

ADOPTING THE SEC'S PROPOSED CLIMATE-RELATED DISCLOSURE RULES WOULD BE UNWISE

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The Enhancement and Standardization of Climate-Related Disclosures for Investors
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This is my second comment on the proposal of the Securities and Exchange Commission (SEC) to require climate-change disclosures (Proposal).¹ My first comment, filed April 12, 2022, explains that the SEC lacks statutory authority to adopt the rules in the Proposal.² This comment describes additional concerns with the Proposal.

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Adopting the Proposal would not be in the best interests of the United States. It would determine significant national environmental policies without direction from Congress, creating a high risk of proving to be a futile gesture because of the likelihood that a court will overturn final rules. It would damage the role of the SEC as a securities regulator. It would interfere with domestic and international energy policy. It would impose massive new costs on business without gaining offsetting benefits. It would impose detailed prescriptions for running a company and execute a further invasion into state corporate law and the business judgment of corporate

1. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249).

2. Andrew N. Vollmer, The SEC Lacks Legal Authority to Adopt Climate-Change Disclosure Rules, Comment on the Enhancement and Standardization of Climate-Related Disclosures for Investors (Apr. 12, 2022), <https://www.sec.gov/comments/s7-10-22/s71022-20123525-279742.pdf>.

managers. It would rest on a disclosure process that is not workable. It would foment meritless private securities litigation.

The Proposal is deeply unwise. No matter how fervently a commissioner personally believes in the need to take action against the effects of climate change, he or she should put duties to the nation and the proper functioning of the system of government first. Personal liberty interests deserve greater weight. The SEC should end the rulemaking with no further action.

RISKS FROM THE LACK OF STATUTORY AUTHORITY FOR THE RULES IN THE PROPOSAL

Various comments, including my first comment, say that the Proposal goes beyond limitations on the SEC's power to order corporate disclosures. The absence of statutory authority to adopt rules in the Proposal is a serious obstacle. More than once in the past, the SEC recognized and heeded its need for further congressional action to issue climate-related disclosure rules, and the federal courts have been rigorous in enforcing statutory limitations.

The Proposal contradicts the position the SEC has taken several times on the need for a specific congressional mandate to order environmental or social disclosures:

In 1975, the Commission considered a variety of “environmental and social” disclosure matters, as well as its own authority and responsibilities to require disclosure under the federal securities laws. Following extensive proceedings on these topics, the Commission concluded that it generally is not authorized to consider the promotion of goals unrelated to the objectives of the federal securities laws when promulgating disclosure requirements, although such considerations would be appropriate to further a specific congressional mandate.³

The SEC reaffirmed that statutory position in 2016.⁴ In 2020, the commission refused to require climate risk disclosures when it amended certain parts of Regulation S-K.⁵

In the past, the SEC recognized that it could not order disclosures on climate change without “a specific congressional mandate,” but now, without receiving such a mandate, the SEC asserts in the Proposal that the general disclosure statutes grant the power to adopt climate-change disclosure rules.⁶ The commission cannot, with credibility, reconcile the two positions and, in any event, may not use an explanation to exceed its statutory limitations. The SEC may not just change its mind about a legal restriction. The SEC did not have the power to adopt the proposed disclosure rules in 1975, 2016, or 2020, and it does not have the authority now.

If the commissioners are not persuaded on the merits of the argument about the lack of statutory authority, they should still take into account the legal risk the Proposal faces. The federal courts are on heightened alert to unusual and excessive assertions of agency authority.

Over the years, including twice in the past year, the Supreme Court rejected well-intentioned agency attempts to stretch statutory language to justify far-reaching rules addressing aspects of serious public policy issues not within the traditional scope of the agency's mission:

3. Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,971 (Apr. 22, 2016) (footnote omitted).

4. *Id.*

5. See Allison Herren Lee, Comm'r, Sec. & Exch. Comm'n, Regulation S-K and ESG Disclosures: An Unsustainable Silence (Aug. 26, 2020).

