UNITED STATES SENATE

Meeting of the Senate Climate Change Task Force

June 12, 2024

Statement of Professor George S. Georgiev:

“The SEC Climate-Related Disclosure Rule: Legal Considerations”

Senator Markey & Senator Whitehouse:

Thank you for inviting me to speak at today's timely and important meeting. My name is George S. Georgiev, and I am a law professor at Emory University where I teach and write about corporate governance and securities law.[1] I have extensive experience with the SEC disclosure regime, both as a former practicing lawyer representing public companies on matters of securities law compliance and, presently, as a legal scholar. I have published a number of academic articles on public company regulation, and I have also contributed academic insights to the SEC rulemaking process. This includes a comment letter responding to the SEC's 2021 request for information on climate-related disclosure[2] and a co-authored analysis affirming the SEC's authority on climate-related disclosure, which was signed by 30 securities law scholars.[3] My remarks today draw on this past work and on new and forthcoming research.

The SEC Rule in Context

Responding and adapting to climate change has rightly been compared in scale and scope to the Industrial Revolution, which lasted for close to a century. Climate change is affecting virtually all aspects of human and economic activity, which necessitates numerous substantive changes in law and policy.[4] Viewed in this context, the SEC rule is incredibly modest: it is an investor-protection regulation—not an environmental one—aimed at providing investors and markets with relevant information about climate risks, climate-driven impacts, and greenhouse gas emissions as a measure of transition risk. The rule applies only to companies that have chosen—voluntarily—to take on public company status and access the public capital markets.[5] Notably, the rule does not require companies to make

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1 A detailed biography is available at https://law.emory.edu/faculty/faculty-profiles/georgiev-profile.html. I am here solely in my personal capacity as a legal scholar and I am not speaking on behalf of any group or entity.

2 *See* George S. Georgiev, Comment Letter to the SEC on Climate Change and Other ESG Disclosure (June 22, 2021), https://ssrn.com/id=3874186.

3 *See* Jill E. Fisch, George S. Georgiev, Donna M. Nagy & Cynthia A. Williams, Comment Letter of Securities Law Scholars on the SEC's Authority to Pursue Climate-Related Disclosure (June 6, 2022), https://ssrn.com/id=4129614.

4 *See, e.g.*, Mark Nevitt, *The Legal Crisis Within the Climate Crisis*, 76 Stan. L. Rev. 1051 (2024).

5 *See, e.g.*, George S. Georgiev, *Is "Public Company" Still a Viable Regulatory Category?*, 13 Harv. Bus. L. Rev. 1 (2023) (noting firms' ability to avoid public company regulation by staying private and raising capital on the private markets).

any changes in strategy, operations, or governance; indeed, the SEC emphasized that it is "agnostic about whether or how [firms] consider or manage climate-related risks."[6]

The SEC rule appears just as modest when viewed in the context of concurrent international developments. The European Union's Corporate Sustainability Reporting Directive, for example, requires much more detailed reporting, covers both public and private and both EU and non-EU companies, and is part of a broader economic agenda seeking to transform the EU financial system and EU economy. The International Sustainability Standards Board (ISSB), part of the IFRS Foundation, issued a comprehensive climate-related disclosure standard (IFRS S2) in June 2023, and a number of major jurisdictions have either adopted it or are in the final stages of considering adoption. And while the SEC is highly unlikely to supplement its climate-related disclosure rule with other sustainability disclosure standards, both the EU and ISSB frameworks extend well beyond climate.

Against this backdrop, the reactions to the SEC climate rule have been quite astounding. Though welcomed by most market participants, the rule has faced a level of opposition from industry lobbyists and others that is unprecedented in both its intensity and consistency.[7] Instead of following standard practice and engaging with the specific policy judgments made by the SEC in an effort to improve the final rule through constructive notice-and-comment rulemaking, many critics have chosen to attack every aspect of the rule and the SEC's very decision to pursue it. This multi-prong strategy has involved disputing the SEC's rulemaking authority, questioning the materiality of climate risk information and the validity of the SEC's economic analysis, and leaning on certain doctrines, such as "major questions" and "compelled speech," that have gained traction in other, unrelated contexts. Before I touch briefly on some of these lines of attack, let me offer my overall assessment: if the courts rely on the actual factual record and apply existing law, the rule ought to survive judicial scrutiny.

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6 U.S. Sec. & Exch. Comm'n, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33–11275, 34–99678, 89 Fed. Reg. 21,668, 21,671 (Mar. 28, 2024).

7 *See* George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 Rutgers L. Rec. 101 (2022).

