

REGENERATIVE  
CRISIS RESPONSE  
COMMITTEE

June 14, 2021

The Honorable Gary Gensler  
Chairman  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

**RE: PUBLIC INPUT ON CLIMATE CHANGE DISCLOSURES**

Dear Chairman Gensler:

The Regenerative Crisis Response Committee (RCRC) welcomes the opportunity to submit comments in response to the Securities and Exchange Commission's (SEC's) request for public input on climate-related financial disclosure issued by former Acting Chair Allison Herren Lee on March 15, 2021.

The RCRC is a nonpartisan group of 10 senior leaders from the banking, financial services, regulatory, and policy arenas who care deeply about ensuring the United States' economic recovery is durable, equitable, and puts us on a path toward lasting sustainability.<sup>1</sup> Founded in late 2020, the RCRC works to identify, compare, and recommend changes in fiscal, monetary, and financial regulatory policies that are likely to enable the United States to achieve net carbon neutrality before 2050.

This letter represents the views of the undersigned members and our comments to the Commission focus on the following: (1) environmental, social and governance (ESG) disclosures should be mandatory, standardized, and timely to be effective; (2) in crafting ESG disclosures, the SEC should build on and expand upon existing standards, including baseline disclosures of qualitative and quantitative data for all firms, but the agency should not wait on global standards to act; (3) the SEC should not to delegate authority to a third-party standard setter to implement ESG disclosures; and (4) the SEC should expand registration requirements and narrow private issuance exemptions to capture ESG disclosures from a larger segment of the capital markets.

As the SEC begins its rulemaking process, the undersigned members of the RCRC also recommend that the SEC consider developing a framework that includes both measurable and quantifiable data as well as qualitative disclosures, and establish baseline disclosure requirements for all issuers, while considering additional requirements for particular industries.

The undersigned RCRC members have decades of experience working with and within government, the private sector, and international organizations. With this perspective, the undersigned members provide the following comments to support the SEC's work to promulgate disclosure standards that provide consistent, comparable, and reliable climate-related information to investors.

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<sup>1</sup> REGENERATIVE CRISIS RESPONSE COMMITTEE, <https://regenerativecrisisresponsecommittee.org/>.



## OVERVIEW

To protect investors and promote efficient capital allocation, the undersigned members of RCRC support the SEC efforts to set disclosure standards for ESG-related data. Mandating climate-related disclosures falls within the SEC’s mission to protect investors; to ensure fair, orderly, and efficient markets, and to facilitate capital formation.<sup>2</sup>

It is clear that ESG and sustainable investing strategies have become mainstream. For example, approximately 75 percent of professional investors report that they incorporate ESG factors into their investment practices.<sup>3</sup> This interest bears out in the explosive demand for ESG or “sustainable” labeled investment products, where assets under management (AUM) using ESG strategies had grown to \$17.1 trillion at the start of 2020. This represents 33 percent or 1 in 3 dollars of the total US-domiciled assets under professional management.<sup>4</sup> The bond market provides a further example. More than a trillion dollars of “green” bonds have been issued, with nearly \$270 billion issued in 2020 alone.<sup>5</sup>

Over the past two decades, numerous voluntary frameworks and standards for disclosing ESG data have emerged in response to investor, consumer, and societal demands for this information.<sup>6</sup> The status quo, in which companies disclose what they want, when they want, and however they want, is untenable, ineffective, and of limited utility, as it does not provide those seeking ESG data the information they want. Disclosures are most useful when they are standardized, mandatory, and timely. Standardized disclosure is necessary if there is to be comparability, and comparability is necessary if there is to be efficiency in capital allocations. The current approach to ESG disclosures fulfills none of these characteristics, leaving investors, consumers, employees, and other stakeholders with incomplete and less useful information.

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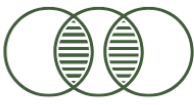
<sup>2</sup> U.S. SECURITIES AND EXCHANGE COMM’N, AGENCY AND MISSION INFORMATION 4 (2014), <https://www.sec.gov/about/reports/sec-fy2014-agency-mission-information.pdf>.

<sup>3</sup> Business Wire, *ESG Investing Reaches Critical Mass; Ongoing Momentum Depends on What’s Driving the Demand, Finds Natixis Investment Managers Survey*, BUSINESS WIRE (Apr. 22, 2021, 8:59 AM), <https://www.businesswire.com/news/home/20210422005347/en/ESG-Investing-Reaches-Critical-Mass-Ongoing-Momentum-Depends-on-What’s-Driving-the-Demand-Finds-Natixis-Investment-Managers-Survey>

<sup>4</sup> US SIF FOUNDATION, 2020 REPORT ON US SUSTAINABLE AND IMPACT INVESTING TRENDS 1 (2020), [https://www.ussif.org/files/Trends/2020\\_Trends\\_Highlights\\_OnePager.pdf](https://www.ussif.org/files/Trends/2020_Trends_Highlights_OnePager.pdf).

<sup>5</sup> Liam Jones, *Record \$269.5bn green issuance for 2020: Late surge sees pandemic year pip 2019 total by \$3bn*, CLIMATE BONDS INITIATIVE (Jan. 24, 2021), <https://www.climatebonds.net/2021/01/record-2695bn-green-issuance-2020-late-surge-sees-pandemic-year-pip-2019-total-3bn>.

<sup>6</sup> See, e.g., Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 AM. BUS. L.J. 407, 434 (2018) (“In the absence of more detailed federal guidance on nonfinancial disclosure, private standard-setters have already created frameworks and indicators for voluntary reporting. The most prominent voluntary reporting standards, developed by the Global Reporting Initiative (GRI), are comprehensive in scope and have been developed through multistakeholder consultation, while others, such as the CDP (formerly known as the Carbon Disclosure Project) standards, focus on a particular type of information. Still others, such as the Extractive Industries Transparency Initiative (EITI), apply only to certain sectors.”).



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At present, 90 percent of issuers on the S&P 500 participate in some form of voluntary ESG disclosures.<sup>7</sup> This voluntary approach, however, is insufficient because it allows firms to self-determine and report which climate risks are material.<sup>8</sup> Thus, firms can provide vague, boilerplate disclosures—or none at all; and they do not have to address climate risks specifically.<sup>9</sup> Such an approach does not necessarily allow for comparability, which is essential for the allocation of capital.