6. Enhancement and Standardization, 87 Fed. Reg. at 21,464.

- Early this year, the Supreme Court stayed an Occupational Safety and Health Administration rule ordering large employers to require employees to receive vaccinations or frequent tests for COVID-19. The relevant act empowers the agency to set workplace safety standards, not broad public health measures. The Court said COVID-19 is a universal risk and not just an occupational hazard.⁷
- In August 2021, the Supreme Court, in a stay proceeding, doubted the lawfulness of a Centers for Disease Control and Prevention (CDC)–imposed nationwide moratorium on evictions of tenants who live in areas with high levels of COVID-19 transmission. The CDC used a 1944 statute that authorized regulations to prevent the spread of communicable diseases by isolating infected people or animals. The Court agreed with the importance of combatting the spread of COVID-19 but said the CDC claimed “a breathtaking amount of authority” from a statute that, when read in context, granted much narrower administrative powers.⁸
- A line of Supreme Court cases supports the two recent examples.⁹
- The DC Circuit also enforces limitations on the statutory authority for SEC rules and actions.¹⁰

The facts of the cases have similarities to the rules in the Proposal: agency concern about a serious social problem, a desire to act in the public interest when Congress has not acted, and reliance on general statutory words written for a different purpose. The SEC is concerned about the financial effects on companies from global warming and claims enormous power under statutes from 1933 and 1934 to adopt climate-change disclosure rules of vast national significance. The SEC’s actions are well intentioned and aim to further the public interest in an important public policy area, but careful examination of the statutes giving the SEC power to adopt disclosure rules and the context and structure of those statutes shows a much more limited grant of authority to the agency.

The legal principles and a substantial body of case law demonstrate that final rules from the Proposal face a substantial risk of being found unlawful by a reviewing court. The commissioners likely think the SEC has a better chance with a reviewing court than commentators do; litigation risk analysis is an art not a science. The commissioners could have a high degree of confidence and could gamble on a complete victory in court, but a more prudent approach would be to hedge the risk, reassess the Proposal in its entirety, and rein in the most aggressive features.

RISKS TO THE ROLE OF THE SEC

Adopting rules in the Proposal would also be ill advised because it would damage the role of the SEC. The Proposal is a combative use of securities regulation.

7. *National Fed’n of Indep. Bus. v. Dep’t of Labor*, 142 S. Ct. 661 (2022).

8. *Alabama Ass’n of Realtors v. HHS*, 141 S. Ct. 2485 (2021).

9. *E.g.*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (holding that the relevant statute does not authorize the EPA to require permits for motor-vehicle greenhouse gas emissions); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 159–60 (2000) (holding that the relevant statute does not authorize the FDA to regulate tobacco products); *NAACP v. FPC*, 425 U.S. 662 (1976) (holding that the relevant statute does not authorize the FPC to adopt affirmative action programs to combat discrimination in employment).

10. *E.g.*, *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 546 (D.C. Cir. 2020) (holding that general rulemaking authority does not permit the SEC to adopt a pilot program to collect data for possible future regulation); *Financial Planning Ass’n v. SEC*, 482 F.3d 481 (D.C. Cir. 2007) (holding that the relevant statute does not authorize the SEC to exempt broker-dealers from the Investment Advisers Act); *Teicher v. SEC*, 177 F.3d 1016 (D.C. Cir. 1999) (holding that the relevant statute did not authorize SEC adjudication order).

Since the early 1930s, the SEC has used its power as a technical regulator of securities markets to publicize standard corporate operational and financial information bearing on the value of securities, patrol for material misrepresentations and unfairness to investors, facilitate the discovery of prices for securities, and improve the efficiency of stock exchanges and other secondary securities markets. Mandating prescriptive and detailed disclosures on the single subject of climate change would depart from the SEC's traditional use of the securities laws and the established functions of the SEC. It would use the SEC and the securities laws as instruments to advance a divisive and contentious public policy not approved by Congress.

