



NASAA

NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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

Re: Request for Public Input on Climate Change Disclosures

Dear Chair Gensler:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to the March 15, 2021 Public Statement, entitled “Public Input Welcomed on Climate Change Disclosures.”² NASAA supports efforts by the Securities and Exchange Commission (“SEC” or the “Commission”) to develop and bring uniformity to climate change disclosure standards because investors are increasingly considering climate change risks in their investment decisions. Improving such disclosures is therefore a matter of investor protection.

I. Climate Change Disclosure Standardization Efforts Should Address the Potential for “Greenwashing” by All Types of Registrants.

NASAA emphasized the need for climate change disclosure uniformity in its Legislative Agenda for the 117th Congress,³ where we wrote that:

In the absence of [uniform standards for reporting on environmental impact], companies may make selective or misleading disclosures about the environmental benefits of their products or services to make the company appear to its investors to be more environmentally friendly than it really is, a phenomenon also known as ‘greenwashing.’ The result is investor confusion.

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures* (Mar. 15, 2021) (the “Request”), available at <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.

³ NASAA, *Legislative Agenda for the 117th Congress* (Mar. 8, 2021), available at <https://www.nasaa.org/policy/legislative-policy/legislative-priorities/>.

We stated accordingly that “Congress should direct the SEC to promptly develop a uniform standard for all reporting by public companies regarding climate risks so that investors can understand companies’ real environmental impact record, and make ‘head-to-head’ comparisons between competing investments.” We are therefore encouraged – both by the SEC’s recent public statements and by the appearance of climate change disclosure on the Agency Rule List for the SEC⁴ – that efforts are being made in this regard.

With respect to rulemaking efforts the SEC may be considering, however, NASAA also believes that concerns about “greenwashing” should not be limited to issuers. For instance, credit ratings and ESG scores issued by credit rating agencies, as well as disclosures by investment companies about fund holdings and investment strategies, may also be confusing or misleading in the absence of climate change disclosure standards. Such confusion can in turn affect the advice delivered by investment advisers and broker-dealers to investors who are trying to make climate change-related investment decisions. Further, such intermediaries could recommend green-branded proprietary products with questionable environmental bona fides. We therefore believe the SEC should consider various ways in which climate change disclosure confusion can affect investment decisions and how to develop disclosure standards for all types of registrants.

II. The Commission Should Consider Regulatory Approaches that Promote Disclosure Uniformity in the Absence of Agreed-Upon Standards.

As the Request recognizes, multiple disclosure frameworks have been developed, including those by the Task Force on Climate-Related Financial Disclosures, the Sustainability Accounting Standards Board, and the Climate Disclosure Standards Board.⁵ NASAA is also aware of efforts among regulators, through the International Organization of Securities Commissions, to develop global standards.⁶ The Request asks for input on the advantages and disadvantages of rules that draw on such frameworks.

Two hurdles come to mind. First, NASAA does not believe that any framework has gained the status necessary to become a consensus standard. Whether or when that will happen is uncertain. Yet, the need for greater uniformity is already present because investors are making climate change-related investment decisions now. Second, the SEC may not be able to craft a regulation that requires adherence to an outside standard – particularly one derived internationally – without a legislative grant.

⁴ Office of Information and Regulatory Affairs, Office of Management and Budget, *Agency Rule List – Spring 2021, Securities and Exchange Commission*, available at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=C9AADA06950B2EA66558B873D95CD66864E3E120DEB126B02D74E408D97B436C9C14D535ED71DD20DA7DD37231CC4EFF5A4E.

⁵ Request, Question 5.

⁶ See, e.g., Media Release, *IOSCO sees an urgent need for globally consistent, comparable, and reliable sustainability disclosure standards and announces its priorities and vision for a Sustainability Standards Board under the IFRS Foundation* (Feb. 24, 2021), available at <https://www.iosco.org/news/pdf/IOSCONEWS594.pdf>.

In part for these reasons, NASAA wrote in support⁷ of H.R. 1187, Title I of which is the ESG Disclosure Simplification Act, which would require public companies to disclose in proxy or solicitation materials “a clear description of the views of the issuer about the link between ESG metrics and the long-term strategy of the issuer,” and “a description of any process the issuer uses to determine the impact of ESG metrics on the long-term business strategy of the issuer.” The bill would also provide a rulemaking mechanism for the SEC to define “ESG metrics” and, importantly, would give the SEC the ability to “incorporate any internationally recognized, independent, multi-stakeholder environmental, social, and governance disclosure standards.”

