. The SEC should also strongly consider that climate-related metrics are often not available to be reported contemporaneously with an annual report.

Additionally, there are well-established approaches and principles to evaluating and contextualizing forward-looking statements that apply equally to ESG-related information as to any other forward-looking statement. And as courts have consistently admonished, it is critical to avoid finding "fraud by hindsight." It is important to extend protections that encourage robust disclosure practices.

---

[7] U.S. Chamber of Commerce, U.S. Chamber of Commerce Foundation, "Project for Growth, Opportunity & Innovation: ESG Reporting Best Practices." Fall 2019. Pg 10.

Further, if the SEC moves forward with new disclosure requirements, it should provide a sufficiently long phase-in for compliance to ensure companies have adequate time to comply with mandates for climate-related information. This would help to ensure that investors are provided with useful information without unnecessarily exposing public companies to litigation risks simply because of the practical challenges of complying with additional mandates.

Additional Considerations

In addition to the three guideposts, the Chamber believes there are several other considerations the Commission should weigh before taking further action related to any climate or other ESG rulemaking.

1. The SEC should continue to set disclosure standards.

The SEC has been effective at setting its own disclosure standards on a wide variety of topics for decades in a manner that has served the capital markets well. Material corporate disclosures are a crucial part of fulfilling the SEC's tripartite mission, particularly with respect to investor protections, and the Commission's calibration of disclosure rules is essential to fulfilling its mission. The SEC should continue to calibrate these rules to ensure that the perspectives of industries, companies, and other market participants are appropriately factored into the standard setting process and should not defer to an external body to determine ESG-related disclosure requirements for the agency.

Reporting concepts or methodologies that have developed under existing voluntary frameworks may not be appropriate for the SEC to incorporate into its own disclosure standards where, for example, the goals of those frameworks are not aligned with the SEC's mission. The SEC should carefully consider the underlying goals, assumptions and challenges associated with any externally developed frameworks. Third-party standard setters may not be insulated enough from stakeholder and other policy agendas and may not satisfactorily incorporate practitioner input into new standards. There are also important questions to answer about organizational governance, due process and funding sources for third-party standard setters, as well as other operators in the ESG marketplace today that may present conflicts of interest.

Past these considerations, the SEC also has expertise in ensuring that regulatory requirements are scaled appropriately. Companies in differing stages of maturity and size should not have to meet the same requirements for disclosure. The 2012 Jumpstart Our Business Startups Act ("JOBS Act") recognized on a bipartisan basis that nascent public companies should not have the same compliance burdens and reporting requirements as large, mature

companies.[8] The SEC should continue to carefully weigh the impact of disclosures on the public company model to ensure that any new mandates do not deter capital formation in the public market.

The Chamber encourages the SEC to carefully follow its statutorily granted authorities, including in any approach to third parties and private companies. We also encourage the agency to continue to practice its expertise in setting its disclosure rules.

2. The SEC should take steps to prevent conflicts of interest in the broader ESG space.

When considering topics related to ESG, the SEC should contemplate the entire ESG ecosystem. For example, the market's increased interest in ESG has led to the rise of third-party ESG assessment providers that evaluate and rank companies based on their individual ESG performance and disclosures. These ESG scores and assessments use a wide variety of metrics and methodologies and provide investors with a summary of a company's ESG performance in relation to its peer group. A 2018 investigation by *The Wall Street Journal* found that a single company can score very differently on varying assessments due to differences in underlying approaches and methodologies.[9] The goal of providing greater scrutiny in these practices should be to provide greater transparency around how scores are reached so that issuers have a better understanding of how they are being assessed and investors have a better understanding of the factors that are incorporated into scores.

As some investment firms are factoring these ESG scores into their investment decisions, the Chamber believes the SEC should take a closer look at transparency and conflicts of interest rules, while maintaining a certain level of confidentiality around intellectual property in a nascent market context and avoiding harmonizing methodologies or regulating the substance of approaches. We encourage the SEC to explore opportunities to invite greater transparency around third-party assessment approaches.

