U.S. Chamber of Commerce

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December 6, 2023

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Via email: rule-comments@sec.gov

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

Dear Ms. Countryman:

The U.S. Chamber of Commerce ("Chamber") writes to further supplement our comments on the proposed rules (the "Proposed Rules") of the Securities and Exchange Commission ("SEC or "Commission") governing climate and the environment in Release No. 33-11042 (the "Proposing Release").[1] Since the Chamber's initial comment letter to the SEC on June 16, 2022, there have been noteworthy updates to the SEC's comment file and the broader climate disclosure landscape that merit discussion.

As Chamber Senior Vice President David Hirschmann noted in introductory remarks during Chair Gary Gensler's appearance at the Chamber on October 26, 2023 ("Chamber event")[2], policymakers across the globe – from California to the European Union and Singapore – are moving to implement mandatory reporting requirements on climate-related information. The risk of resulting fragmentation makes it all the more important that the SEC proceed with great care.

In the period since the SEC issued its Proposed Rules, California has adopted climate reporting laws, and the European Union ("EU") has finalized its European Sustainability Reporting Standards ("ESRS") as directed by the Corporate Sustainability Reporting Directive ("CSRD"). Some commenters have suggested that these developments either alleviate costs associated with the SEC's final rule or affirm

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[1] *See*: Letter from Tom Quaadman to SEC re: Enhancement and Standardization of Climate-Related Disclosures for Investors. June 16, 2022. *Available at*: https://www.sec.gov/comments/s7-10-22/s71022-20131892-302347.pdf; Letter from Tom Quaadman to SEC re: Enhancement and Standardization of Climate-Related Disclosures for Investors. November 1, 2022. *Available at*: https://www.sec.gov/comments/s7-10-22/s71022-20148911-315866.pdf; Letter from Tom Quaadman to SEC re: Enhancement and Standardization of Climate-Related Disclosures for Investors. February 27, 2023. *Available at*: https://www.sec.gov/comments/s7-10-22/s71022-20158140-326233.pdf.

[2] Remarks of David Hirschmann, Senior Vice President, at U.S. Chamber of Commerce event entitled, "The SEC, California, and EU Extraterritoriality." October 26, 2023. *Available at*: https://vimeo.com/event/3823078/45f5572654.

that the SEC should finalize a rule very similar to its Proposed Rules.[3] Those suggestions make it all the important for the SEC to ensure that the course it takes in this area will appropriately serve U.S. markets and fit within the Commission's defined legal authorities and obligations.

I. California Climate Reporting Laws

On October 7, 2023, California Governor Gavin Newsom signed two climate reporting bills into state law: Senate Bill 253 ("SB 253"), the Climate Corporate Data Accountability Act, which requires greenhouse gas (GHG) emission reporting and applies to companies with over $1 billion in global annual revenue and doing business in California; and Senate Bill 261 ("SB 261"), the Climate-Related Financial Risk Act, which requires climate-related financial risk reporting and applies to companies with over $500 million in global annual revenue and doing business in California. As the Governor himself acknowledged, the new laws are flawed.[4,5] The California disclosure laws should not and cannot be relied upon to reduce cost burdens or advance policy preferences in any final climate rule at the SEC.

Stated Purpose

The stated purpose for the SEC's Proposed Rules and the California laws are notably divergent. The stated purpose of the SEC's Proposed Rules is to "provide consistent, comparable, and reliable – and therefore decision-useful – information to investors to enable them to make informed judgments about the impact of climate-related risks on current and potential investments."[6] In comparison, in remarks before the California Senate, California Senator Scott Wiener, author of SB 253, stated, "... corporations must be required to transparently report their activities and the emissions associated with them. Californians are watching their state get irrevocably harmed by climate change, and they have a right to know who is at the forefront of the pollution causing this. SB 253 would bolster California's position as a leader on climate change, will allow for consumers to make informed decisions regarding their patronage of these corporations, and will give policymakers the specific data required to significantly decrease corporate emissions."[7]

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[3] *See*: Letter from Congressional Democrats to SEC. September 26. Available at: https://www.sec.gov/comments/s7-10-22/s71022-265199-635822.pdf; Letter from Representative Maxine Waters to SEC. October 30, 2023. Available at: https://www.sec.gov/comments/s7-10-22/s71022-289379-705962.pdf; Letter from National Resources Defense Council. October 12, 2023. Available at: https://www.sec.gov/comments/s7-10-22/s71022-272719-657862.pdf.