Adopting climate-change disclosure rules would set an unfavorable regulatory precedent for the SEC and other federal agencies. If a majority of the current commissioners are able to force climate-change disclosure rules, what will a new set of commissioners—perhaps a group appointed by a president with a different set of values—be able to do? A future commission could compel specialized disclosures about, for example, the costs of compliance with government regulations, the use of undocumented immigrant workers, or the effects of crime on company property and operations.

Adopting climate-change disclosure rules would negatively affect public perception of the day-to-day functions of the SEC. The willingness of the commission to bow to broad policy goals outside the norms of securities regulation would lower public confidence in the expertise and evenhandedness of the SEC. Filing companies would have reason to suspect untoward influence on comments on draft registration statements or filed annual reports. Would the annual report of a company with high greenhouse gas (GHG) emissions receive closer and less flexible scrutiny or be perceived to be treated less fairly? Would climate change or other nonstandard considerations weigh in the selection of registered persons, such as broker-dealers or investment advisers, for inspections; weigh in the setting of enforcement priorities; or be perceived to be a factor? A new climate-change orientation for the SEC makes these dangers serious possibilities.

DOMESTIC AND INTERNATIONAL ENERGY POLICY

A natural and predictable consequence of the Proposal will be to reduce the supply and use of oil, gas, and coal and to accelerate the trend to a lower-carbon economy. That also seems to be the purpose.

The SEC should not dabble in energy policy. It is a complex area with serious domestic and international repercussions and should be left to Congress, which is the forum capable of collecting the necessary information and taking into account and balancing the many competing interests.

Recent events show that US and international energy markets react strongly to unexpected reductions in the supply of oil and gas. In the United States, reductions in oil and gasoline supplies have caused significant price increases and have been a major contributor to inflation. Decreases in supplies in the United States and the rest of the world have complicated the imposition of international economic sanctions on Russia for the invasion of Ukraine. In the longer term, energy policy must consider the growth in energy demand, the need to continue to rely on fossil fuels for decades,¹¹ the goal of increasing the supply of renewable and lower-carbon sources of energy, and the possibility of shortages of materials for electric vehicles and batteries.

11. According to a government source, coal, oil, and natural gas will account for approximately 70 percent of energy in 2050 even with renewable sources growing from 15 percent in 2018 to approximately 28 percent in 2050. The proportion from coal, oil, and natural gas will be 70 percent of a much larger demand for energy. Energy consumption is expected to increase by 15

These are complicated issues that preoccupy policymakers and lawmakers in the United States. Addressing climate change and energy security requires broad knowledge, experience, expertise, and the institutional competence to be responsive to competing interests, set priorities, make tradeoffs, and find acceptable compromises. Under the US system of government, decision makers should have accountability to voters. The SEC—the US securities regulator—is not the right government institution for the job, yet it has forged to the front and decided to aggravate these issues with an initiative to reduce carbon energy supplies. Congress, with advice from the executive branch, is the institution that must handle this task.

COSTS AND BENEFITS

The discussion of costs and benefits in the Proposal is not adequate and shows that the commission would need to make significant improvements in its analysis of final rules to satisfy its obligation “adequately to assess the economic effects of a new rule.”¹² The Proposal describes benefits that would be mostly relatively minor improvements over the current system and costs that would be immediate, high, and continuing. The Proposal no doubt attempts to make the most positive economic case, which suggests that the SEC would be unable to make a persuasive case that final rules would produce benefits that exceed costs.

The base economic case is the current regulatory and economic landscape for climate-related disclosures,¹³ and many of the disclosures covered by the Proposal already are made. Regulation S-K and existing accounting standards elicit climate-related disclosures.¹⁴ An EPA program and some states require disclosure of GHG emissions.¹⁵ Many large companies voluntarily provide public information on climate-change issues.¹⁶

The Proposal would adopt a mandatory, standardized disclosure approach that would produce only small marginal benefits over the current system. The Proposal recognizes that the gains would be modest in the way it describes them. Adoption of the proposed rules would “improve” the information for investors. The mandatory disclosures would result in “more” consistency, “enhance comparability,” and allow investors to be “better” informed.¹⁷ The SEC does not quantify the benefits.¹⁸