Without reliable and comparable corporate disclosures, investors are unable to make informed decisions about the consequences of climate change for the value of their investments. They are, therefore, unable properly to evaluate one of the most important risks facing investors today. As a result, our markets will fail to allocate capital efficiently. Investors face the risk of being unable to recognize corporate “greenwashing” hyperbole and market prices will be unable to accurately reflect investors’ views on the costs and benefits of reducing carbon.

Ideally, disclosure requirements should: address both physical and transition risks; assess (or provide information for investors to assess) systemic risk; and disclose information relevant to assets, activities, and processes. This information should include data used to assess climate risks, such as the price of carbon used in internal calculations, and the processes for assessing risks of the ownership of stranded assets, and related current and anticipated changes in climate-related public policy.

The need for ESG disclosures is urgent. The SEC should use its regulatory authority to require mandatory disclosures of standardized ESG data.<sup>10</sup> The undersigned members of the RCRC, therefore, recommend that the SEC proceed with the adoption of ESG disclosure regulations without awaiting an international agreement; build its disclosure requirements on the existing disclosure frameworks already established by others; include both measurable and quantifiable data as well as

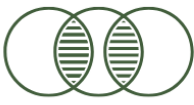
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<sup>7</sup> Governance & Accountability Institute, *90% of S&P 500 Index Companies Publish Sustainability Reports in 2019*, G&A Announces in its Latest Annual 2020 Flash Report, INTRADO (July 16, 2020, 9:35 AM), <https://www.globenewswire.com/news-release/2020/07/16/2063434/0/en/90-of-S-P-500-Index-Companies-Publish-Sustainability-Reports-in-2019-G-A-Announces-in-its-Latest-Annual-2020-Flash-Report.html>.

<sup>8</sup> Securities and Exchange Commission, COMMISSION GUIDANCE REGARDING DISCLOSURE RELATED TO CLIMATE CHANGE 8 (Feb. 8, 2010), <https://www.sec.gov/rules/interp/2010/33-9106.pdf>.

<sup>9</sup> Lee Reiners & Charlie Wowk, CLIMATE RISK DISCLOSURES & PRACTICES 52 (2020), <https://climatedisclosurelab.duke.edu/wp-content/uploads/2020/10/Climate-Risk-Disclosures-and-Practices.pdf>.

<sup>10</sup> In response to the SEC’s recent efforts to mandate ESG disclosures, two inter-related questions have been raised with respect to the agency’s authority: (1) are ESG disclosures material enough to require disclosure?; and (2) does the SEC have the statutory authority to mandate ESG disclosures (especially if these disclosures are not material)? These questions reflect a misunderstanding of the agency’s mandate and statutory authority and are unfounded assertions with respect to the Commission’s ability to require disclosures as it deems necessary to further its mission. Despite being formulated as two questions, the answer to both is the same: the SEC has the authority to require ESG disclosures, regardless of whether these disclosures are deemed ‘material.’ Several commentators have ably answered this question in response to the SEC’s Request for Information and, as such, we do not address the issue in our letter. *See e.g.*, ALEXANDRA THORNTON & TYLER GELLASCH, CENTER FOR AMERICAN PROGRESS, THE SEC HAS BROAD AUTHORITY TO REQUIRE CLIMATE AND OTHER ESG DISCLOSURES (2021); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 Harv. L. Rev. 1197, 1205 (Apr. 1999) (concluding that “it is fully consistent with the language, purpose, and legislative history of section 14(a) for the SEC to use its authority to require expanded disclosure about management’s policies and practices with respect to social and environmental issues.”).



qualitative disclosures; and establish baseline disclosure requirements for all industries while considering additional requirements for firms in particular industries.

## I. ESG DISCLOSURES SHOULD BE MANDATORY, STANDARDIZED, AND TIMELY<sup>11</sup>

In order to be effective and useful to investors, ESG disclosures should be mandatory, standardized, and timely. Mandatory disclosure is the bedrock of the U.S. securities regulatory framework. Recognizing that corporate managers would be reticent to disclose information, particularly bad information, Congress opted for a mandatory disclosure regime.<sup>12</sup> With mandatory disclosure the decision of whether to release required information to the public is taken out of the hands of management, thereby protecting investors from managerial opportunism and providing a baseline level of information for all investors.<sup>13</sup> Mandatory disclosure, therefore, has resulted in increased informational and allocative efficiency in the U.S. capital markets.<sup>14</sup>

The same concerns that motivated Congress and the Commission to adopt mandatory disclosures—i.e., that managers would refuse to disclose information unless required—are undeniably present with respect to ESG data. These concerns are currently manifesting themselves as investors try to identify sustainable investment opportunities but are often left frustrated by their efforts. Investors, consumers, and others are demanding ESG data from firms, but market forces have not resulted in useful, comparable disclosures of this information.<sup>15</sup>

Currently, both informational and allocative efficiency is missing from the markets with respect to ESG data.<sup>16</sup> In the absence of a mandatory regime, ESG disclosures may be incomplete,

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<sup>11</sup> RFI Questions 1, 3, 7, 11, and 12.

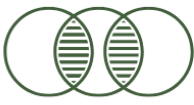
<sup>12</sup> See, e.g., Sarah Coleman & Jonathan Friedler, *The Road to Reform in the Wake of Kiobel: Multinational Corporations and Socially Responsible Behavior*, 13 J. INT'L BUS. & L. 191, 217 (2014) (“Advocates for regulation argue that without any legal accountability, corporations have no incentive to act in the public interest when doing so undermines profit maximization.”); see also Peter J. Henning, *Companies Are Pushing for Less Disclosure. Is That Good for Investors?*, NEW YORK TIMES (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/business/dealbook/sec-disclosure-investors.html> (“The common complaint is that disclosure requirements force companies to focus on the short term at the expense of making investments that may pay off years later.”).

<sup>13</sup> Luca Enriques & Sergio Gilotta, *Disclosure and Financial Market Regulation*, 15–16 (Eur. Corp. Governance Inst., Working Paper No. 252/2014, 2014).

<sup>14</sup> Reiners & Wowk, *supra* note 9 at 12 (SEC disclosure requirements “allow[] investors to make efficient and accurate valuations.”).