[4] Signing Statement of California Governor Gavin Newsom to the Members of the California State Senate on SB 253. October 7, 2023. *Available at*: https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-253-Signing.pdf.

[5] Signing Statement of California Governor Gavin Newsom to the Members of the California State Senate on SB 261. October 7, 2023. *Available at*: https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-261-Signing.pdf .

[6] 87 Fed. Reg. 21,335 (Apr. 11, 2022)

[7] Senate Floor Analyses, SB 253 – Climate Corporate Data Accountability Act. September 11, 2023. *Available at*: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240SB253.

The California laws are clear in their purpose to reduce greenhouse gas (GHG) emissions. The SEC's tripartite mission is also clear but markedly different: promoting investor protection, competition, and fairly, orderly and efficient markets. The SEC does not have statutory authority to require disclosure for the purpose of reducing GHG emissions. The Commission cannot rely on laws that explicitly target reducing corporate emissions to justify a rule intended to protect investors.

Constitutional Questions

The Commission should not assume that SB 253 or SB 261 will take effect. Indeed, the Chamber believes that legal challenges to them are imminent. Both California laws suffer serious legal flaws. Each would impermissibly force thousands of businesses to make costly, burdensome, and politically fraught statements about "their operations, not just in California, but around the world," in order to stigmatize those companies and shape their behavior. The laws thus unconstitutionally compel speech in violation of the First Amendment; the Chamber's initial comment to the SEC extensively addresses this First Amendment subject.[8] In addition, each law significantly burdens interstate and foreign commerce, and seeks to regulate in an area that is both outside California's jurisdiction and subject to exclusive federal control. The laws are therefore likely to flunk judicial review.

Implementation Timelines

The California laws set their first reporting in Fiscal Year (FY) 2026. In his signing statement on SB 253, Governor Newsom stated that he is concerned that "the implementation deadlines in this bill are likely infeasible…"[9] Likewise, in his signing statement accompanying SB 261, the Governor expressed concern that the envisioned implementation timeline did not provide his *government* with "sufficient time to adequately carry out the requirements" in the bill.[10] Even as the Governor hailed the new laws as "demonstrat[ing] California's continued leadership," he acknowledged that the implementation timelines are unreasonable and expressed public concern about "the overall financial impact" of both bills.

The SEC's Proposed Rules envision first reporting in compliance with its new mandatory regime in 2024. At the October 26 Chamber event, Chair Gensler reiterated his preference for quick implementation of a final SEC rule, implying that the SEC's new reporting requirements would likely take effect the first full year after the final rule was published in the *Federal Register*.[11] If the SEC finalizes a rule that hurries the

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[8] Letter from Tom Quaadman to SEC re: Enhancement and Standardization of Climate-Related Disclosures for Investors. pp. 39-42. June 16, 2022. *Available at*: https://www.sec.gov/comments/s7-10-22/s71022-20131892-302347.pdf

[9] *Supra* Fn 5.

[10] *Supra* Fn 6.

[11] Remarks of SEC Chair Gary Gensler at U.S. Chamber of Commerce event entitled, "The SEC, California, and EU Extraterritoriality." October 26, 2023. *Available at*: https://vimeo.com/event/3823078/45f5572654

first round of reporting in this manner, it will: 1. Not be able to rely on the California laws in reducing its cost estimates of the final rule, as the SEC's final rule would precede California in implementation; and 2. Risk rolling out a mandatory disclosure regime on a timeline that is not reasonable for compliance, as Governor Newsom's signing statements suggest.

Multiple commenters have asserted that the costs in any final rule at the SEC would be significantly reduced by the disclosure requirements in California.[12] But implementation timelines in California, which are likely to lag behind the SEC's own envisioned implementation timeline, will not take effect in time to meaningfully reduce the SEC's costs in any way.

Financial Impact

The pair of signing statements from Governor Newsom both state: "I am concerned about the overall financial impact of this bill on businesses…"[13] The Chamber agrees with the Governor's concern, particularly in relation to compliance costs resulting from differences in the California laws and the SEC's Proposed Rules. It would be anomalous for the Commission to justify its rule's financial impact by reference to two laws whose costs "concern" the very governor who signed them.