In fact, the Proposal itself gives reasons to question the SEC statement that the Proposal would achieve “more” comparable, consistent, and reliable disclosures.¹⁹ The Proposal would increase consistency and comparability to some extent, but it acknowledges that much variability would occur. The disclosures for financial statement metrics would require many judgments and assumptions.²⁰ GHG emissions reporting is “evolving” and “warrants varying methodologies,

percent between 2018 and 2050 in Organisation for Economic Co-operation and Development countries and 70 percent in other countries. U.S. ENERGY INFO. ADMIN., #IEO2019, INTERNATIONAL ENERGY OUTLOOK 2019 31, 24 (2019).

12. *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

13. Enhancement and Standardization, 87 Fed. Reg. at 21,413.

14. *Id.* at 21,363, 21,413.

15. *Id.* at 21,414.

16. *Id.* at 21,415–24.

17. *Id.* at 21,429–32.

18. *Id.* at 21,428.

19. *Id.*

20. *Id.* at 21,363.

differing assumptions, and a substantial amount of estimation.”²¹ A disclosing company might need “to rely heavily on estimates and assumptions to generate Scope 3 emissions data.”²² The benefits of consistency and comparability are overstated.

The claim to improved reliability also must be discounted. For reporting companies, the claim rests on requiring disclosures to be filed, rather than furnished, and therefore be subject to potential liability under section 18 of the Securities Exchange Act.²³ Liability under section 18 rarely exists because a plaintiff must prove actual reliance on the false or misleading statement and may not use presumed reliance, which is available for a claim based on Rule 10b-5.²⁴ Nearly all cases based on public statements from a reporting company use Rule 10b-5. The potential for alleging a violation of section 18 would add almost nothing to the reliability of public company filings.

The Proposal’s treatment of GHG emissions disclosures encapsulates the flaws with the SEC’s cost-benefit approach. If adopted, the SEC’s proposed disclosures and attestation obligations on GHG emissions would impose enormous costs. The SEC proposal is for all covered disclosing companies to publish scopes 1 and 2 GHG emissions, even if those emissions are not material, plus extensive and detailed information about calculations and methodology. Certain companies would need to disclose scope 3 emissions, and large filers would need to pay for third-party attestations of scope 1 and 2 emissions.²⁵ The SEC has made these proposals even though it claims it is “unable to fully and accurately quantify these costs.”²⁶

The potential benefits pale in comparison. The SEC states that the potential benefits are more comprehensive, tailored, and comparable emissions information,²⁷ but the emphasis must be on the comparative “more” because the EPA and 17 states have GHG emissions reporting requirements.²⁸ The natural question is why the SEC feels compelled to require its own GHG emissions disclosures when the EPA already has a public reporting program that “covers 85-90% of all GHG emissions from over 8,000 facilities in the United States.”²⁹ The SEC attempts to justify the overlapping reporting obligations on the grounds that the EPA GHG reporting requirement is not exactly the same as the proposed SEC GHG reporting and is not well suited to the needs of investors.³⁰

The SEC’s explanation is not a sufficient assessment of the economic effects of the proposed GHG emissions disclosure rules. The commission should do a specific cost-benefit analysis comparing its proposed GHG emission reporting requirements with the EPA and other existing GHG emissions reporting systems as the baseline. The SEC should quantify the additional benefit investors would receive from the Proposal and the additional costs of adding the SEC requirements. The SEC should demonstrate that any GHG emissions reports that it requires in final rules will be worth the extra cost.

21. *Id.* at 21,393.

22. *Id.* at 21,390.

23. *Id.* at 21,429 & n.842

24. John A. Occhipinti, Note, *Section 18 of the Securities Exchange Act of 1934: Putting the Bite Back into the Toothless Tiger*, 47 *FORDHAM L. REV.* 115, 116 (1978).

25. Enhancement and Standardization, 87 *Fed. Reg.* at 21,468-70.

26. *Id.* at 21,441.