Rulemaking Authority

The statutory language, relevant legislative history, judicial pronouncements, and the SEC's rulemaking practice all support the SEC's authority to mandate climate-related disclosure. The original securities laws, which date back to the 1930s, authorized the SEC to promulgate public company disclosure rules "as necessary or appropriate in the public interest or for the protection of investors."[8] In addition to this broad language, Congress also supplied the SEC with a detailed initial template for disclosure, Schedule A of the Securities Act, and delegated power to the SEC to mandate disclosure of "other information" and "other documents" it deems necessary.[9]

Over the past nine decades, the SEC has continuously done just that, without any challenge to its authority by Congress or the courts. And though it dates back to the 1930s, the SEC disclosure regime is not simply a 20th-century artifact: In 2002, the bipartisan Sarbanes-Oxley Act reaffirmed Congress' broad view of the SEC's disclosure authority.[10] In another example, a Republican-led SEC in 2020 adopted a new disclosure requirement on human capital management—acting without specific congressional authorization and despite the fact that, similar to the case of climate-related disclosure, Congress had given some consideration to legislating action in this space but failed to act.[11] It also bears noting that the SEC's statutory authority extends to mandating disclosure of information used by investors in connection with the exercise of their voting power through what the Supreme Court has described approvingly as "the procedures of corporate democracy."[12]

What about the objection that the disclosure at issue here is too focused on one particular topic—the impact of climate change on corporate activity? This too is not a valid source of concern once we review the history of securities regulation. The SEC has frequently required disclosure, often quite granular, on particular topics of interest to investors; it has also required disclosure of environmental risks, impacts, and contingencies, in some cases

[8] Securities Exchange Act of 1934, 15 U.S. C. § 78m(a)(1), § 13(a)(1). This broad authorizing language is repeated several times in the securities laws. For an expanded list, see George S. Georgiev, *The Market-Essential Role of Corporate Climate Disclosure*, 56 U.C. Davis L. Rev. 2105, 2120 (2023).

[9] Securities Act of 1933, Schedule A, 48 Stat. 88 (1933).

[10] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 409, 116 Stat. 745, 791 (mandating that public companies should disclose "on a rapid and current basis" such information about "material changes in [their] financial condition or operations" as the SEC determines "necessary or useful for the protection of investors and in the public interest").

[11] *See* George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639 (2021).

[12] Citizens United v. FEC, 558 U.S. 310, 361-362 (2010).

dating back over five decades.[13] If the impacts of climate change are the biggest undisclosed risk identified by investors, then the SEC is not simply *authorized* to act, but, rather, it is *required* to do so in order to ensure that its vaunted disclosure framework is fit for purpose in the 21st century.

The "Major Questions" Doctrine

Since the Supreme Court's decision in *West Virginia v. EPA* in 2022, some of the objections pertaining to the SEC's legal authority have been repacked as objections based on the Court's major questions doctrine (MQD). As the Court explained, the MQD applies when an agency "claims to discover in a long-extant statute an unheralded power . . . representing a transformative expansion in [its] regulatory authority."[14] Of course, nothing of the kind has happened here. The climate disclosure rule concerns the SEC's traditional regulatory function: mandating that publicly traded companies include in their SEC filings certain new disclosures determined by the agency to be relevant to investor trading decisions and the exercise of shareholder voting rights. In other words, the SEC rule does not constitute the exercise of "an unheralded power," but, rather, the exercise of a power that was explicitly authorized by Congress and that has always been the core part of the SEC's regulatory role.[15] As noted already, the grants of congressional authority in the 1930s were specific—authority over the disclosure regime in the interest of protecting investor and the capital markets—and, as a result, the SEC has not relied on authorizations that a court would find invalid because they contain "modest words," "vague terms," or "subtle devices."[16]

The original policy determinations made by Congress when it adopted the federal securities laws clearly involved important questions, but those were asked and answered by Congress in the 1930s. The SEC, in turn, has exercised its disclosure authority consistently—and without legislative override—in the ninety years that followed, and it has done so once more with the climate-related disclosure rule.[17]

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[13] For an overview, see Jill E. Fisch, George S. Georgiev, Donna M. Nagy & Cynthia A. Williams, Comment Letter of Securities Law Scholars on the SEC's Authority to Pursue Climate-Related Disclosure (June 6, 2022), https://ssrn.com/id=4129614.

[14] West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

[15] *See* Jill E. Fisch, George S. Georgiev, Donna Nagy & Cynthia Williams, *Climate Change, West Virginia v. EPA, and the SEC's Distinctive Statutory Mandate*, 47 Admin. & Reg. L. News 9 (2021-2022).

[16] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)) (setting out criteria which cause an agency decision to require MQD scrutiny).

[17] For an expanded discussion of the relevance of the MQD to SEC rulemaking, including rulemaking on climate, see Donna M. Nagy, *The SEC and "Major Questions Doctrine" Questions*, 26 U. Penn. J. of Bus. Law (forthcoming 2024).

Materiality

The concept of materiality is fundamental to securities law. In recent years, however, a narrow and idiosyncratic understanding of materiality has been advanced in an attempt to straightjacket the SEC's ability to promulgate disclosure rules on climate change and other important matters. Partly in an effort to neutralize those critiques, the SEC expanded the use of materiality qualifiers in the final rule. While there are both benefits and downsides to this approach to rule design,[18] the changes made between the proposed and final rule have done little to satisfy the rule's opponents, and I predict that we will be hearing much more about materiality in the coming months.