<sup>15</sup> See *id.* at 14 (“many investors find current disclosure practices to be insufficient, uninformative, and imprecise”); see also Kreuger et al., *The Effects of Mandatory ESG Disclosure Around the World*, 1 (Eur. Corp. Governance Inst., Working Paper No. 754/2021, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3832745](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832745) (“Environmental, social, and governance (ESG) considerations have become increasingly important for investment decisions by institutional investors. Yet, institutional investors frequently complain that the availability and quality of firm-level ESG disclosures are insufficient to make informed investment decisions”); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM, 12 (2020) (noting that inconsistencies in companies' quantitative disclosures results in a lack of comparability across companies reporting on the same ESG topics).

<sup>16</sup> See e.g., Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 299, 302 (2016).



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haphazard, and cherry-picked,<sup>17</sup> with investors unable to easily ascertain whether this is the case or not. Although a majority of public issuers make some ESG disclosures, the voluntary nature of the disclosures means that there are still several issuers that do not make any disclosures.<sup>18</sup> Unsurprisingly, some disclosures are bland, generic statements that do not actually provide meaningful information on the issuers' ESG activities or impact.<sup>19</sup> Even among those that do make disclosures, the data is inconsistent and cannot be compared among issuers, diminishing the utility of these disclosures for investors and other stakeholders.<sup>20</sup>

Importantly, a “comply or explain” regime would suffer from similar deficiencies. Issuers would continue to make incomplete and non-standardized disclosures that would be of little value to the markets. To avoid providing more information than necessary, some firms would simply refuse to comply, providing boilerplate explanations; and other firms' responses would vary widely as issuers interpret their obligations differently. Thus, to make ESG disclosures as effective and useful to investment decision making as possible, the SEC should mandate disclosures from both public and private issuers and offerings.<sup>21</sup>

Even if the disclosures are mandated, they should also be standardized to be the most useful to the markets, investors, and stakeholders.<sup>22</sup> Currently, ESG disclosures lack consistency and comparability, and this is only likely to worsen if disclosures are mandated but not standardized. Firms, lawyers, and consultants will vary in their interpretation of the required disclosures, with many providing the bare minimum that they believe would be necessary to avoid enforcement action or litigation. Some firms would have incentives to disclose information in a form that would make comparability with others difficult.

Notably, today, many firms that do produce lengthy reports on their ESG activity nonetheless fail to connect their ESG data to the firms' core strategy and business development. As such, despite their length, many ESG reports do not provide a holistic view of how ESG-related activities impact the company's profitability or performance. Standardization of disclosures and ensuring that the

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<sup>17</sup> See Reiners & Wowk, *supra* note 9 at 7 (noting that flexibility in ESG reporting “allows companies to omit favorable information and use their own scope and calculation methods while disclosing climate risks.”); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-530, PUBLIC COMPANIES: DISCLOSURE OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE FACTORS AND OPTIONS TO ENHANCE THEM, 12 (2020) (noting gaps and inconsistencies in current ESG reporting).

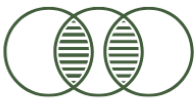
<sup>18</sup> See generally *ESG Disclosure Trends in SEC Filings*, WHITE & CASE (13 Aug. 2020), <https://www.whitecase.com/publications/alert/esg-disclosure-trends-sec-filings> (surveying 2019–2020 ESG disclosures of the top 50 companies by revenue in the Fortune 100); see also *2020 Status Report: Task Force on Climate-related Financial Disclosures*, FIN. STABILITY BD. (29 Oct. 2020), <https://www.fsb.org/2020/10/2020-status-report-task-force-on-climate-related-financial-disclosures/> (“Nearly 60% of the world's 100 largest public companies support the TCFD, report in line with the TCFD recommendations, or both.”).

<sup>19</sup> See *The State of Disclosure*, SUSTAINABLE ACCOUNTING STANDARDS BOARD, 2, 14 (2017), <https://www.sasb.org/knowledge-hub/state-of-disclosure-2017>.

<sup>20</sup> *Id.* at 2 (noting that sustainability performance metrics are obviously more useful to investors but still rarely disclosed and lack comparability even when they are).

<sup>21</sup> To address concerns regarding the costs of these disclosures for small firms, the SEC could tier the disclosure obligations so that medium and large firms have a heavier disclosure burden than small firms.

<sup>22</sup> Gibbs et al., *Building a Global ESG Disclosure Framework: A Path Forward*, INST. OF INT'L FIN., 17 (June 10, 2020), <https://www.iif.com/Publications/ID/3945> (noting that comparability enhances the decision-usefulness of disclosures).



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disclosures are sufficiently comprehensive, therefore, is necessary to ensure that investors and stakeholders can compare data from period-to-period for the same firm, to ascertain the climate and other ESG activities the firm is undertaking, and to compare across firms.

Standardization of disclosures will also benefit issuers and firms. For instance, evidence to date is that markets reflect climate risk only to a limited extent but, increasingly, this risk is being better reflected.<sup>23</sup> This has important implications for investors. At this juncture, investors can have no confidence that climate-related risks are adequately priced into assets and, therefore, it is all the more important that all information related to transitional and physical risk be fully disclosed. Standardized disclosures, therefore, will facilitate better market pricing of ESG-related risks, thereby allowing ESG leaders and laggards to be easily identifiable.

The final component to ensuring that the ESG disclosure regime works for market participants is timeliness. The SEC has a robust public reporting regime—requiring both quarterly and annual reports, as well as requirements to announce significant events within four business days of occurrence.<sup>24</sup> ESG disclosures should be included in SEC filings and reported annually, at a minimum, to ensure that the markets, investors, and stakeholders have up-to-date and accurate information. Additionally, any data that is reported in financial statements should be reported quarterly (depending on the issuer’s float) to ensure current information is available to the markets, investors, and stakeholders.

In sum, to create an effective disclosure regime, the SEC should mandate standardized annual disclosures of ESG-related metrics, including those related to greenhouse gas (GHG) emissions, and other relevant data. This ensures that investors and the markets are well-informed as to the ESG risks firms face, thereby allowing capital to efficiently flow to its best and most productive use.