Commenters that argue that the California GHG disclosure law (SB 253) will reduce the costs of a final SEC rule erroneously assume that the GHG emissions data required to be disclosed by SB 253 will be the same as that required by the SEC, and that issuers subject to SB 253 will be able to use the data they prepared for California to comply with the SEC's rule. Those assumptions are incorrect. The SEC's rule would require public companies doing business in California to compile and calculate *different* Scopes 1, 2, and 3 emissions data than what the California law requires based on different organizational boundaries.

SB 253 requires a reporting company to measure, obtain third-party assurance over, and report its GHG emissions "in conformance with the Greenhouse Gas Protocol standards and guidance."[14] Under this approach, a company subject to SB 253 "would base its organizational boundaries on either an equity share approach or a control approach."[15] In contrast, the SEC's Proposing Release recognizes, the "initial step" in calculating a company's GHG emissions is "to set [its] organizational boundaries," which "determine the business operations owned or controlled by a registrant to be included in the calculations of its GHG emissions."[16] The SEC's

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[12] *See*: e.g. Letters from House Democrats; Rep. Waters; NRDC. *Supra* Fn 4.
[13] *Supra* Fn 5,6.
[14] SB 253, § 2(c)(1)(A)(ii)
[15] 87 Fed. Reg. 21,334, 21,384 (Apr. 11, 2022)
[16] *Id*.

approach would then "require a registrant to set the organizational boundaries for its GHG emissions disclosure using the same scope of entities, operations, assets, and other holdings within its business organization as those included in, and based upon the same set of accounting principles applicable to, its consolidated financial statements."[17]

Because the data encompassed by the California law and the SEC's proposed rule are different and are based on different sources, companies would have to obtain separate third-party assurances of *both* their California-compliant GHG emissions data *and* their SEC-compliant data. That would carry additional compliance costs, contrary to what some commenters have incorrectly assumed. Further, the SEC should consider the costs of requiring issuers to compile two sets of substantially overlapping, but distinct, GHG-emissions data. Issuers will have to implement systems to keep track of which GHG emissions need to be included in their California disclosure but not the SEC's, which need to be included in their SEC disclosure but not California's, and which need to be included in both. The SEC must also consider the risk of investor confusion that would be created by requiring public companies to publicly file different GHG emissions data (both of which are described as Scope 1, 2, and 3 emissions) with different regulators. Such variations warrant discussion by the Commission, and input by the public, before the California laws are incorporated into a Commission assessment of the impact of any final rule.

One comment letter[18] in the SEC's file wrongly seeks to justify inclusion of Scope 3 emissions in a final SEC rule by suggesting that, because of SB 253's Scope 3 reporting requirement, companies subject to SB 253 will not save any money if the Commission removes that provision from the Proposed Rules. The letter includes a study that estimates that 751 of Fortune 1000 companies would be subject to SB 253's GHG emissions disclosure requirement. These companies, however, represent the largest public companies listed on securities exchanges, and are therefore the companies most capable of absorbing the massive fixed costs imposed by the Proposed Rules. Further, these 751 companies constitute only about 12% of the 6,220 issuers the Proposing Release identifies as being subject to the Scopes 1 and 2 disclosure requirements and about 24% of those subject to the Scope 3 requirement. Rather than justifying inclusion, the commenters evaluating the Fortune 1000 have instead demonstrated that the heavy fixed costs of the SEC's Proposed Rules will fall even more disproportionately on smaller firms less capable of bearing them, and on many U.S. companies that do not do business in California.

Relatedly, any argument that SB 261's required disclosure of climate-related risks will meaningfully reduce compliance costs with the SEC's rule should be

[17] *Id*.
[18] *See*: Letter from Americans for Financial Reform Education Fund, et al. October 26, 2023. *Available at*: https://www.sec.gov/comments/s7-10-22/s71022-282039-689422.pdf.

rejected. SB 261 requires only biennial (not annual) disclosures "in accordance with the recommended framework and disclosures contained in the Final Report of Recommendations of the Task Force on Climate-related Financial Disclosures."[19] The SEC's Proposed Rules would require companies to disclose climate-related information on an annual basis.

Finally, there is good reason to think that the California laws will *increase* the cost of complying with any SEC rule. The Proposing Release estimates an annual cost for external consultants and services of $6,378,073,242.[20] By requiring many more companies – including many private companies not subject to the SEC's reporting regime and disclosing climate-related information for the first time – to report climate-related information, the California laws will increase demand for related external consultants and services, driving up costs and making implementation, particularly in the short term, even more infeasible.