A few brief points are in order: First, materiality is always viewed through the eyes of the "reasonable investor," which—deliberately—is a flexible construct that evolves as standards of reasonable conduct and reasonable expectations evolve over time.[19] The substantial investor demand for climate-related disclosure certainly suggest that the SEC is on solid footing in mandating such disclosure. Second, Supreme Court precedent suggests that materiality determinations need to take into account both the probability and the magnitude of an event or effect; consequently, even lower-probability effects may be material if they are sufficiently large.[20] Finally, the SEC has always had an important role to play in providing guidance on how firms are to make the often-difficult judgments involved in materiality analysis.[21] When it provides such guidance, the SEC is not "redefining" materiality; rather, it is simply operationalizing the Supreme Court's succinct and open-ended articulation of materiality.

Cost-Benefit Analysis

The final objection I'd like to touch on relates to the SEC's analysis of the economic impact of the climate disclosure rule. Here, some of the problems are of the SEC's own making

[18] *See* George S. Georgiev, Congressional Testimony before the U.S. House Committee on Financial Services, Subcommittee on Oversight and Investigations: The Legality of the SEC's Proposal and Process for Climate-Related Disclosure (Jan. 18, 2024), https://ssrn.com/id=4730777.

[19] *See* George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 Rutgers L. Rec. 101, 123-24 (2022).

[20] *Id.*, at 124-25.

[21] *See, e.g.,* Jill E. Fisch, George S. Georgiev, Donna M. Nagy & Cynthia A. Williams, Comment Letter of Securities Law Scholars on the SEC's Authority to Pursue Climate-Related Disclosure (June 6, 2022), https://ssrn.com/id=4129614.

because the SEC has over time elevated the significance of its cost-benefit analyses without clearly stating the inherent limitations and idiosyncrasies. Though commentators often use the term "cost-benefit analysis," the label is actually misleading because the SEC is not required to—and does not—perform true OIRA-style cost-benefit analysis. It is important to bear in mind that the SEC does not attempt to quantify *benefits* if they are uncertain, but it does routinely quantify *costs*, and, as a result, disclosure rules often appear to impose significant and precisely-stated costs while providing underspecified benefits, which makes the rules liable to criticism. An SEC disclosure rule was struck down by the Fifth Circuit last year on the grounds that "the SEC acted arbitrarily and capriciously . . . when it failed to respond to [industry] comments and failed to conduct a proper cost-benefit analysis."[22] The pending litigation over the climate disclosure rule will feature very similar challenges.

When cost-benefit critiques are raised, it is worth recalling that the D.C. Circuit, as recently as 2022, stated that "an agency's duty to consider economic impacts does not necessarily require a precise cost-benefit analysis," and that the SEC "need not . . . base its every action upon empirical data, and may reasonably conduct a general analysis based on informed conjecture."[23] In an earlier case, the D.C. Circuit ruled that "an agency is *not required to measure the immeasurable*, and need not conduct a rigorous, quantitative economic analysis *unless* the statute explicitly directs it to do so."[24] No statute does so for the SEC.[25] And if the SEC overstates the significance of its cost-benefit analyses, those analyses will always underdeliver, which makes the cost-benefit section the Achilles' heel of any SEC rule.

Conclusion

The legal matters discussed here today will no doubt be litigated over the coming years in the pending challenge to the rule, currently in the Eight Circuit, and in the court of public opinion. In my view, however, the vast majority of U.S. companies have already moved on. They were never intent on fighting the SEC's proposal in the first place—the campaign has

[22] Chamber of Com of the USA v. SEC, No. 23-60255 (5th Cir. 2023).
[23] NASDAQ Stock Market LLC v. SEC, 34 F.4th 1105 (D.C. Cir. 2022).
[24] Nat'l Ass'n of Mfrs. v. Sec. & Exch. Comm'n, 800 F.3d 518, 552 (D.C. Cir. 2015).
[25] The SEC is, instead, required to consider whether its rulemaking will "promote efficiency, competition, and capital formation" (in addition to investor protection). Securities Act § 2(b); Exchange Act § 23(a)(2). The statutory text suggests that Congress may have intended this requirement to apply more narrowly and only in cases when the SEC is "engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest" (*see id.*); nevertheless, the SEC's practice has been to consider the promotion of efficiency, competition, and capital formation in rulemakings across the board.

been driven primarily by industry associations and political actors[26]—and they are even less interested in a protracted legal battle over the already-adopted rule. U.S. companies are focusing instead on meeting investor demand for climate-related disclosure, on establishing procedures for complying with the SEC rule on the assumption that it will not be struck down, and on figuring out how to comply with California's climate disclosure requirements, which, incidentally, go further than the SEC's.

Finally, even if all investor demand and all U.S. regulatory requirements were to somehow disappear overnight, U.S. companies will still need to continue working on determining whether and how they will comply with the European Union's sustainability disclosure requirements, which are much more expansive and which will eventually apply to thousands of U.S. companies with operations in Europe. The SEC has an important role to play in preventing regulatory fragmentation and promoting harmonization between its own rules and the rules of other jurisdictions, which can redound to the benefit of U.S. companies and promote U.S. capital formation. Unfortunately, the battles over the SEC disclosure rule and the attendant regulatory uncertainty are diverting attention away from this much-needed effort.