## II. ADDITIONAL CONSIDERATIONS FOR THE ESG DISCLOSURE FRAMEWORK

It is beyond the scope of this letter to state with granularity and specificity what the ESG disclosure regime should look like. Nonetheless, there are several important considerations that we urge the SEC to keep at the forefront as it embarks on this process.

*Global Standards.*<sup>25</sup> There is undeniable value in global harmonization of ESG disclosures.<sup>26</sup> Capital moves freely across state borders and firms operate seamlessly around the globe. Financial market regulation in one country can impact capital allocation and availability in another. Yet, despite these interconnections, the SEC should not wait for international agreement to implement ESG

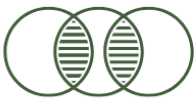
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<sup>23</sup> See, e.g., Pierpaolo Grippa, Jochen Schmittmann & Felix Suntheim, *Climate Change and Financial Risk*, 56 FINANCE & DEVELOPMENT, no. 4, 2019, at 26, 28 (“There is some evidence that markets are partly pricing in climate change risks, but asset prices may not fully reflect the extent of potential damage and policy action required to limit global warming to 2°C or less. Central banks and financial regulators increasingly acknowledge the financial stability implications of climate change.”).

<sup>24</sup> These disclosures are made on Forms 10-Q, 10-K, and 8-K, respectively.

<sup>25</sup> RFI Question 9.

<sup>26</sup> Gibbs et al., *supra* note 30 (“The desirability of a harmonized global framework for ESG disclosures is becoming widely recognized across many financial institutions, corporates, and public authorities.”).



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disclosures. As the primary regulator of the US capital markets, the SEC should adopt ESG disclosure requirements to respond to the demands of US investors and stakeholders. Although global comparability ought to be the ultimate goal, the SEC does not need to have international agreement to move forward with ESG disclosures. Indeed, the European Union has already moved ahead with regulating sustainability in the financial markets. The SEC should do the same to avoid falling (even further) behind its global peers.

Additionally, even if a global standard emerges, the SEC should independently assess the adequacy of these standards before committing to them. It is possible, for instance, that distinctive characteristics of the U.S. capital markets, such as the wide ownership of shares, may require a higher standard than those set through international agreement.

*Building on Standard-Setters' Frameworks.*<sup>27</sup> Although we do not believe that the SEC should delegate authority to a third-party standard setter to oversee the ESG disclosure framework, we do recognize that there is value in the existing regimes. The Sustainability Accounting Standards Board (SASB), Task Force on Climate-Related Financial Disclosures (TCFD), and Climate Disclosure Standards Board (CDSB) all provide a useful starting point for the Commission as it considers what metrics and information it ought to require from issuers. Third-party standard setters have developed a broad range of metrics and discussion items that would serve well as a springboard for the SEC in crafting quantitative and qualitative disclosures. For example, SASB includes several disclosure metrics as part of its framework and, in fact, each topic area has specific metrics that are to be included in a firm's disclosures. The TCFD, on the other hand, focuses more on discussions and descriptions of firms' climate-related activities and could provide a useful starting point for the agency. Similarly, the Partnership for Carbon Accounting Financials (PCAF) provides a globally accepted methodology and standard for measuring and disclosing GHG emissions for financial transactions, certified by the GHG Protocol.

Because none of these frameworks is comprehensive enough, as discussed above, the SEC necessarily will have to expand on these existing disclosures. Through notice and comment rulemaking, the agency can identify other metrics and information that ought to be included to create a robust regulatory framework.

*Measurable & Quantifiable Data.*<sup>28</sup> To address the core climate risks that issuers face, issuers should report their total GHG emissions for Scopes 1, 2, and 3<sup>29</sup> and their plans to reduce GHG emissions, with reference to specific targets, metrics, and any long-term assumptions on which these plans rely. Scope 3 disclosures are particularly important for financial institutions, which fund, insure, and profit from climate-negative projects. If financial institutions were only required to disclose Scope 1 and Scope 2 emissions, their contribution to GHG emissions through their value chain would remain undisclosed, thereby providing an incomplete picture of their true climate risks.

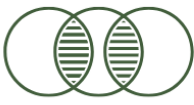
Additionally, firms should disclose the price of carbon they use in evaluating investments and future projects. The absence of carbon markets (or the presence of carbon markets with inadequate

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<sup>27</sup> RFI Question 5.

<sup>28</sup> RFI Question 2.

<sup>29</sup> See *A Corporate Accounting and Reporting Standard*, THE GREENHOUSE GAS PROTOCOL, 25 (revised 2015), <https://ghgprotocol.org/corporate-standard>.



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pricing of carbon) increases transitional risk, and therefore makes it all the more important that there be full disclosure of information that might help investors assess transitional risk, and to make judgments about the kinds of climate risks they are willing to bear.

*Qualitative Disclosures.*<sup>30</sup> All issuers should provide qualitative disclosures, at least annually, in which they address the climate risks the firm faces, expected impact of climate risk on the firm's future performance and profitability, and plans to mitigate existing and future climate-related challenges. To avoid these qualitative disclosures from denigrating into boilerplate discussions with little information, the SEC should mandate that certain issues be concretely addressed, rather than leaving the decision to management's determination of what constitutes materiality. Given the magnitude of climate risks and the early stages in establishing appropriate standards for evaluating such risks, developing standards for the disclosures on the processes is particularly important. One part of such disclosures should be disclosure of incentives, if any, provided for executives to evaluate accurately climate-related risks, including systems of accountability for deviations between executives' assessments and risks that later materialize.

Other possible disclosures include information on: how the board oversees and monitors its climate risks; what role sustainability plays in the company's risk management, acquisitions, and/or annual budget; and how management incorporates ESG considerations in developing the firm's overall business strategy, among other issues.

*Industry-specific Standards vs. Disclosures for all Issuers.*<sup>31</sup> The SEC should require a baseline set of disclosures for all firms regardless of their industry. These baseline disclosures should primarily be broad, but manageable, and include a mix of qualitative and quantitative disclosures. Without this baseline level of ESG disclosures, comparability will never be achieved; and comparability of climate risk across industries is important for inter-sectoral allocation of capital.