27. *Id.* at 21,434.

28. *Id.* at 21,414.

29. *Id.*

30. *Id.* at 21,414, 21,434, 21,463. The EPA reporting system is different in one critical way: Congress authorized the EPA system. See 42 U.S.C. § 7414(a)(1). Congress has not empowered the SEC to impose climate-change or GHG emissions disclosure rules.

FEDERAL REGULATIONS ON HOW TO RUN THE COMPANY

Proceeding with the Proposal would be another federal usurpation of regulation of areas traditionally reserved for state corporate law and decisions by individual companies. Federal law would make climate change the predominant consideration for corporate boards and management.

The rules in the Proposal would require disclosure of whether and how a board of directors and management discuss and manage climate-change risks.³¹ It would require disclosure of any processes a company has for assessing and managing climate-related risks.³² It would require disclosure of the way a company has integrated climate-change risks into its business strategy.³³ The law would be cast in terms of disclosures only, but the need for disclosures would affect the actual operations of disclosing companies.³⁴ Climate-change considerations would dominate corporate governance and behavior. That would be both the purpose and the result of the rules in the Proposal.

That dominance would interfere with the best judgment of the board and management on how to structure their decision-making and internal processes and how to achieve returns for investors. It therefore would be a new, large incursion of federal law into state corporate law and the freedom of companies to make their own decisions in these areas.

Moreover, this intrusion by the SEC is not necessary. Each company has incentives to pay attention to climate-change effects on its business and has an obligation under current law to disclose significant effects.

COMMISSIONER PEIRCE'S DISSENT

Commissioner Hester Peirce dissented from the decision to issue the Proposal for comment.³⁵ Her criticisms of the Proposal are serious and thoughtful and deserve careful consideration. I endorse them.

Thus far, I have pointed out reasons the SEC should end the rulemaking without taking any further action and without adopting any final climate-change disclosure rules in the Proposal. My next two points apply only if a majority of the commissioners decide to proceed with adopting final rules. My final points involve deficiencies that the SEC could address in drafting final rules, but my inclusion of those points is not intended to detract in any way from the principal position that the SEC should not adopt the Proposal in whole or in part.

BREADTH OF DISCLOSURES AND MATERIALITY

The Proposal creates confusion about the standards for disclosure of climate risks and materiality. These problems are in addition to issues in the perceptive comments in section II of Commissioner Peirce's dissent about the Proposal's treatment of materiality.

Proposed Item 1502 is one of the core disclosures in the Proposal. Item 1502(a) would require a description of "any climate-related risks reasonably likely to have a material impact on the registrant, including on its business or consolidated financial statements, which may manifest

31. Enhancement and Standardization, 87 Fed. Reg. at 21,467.

32. *Id.* at 21,468.

33. *Id.* at 21,467.

34. Hester M. Peirce, Comm'r, Sec. & Exch. Comm'n, We Are Not the Securities and Environment Commission—At Least Not Yet § VI (Mar. 21, 2022).

35. Peirce, *supra* note 34.

over the short, medium, and long term.”³⁶ Item 1502(b) would require a description of “the actual and potential impacts” of the risks identified in response to 1502(a) on the company’s strategy, business operations, and suppliers or other parties in the company’s “value chain.”³⁷ Item 1502(d) would require a discussion of any risks described in response to 1502(a) that “affected or are reasonably likely to affect” the financial statements.³⁸

Subitem (a) is very broad and covers risks that are not currently material but could be material in the future. Subitems (b) and (d) would require disclosures for all risks identified in response to subitem (a) and therefore would require discussion of actual impacts and financial statement effects from currently immaterial risks. Mandating disclosure of immaterial risks or effects would be unnecessarily broad and costly. It would not be helpful for investors and would impose high costs of data collection and analysis on the company. Obtaining information from suppliers and parties in the company’s value chain of immaterial risks or effects could be especially difficult.