[26] *See* George S. Georgiev, *The SEC's Climate Disclosure Rule: Critiquing the Critics*, 50 Rutgers L. Rec. 101 (2022).

Good afternoon. My name is Cambria Allen-Ratzlaff, and I am the Chief Responsible Investment Ecosystems Officer at the Principles for Responsible Investment, or PRI, covering the Americas and Asia Pacific.

PRI is a global network of 5,400 investment organizations, representing over $120 trillion in assets. PRI was founded on Principles developed by investors, for investors, who believe that environmental, social, and corporate governance – or ESG – factors can affect investment performance, and that understanding and incorporating these factors into the investment decision-making process is prudent money management. In the United States alone, our signatories – including public pension funds, endowments, foundations, insurance providers, and asset managers – invest nearly $50 trillion in capital on behalf of their clients and beneficiaries.

The strength and stability of the U.S. capital markets system largely rests on the availability of high-quality, decision-useful information investors rely on to understand and assess a company's business, risks and prospects, to make decisions about how and where to allocate capital.

It is therefore critical that this information is reliable, consistent, comparable, and accurately reflects the realities of our capital markets as they are – including the key sources of value, risk, and opportunities, to make informed decisions about how an investment made today may perform in the future.

Over the past 50 years, climate change has emerged as one of the most consequential sources of risks – and opportunities – for investors. Economists project that every 1-degree Celsius increase in temperature will lead to a 12 percent decrease in global gross domestic product.[1] Physical risks, like the increase in extreme weather events and shifts in weather patterns, may lead to increases in operating costs, decreased production capacity, supply chain interruptions, property loss, and a higher incidence of impaired, stranded, and uninsurable assets, all taking a toll on corporate balance sheets and investors' portfolios. Transition risks, including the impacts of domestic and global policy responses, reputational impact, and shifts in consumer tastes and demands, create new complexities in the operating environments for firms and investors.

Simultaneously, the transition to a lower-carbon economy is creating opportunities for economic growth through technological advancement and the rise of new industries, giving investors clear incentives to invest in our collective future. Since 2022, the Inflation Reduction Act has generated over $350 billion in clean energy investments and created over 270,000 new jobs along the way.[2] This year is on pace to eclipse these results, with investments made in Q1 2024 already exceeding Q1 2023 by up to 40%.[3]

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[1] Adrien Bilal and Diego R. Känzig, "The Macroeconomic Impact of Climate Change: Global vs. Local Temperature" (May 2024), https://www.nber.org/papers/w32450.
[2] Climate Power, "The State of the Clean Energy Boom" (February 2024), https://climatepower.us/wp-content/uploads/2024/03/State-of-the-Clean-Energy-Boom-Report-March-2024.pdf.
[3] Rhodium Group and Massachusetts Institute of Technology Center for Energy and Environmental Policy Research, "The Clean Investment Monitor," https://www.cleaninvestmentmonitor.org/.

As investors' informational needs have evolved, the information available to them has not kept up. In supporting the U.S. Securities and Exchange Commission's climate disclosure rule proposal, PRI noted that the "lack of consistent, comparable data" was identified by our signatories as "the largest barrier to incorporation of climate and ESG factors in investment practices."[4] Non-standardized disclosure of firm-level data results in increased costs for investors through additional time spent gathering, decoding and analyzing information so it can be used in investment decision-making.[5] The relative paucity of high-quality data also makes it unlikely that climate risks are fully priced, a phenomenon that is reportedly acute in the U.S. public equity markets.[6]

PRI believes the final rule responds to investors' needs and represents a crucial step in the right direction toward the consistent, comparable, and decision-useful sustainability-related information that investors in the U.S. capital markets have been demanding for decades.[7] Should the SEC's rule not go into effect, investors will lose the opportunity to fully access one of the fundamental tenets of our capital markets regulatory system: the right to fair and accurate investment information.

We are therefore disappointed to see the rule delayed. First, we are concerned that by waiting too long to implement a rule that investors themselves asked for, the U.S. runs the risk of falling from a worldwide leader in balanced and effective securities regulation into a regulation-taker, where we may lose the ability to drive regulation impacting American companies operating globally. Perhaps more concerning is the thought that these delays are reflective of a polarized legal and regulatory environment that is becoming increasingly hostile to investors seeking to understand and navigate the realities of modern capital markets and invest using their professional judgment, consistent with fiduciary duties and best practices.

These unprecedented attacks are disruptive, not productive. In interviews with over a dozen large U.S. investment managers, funds reported that state legislation seeking to limit investors' ability to use ESG information to make investment decisions, consistent with their fiduciary duties, has forced their firms to expend considerable resources defending well-established and previously uncontroversial investment practices, at no tangible benefit to anyone. Interviewees reflected that such legislation appears to be rooted in misconceptions about investment decision-making. Still, despite the politicization of finance, not one fund reported changing their fundamental investment practices, since their practices already are grounded in fiduciary duty, and their use of ESG data or engagement on ESG issues reflects efforts to fulfill that duty. Why? Because it's good business.

