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Submitted via email to: rule-comments@sec.gov

Hon. Gary Gensler, Chair
Securities and Exchange Commission
100 F. Street, NE
Washington, DC 20549

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

Dear Chair Gensler:

We the undersigned state entities write to express our concerns regarding the scope and reach of the above-referenced proposal. We firmly believe that the proposal goes beyond the scope of a disclosure framework to advance substantive social policy positions that exceed and are outside the legislative authority granted to the Securities and Exchange Commission.

We understand that due to demand from a segment of investors, some companies may make disclosures that are misleading or untrue concerning their environmental policies, commitments, or impact to entice those investors. Companies that make environmental disclosures should do so in a fair, truthful, and uniform way. Likewise, companies should disclose, in a consistent and uniform way, material factors, information, and standards which they already consider and calculate pursuant to existing substantive law or industry practice.[1]

[1] Disclosure rules should require the consistent presentation of material, decision useful information already utilized by issuers. *See*, *e.g*. IAC Recommendation, Proposal at 24, footnote 54.

The proposal, however, goes beyond the disclosure of material factors. It implies value judgments about social issues under the guise of a disclosure rubric and requires the consideration of those factors. In the process the proposal assumes future consumer trends, investor demands, environmental outcomes and statutory changes. It requires companies to report greenhouse gas emissions from third party sources over which they may have little or no control and extrapolate the occurrence of unpredictable future events potentially requiring the use of predictive models and algorithms that can provide varying results of questionable accuracy and utility.

For example, the proposal's disclosure of actual or potential climate related risks includes "physical risk" disclosure. Companies will be required to consider and predict the potential for and likely harm from physical risks such as "…wildfires, hurricanes, tornadoes, floods, and heatwaves"[2] The proposal further asserts that physical risks include chronic and acute risks to the business itself or to those with whom it does business. "'Acute risk' is defined as event-driven risks related to shorter-term extreme weather events, such as hurricanes, floods and tornadoes. 'Chronic risk' is defined as those risks a business may face as a result of longer term weather patterns and related effects, such as sustained high temperatures, sea level rise, drought, and increased wildfires, as well as related effects such as decreased arability of farmland, decreased habitability of land, and decreased availability of fresh water."[3] Although these occurrences cause harm and economic impact when they occur, predicting their potential future occurrence and likely impact on a company or its business associates with any degree of assurance seems a formidable, speculative task unlikely to provide consistent, reliable decision useful information.

[2] Proposal at 59.
[3] Proposal at 62.

The proposal further requires the disclosure of 'transition risks". These are risks associated with a "…potential transition to a less carbon intensive economy. These risks may arise from potential adoption of climate-related regulatory policies including those that may be necessary to achieve the national climate goals that may be or have been adopted in the United States or other countries; climate-related litigation; changing consumer, investor, and employee behavior choices; changing demands of business partners; long-term shifts in market prices; technological challenges and opportunities, and other transitional impacts."[4] The definition assumes changes that may not occur such as long term legislative and policy shifts based on climate change and consumer and employee behavioral shifts based on the same. These assumptions seem more about applying normative values than disclosing material facts that companies consider.

To further compound the likely speculative nature of the endeavor, the disclosure of climate-related risks will extend to a company's value chain. "'Value chain' would mean the upstream and downstream activities related to a registrant's operations."[5] These include the activities of other parties that provide goods or services to the company prior to production and those parties that provide some activity related to the product or service once it leaves the company. Thus, companies will have to consider and report climate related activities for entities over which they have little or no control and potentially extremely limited information.[6]

Additionally, this speculative information will be required to be considered and disclosed, when material, on a short, medium, and long-term basis.[7] The proposal recognizes the conjectural nature of this endeavor and therefore promotes the use of

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[4] Proposal at 59-60.
[5] Proposal at 61.
[6] Downstream activities even include the consideration of end of life treatment of sold products, presumably even the consideration of disposal activities of consumers. Proposal at 61.
[7] Proposal at 68.

climate modeling tools and consulting firms to obtain a simulacrum of factual information. The proposal notes that "[w]e recognize that determining the likely future impacts on a registrant's business may be difficult for some registrants"[8] Although the proposal assures that climate modelling has "come a long way" that is a far cry from producing reliable, accurate and material information.

Another example involves the proposed disclosure of greenhouse gas emissions, ("GHG"). The proposed disclosure would require the disclosure of "direct" and "indirect" emissions in three "scopes". As defined, "direct emissions are GHG emissions from sources that are owned or controlled by a registrant, whereas indirect emissions are GHG emissions that result from the activities of the registrant, but occur at sources not owned or controlled by the registrant".[9] Therefore as proposed, companies would be required to report emission information for the most recent fiscal year from sources over which they have no ownership or control and potentially very limited information.

Additionally, these disclosures must be reported in scopes. Scope 1 emissions are defined as "…direct emissions from operations that are owned or controlled by a registrant".[10] Scope 2 emissions are defined as "…indirect GHG emissions from the generation of purchased or acquired electricity, steam, heat, or cooling that is consumed by operations owned or controlled by a registrant".[11] Scope 3 emissions are defined as "…all indirect GHG emissions not otherwise included in a registrant's Scope 2 emissions, which occur in the upstream and downstream activities of a registrant's value chain". Scope 1 and 2 emissions relate to a company's operational activities. Scope 3 emissions, by contrast, are all emissions generated "upstream" and "downstream" by any and all sources outside the ownership or control of the company.