In addition to these baseline disclosures, the SEC should also require industry-specific disclosures that provide more granular detail about a firm's operations as it relates to their specific industry.<sup>32</sup> Sectors such as finance, oil and gas, and real estate ought to make additional disclosures specific to their industry. For example, in real estate, large enterprises should disclose physical risks by making use of risk assessments on changes in sea level and other sources of potential physical risks. In the oil and gas sector, disclosure requirements should include assessments of the impact of asset values of carbon prices in the range of \$125 per ton by 2030. And for financial firms, there needs to be disclosures of the risks associated with stranded assets and systemic risks.

Regardless of industry, the SEC should also require that the CEO and a board member or the committee responsible for ESG issues assess and certify the accuracy and completeness of ESG disclosures. These disclosures should be audited for accuracy and adequacy, providing assurances to the markets that these disclosures are reliable.

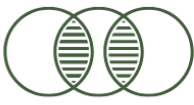
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<sup>30</sup> RFI Question 13.

<sup>31</sup> RFI Question 4.

<sup>32</sup> In these cases, stakeholder agreements of disclosure standards may be an appropriate way of developing appropriate disclosure standards, at least initially, and would be important for intra-sectoral efficiency in capital allocation.





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*Non-Climate Disclosures.*<sup>33</sup> Climate risk is only one part of ESG and should not be the sole focus of the SEC’s ESG disclosure framework. While there is an obvious materiality and urgency to climate-related disclosures and the risks are more amenable to quantification, the SEC should, ultimately, mandate a broader set of disclosures. For example, the SEC should require disclosures related to climate and environmental justice, racial equity, diversity, and human capital management. Disclosures on these issues would provide investors and the markets with a more complete picture of firms’ ESG-related activities, their potential risk exposure, and their long-term valuation—all necessary for investors and the markets in allocating capital efficiently.

For data that firms already compile, but do not make public, such as EEO demographic workforce data,<sup>34</sup> the SEC should mandate disclosure as soon as possible. To the extent, however, that the agency needs more time to promulgate non-climate disclosures, the Commission should move forward with climate-related disclosures separately, following up with non-climate disclosures as soon as practicable.<sup>35</sup>

### III. ROLE OF THIRD-PARTY STANDARD SETTERS<sup>36</sup>

The SEC should not delegate regulatory authority over ESG disclosures to third-party standard setters. Third-party standard setters have proliferated over the past twenty years to meet the demands of the markets for ESG disclosures. Despite the expertise and experience of these standard setters, the SEC ought not to deputize these entities to oversee or administer its ESG regulatory framework. Rather, the SEC should formulate and enact ESG disclosures in keeping with its mission to protect investors and promote capital formation.

Regulation of public disclosures is an essential public function that is at the core of the SEC’s responsibilities and, therefore, should not be delegated to private parties whose interests and responsibilities may differ from that of government, particularly in advancing the public good. Research has shown that there are very limited domains under which there should be delegation of public responsibilities to private (whether for profit or non-profit) entities.<sup>37</sup> Nor is there a compelling case for such delegation. The SEC has general expertise in the formulation and enforcement of disclosure requirements, and undoubtedly has the capacity to acquire any additional competencies required to develop ESG disclosures. In doing so, of course, it might (like any government agency) seek advice and assistance from those with previous expertise in developing standards in these areas;

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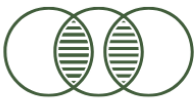
<sup>33</sup> RFI Question 15.

<sup>34</sup> See generally EEO-1 COMPONENT 1 DATA COLLECTION, <https://www.eeoc.gov/employers/eo-1-data-collection> (last visited June 14, 2021).

<sup>35</sup> If the agency builds on the existing framework of third-party standard setters (as we suggest above), it should be able to adopt non-climate ESG disclosures contemporaneously with climate-related disclosures. But, if more time is needed to craft non-climate disclosures, we do not believe the SEC should delay climate disclosures. Rather, the two sets of disclosures (i.e., climate and non-climate) should move expeditiously on their own track.

<sup>36</sup> RFI Questions 3, 5, and 6.

<sup>37</sup> See Kimberly N. Brown, *Public Laws and Private Lawmakers*, 93 WASH. U. L. REV. 615, 634 (2016) (noting that private actors exercising government power “systematically evade” baseline values of accountability, transparency, legitimacy, and rational decision-making in contrast to their federal counterparts).



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but such consultation and advice does not require a broad-based delegation of authority to a third-party standard setter.

Legal and logistical issues would arise if the SEC deputized a third-party standard setter to oversee its ESG disclosures. Should the SEC grant authority to a third-party, the agency is likely to face court challenges for its decision.<sup>38</sup> In the best-case scenario, this litigation would needlessly delay implementation of the ESG framework, leaving investors and the markets without the disclosures they are demanding today. The litigation risk that accompanies such delegation of regulatory authority, therefore, will only impede the agency as it creates a much-needed regulatory framework for ESG disclosures.

Further, deputizing a third-party standard setter adds a layer of bureaucracy that will not materially enhance ESG disclosures. Within this two-tiered framework, levels of rulemaking, approvals, and consensus from the standard setter and the SEC would impede progress towards achieving disclosures. This would be true not just at the outset, but at every stage in which changes to the regulations or framework would be needed. Having flexibility to act responsively as international regulators coalesce around global standards and harmonize disclosure obligations will be key to ensuring that the ESG disclosure regime evolves to keep pace with market demands, investor needs, and international expectations. With a third-party standard setter intermediating the disclosure obligations, the process to update regulations will be burdened with bureaucratic delays that may impede the effectiveness of the disclosure mandate and frustrate the markets. A third-party standard setter would serve only to provide yet another forum for industry lobbying, thereby ensuring further delays.

It is also important to note that none of the existing standards encapsulates the totality of information—both in terms of content and format—that investors, stakeholders, and the markets need to make climate-related determinations about a company.

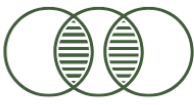
For example, the disclosure regime of the TCFD relies heavily on qualitative disclosures, with only one of the four disclosure categories specifically requiring metrics and targets.<sup>39</sup> While there is value in qualitative disclosures, ESG disclosures need to also have a strong quantitative component to be most decision-useful to investors and the markets. To enhance the comparability and machine-readability of ESG disclosures, firms should be required to disclose specified metrics that demonstrate their climate-related activities, such as GHG emissions, carbon footprints, and the costs or expenses associated with climate-negative conduct and the carbon prices they use in their decision-making.