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[4] Principles for Responsible Investment, "Consultation response: Securities and Exchange Commission: Request for Comment of Climate Disclosure" (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8906878-244193.pdf

[5] Ibid.

[6] Toan Phan, "Pricing and Mispricing of Climate Risks in U.S. Financial Markets" (December 2021), https://www.richmondfed.org/publications/research/economic_brief/2021/eb_21-41.

[7] Principles for Responsible Investment, "Climate Data and Net Zero: Closing the Gap on Investors' Data Needs" (September 2023), https://www.unpri.org/download?ac=19179.

The PRI looks forward to engaging with both the SEC and policy makers in protecting the U.S. capital markets – the largest, deepest, most liquid and most efficient pool of capital on earth. And by extension, our collective future financial wellbeing.

Thank you, and I look forward to your questions.

Opening Statement before the Senate Climate Change Task Force on the
Final Securities and Exchange Commission Climate-Risk Disclosure Rule

Jake Rascoff
Director, Climate Financial Regulation
Ceres Accelerator for Sustainable Capital Markets

June 12, 2024

Senator Markey and Members of the Task Force,

Thank you for inviting me to discuss the climate risk disclosure rule adopted by the U.S. Securities and Exchange Commission (SEC) on March 6, 2024. This rule is the culmination of more than 20 years of advocacy that Ceres has done alongside, and on behalf of, institutional investors.

Ceres is a Boston-based nonprofit advocacy organization whose Investor Network includes more than 200 asset owners and managers with approximately $44 trillion in assets. To understand why the SEC promulgated this rule, it is important to understand the history of investor demands for better corporate transparency on climate risks. In 2003, when our Investor Network was founded, Ceres organized meetings between investors and SEC officials to present an action plan that called for better climate risk disclosure in SEC filings.[1]

Why is this important? Investors bound by fiduciary duty need to understand how companies are managing *all* material financial risks. Climate-related physical and transition risks threaten to reduce the value of assets and collateral, increase insured and uninsured losses, and disrupt businesses' operations and supply chains. Investors need to understand the magnitude of company-specific exposure to these risks to compare one company's risk profile to its peers. That is why investors want standardized, decision-useful information; they use it to conduct due diligence, determine position adjustment, prioritize engagements, and inform proxy voting.[2] Accordingly, they want these disclosures in the same place they get all other material information: in SEC filings, alongside audited financials and other important disclosures.

So, for more than 20 years, investors have been asking for more high-quality, comparable, decision-useful data on companies' climate risk management. In 2007, in collaboration with our Investor Network members, we decided that SEC interpretive guidance was needed to improve

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[1] https://portal.ct.gov/-/media/ott/pdfs/2003finalsummitreport.pdf, p. 21
[2] See, e.g., https://www.sec.gov/comments/s7-10-22/s71022-20131967-302426.pdf and https://www.sec.gov/comments/s7-10-22/s71022-20131391-301546.pdf

these disclosures for investors. We filed a petition for interpretive guidance in 2007[3] and submitted supplemental investor petitions in 2008[4] and 2009.[5] These efforts culminated in the SEC's February 2010 issuance of interpretive guidance on climate risk disclosure, which outlined the Commission's views with respect to *existing* disclosure requirements, as they apply to climate change matters.[6]

Unfortunately, the SEC's 2010 guidance did not prove effective. Ceres issued a 2014 report that found that among the S&P 500 companies that made climate disclosures, most companies' disclosures in SEC filings were very brief, provided little discussion of material issues, and did not quantify impacts or risks. Companies that disclosed climate information provided significantly more detailed information in their voluntary, standalone sustainability reports than in their mandatory SEC filings.[7]

The problem did not improve over time. SEC staff reviewed nearly 53,000 annual reports submitted between 2016 and 2022 to determine how many contained any of the following keywords: "climate change," "climate risk," or "global warming." In recent years, only 36 percent of filings contained any keywords. Prior to 2020, the percentage hovered below 20 percent.[8] And this was merely *any mention* of climate change; where these disclosures did exist, there was no guarantee that they were useful.

