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June 11, 2021

The Honorable Allison Herren Lee
Commissioner
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

VIA ELECTRONIC MAIL
rule-comments@sec.gov

Subject: Public Input Welcomed on Climate Change Disclosures

Dear Commissioner Lee:

The National Investor Relations Institute ("NIRI") appreciates the opportunity to comment on your request for feedback and input on climate change disclosures.[1]

Founded in 1969, NIRI is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts, and other financial community constituents. The largest professional investor relations association in the world, NIRI's more than 2,800 members represent over 1,350 publicly held companies with more than $7 trillion in stock market capitalization.

In response to your request for feedback and input, NIRI offers the following comments on climate-related disclosures:

1. **Materiality Standard**. Existing disclosure standards in the United States require disclosure of information by public companies that is "material" to a reasonable investor in making informed investment and proxy voting decisions. As stated by the U.S. Supreme Court in its *TSC Industries v. Northway* decision:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. … What the standard [contemplates] is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have

[1] *See* Acting Chair Allison Herren Lee, Public Input Welcomed on Climate Change Disclosures, March 15, 2021.

> assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.[2]

Ensuring that any new disclosure standards are rooted in the materiality standard is critical to preserving the ability of investors to identify and act on decision-useful information. There certainly are public companies that emit greenhouse gases and already need to disclose climate-related information. However, many public companies operate businesses that lack any type of significant carbon footprint. Mandated climate change disclosures for these companies would be unnecessary and non-material information.

NIRI believes that the materiality standard forms a solid foundation that supports the goal of enhanced climate change disclosures by public companies. As an example, one of the leading third-party standard setters, the Sustainability Accounting Standards Board ("SASB"), has developed standards for 77 industries where sustainability risks and opportunities are "reasonably likely to *materially* affect the financial condition, operating performance, or risk profile of a typical company within an industry."[3] (emphasis added).

For these reasons, the SEC should refrain from imposing a "one-size-fits-all" disclosure regime that would end up generating an abundance of climate-related information of interest only to a minority of shareholders and investor activists. As noted by the Supreme Court in its *TSC Industries* decision, "management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decision making."[4]

2. **<u>Private Ordering</u>**. Voluntary disclosures by public companies in sustainability reports and other public statements have increased dramatically over the past several years, in response to investor interest and marketplace demands. Similarly, there are positive trends in the use by public companies of third-party disclosure frameworks. For example, the Task Force on Climate-Related Financial Disclosures ("TCFD") reports that between 2019 and 2020, "the number of organizations expressing support for the TCFD has grown by 85% … including over 1,340 companies with a market capitalization of $12.6 trillion and financial institutions

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[2] *TSC Industries, Inc. v. Northway, Inc*., 426 U.S. 438, 449 (1976). The materiality standard was reaffirmed by the Supreme Court in *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988) ("We now expressly adopt the TSC Industries standard of materiality for the § 10(b) and Rule 10b-5 context."). In its decision in *Basic*, the Court also stated that when an "event is contingent or speculative in nature, it is difficult to ascertain whether the 'reasonable investor' would have considered the omitted information significant at the time." *Id.* at 232.

[3] Sustainability Accounting Standards Board, *Proposed Changes to the SASB Conceptual Framework & Rules of Procedure*, at 30 (Aug. 28, 2020), *available at* https://www.sasb.org/wp-content/uploads/2020/08/Invitation-to-Comment-SASB-CF-RoP.pdf.

[4] *TSC Industries* at 448-449.

responsible for assets of $150 trillion."[5] Likewise, the SASB notes that the number of public companies reporting SASB metrics increased by 359% in 2020 and, thus far in 2021, has increased another 289%.[6]

There are many other climate-related frameworks under development with significant differences in approach and methodology. Since there is no single standards-setter that has emerged, many companies and investors rely on multiple frameworks to inform their internal decision-making and climate-related disclosures.

These frameworks are still at relatively early stages and should be given time to develop further. And companies should continue to have the flexibility to use one or more of these frameworks, depending on their business needs and/or their industry sector.

Public companies also have concerns about the costs of systems, processes, and controls for gathering reliable climate change data that currently are not standardized, uniformly measurable, or comparable across companies and industries.[7]

NIRI believes that the current "private ordering" process should continue to proceed without interference. The imposition of prescriptive disclosure rules at this time would have unintended consequences, largely because there is no consensus among public companies or their investors about what climate change metrics are relevant, calculable, and material across different companies and industries.

NIRI acknowledges that there are clearly a number of industries where measuring greenhouse gas emissions and carbon footprints may provide important information for internal company planning purposes and for investors who can use this data to make investment decisions. However, climate change may not be a significant issue for companies in other sectors and these companies may lack the ability to measure and report emissions data. It would be reasonable for them to determine that these disclosures are not material, relevant, or important to their internal business operations, or to the investment decisions of their shareholders.

