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Office of the Attorney General

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June 14, 2021

The Honorable Gary Gensler
Chair
Securities and Exchange Commission
100 F St. NE
Washington, DC 20549

Re: Climate Change Disclosures

Dear Chair Gensler:

As State Attorneys General, we write in response to the Commission's March 15, 2021, request for public input regarding climate change disclosures. As the Commission considers potential regulations in this area, we urge the Commission to act mindful of the statutory and constitutional guideposts that define its authority. We also emphasize that these legal concerns are all the more pressing because it appears requiring mandating detailed emissions metrics is not necessary from a market-protection standpoint based on current disclosure practices in mandatory filings, and that the market is already responding in other forums—voluntarily—to investors' interest in these topics. We look forward to the opportunity to work with the Commission if it proceeds further toward rulemaking in this space.

I. The Commission's authority is limited to mandating public reporting that is "necessary or appropriate for the proper protection of investors and to insure fair dealing in the security."

The Commission's authority to require ongoing public reporting from widely held issuers of securities is limited by the express terms of Section 13(a) of the Exchange Act:

Every issuer of a security registered pursuant to section 781 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe *as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security* . . . (1) such information and documents . . . as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 781 of this title . . . [and] (2) such annual reports . . . and such quarterly reports . . . as the Commission may prescribe.

15 U.S.C. § 78m(a) (emphasis added). The Commission's request for public input does not cite this statutory source of authority, particularly its express limit that reporting rules may only be required "for the proper protection of investors and to insure fair dealing in the security." *Id.* This is a core, threshold requirement that every rule and regulation concerning public reporting must satisfy.

The request for public input does, however, refer to "materiality." That standard flows from the Commission's Rule 10b-5, which prohibits purchasing and selling securities while concealing "a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5. This regulatory requirement is limited by, and does not expand beyond, the proper protection of investors from securities fraud and insuring fair dealing in securities: The purpose of the Rule 10b-5 obligation to disclose material facts is limited by its text to proscribing fraudulent conduct. In context, it falls within a larger set of proscribed practices in the Commission's rules that all deal with fraudulent conduct. *Id.* (prohibiting "employ[ing] any device, scheme, or artifice to defraud," "mak[ing] any untrue statement of material fact," and "engag[ing] in any act, practice, or course of business which . . . would operate as a fraud or deceit upon any person"). This portion of Rule 10b-5 is therefore not a freestanding source of authority for the Commission to require climate change disclosures—at least without a showing that they are needed to prevent misleading or fraudulent representations.

Nor does the Commission possess broad powers to require issuers of widely held securities to make statements on nearly any topic as long as there is some "investor demand." When the Supreme Court interpreted what is and is not "material" for purposes of Rule 10b-5, it outlined an objective standard of significance to past and future performance and the value of the security. *See Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988) (materiality of information depends on whether the "impact" on a company's "fortune" is "certain and clear" or "contingent and speculative"); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976) (holding that "[t]he question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor"). That is the correct standard that should guide the Commission's decisions with respect to potential additional disclosure rules.

Indeed, the Exchange Act itself emphasizes that the Commission's rulemaking powers must stay within the bounds of investor protection and insuring fair dealing. In Section 12, the statute lists several specific dangers that can establish "[n]ecessity for regulation." 15 U.S.C. § 78b. Public reporting requirements can, for instance, protect against the fact that "the prices of securities . . . are susceptible to manipulation and control." *Id.* Reporting rules can also respond to the presence of "excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities" that lead to "unreasonable expansion and unreasonable contraction of the volume of credit available," "hinder the proper appraisal of the value of securities," or "prevent the fair valuation of collateral." *Id.* From beginning to end, the governing statutes make clear that legitimate mandatory disclosures are those required to protect investors from inflated prices and fraud, not merely helpful for investors interested in companies with corporate practices consistent with federally encouraged social views. We strongly urge the Commission to consider these statutory purposes and limits as it considers moving forward in this area.

II. The First Amendment poses a high bar for potential public reporting rules concerning climate disclosures.

In addition to the statutory limits on the Commission's authority, the Constitution imposes constraints that the Commission must abide going forward. In a series of cases from 2015 to 2020, the Supreme Court has scrutinized content-based speech requirements.