While the ESG Disclosure Simplification Act could address the hurdles mentioned above, it may not become law. In fact, no supporting law may be enacted. The SEC should therefore consider disclosure approaches that are agnostic of any outside or third-party standard. Still, the ESG Disclosure Simplification Act suggests a path that could be crafted into regulation by requiring an issuer to describe both the process by which it determines the impact of ESG metrics on its long-term business strategies as well as the ESG metrics it has chosen to make its determination. While such an approach may not yield the ability to make “head-to-head” comparisons for which NASAA has advocated – because issuers may choose differing metrics – it would at least give investors and regulators enough information to determine whether an issuer has thought about these issues in a disciplined manner, and the ability to evaluate those efforts against the issuer’s chosen standard in order to assess whether they effectively address climate change risk and impact concerns. More generally, a regulation that requires a registrant to describe the methodology by which it measures climate change-related risks and impacts would serve regulators and investors well until consensus standards emerge.⁸

⁷ Letter from Lisa Hopkins to Hon. Maxine Waters and Hon. Patrick McHenry (Apr. 20, 2021), *available at* <https://www.nasaa.org/wp-content/uploads/2021/04/NASAA-Letter-to-HFSC-Re-4-20-21-Full-Committee-Markup-PDF-F.pdf>; Letter from Lisa Hopkins to Hon. Nancy Pelosi and Hon. Kevin McCarthy (June 15, 2021), *available at* <https://www.nasaa.org/wp-content/uploads/2021/06/NASAA-Letter-to-House-Leadership-Re-H.R.-1187-Corporate-Governance-and-Investor-Protection-Act-June-15-2021.pdf>.

⁸ Certain portions of Regulation S-K apply to climate change-related disclosures, but not fully in the manner suggested above. For instance, while Item 105 (Risk Factors) requires explanations as to how identified risks affect a registrant or the securities being offered, it does not require the issuer to explain the process it used to identify its climate change-related risks. Similarly, references to compliance with environmental regulations required under Item 101 (Description of Business) depend on current regulations, which do not fully require issuers to address the questions discussed in the Request. Further, while the Commission’s 2010 *Guidance Regarding Disclosure Related to Climate Change* – SEC Rel. Nos. 33-9106 and 34-61469 (Feb. 2, 2010) – explains that Item 303 (Management’s Discussion and Analysis of Financial Condition and Results of Operations) is a flexible requirement that “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,” the Commission also acknowledges that “we and our staff continue to have to remind registrants, through comments issued in the filing review process, public statements by staff and Commissioners and otherwise, that the disclosure provided in response to this requirement should be clear and communicate to shareholders management’s view of the company’s financial condition and prospects.” In other words, the generality of the requirement must be buttressed with further guidance. The limitations of current Regulation S-K requirements therefore counsel in favor of further clarity for disclosure requirements.

III. Climate Change Disclosure Regulation Would Improve Examination and Enforcement Efforts.

Because the SEC recognizes that investors are making climate change-related investment decisions, and that registrants are making disclosures and acting accordingly, it has already directed examination⁹ and enforcement efforts¹⁰ to scrutinize and police climate change-related disclosures and activities. Without greater clarity on how to craft climate change disclosures, examination and enforcement efforts may have limited usefulness and may expose the SEC to criticism that it is regulating by enforcement.

Greater clarity for registrants on how and when to report and fashion disclosures on these issues would improve examination efforts, benefit investors interested in learning about ESG-related issues in the companies and products in which they are considering investing, and reduce the potential for enforcement actions related to misrepresentations and omissions.

IV. The Commission Should Consider Whether Other ESG-Related Disclosure Regulations Are Appropriate.

The SEC's focus on climate change-related disclosures makes sense in light of the urgency of the issue, the breadth of government and industry efforts to address climate change, and, particularly, the amount of investor interest in the issue. The Request, however, also asks "[s]hould climate-related requirements be one component of a broader ESG disclosure framework?"

From the perspective of securities regulation, the answer is yes. Like climate change, issues of diversity in corporate governance are also important, and recognition of the importance of these issues is increasing.¹¹ Some state governments are already acting in this area through laws that require either the inclusion of underrepresented persons on public company boards of directors,¹² or disclosures on the gender and racial composition of boards.¹³ However, while investor interest in ESG-related issues in U.S. companies is beyond question, leaving such disclosures to the discretion of management, rather than providing specific requirements, leaves

⁹ Press Release, *SEC Division of Examinations Announces 2021 Examination Priorities, Enhanced Focus on Climate-Related Risks* (Mar. 3, 2021), available at <https://www.sec.gov/news/press-release/2021-39>.

¹⁰ Press Release, *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues* (Mar. 4, 2021), available at <https://www.sec.gov/news/press-release/2021-42>.