3. **Principles-Based Regulation**. The SEC's 2010 climate guidance acknowledged the importance of flexibility in disclosure requirements, noting that this approach "has resulted in disclosures that keep pace with the evolving nature of business trends without the need to continuously amend the text of the rule."[8]

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[5] Task Force on Climate-Related Financial Disclosures, *2020 Status Report*, at 2 (October 2020)
[6] Letter from Janine Guillot, Chief Executive Officer, Sustainability Accounting Standards Board, to Chair Gensler, Securities and Exchange Commission, at 6 (May 19, 2021), *available at* https://www.sec.gov/comments/climate-disclosure/cll12-8815762-238031.pdf.
[7] These additional costs could also include the expense of having climate risk data audited by an outside audit firm.
[8] Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg, 6,290, at 6,294 (Feb. 8, 2010).

If the SEC decides to proceed with a rulemaking, the Commission should employ a flexible, principles-based approach, as it has done successfully in the past.[9] This approach could establish principles for the required disclosures and provide guidance about how best to meet their terms. A proposed rule could also include more specific requirements for the disclosure of certain metrics and data points, as long as they are measurable, widely in-use, and cost-effective to implement.

Public companies should have additional flexibility to either provide the requested disclosure or explain why the information is not material, relevant, or available to be disclosed.

It is also important that any ongoing regulatory process be completely transparent and provide appropriate processes for public companies, investors, and other stakeholders to participate in the development of climate-related standards and requirements. For example, the Financial Accounting Standards Board ("FASB"), which governs U.S. Generally Accepted Accounting Principles ("GAAP"), has long-established processes to take input from companies that provide financial information, investors that consume the information, and the accounting profession that administers the GAAP standards. Any proposed climate change disclosure rules should have similar processes established so that companies, investors, and other stakeholders are permitted to provide the input necessary to ensure that the standards are focused on relevant, widely-accepted, and decision-useful information.

Similarly, if the SEC decides to permit companies to satisfy new climate change disclosure rules by relying on a recognized, third-party standard setter, the Commission should ensure that these rules, including any updates or amendments over time, only be promulgated pursuant to the Administrative Procedures Act, with notice and comment rulemaking and sufficient opportunity for public input. This approach, if followed, should also ensure that SEC oversight and governance of any third-party standard setter be subject to the same processes used by the Commission to oversee the FASB and/or the Public Company Accounting Oversight Board ("PCAOB").

4. **Legal Liability Issues**. Since there is no widespread consensus among companies and investors about specific climate change metrics and risks, public companies are concerned about their potential liability if a new climate change disclosure regime is promulgated. Unlike quantitative financial information, climate change metrics and data points are currently difficult to collect in a reliable and standardized manner. They are also not comparable in their application or impact across companies and industries.[10]

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[9] *See, e.g.,* Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726 (Oct. 8, 2020).

[10] Further evidence of the current confusion about ESG standards and metrics is the creation of an SEC Climate and ESG Task Force in the Division of Enforcement to "identify any material gaps or misstatements in issuers' disclosure of climate risks under existing rules." Press Release, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021).

To address these concerns, any new climate change disclosure requirements should be treated as "furnished," so that they are not subject to the same level of liability under the securities laws as information that is filed with the Commission.[11]

The SEC should also consider providing companies with a safe harbor for good faith company statements about climate change risks and opportunities. For almost every public company, the future is difficult to predict with precision (*e.g.*, COVID-19) and the science of climate change is complex and evolving. These disclosures should be considered similar to forward-looking statements under the Private Securities Litigation Reform Act ("PSLRA"); and companies should be protected from liability (and frivolous lawsuits) if they comply with appropriate conditions and their statements turn out to be incorrect.

5. **Scaled and Phased Disclosure**. In developing any new disclosure requirements, the SEC should provide for "scaled" disclosure, which would allow smaller issuers more time to comply and would subject these companies to less onerous requirements.[12] The SEC should also consider phasing in any new rules, to permit companies enough time to gather data, assess risks, and prepare their disclosures.

Thank you for the opportunity to present the views of the National Investor Relations Institute on this important topic.

Sincerely,

Gary A. LaBranche, FASAE, CAE
President and CEO
National Investor Relations Institute

cc: The Honorable Gary Gensler
The Honorable Hester M. Peirce
The Honorable Elad L. Roisman
The Honorable Caroline A. Crenshaw

[11] This information could be either furnished to the Commission or published to a company's website, or both.
[12] NIRI also believes that smaller reporting companies ("SRCs") and emerging growth companies ("EGCs") should be provided at least an additional two (2) years to comply with any new climate change disclosure rules.