The process in the Proposal for making climate-related disclosures raises a further series of difficulties. The disclosure standard in Item 1502(a) is that a risk must be reasonably likely to have a material impact. That means a company must identify a climate-related risk for the company (not always an easy job), decide whether the risk is reasonably likely to affect the company, and then determine whether the effect of that risk is material. The Proposal does not explain how a reasonably likely risk is different from a likely risk. A material effect is one “substantially likely” to be significant in an investment or shareholder voting decision.³⁹ Thus, to make a disclosure decision, management must assess a reasonable likelihood of a substantial likelihood on a reasonable investor. This is not an easy standard for users to apply.

In fact, the commission’s disclosure approach is even more contorted. The Proposal says that the process for determining the disclosure of climate-related risks is similar to the one for preparing the Management’s Discussion and Analysis (MD&A) section for a registration statement or annual report.⁴⁰ The commission explains the process in guidance issued in 1989 and 2021.⁴¹

That process is incomprehensible. It has been the subject of scathing criticism, and the commission has struggled—unsuccessfully—to explain it. The guidance interweaves “likelihood that they will come to fruition,” “reasonably likely,” remoteness, and materiality.⁴² The disclosure threshold “requires a thoughtful analysis that applies an objective assessment of the likelihood that

36. Enhancement and Standardization, 87 Fed. Reg. at 21,467.

37. *Id.*

38. *Id.*

39. The Proposal subscribes to the traditional Supreme Court definition of materiality in cases of liability for a misrepresentation: “a matter is material if there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote.” *Id.* at 21,351.

40. *Id.* at 21,352.

41. Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2,080, 2,093–94 (Jan. 11, 2021) (to be codified at 17 C.F.R. 210, 229, 230, 239, 240, 249); Management’s Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, 1989 WL 1092885, at *6 (May 18, 1989) (interpretive release).

42. Management’s Discussion and Analysis, 86 Fed. Reg. at 2,093–94 (stating that known events “that are not remote or where management cannot make an assessment as to the likelihood that they will come to fruition, and that would be reasonably likely to have a material effect on the registrant’s future results or financial condition, were they to come to fruition, should be disclosed if a reasonable investor would consider omission of the information as significantly altering the mix of information made available in the registrant’s disclosures”).

an event will occur balanced with a materiality analysis regarding the need for disclosure regarding such event.”⁴³

Neither the guidance document from 1989 nor the one from 2021 gives the normal, sensible reading of “reasonably likely,” which is more likely than not or 51 percent probability. If the word “reasonably” is supposed to convey a higher or lower level of certainty, the guidance should have said so, but it does not. Instead, the guidance advises an approach that is opposite from the meaning of the words “reasonably likely” to have an effect. Disclosure is necessary when risks “are not remote or where management cannot make an assessment as to the likelihood that they will come to fruition.”⁴⁴ Rather than make a disclosure only when management is able to come to the positive conclusion that a risk or event is more likely than not to occur, the company must make disclosures about all risks, even when the chance of occurrence is not known, except when it is able to say (and prove) that a risk is remote—that is, extremely unlikely to occur.

In addition, the Proposal creates uncertainty about the probability-magnitude test for materiality. The Proposal expressly encourages use of the test,⁴⁵ but it also says that climate-related disclosures should be made the way MD&A disclosures are made. The commission earlier had said twice that the probability-magnitude test does not apply to MD&A disclosures.⁴⁶ That earlier position confuses courts and parties to securities litigation and has prompted novel questions about claims under Rule 10b-5.⁴⁷

The applicability of the probability-magnitude test is particularly relevant to possible disclosure of scope 3 GHG emissions. The materiality of scope 3 emissions is full of uncertainty, from the way to measure the emissions to the way governments or consumers will respond to climate change to the types and severity of effects on any particular disclosing company. For many disclosing companies, with exceptions such as oil and gas producers and refiners and vehicle manufacturers, the relevant events will have a low probability or minor effects and be almost *per se* immaterial.