Similarly, the SASB also lacks an adequate disclosure framework. SASB does not view all metrics as being relevant for every industry or sector and, as such, does not require some disclosures of certain firms. For example, within SASB's framework firms categorized as Consumer Goods (which includes apparel, appliance manufacturing, and e-commerce, among several others) are not required to disclose information on GHG emissions, air quality, waste and hazardous materials management, and ecological impact because this data is not deemed material to the industry. However, given the

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<sup>38</sup> *See, e.g.,* *Free Enter. Fund et al. v. Pub. Co. Acct. Oversight Bd. et al.*, 561 U.S. 477 (2010).

<sup>39</sup> TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, FINAL REPORT: RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, 14 (2017).



breadth of firms included in Consumer Goods, these data should be disclosed for investors to have an accurate picture of the relevant firms' ESG-related activity. SASB's assessment of materiality for ESG disclosures, therefore, reduces the information provided to the markets and investors, which limits the utility of the disclosures. Thus, while the existing third-party organizations are a good beginning point, none is comprehensive enough to be adopted wholesale for ESG disclosures.

In sum, the SEC should move forward with rulemaking for ESG disclosures, without granting authority to any third-party standard setter, whether currently in existence or created for this purpose. The SEC is in the best position to craft, enact, and enforce a mandatory ESG disclosure regime quickly and effectively. The agency should embrace its role as the primary regulator of the securities markets and immediately move forward with adopting and approving ESG disclosures for public issuers, at a minimum, and for private issuers.

#### IV. ESG DISCLOSURES FOR PRIVATE ISSUANCES<sup>40</sup>

The SEC should mandate ESG disclosure requirements of certain private firms and private issuances to provide the markets with a true and accurate picture of climate risks. Since 2000, the growth in net asset value of global private equity has outpaced the growth in market capitalization of public equities by more than threefold.<sup>41</sup> And U.S. private securities offerings have raised more than \$3 trillion in capital—more than double the amount raised by public offerings.<sup>42</sup>

While the drastic shift from the public to private markets is often attributed to the high cost of regulation of the public capital market, the proliferation of exemptions and deregulation of private capital play a substantial role.<sup>43</sup> Currently, SEC exemptions allow for large offerings to be made in the private markets, allowing firms to avoid the burdens of disclosure and the transparency of the public markets, without losing meaningful access to capital.<sup>44</sup> Similarly, firms are able to stay private longer, sidestepping meaningful disclosures to investors, employees (many of whom are investors through

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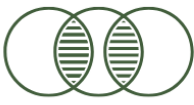
<sup>40</sup> RFI Question 14.

<sup>41</sup> MCKINSEY & CO., MCKINSEY'S PRIVATE MARKETS ANNUAL REVIEW 18 (2021), <https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/mckinseys-private-markets-annual-review>.

<sup>42</sup> Bauguess et al., *Capital Raising in the U.S.: An Analysis of the Market for Unregistered Securities Offerings, 2009-2017*, SECURITIES AND EXCHANGE COMMISSION, 7 (Aug. 2018), [https://www.sec.gov/dera/staff-papers/white-papers/dera\\_white\\_paper\\_regulation\\_d\\_082018](https://www.sec.gov/dera/staff-papers/white-papers/dera_white_paper_regulation_d_082018) ("In 2017, registered offerings accounted for \$1.5 trillion of new capital compared to more than \$3.0 trillion reported raised through all private offering channels.").

<sup>43</sup> See Elisabeth De Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L. J. 445, 464-70 (2017).

<sup>44</sup> Nisa Amoils, *Private vs. Public Offering Regulation in the Game of Coins*, Forbes (Aug. 27, 2019), <https://www.forbes.com/sites/nisaamoils/2019/08/27/private-vs-public-offering-regulation-in-the-game-of-coins/?sh=42fc2c626ace> ("SEC data show that companies raised \$2.9 trillion in exempt offerings in 2018, compared with \$1.4 trillion raised in registered public offerings . . . [T]he SEC's release has some investor advocates concerned that the agency is leaning toward further enlarging the exempt offerings market, potentially leading to fewer opportunities in registered public markets, where investors enjoy greater protections -- company disclosures, transparent pricing and lower trading costs.").



equity compensation plans), and the markets.<sup>45</sup> If mandatory ESG disclosures do not extend to large private offerings and some private firms, the regime will be severely limited in its effectiveness and, notably, may exacerbate risks in the market.

A lopsided ESG disclosure regime that leaves private capital unencumbered from providing even basic ESG-related data will undermine the agency's efforts to provide investors, the markets, and stakeholders with a clear and accurate assessment of climate risks. As an initial matter, if private offerings are excluded from the new ESG disclosure regime, this will incentivize issuers to direct climate negative or high-risk climate projects into the private markets to avoid scrutiny. For example, a fossil fuel public company undertaking a project that will result in high carbon emissions will be able to avoid disclosure of key climate metrics by doing a debt offering privately rather than publicly. In this example, the company is already subject to SEC disclosures and there is no meaningful reason why it should be able to avoid mandated disclosures simply because it chooses to utilize the private markets. Put another way: the climate risks of the project do not disappear simply because the offering is private. Indeed, some may argue that the risks are exacerbated if these projects can avoid the very disclosures that are geared towards shedding light on the specific risks inherent in the project.

A notable real-world example of this is ExxonMobil. Recently, Exxon has done large debt offerings and avoided disclosures of climate risks because the offerings were on the private markets.<sup>46</sup> The risks associated with Exxon's projects are not meaningfully different owing to the form of the offering and, importantly, Exxon's investors are unable to accurately assess the full climate risk of the firm when it siphons large capital raises off to the private capital markets, avoiding all disclosures. The coal industry provides yet another example—although this industry has seen a decline in its market capitalization in the public market, it has been able to finance much of its capital needs through the private markets.<sup>47</sup> The proliferation of private market exemptions therefore will undermine meaningful ESG disclosures if the SEC does not limit the availability of these exemptions.