Precedent Setting

Beyond the substantive differences between the SEC and the California reporting laws, companies face another challenge in the dangerous precedent set by the California laws. California's state-operated, first-in-the-nation reporting requirements for corporations invite other states to take retaliatory policy action that may have a differing perspective on the usefulness of corporate climate-related information.[21]

Such a system, where corporations comply with the disclosure preferences of individual states – and are even under pressure from requirements in extraterritorial jurisdictions – is likely to create even more confusion in complying with any final SEC rule. Action from individual states to block or prevent disclosure like that prescribed by California will lead to greater fragmentation and confusion for investors, higher costs for companies, and increased liability risk.[22]

II. SEC Process

Some stakeholders have called on the SEC to reconsider its Proposed Rules,[23,24] suggesting that if the SEC believes that the California climate laws have impacted

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[19] SB 261, § 2(b)(1)(A)(i).
[20] *Supra* Fn 9, Overdahl Report ¶ 85.
[21] *See*: Leah Malone, et al. "ESG Battlegrounds: How the States Are Shaping the Regulatory Landscape in the U.S." March 11, 2023. *Available at*: https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-the-regulatory-landscape-in-the-u-s/.
[22] *See*: Raquel Fox, et al. "The EU's New ESG Disclosure Rules Could Spark Securities Litigation in the US." September 23, 2023. *Available at*: https://corpgov.law.harvard.edu/2023/09/23/the-eus-new-esg-disclosure-rules-could-spark-securities-litigation-in-the-us/.
[23] Commissioner Mark T. Uyeda. "Remarks at the Practising Law Institute's 55th Annual Institute on Securities Regulation." *Available at*: https://www.sec.gov/news/speech/uyeda-remarks-practicing-law-institute-110723.
[24] Letter from Senators Bill Hagerty and Joe Manchin III. November 9, 2023. *Available at*: https://www.sec.gov/comments/s7-10-22/s71022-296539-721142.pdf.

the baseline costs and benefits of its proposal, then it must re-propose the rule, revise its analysis of the rule's costs and benefits, and give commenters an opportunity to comment on that revised analysis. The Commission must treat these comments seriously. Indeed, there is recent precedent for the SEC reopening a comment file in light of new information; the Commission reopened its comment file on Share Repurchase Modernization to examine whether a new law changed its proposal's economic baseline.[25] The Commission cannot introduce new data in a final rule to support substantially revised cost estimates. When the Commission places heavy reliance on materials that were not part of the rulemaking record subject to public comment "in arriving at its cost estimates," a "further opportunity for comment under section 553(c)" is "required."[26]

For this reason, a bipartisan pair of Senators, Bill Hagerty (Tennessee) and Joe Manchin (West Virginia), submitted a comment letter discussing the alleged "interconnectedness of the California requirements and the SEC's proposal" and emphasizing that "key differences between the two approaches raises significant compliance questions that the SEC should thoroughly review."[27] Accordingly, those Senators stated that "the SEC should reopen the comment period to solicit public feedback on its assumptions and economic analysis."[28]

Further, as Professor Joseph A. Grundfest of Stanford Law School, who served as an SEC Commissioner from 1985 to 1990, has observed, the proliferation of regulatory requirements (including California's new ones) have *undercut* the asserted benefits of the SEC's proposal: "[E]ven if the Commission never adopts the Proposed Climate Rules, investors" may receive "emissions-related information generated by other foreign and domestic regimes."[29] Accordingly, Professor Grundfest has recommended that the SEC should *not* require issuers to "make any measurements or public disclosure that they are not already making because of other regulatory requirements, or voluntarily," but should only "call for efficient aggregation and curation of information that filers are already disclosing in other venues."[30] The Commission has an obligation to respond to comments about the proposed rules' economic implications and consider all relevant issues and significant points within.

Conclusion

The Chamber remains committed to working with the Commission to craft a more practical and durable approach to climate disclosure. As the above regulatory and policy developments confirm, however, the rules as proposed are not the proper way

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[25] https://www.sec.gov/news/press-release/2022-216
[26] Chamber of Com. of U.S. v. SEC, 443 F.3d 890, 901 (D.C. Cir. 2006).
[27] *Supra* Fn 25.
[28] *Id*.
[29] Letter from Joe Grundfest. October 9, 2023. *Available at*: https://www.sec.gov/comments/s7-10-22/s71022-269519-651302.pdf.
[30] *Id*. P. 10.

to proceed, and deficiencies must be addressed.

Sincerely

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