¹¹ Human capital management issues were of high interest to filers in the 2020 proxy season. Six proposals received majority support, with average support of 28 percent, up from 26 percent in 2019. In addition to proxy proposals, many large institutional investors are directly engaging with companies now on their ESG practices. See Alexandra Thornton and Tyler Gellasch, Center for American Progress, *The SEC Has Broad Authority To Require Climate and Other ESG Disclosures* (June 10, 2021), available at <https://www.americanprogress.org/issues/economy/reports/2021/06/10/500352/sec-broad-authority-require-climate-esg-disclosures/>.

¹² See California Assembly Bill No. 979, *Corporations: boards of directors: underrepresented communities*, available at https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB979.

¹³ See, e.g., Maryland House Bill 1210, *Corporate Diversity – Board, Executive Leadership, and Mission*, available at <https://mgaleg.maryland.gov/2021RS/bills/hb/hb1210E.pdf>.

investors exposed to conflicts of interest and subjective judgments. Therefore, NASAA encourages the SEC to follow state efforts to help guide SEC regulatory proposals in this area.

NASAA has also written in support of H.R. 1277, the Improving Corporate Governance through Diversity Act, and H.R. 2123, the Diversity and Inclusion Data Accountability and Transparency Act.¹⁴ H.R. 1277 would require public companies to disclose annual information on the voluntary self-identified racial, ethnic, gender, and veteran composition of their boards of directors and executive officers. H.R. 2123 would amend the Dodd-Frank Wall Street Reform and Consumer Protection Act to require that regulated financial firms with 100 employees or more disclose diversity data.

V. The Commission Should Examine Options to Modernize the Disclosure Framework for ESG Metrics for Large Private Companies.

As the Commission explores options for improving and standardizing environmental and other ESG disclosures by public companies, it should also explore in earnest the tools and authorities at its disposal for requiring or incentivizing greater disclosure of ESG-related information by large privately held companies. The SEC is correct to focus its efforts initially on disclosure of ESG information by publicly held companies; there is no question that the SEC's authorities are most robust and well-established in the public segment of the capital markets. However, as the Commission itself has noted, the private securities markets have grown at a pace that vastly exceeds the expansion of the public markets, and the Request accordingly seeks input on how the SEC should address private companies' climate disclosures.¹⁵ Moreover, as NASAA and others have pointed out, recent changes to the securities laws and the securities regulatory framework have created a host of incentives for companies to remain private for much longer than in the past, or even to remain private indefinitely.¹⁶

The modernization of the ESG disclosure framework for public issuers is an important priority, and it should proceed without further delay. However, at the same time, the SEC should endeavor to ensure that establishment of enhanced ESG disclosure requirements for publicly held companies does not become yet another incentive for large issuers with national or international operations to remain private for excessive amounts of time. The state of ESG reporting by public and private companies should be examined concurrently. Moreover, should the SEC determine that it does not possess adequate authority to address transparency with respect to private issuers – in relation to ESG or other types of information – it should request such authority from Congress.

¹⁴ See note 7 above.

¹⁵ Request, Question 14.

¹⁶ See, e.g., *Written Testimony of Michael S. Pieciak, NASAA Past-President and Vermont Commissioner of Financial Regulation, on behalf of The North American Securities Administrators Association* (Sept. 11, 2019), available at <https://www.nasaa.org/wp-content/uploads/2019/09/NASAA-Written-Testimony-HFSC-IPECM-Commissioner-Michael-Pieciak.pdf>.

VI. The Commission Should Develop More ESG-Related Investor Education.

As the SEC knows, rulemaking takes a significant amount of time. Further, climate change-related rulemaking may be especially difficult in the absence of consensus standards. In the meantime, regulators still need to inform and protect investors. NASAA is making efforts to educate investors about these issues, such as through our Get in the Know video segment on ESG investing,¹⁷ and our Informed Investor Advisory on ESG investing.¹⁸ While such efforts are not a substitute for regulation, they are of immediate benefit to regulators seeking to educate investors who come to them with questions.

NASAA works with the SEC on numerous investor education initiatives, and we hope that that the SEC will join us in educating investors about how to be better informed on ESG issues.

Thank you for considering these views. Should you have questions, please contact either the undersigned or NASAA's Executive Director, Joseph Brady, at (202) 737-0900.

Sincerely,



Lisa Hopkins
NASAA President
General Counsel and Senior Deputy
Commissioner of Securities, West Virginia

¹⁷ Available at <https://www.nasaa.org/investor-education/multimedia-library/nasaa-videos/>.

¹⁸ Available at <https://www.nasaa.org/57335/informed-investor-advisory-esg-investing/?qoid=investor-education>.