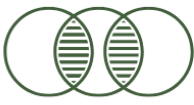
Further, if ESG disclosures do not extend to the private markets, private firms may be disincentivized to go public for two reasons. First, a private firm that has significant ESG-related activity may decide to stay private longer since this would allow it to avoid public scrutiny. (Or conversely, a public firm may decide to go private if it engages in significant climate-negative activity.) Second, a private firm may avoid the public markets to avoid mandatory ESG disclosures if it believes that these disclosures will significantly increase its compliance costs. In either case, the result is that climate-negative activity will be disproportionately directed to the private markets, where firms are

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<sup>45</sup> *Id.* (“The rise in exemptions has made it easier for companies to stay private longer.”).

<sup>46</sup> TYLER GELLASCH & LEE REINERS, FROM LAGGARD TO LEADER 12 (Charlie Wowk & James E. Lavery eds., 2021) (Asserting that the SEC should impose reporting requirements for large private offerings, and citing as an example Exxon who in 2020 “sold long-term debt at low rates,” contributing to the fact that in “2020, fossil fuel companies accounted for a significant portion of the corporate debt sold, and yet almost none of it accounted for the various climate-related risks.”).

<sup>47</sup> Tim McLaughlin, *How Private Equity Squeezes Cash from the Dying U.S. Coal Industry*, REUTERS (Mar. 2, 2021, 9:59 AM), <https://www.reuters.com/article/us-usa-investment-coal-insight/how-private-equity-squeezes-cash-from-the-dying-u-s-coal-industry-idUSKBN2AU1YW> (“Private equity firms are proving there’s still plenty of profit in the U.S. coal industry despite a decade of falling demand for the fossil fuel. . . . The lucrative investments illustrate how fossil fuels will remain an important part of the energy mix - and continue spinning off cash for investors - even years after demand for them peaks as the world transitions toward cleaner energy sources.”)



able to avoid mandatory disclosures, allowing climate and other ESG-related risks to proliferate unchecked to the detriment of investors, stakeholders, and the broader market.

Exempting private issuers and offerings from ESG disclosures will also result in the inefficient allocation of capital in private markets. Like public investors, private investors increasingly seek to optimize ESG outcomes through their investments.<sup>48</sup> This is especially true given that many retail investors are indirectly exposed to the private securities markets via mutual funds and pension funds. As with the public markets, ESG disclosures in the private markets is voluntary, which results in limited, divergent, and sometimes incomplete disclosures to investors that can result in suboptimal capital allocation. In the rare instances where private companies disclose ESG-related data—particularly in niche sustainable finance transactions—such voluntary and selective disclosures suffer from the same shortcomings as those discussed above. Indeed, these shortcomings are likely amplified in the private company context because different investors can negotiate for divergent levels of access to data for the same company.<sup>49</sup>

An additional concern with uneven ESG disclosures is that anti-fraud enforcement actions may be stifled, potentially contributing to inefficiencies in capital allocation. Experts have noted securities fraud enforcement actions are underrepresented in the private securities market despite the high potential for fraud.<sup>50</sup> And a lack of disclosure is a root cause.<sup>51</sup> A failure to mandate ESG disclosures in the contexts of private securities offering would likely extend the risks of underenforcement to ESG-related fraud. And such fraud may not be that far-fetched. As ESG factors become increasingly important to investor decision-making and company performance, material misstatements and/or omissions with respect to ESG data may rise to the level of actionable securities fraud.

Finally, an unequal ESG disclosure regime will also harm other stakeholders, who are also increasingly interested in private firms' ESG activity. With public firms, stakeholders—such as employees, consumers, and communities—may rely on disclosures to shame, boycott, avoid working for, and/or regulate bad actors to curtail antisocial corporate activity.<sup>52</sup> In effect, mandatory

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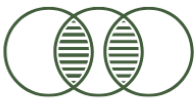
<sup>48</sup> See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 17 at 9 (“All seven private asset managers and representatives at five of seven public pension funds said they seek ESG information to enhance their understanding of risks that could affect companies’ value over time.”).

<sup>49</sup> Marianne Hudson, *It's All in The Terms: What To Prioritize in Angel Term Sheets*, FORBES (Dec. 11, 2015, 11:12 AM), <https://www.forbes.com/sites/mariannehudson/2015/12/11/its-all-in-the-terms-what-to-prioritize-in-angel-term-sheets/?sh=ea442613f807> (Information Rights: These rights . . . determine the information [investors] will receive from the company and how often [investors] will receive it. For example by explicitly asking for quarterly financial statements and annual budgets, everyone can keep their eye on the ball on the status of the business while ensuring the company doesn't have onerous requirements . . .).

<sup>50</sup> See Elizabeth Pollman, *Private Company Lies*, 109 *Georgetown L. J.* 353 (2020); Verity Winship, *Private Company Fraud*, 54 *U.C. Davis L Rev* 663 (2020).

<sup>51</sup> See Section I *supra*.

<sup>52</sup> See, e.g., Ann M. Lipton, *Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 *YALE J. ON REG.* 399, 509 (2020) (“[A]n effective system of “soft” corporate discipline ensures that the pursuit of shareholder wealth is aligned with the well-being of the broader society in which the corporation operates.”).



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disclosures can hold companies accountable to certain perceived public duties.<sup>53</sup> In the absence of mandatory ESG disclosures, however, non-investor stakeholders are limited in their ability to detect and curtail antisocial private company activity; and such companies may lack effective monitors and incentives to do so on their own.