The MD&A standard for disclosure is impenetrable and metaphysical. It is like reading Kierkegaard in the original Danish. Fortunately, agency guidance is not legally binding, and it deserves no weight when it is plainly erroneous or inconsistent with the regulation.⁴⁸

If the SEC proceeds to final rules on climate-change disclosure, it should resolve these disclosure issues and not compound the problems by applying them to the new climate-risk disclosures. The commission should explicitly reject application of the 1989 and 2021 MD&A

43. *Id.* at 2,093.

44. *Id.*; *see also id.* at 2,094 (stating that an event is reasonably likely if “the fruition of future events is unknown” or “where the likelihood of fruition cannot be ascertained”).

45. Enhancement and Standardization, 87 Fed. Reg. at 21,352 (“[W]hen assessing the materiality of a particular risk, management should consider its magnitude and probability over the short, medium, and long term”); *id.* at 21,379.

46. Management’s Discussion and Analysis, 86 Fed. Reg. at 2,094 (“We are not . . . adopting the probability/magnitude test of [*Basic, Inc. v. Levinson*, 108 S.Ct. 978 (1988)]” for MD&A); Management’s Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, 1989 WL 1092885, at *6 n.27 (May 18, 1989) (interpretive release) (“The probability/magnitude test for materiality approved by the Supreme Court in *Basic, Inc. v. Levinson*, 108 S.Ct. 978 (1988), is inapposite to Item 303 disclosure.”).

47. *See Leidos, Inc. v. Indiana Pub. Ret. Sys.*, cert. granted, 137 S. Ct. 1395 (2017) (mem.) (No. 16-581), cert. dismissed by agreement, 138 S. Ct. 2670 (2018); *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94 (2d Cir. 2015); *In re Nvidia Corp. Sec. Litig.*, 768 F.3d 1046 (9th Cir. 2014).

48. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2411, 2420 (2019).

guidance for the climate-risk disclosures. It should abandon the formulation of a risk “reasonably likely to have a material impact.” It should make clear that a materiality assessment for a future or contingent event includes the probability-magnitude test, notwithstanding the statements to the contrary in the 1989 and 2021 MD&A guidance. It should not demand that disclosers make projections into the long-term future.

The rule should require disclosure of climate-related risks that had an actual material effect on the registrant’s business or financial statements during the reporting period. It could also require disclosure of climate-related risks that are more likely than not to have a material effect on the registrant’s business or financial statements in the short- and medium-term future.

SAFE HARBOR

The Proposal would require many forward-looking statements and predictions of the future, but the safe harbor protections would be inadequate. The current and proposed safe harbors for the new disclosures are a hodgepodge, including the proposed safe harbor for scope 3 emissions disclosures, the statutory provisions on forward-looking statements that apply in private litigation, and the limited protections in SEC rules 175 and 3b-6 and items 303(b) and 303(c) of Regulation S-K.⁴⁹ The different terms and applications of the safe harbors create uncertainty and encourage private litigation. The legal authority for the regulatory safe harbors is not clear.

After confirming its statutory authority, the SEC should adopt a uniform and stronger safe harbor based on the following principles:

- The safe harbor should apply to all projections and forward-looking statements made in response to any new climate-risk disclosure rule the SEC adopts.
- The safe harbor should apply to information in any document required to be filed with the SEC, including registration statements, periodic reports, and proxy statements.
- The safe harbor should apply in SEC enforcement cases and private securities cases.
- A person should not be liable for false or misleading forward-looking information if it was accompanied by meaningful cautionary statements about the risk that the forward-looking information could be incorrect or if the person making the statement did not have actual knowledge that the statement was false or misleading.⁵⁰ Recklessness should not be enough. Protection dependent on a reasonable basis and good faith is too vague and subjective to provide the necessary certainty to disclosing companies.

49. See Enhancement and Standardization, 87 Fed. Reg. at 21,390-91; 15 U.S.C. §§ 77z-2, 78u-5; 17 C.F.R. §§ 229.303, instruction 6 to paragraph (b), instruction 1 to paragraph (c), 230.175, 240.3b-6.

50. See 15 U.S.C. §§ 77z-2(c), 78u-5(c).