Opponents of mandatory climate disclosure sometimes argue: "if these risks were material, companies would already disclose them." This ignores the 12-year track record of inadequate disclosures that preceded the SEC's rule proposal, just as it ignores the key test of materiality. Supreme Court case law defines information as material if "there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision."[9] It is important to keep in mind that the determination of materiality is made from the investor's standpoint: the *issuer* must figure out what the *investor* wants or needs. Whether or not information is material can be gleaned from the comment letters on the SEC's proposal. Ceres analyzed comment letters on the proposed rule from more than 300 institutional

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[3] https://www.sec.gov/files/rules/petitions/2007/petn4-547.pdf
[4] https://www.sec.gov/files/rules/petitions/2008/petn4-547-supp.pdf
[5] https://www.sec.gov/files/rules/petitions/2009/petn4-547-supp.pdf
[6] https://www.federalregister.gov/documents/2010/02/08/2010-2602/commission-guidance-regarding-disclosure-related-to-climate-change
[7] https://www.ceres.org/resources/reports/cool-response-sec-corporate-climate-change-reporting
[8] https://www.sec.gov/files/rules/final/2024/33-11275.pdf, p. 611-613
[9] See SEC Adopting Release (https://www.sec.gov/files/rules/final/2024/33-11275.pdf) at fn. 381, citing 17 CFR 230.405; 17 CFR 240.12b-2; Basic Inc. v. Levinson, 485 U.S. 224 at 231, 232, and 240 (1988); TSC Industries, Inc. v. Northway, Inc., 426 U. S. 438, 449 (1977)

investors: 97 percent supported requiring climate-related disclosures in companies' annual reports.[10]

If investors consider this information important for their decision-making, but companies aren't disclosing it in their SEC filings, then the status quo is not working. The existing information landscape is fragmented and unreliable. Investors spend considerable resources to access the data they need,[11] and voluntary disclosures lack consistency and comparability.[12]

The SEC has no climate policy mission. The Commission does not, and should not, care *if* or *how* companies manage climate risks. Its only interest is ensuring that companies are transparent with their investors. The SEC issued this rule to protect investors by directly responding to the overwhelming demand in the market for better information on material risks.

The SEC received a record-breaking 24,000 public comments on its proposal—a testament to the uniquely charged atmosphere surrounding climate disclosures in the United States—and the agency was extremely responsive to concerns in the comment file.[13] Ultimately, this rule should be measured not only against the 2022 proposal, but also against the status quo. The final rule, while less far-reaching than the proposal, will result in the most significant improvements to climate-related disclosure in U.S. history. A disclosure made in an SEC filing is much more carefully prepared than disclosures made in voluntary reports. When information is included in filings, companies' liability risks are increased, as is the possibility of SEC enforcement action. If the intent of mandatory disclosure is to elevate climate reporting to the same level of rigor as financial reporting, this rule should accomplish that goal.

[10] https://www.ceres.org/resources/news/analysis-shows-that-investors-strongly-support-the-secs-proposed-climate-disclosure-rule
[11] https://www.erm.com/news/survey-reveals-costs-and-benefits-of-climate-related-disclosure-for-companies-and-investors/
[12] https://www.sec.gov/files/rules/final/2024/33-11275.pdf, p. 626
[13] https://www.sec.gov/news/press-release/2024-31

Testimony of Damon Silvers

Senior Advisor

American Federation of Teachers

to the Senate Climate Change Task Force

June 12, 2024

Good afternoon Senator Markey and members of the Climate Change +Task Force. My name is Damon Silvers, I am Senior Advisor to the American Federation of Teachers, and Visiting Professor of Practice at University College London. I am a former member of the Securities and Exchange Commission's Investor Advisory Group and the Public Company Auditing Oversight Board's Standing Advisory Committee. I also had the honor of serving as the Deputy Chair of the Congressional Oversight Panel for TARP.

I appreciate greatly the opportunity to speak today on behalf of the American Federation of Teachers on the critical issue for our members of climate change and the securities markets. AFT members participate in pension funds with close to $3 trillion in assets. These funds are without exception managed to be able to provide benefits for workers the youngest of whom are in their twenties and thirties today, and whose retirement years could last until the end of this century. Our pension fund's trustees and money managers have a fiduciary duty under ERISA and the laws of their states to manage these funds in an expert manner, seeking to maximize the long term risk adjusted returns to our funds.

Even a cursory survey of the economic and scientific literature shows conclusively that the degree of climate change and its consequences—financial, economic, social and political—will be a critical determinant of the performance of the world economy, national economies, and of individual companies in the 21st century. It may well be THE most important driver of risk and return for long term investors in our lifetimes.

For example, a recent comprehensive study published in the world's leading scientific journal Nature of likely economic impacts of climate change estimates that already baked in climate change will by 2050 have reduced the size of the global economy by 19%-- an impact comparable to the Great Depression, with a worst case scenario of 29%, a substantially worse event than the Great Depression, with the impacts being greatest in areas that would otherwise have been significant drivers of global growth—South Asia and Africa. And that those impacts could double absent effective action to reduce emissions along the lines of the Paris Climate Agreement. https://www.nature.com/articles/s41586-024-07219-0

Worker pension funds are long term globally diversified investors. Their ability to meet their financial targets is ultimately a function of the health of the global economy, and 2050 is well within the investment time horizon of worker pension funds.

It is critical for those responsible for workers' retirement assets to have comprehensive, comparable data on how climate change and the responses of the full range of relevant market actors to climate change will affect our pension funds' investments. This includes, but is not limited to, comprehensive company specific data on

- Greenhouse gas emissions, including from supply chains;
- Possible business risks arising out of climate change and risk mitigation strategies,
- Business opportunities arising out of climate change and the global effort to combat climate change,
- Compliance with all relevant greenhouse gas regulatory regimes, most importantly the Paris Climate Accords.