To mitigate these risks, mandatory ESG disclosures should extend to certain companies and securities offerings that would otherwise be deemed “private” under the existing framework. To be sure, private companies have access to a host of ESG data, including their GHG emissions, ESG-linked management compensation incentives, and aggregated ESG performance assessments reflected in third-party “ESG scores.”<sup>54</sup> It is, therefore, reasonable to believe that some degree of mandatory ESG disclosures would be practicable for these companies.<sup>55</sup>

There are a few options the SEC may pursue to narrow the informational gap between the private and public markets. To start, the SEC should require minimum disclosure requirements—of financial and ESG data—for some private offerings and private firms. These disclosures should be broad-based enough to capture a meaningful segment of the private capital markets but should not be so onerous as to stifle capital formation for new entities. Applicability of the minimal disclosure regime should be triggered by an objective measure, such as market capitalization, asset size, or annual revenue. For ESG specifically, disclosures should be based on whether the company operates in a specific industry, such as fossil fuel, real estate, or transportation; or based on company size as determined by capitalization, outstanding shareholders, or number of employees. Again, to be most effective in mitigating information asymmetry and inefficiency disclosures for the private markets should mandatory, standardized, and timely. Importantly, by not imposing the full scope of public market disclosures, the private capital markets will continue to have some flexibility; but private firms

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<sup>53</sup> See Donald C. Langevoort & Robert B. Thomsson, “Publicness” in *Contemporary Securities Regulation After the Jobs Act*, 101 GEORGETOWN L.J. 337, 372 (2013) (“The orthodox account is that mandatory disclosure and its accompaniments correct for a potential market failure in the socially optimal production of information and shed sunlight on markets that otherwise would be easier candidates for fraud and manipulation.”); Hillary A. Sale, *The New “Public” Corporation*, 74 L. & CONTEMP. PROBS. 137, 144 (2011) (“For example, as reporting requirements grow and technology increases, information becomes more accessible, digestible, and analyzable.”).

<sup>54</sup> See, e.g., Betty Moy Huber & Michael Comstock, *ESG Reports and Ratings: What They Are, Why They Matter*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (July 27, 2017), <https://corpgov.law.harvard.edu/2017/07/27/esg-reports-and-ratings-what-they-are-why-they-matter/> (“Most international and domestic public (and many private) companies are being evaluated and rated on their environmental, social and governance (ESG) performance by various third party providers of reports and ratings. Institutional investors, asset managers, financial institutions and other stakeholders are increasingly relying on these reports and ratings to assess and measure company ESG performance over time and as compared to peers.”).

<sup>55</sup> See, e.g., Adam Sulkowski & Sandra Waddock, *Beyond Sustainability Reporting: Integrated Reporting Is Practiced, Required, and More Would Be Better*, 10 U. ST. THOMAS L.J. 1060, 1084 (2013) (“The final recommendation . . . is to actively and constructively engage with the SEC and any other governmental bodies in the development of specific and mandatory minimum ESG disclosure guidelines. Expertise about best practices already exists, and more is being developed by companies at the leading edge of integrated reporting. Rather than resisting regulation and having something imposed that potentially is suboptimal, these leading companies could assure that the most effective and efficient practices become standard.”).

and private offerings will not be able to completely evade public disclosures of financial and ESG data, as is currently the case.<sup>56</sup>

The SEC should also consider narrowing the most heavily utilized private placement exemption—Rule 506 of Regulation D. Generally, Rule 506 allows firms to raise an unlimited amount of private capital from an unlimited number of accredited investors.<sup>57</sup> In 2018, more than \$1.7 trillion in private capital was raised under the Rule 506 exemptions alone.<sup>58</sup> This unlimited, semi-liquid and easily accessible pool of capital affords private companies the financial flexibility to remain private longer. The SEC should incentivize (or pressure) firms to exit the shadows of the private markets by making such capital difficult to access. One way to do so is to establish a cap on capital raises under Rule 506 for a given company in a rolling 12- to 24-month period. This proposal runs counter to robust pressure to expand private placement exemptions in the name of increased access to investment opportunities. However, the most ideal and equitable access for retail and institutional investors would arguably be in a market with relatively robust disclosures and other investor protections—i.e., the public securities market.<sup>59</sup>

In sum, the SEC should mandate ESG disclosures from certain private offerings and private firms to ensure an even playing field between similarly situated firms, regardless of whether they are “public” or “private.” Companies are staying private and accessing private capital simply because can. The SEC should, therefore, facilitate a robust pipeline of companies seeking public capital by lowering the thresholds for registration requirements and curtailing access to private capital. In all instances, however, the Commission should establish a minimum disclosure regime for certain private firms and private securities offerings. Imposing ESG disclosures on the public markets without a corresponding obligation on private firms and private capital would only serve to undermine any disclosure regime the Commission implements.

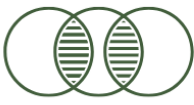
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<sup>56</sup> The SEC should also consider disclosures for the benefit of employee-investors in private firms. Employees of private firms may bear a hefty financial burden following a company’s underperformance or failure, but they lack disclosures that would help them assess ESG-related risks that bear on the firm value and future prospects. Thus, we believe that protection of employee investors requires better disclosures to these individuals to ensure they are able to consider a company’s climate impact and ESG conduct in their employment and investment decisions.

<sup>57</sup> There are two distinct exemptions under Rule 506. One restricts general solicitations and allows a firm to sell securities to 35 non-accredited, sophisticated investors (Rule 506(b)). The other permits general solicitations but requires all investors to be accredited investors. (Rule 506(c)).

<sup>58</sup> Era Anagnosti et al., *SEC: Time to revamp securities offering exemptions*, WHITE & CASE (July 23, 2019), <https://www.whitecase.com/publications/alert/sec-time-revamp-securities-offering-exemptions>.

<sup>59</sup> Amending Section 12(g) of the Securities Exchange Act of 1934 would also go a long way to rebuilding the public securities markets. Section 12(g) requires firms of a certain size to register with the SEC and comply with certain periodic and event-based disclosure requirements. The threshold triggers were once \$10 million in asset value and 500 shareholders of record; but the JOBS Act of 2012 quadrupled the shareholder threshold to 2000. And these numbers do not account for employee shareholders or the innumerable investors underlying pooled investment vehicles. As a result, many unicorns have the flexibility to remain private longer, thereby concealing pertinent financial and social activity. Amending Section 12(g) is beyond the scope of the SEC’s authority but should be considered as a way to reduce the size of the public capital markets.



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**CONCLUSION**

The time has come for the SEC to mandate standardized and timely ESG disclosures. The status quo, with its myriad of voluntary frameworks is untenable, ineffective and of limited utility to investors as it does not provide the desired data to those seeking ESG-related information. As the SEC moves forward with crafting its ESG disclosure standards we recommend the agency lead on this issue, and not wait for an international agreement. We look forward to constructive engagement with the SEC as it considers potential future rulemaking on ESG Disclosures.

Thank you for the opportunity to share our views regarding Climate Change Disclosures. For further conversation and follow up, please feel free to contact the RCRC Secretariat:

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