3. The SEC should allow a market-developed approach to third-party assurance for climate-related reporting.

Third-party assurance has the potential to add to the reliability of sustainability information, including climate-related information reported by companies, similar to the process that occurs with audits of financial statements and internal control over financial reporting. Providers of these services include both independent accounting firms (although not necessarily the independent accounting firm performing the financial statement audit) and engineering and consulting firms. Further, the nature of the assurance services provided by these firms also differs. Engineering and consulting firms can provide verification or certification

[8] Securities and Exchange Commission, "Emerging Growth Companies." July 24, 2019.
[9] James Mackintosh, "Is Tesla or Exxon More Sustainable? It Depends Whom You Ask," WALL ST. JOURNAL. September 17, 2018.

services, while assurance services provided by independent accounting firms range from review to examination level attestations.

Consistent with the Chamber recommendation that the SEC should allow for variability in disclosures related to ESG information, the SEC should allow a commensurate market-based approach to third-party assurance for climate-related reporting for companies that desire to enhance the reliability of information. Companies are in the best position to determine how to signal to investors the use of outside expertise or an enhanced reliability of their climate-related disclosures through third-party assurance, how that assurance is suited to their individual circumstances and, if so, the type of assurance signal. It should be noted that company management should be met with the same level of confidence in providing ESG information as is given to other kinds of disclosures and public statements. A market-based approach allows for good practices regarding third-party assurance to evolve along with the evolution of climate-change reporting and the criteria for such reporting.

4. The SEC should not politicize its regulation of corporate disclosure.

The bipartisan structure of the Commission is intended to promote objective, consensus-driven regulation. Disclosure should focus on a company's risks and opportunities that bear a sufficient potential to impact the company's long-term operational and financial performance and should not be a tool for advancing political interests or achieving policy goals, especially as it extends to other topics in ESG outside of climate. Disclosures must be aligned to the fiduciary duties of directors and management and should carry forward with durability into the future.

5. The SEC should follow the appropriate notice-and-comment Administrative Procedure Act process.

New policies related to ESG should be made only after weighing the costs and benefits of the chosen course, with justification for new policies being made clear to affected parties and the public. As Commissioner Allison Herren Lee noted in a public statement on August 21, 2019, Commission interpretive guidance and staff directives can serve as useful tools, but they cannot replace notice-and-comment rulemaking.[10]

The SEC must observe the rules and processes governing administrative procedure required by law, and should ensure America's capital markets are safe, orderly, and efficient.[11] Clear communication with companies is important to achieve that objective, and enforcement should not be used as a means to establish new policy or regulatory requirements.

---

[10] Allison Herren Lee, "Statement of Commissioner Allison Herren Lee on Proxy Voting and Proxy Solicitation Releases." August 21, 2019.

[11] Chamber of Commerce Center for Capital Markets Competitiveness, "Examination U.S. Securities and Exchange Commission Enforcement." 2015. Pg. 18.

While it is essential that the SEC pursue bad actors, market participants should likewise have fair and advanced notice of their disclosure and compliance obligations. We encourage the Commission to provide fair notice, expressly communicate its expectations, and adhere to the Administrative Procedure Act ("APA") when acting related to climate change and other future rulemakings related to ESG topics. In order to cultivate certainty among issuers about the longevity of policies and create lasting investor protections, it is important that climate policies be subject to notice and comment to be sure that all voices are heard and taken into consideration.

Conclusion

As the SEC reviews the current landscape of climate change reporting and considers possible new mandates for public companies, it must recognize the remarkable progress that has already been achieved through market-based approaches and practices and increased communication between issuers and investors. Any rulemaking related to ESG reporting should be rooted in the materiality standard established by the Supreme Court and should afford companies and investors the flexibility to adequately adopt disclosures that are appropriate considering a company's particular business, operations, and financial performance. While ESG information can be helpful to investors, the SEC should stay on course with its tripartite mission and continue to set the global gold standard disclosure regimes that American investors and businesses have benefited from and rightfully have fought to preserve.

The Chamber stands ready to work with the SEC on this initiative as it moves forward.

Sincerely,

Tom Quaadman