[8] Proposal at 71.
[9] Proposal at 157.
[10] *Id.*
[11] Proposal at 158.

The proposal defines upstream emissions to "…include emissions attributable to goods and services that the registrant acquires, the transportation of goods (for example, to the registrant), and employee business travel and commuting. The proposal defines downstream emissions to "…include the use of the registrant's products, transportation of products (for example, to the registrant's customers), end of life treatment of sold products, and investments made by the registrant". Scope 3 emissions include the items described above but are certainly not limited to them, as Scope 3 emissions encompass all indirect sources of emissions without limitation. The proposal suggests that only such Scope 3 emissions deemed material are required to be reported.[12] However the proposal does not explain how a company would acquire access to all the relevant data needed to make this materiality analysis. Presumably, most companies exercise little to no control over the activities of many of these sources such as end user product disposal activities. Any reported information in this area, therefore, is likely to be variable and speculative in nature and likely to mislead and foster investor confusion.

The proposal tacitly acknowledges the problems associated with Scope 3 analysis and disclosure. "Unlike Scopes 1 and 2 emissions, Scope 3 emissions typically result from the activities of third parties in a registrant's value chain and thus collecting the appropriate data and calculating these emissions would potentially be more difficult than for Scopes 1 and 2 emissions."[13] The proposal also states that "[w]e recognize that methodologies pertaining to the measurement of GHG emissions, particularly Scope 3 emissions, are evolving."[14] Despite the difficulty in obtaining the data, and the resultant potential unreliability of it, the proposal concludes that these disclosures "…may be necessary to present investors a complete picture…".[15] Although there are significant

[12] Proposal at 159.
[13] Proposal at 168-169.
[14] Proposal at 167.
[15] Proposal at 169.

issues surrounding the acquisition and reliability of the data, companies will be required to report it to give investors a "complete" picture, no matter how inaccurate or misleading that picture.

These examples demonstrate that the proposal does something other than provide investors with decision meaningful information. It encroaches upon regulatory areas delegated to other entities, are outside agency expertise, and therefore exceeds the SEC's jurisdiction.

Agency rule authority is limited by the statutory parameters set forth by Congress. *See,* e.g. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837(1994). The Commission relies upon its "broad authority to promulgate disclosure rules that are in the public interest or for the protection of investors and that promote efficiency, competition and capital formation".[16] Although a broad mandate, it is not limitless. As discussed above, many of the proposed disclosures are speculative in nature and of questionable comparative value for investors. Rather than increase efficiency, the proposal will cause a complex process of subjective analysis of dubious worth. Rather than promote competition, it frontloads winners and losers, favoring those companies and industries that can advantageously showcase their business model within the framework of these questionable disclosures. Finally, rather than promote capital formation, the requirement of consideration and disclosure of many of these items, likely a costly and complex endeavor, may discourage many companies from going public. Thus, the authority relied upon conflicts with the rule's provisions and consequences.

In *Chamber of Commerce v. DOL*, 885 F. 3d 360 ((2018), the Fifth Circuit discussed the Department of Labor's("DOL") attempt to expand the scope and application of the term fiduciary to, among other things, include single sales transactions. In that

[16] *See,* e.g. Proposal at 23.

case the Court struck down the rule finding that the statutory scheme did not support the DOL's interpretation of its authority. The court stated that the contemplated expansion amounted to an attempt to "rewrite the law that is the sole source of its authority". *DOL*, 885 F. 3d at 373. The court further elaborated that "Congress does not 'hide elephants in mouse holes' and asserted that, had Congress intended to make such a dramatic departure from traditional concepts of fiduciary duty, "one would reasonably expect Congress to say so". *DOL*, 885 F. 3d at 376, *quoting Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). Similarly, if Congress had intended the protection of investors and the promotion of capital formation to support disclosure of uncertain and unknown future climate events, as well as effects arising from the activities of unrelated third parties, as contemplated by this proposal, one would reasonably expect Congress to say so.

Instead, the proposal represents a novel, new interpretation of the SEC's authority, unsupported by any express congressional delegation. As the DOL court succinctly noted: "[m]ore over, that it took DOL forty years to discover its novel interpretation further highlights the Rule's unreasonableness". *DOL*, 885 F. 3d at 380. *See also*, *Util. Air Regulatory Grp. V. EPA,* 134 S. Ct. 2427, 2444, 189 L. Ed. 2d 372 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism."); *see also*, *King v. Burwell*, 576 U.S. 473, 485 (2015)(No *Chevron* deference granted to the IRS where the issue involved a key reform involving questions of "deep economic and political significance"). The SEC has now discovered the authority to require disclosure of information of deep economic and political significance not currently required by law or the agencies granted express authority in this area.

While we support the requirement that companies asserting environmental positions should be required to do so truthfully, and the requirement that all companies should disclose material information in a fair, comparable and reliable manner, this proposal does not achieve that objective.

Very truly yours,

John B. McCuskey
West Virginia State Auditor

Michael Watson
Mississippi Secretary of State