The lack of this type of information on a comprehensive, comparable basis is already creating challenges for fund fiduciaries, challenges that are certain to grow rapidly given both the reality of accelerating climate change and an intensifying consumer and regulatory response to that reality.

This is why we strongly support the Securities and Exchange Commission's recently finalized climate disclosure rule.
https://www.federalregister.gov/documents/2024/04/12/2024-07648/the-enhancement-and-standardization-of-climate-related-disclosures-for-investors-delay-of-effective#:~:text=On%20March%206%2C%202024%2C%20the,Register%20on%20March%2028%2C%202024.

The rule lays out a comprehensive framework for public company disclosure of comparable data on each company's greenhouse gas emissions, laying the indispensable foundation for our funds' asset managers to be able to do their job in a world where it is increasingly impossible to assess the risk/return characteristics of individual companies and entire industries without this type of data.

We do believe that the SEC's rule could have been more effective in important ways. First, the materiality limitation of the disclosure requirements gives companies seeking to hide information from their investors a possible excuse, an excuse of the kind that is not generally available to issuers in other areas of mandatory disclosure, like for example executive compensation, taxation, or capital structure. You can't have for example undisclosed classes of stock that are not material.

Secondly, the rule should have included what was referred to in the original draft as Scope 3 greenhouse gas emissions, i.e. emissions from issuers' supply chains. It is not possible for investors to understand the true exposure of a company to climate change related risks without understanding ALL of the emissions that go into the company's greenhouse gas footprint. This is because ultimately both regulators and consumers will be looking at that comprehensive number, and demanding it be reduced.

We understand why the Commission made the choices it made given the essentially arbitrary nature of the courts where recent Commission actions have been challenged. In view of this environment, it may be necessary for Congress to make clear there is no climate exemption to the Commission's general authority to require disclosures of public companies that investors such as worker pensions need to make investment decisions.

Let me close by pointing out that those who are attacking the Commission's authority in this area are many of the same people who are seeking to prevent fiduciaries from looking at a wide range of issues including climate change when they make investment decisions. Some of these politicians have been quite candid that they want to force worker pension funds to subsidize the fossil fuel industry even as greenhouse gas emissions threaten the well being of the global and the US economies and the very stability of human civilization.

Worker pension funds are not a piggy bank for the fossil fuel industry. The people who manage worker pension funds have a fiduciary duty to protect the retirement security of our members. They need the kind of information the SEC is seeking to require companies to disclose to carry out that duty. In fact thay need more information than the SEC is currently requiring. Congress should be supporting the Commission in what it has done and working with the Commission to move forward to a genuine comprehensive system of climate-related public company disclosure. Thank you and I look forward to your questions.

The Necessity of the SEC Climate Disclosure Rule and Further Action on Climate-Related Financial Risk

June 12, 2024

Hana V. Vizcarra

Good afternoon and thank you for the invitation to speak to you today. My name is Hana Vizcarra. I am a Senior Attorney at Earthjustice, where I work as a litigator focused on federal climate related rulemaking and litigation. In this capacity, I have led our work on the SEC's Climate Disclosure Rule and represented the Sierra Club and Sierra Club Foundation in related litigation. Before joining Earthjustice, I researched and published on the rise of investor concern about climate-related financial risks, investors' evolving expectations for corporate disclosure of those risks, and how it impacts disclosure practices and the law as an attorney with Harvard Law's Environmental & Energy Law Program.

The SEC took an important step to address a well-documented gap in disclosure practices with its Climate Disclosure Rule, but additional work remains to ensure investors will have the information they need to assess climate-related risk. Meanwhile, current litigation efforts threaten to undercut the SEC's ability to protect investors from climate-related and other future risks through disclosure requirements.

The SEC's Climate Disclosure Rule Is Necessary and Long Overdue

Investors and asset managers have worked for years to get better disclosures from public companies about climate-related risks. Recognizing the blind spots in the market, they have engaged with companies, pushed shareholder proposals, contributed to the development of voluntary disclosure frameworks, and advocated for mandatory disclosure requirements. However, despite some improvement in corporate disclosure practices, this work has yet to yield the reliable, comparable disclosures needed. As the SEC notes in the preamble to its final rule, reporting remains "fragmented and difficult for investors to compare across companies or across reporting periods."[1]

Climate-related financial risks are not hypothetical; the physical and transition-related impacts of climate change are already affecting the economy and federal budget, industry, and our communities in ways that can have substantial financial impacts on public companies. Federal analyses of climate change's economic impacts over the last several years demonstrate the substantial financial risks at stake.[2] As these analyses highlight, climate change presents financial risks now that are likely to grow in the future.

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[1] SEC, Final Rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21668, 21670 (March 28, 2024).