Beginning with *Reed v. Town of Gilbert*, the Court reviewed regulations that applied different requirements to signs based on the content of their message. 576 U.S. 155, 159 (2015). Justice Breyer specifically recognized the majority's analysis could implicate "governmental regulation of securities" as well. *Id.* at 177 (Breyer, J., concurring in judgment). In *NIFLA v. Becerra*, the Court addressed compelled speech. 138 S. Ct. 2361, 2368 (2018). And most recently in an opinion by Justice Kavanaugh, the Court reviewed a content-based exception to the Telephone Consumer Protection Act. *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2343-44 (2020). Concurring in part and dissenting in part, Justice Breyer again recognized the logic of Justice Kavanaugh's opinion implicated "the regulation of securities sales" because "the regulatory spheres in which the Securities and Exchange Commission . . . operate[s]" is "defined by content." *Barr*, 140 S. Ct. at 2360.

To pass muster, speech regulation must advance a constitutionally sufficient government interest, must be adequately related to advancing that end, and may be required to use the least restrictive means. See *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000). This can be a high bar for the government. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015).

Responding to purported public demand for increased information about public companies' climate measures is not a sufficient government interest to compel speech. And while protecting investors from fraud and deceptive practices in the issuance and trading of public securities would likely be a sufficient interest to justify regulation, any climate disclosure rules would have to adequately serve that end, and the Commission may have to show that requiring companies to make these statements is the least-restrictive means for investors to obtain such information.

Existing market trends suggest that climate disclosures are not needed to serve a compelling end, and that—at minimum—compelled disclosures are unnecessary as many companies are opting to provide this information on their own.

Under current, well-established reporting obligations, issuers uniformly do not include any statements regarding the quantity of their direct or indirect greenhouse gas emissions in the reports mandated by the Commission. An internal review of the 2020 Form 10-K annual reports of the Fortune 150 revealed that none of these reports included statements quantifying the direct or indirect greenhouse gas emissions associated with the issuer. This absence reflects the uniform, collective judgments of a wide range of securities professionals from all over the country and with differing views on a wide range of issues, including climate change. The fact that none of the companies included quantified metrics regarding the extent of issuer-associated greenhouse gas emissions strongly indicates that information is not necessary to protect investors who are considering securities purchases.

At the same time, companies *voluntarily* make statements regarding a wide range of environmental, social, and governance matters. These statements are found in separate reports that serve purposes distinct from providing information for accurately assessing value in order to protect investors and insure fair dealing. Companies make voluntary statements regarding a host of matters, including climate, based on a variety of motivations—such as securing the good will of customers and, in certain cases, attracting investors. *E.g.*, CVS Health, *2020 Corporate Social Responsibility Report* (2020), available at <http://cvshealth.com/sites/default/files/2020-csr-report.pdf>; AT&T, *ESG Summary* (May 2021), available at <http://about.att.com/ecms/dam/csr/2019/library/corporate-responsibility/2020-2021-summary.final.pdf>; Home Depot, *Responsibility Report* (2020), available at http://ir.homedepot.com/~media/Files/H/HomeDepot-IR/documents/ESG%20Page/2020_Responsibility%20Report_FINAL.pdf.

Companies are thus already determining what statements serve their customers and investors outside of the sphere the Commission protects—and without government mandates. To be sure, the status quo's voluntary approach may fail to satisfy the desires of at least some socially conscious, would-be investors. But companies are well positioned to decide whether and how to satisfy the market's evolving demands, for both customers and investors. If the Commission were to move forward in this area, however, it would be delving into an inherently political morass for which it is ill-suited.

* * *

The Commission has an important and difficult mandate with respect to safeguarding public trading, but it is hard to see how it can legally, constitutionally, and reasonably assume a leading role when it comes to climate change. We urge the Commission to remain focused on its historic mission and role rather than seeking to expand its congressional mandate into unrelated social matters—particularly where companies are showing themselves adept to provide the type of information that customers and investors actually demand in this area. We fully expect that the Commission will continue its review of this issue with a commitment to the rule of law and reasoned administrative decisionmaking.

We look forward to participating with the Commission in any future rulemaking effort.

Sincerely,



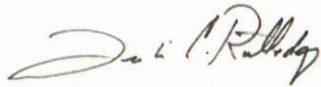
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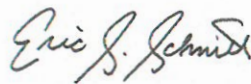
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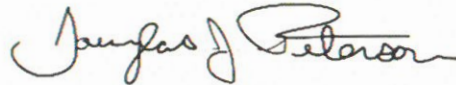
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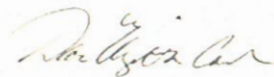
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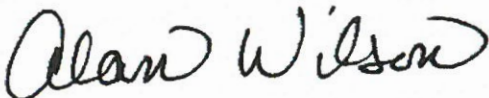
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