[2] The Financial Stability Oversight Council named climate change "an emerging threat" to financial stability, finding "climate-related impacts in the form of warming temperatures, rising sea levels, droughts, wildfires, intensifying storms, and other climate-related events are already imposing significant costs upon the public and the economy" and recommending that financial regulators take action. Financial Stability Oversight Council, Report on Climate-Related Financial Risk (October 2021), https://home.treasury.gov/news/press-

Public companies have always faced an evolving array of financial risks. As the world and economy change over time, so do the topics that give rise to material risks that reasonable investors would expect to evaluate when making informed decisions. Part of the SEC's role is to recognize the rise of significant financial risks and ensure public company filings adequately capture and inform investors of them. This is not a new authority; it is a fundamental responsibility of the Commission and one that has led to new guidance and disclosure requirements on a wide range of topics over the years.

In 2010, the SEC responded to investor concerns about climate-related risks by issuing guidance reminding companies that climate change could present financial risk they need to disclose.[3] Fourteen years later, the SEC rightly recognized the need to finalize more prescriptive disclosure requirements. Over these fourteen years climate change has wreaked havoc on our supply chains, our insurance markets, agriculture, water supplies, and coastal and inland communities alike, yet we have seen minimal meaningful shifts in disclosure practices from public companies. The SEC's hands-off approach during that time allowed companies to distort the magnitude of their climate-related financial risk and mask how well they assessed and managed it.[4] Allowing the continued obfuscation of these risks does not serve the SEC's mission and puts ordinary investors at risk.

The Climate Disclosure Rule is an Important First Step but More Work Remains

The SEC's Climate Disclosure Rule was a long-overdue step to improving climate-related risk information in annual reports and registration statements, but it does not finish the job. In the final rule, the SEC dropped important components of its proposal that could leave gaps in disclosures. Most notable among these is the decision to drop the disclosure requirement for Scope 3 emissions, even for companies with transition plans that include Scope 3 reduction targets. This metric is an important indicator of how well a company is managing its transition risks and how meaningful a corporate net-zero goal is. The SEC also gave companies significantly more discretion to decide what to disclose. The final rule represents a cautious approach that does not exercise the Commission's full authority. This approach does not limit its ability to take additional steps in the future but will require additional actions to achieve the rule's aims. The SEC will need to follow it with consistent and detailed guidance, review, and enforcement to ensure companies properly

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releases/jy0426. The Commodity Futures Trading Commission's Market Risk Advisory Committee similarly concluded that climate-related risks "are already impacting, or are anticipated to impact, nearly every facet of the U.S. economy." CFTC, Market Risk Advisory Committee, Subcommittee on Climate-Related Market Risk, *Managing Climate Risk in the U.S. Financial System* 11 (Sept. 9, 2020), https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf ; The Office of Management and Budget and Council on Environmental Quality found the federal budget "directly and substantially at risk from expected lost revenues and increasing expenditures due to climate change damages in coming decades." OMB, *Climate Risk Exposure: An Assessment of the Federal Government's Financial Risks to Climate Change* 1 (April 2022), https://www.whitehouse.gov/wp-content/uploads/2022/04/OMB_Climate_Risk_Exposure_2022.pdf.

[3] Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010).

[4] Carbon Tracker, Flying Blind: In A Holding Pattern (February 22, 2024), https://carbontracker.org/reports/flying-blind-in-a-holding-pattern/ (detailing the extent to which public companies continue to fail to provide meaningful climate-related disclosures to investors).

assess and disclose material climate-related risks. It should also closely track developments in disclosure practices both here and in other jurisdictions and take further action to address remaining disclosure gaps.

But before these important implementation and oversight considerations, the rule must survive anti-regulatory attacks that threaten it and the SEC's disclosure authority more broadly.

Current Attacks on the Climate Disclosure Rule Could Curtail the SEC's Authority to Protect Investors from More than Climate-Related Risks

If successful, current challenges to the Climate Disclosure Rule brought by anti-regulatory parties could allow companies to continue to hide climate-related financial risk from investors while also potentially undercutting the SEC's ability to address climate-related and other financial risks in the future. Opening briefs for the consolidated cases challenging the rule in the Eighth Circuit are due on June 14th. We expect to see broad attacks on the SEC's authority to require corporate disclosures. Some of the expected claims are designed to redraw the SEC's regulatory role that would prevent the Commission from protecting investors from developing financial risks like climate change.

The partners and clients I work with manage long-term investments designed to support the operations of their organizations for years to come. They also operate with investment policies requiring them to ensure their investments do not conflict with their missions. It is their duty to consider the type of information this rule was designed to elicit. They recognize the deficiencies of the final rule and will continue to advocate for actions that will protect investors from hidden transition risk. But should the court broadly curtail the SEC's authority to develop new disclosure requirements in the face of emergent risks, it will not only harm those concerned about the impacts of climate change on their investments. Such a decision would harm all investors by allowing significant risks on topics not yet well disclosed to fester in darkness, only to come to light following unexpected losses and market distortions.

Thank you for the opportunity to discuss the importance of climate-related disclosures and the SEC's role in protecting investors from the financial risks of climate change. I look forward to your questions.