September 14, 2021

SEC'S *REQUEST FO R PUBLIC INPUT* ON MANDATORY CLIMATE DISCLOSERS: REVIEW OF SELECT COMMENTS

The Securities and Exchange Commission (SEC) sent out a Request for Public Input (the RFPI) on climate-risk disclosures last March, with comments due June 13th. As of June 24th, there were 297 institutional comments submitted totaling 3,290 pages. There were many more unaffiliated individual comments submitted, drawing more than 550 responses in total.

Institutional comments were submitted from a wide range of parties including, but not limited to, academics, accounting firms, asset managers/investors, banking and financial trade associations, business trade associations, government officials, standard setters, sustainability groups, and a group of leading technology companies.

As expected, the opinions ran the full spectrum from the need to require extensive, internationally aligned, and audited disclosures filed with the SEC, to those arguing that it is not the SEC's job and they do not have the legal authority to mandate nonfinancial disclosures—with a plethora of opinions in between.

The impetus of the RFPI came from investors' recent pressure on businesses to disclose green-house gas (GHG) emissions related to their products and services. Investor demands are increasingly carrying more weight as sustainable investment products have surged in popularity. According to Morningstar, around $51 billion flowed into sustainable U.S. mutual funds and ETFs last year, which accounted for nearly a quarter of all cash that was invested. This level of "green" investment was ten times the level seen in 2018.

Regulators have now been asking the same questions, and SEC Chairman Gary Gensler said in a speech in late June, *"When it comes to disclosure, investors have told us what they want. It's now time for the Commission to take the baton."* He went on to say at a Climate and Global Financial Markets webinar that *"Investors are looking for consistent, comparable, and decision-useful disclosures so they can put their money in companies that fit their needs. Companies and investors alike would benefit from clear rules of the road."* Chairman Gensler believes it is the commission's job to bring consistency to company disclosures related to climate and other environmental risks.

A recent Wall Street Journal article likened climate-risk disclosures to the calorie counts on menus. *"…the climate data would be designed to help buyers of shares know what they are getting."* The article went on to say, *"A U.S. mandate would standardize what is now a confusing mishmash."*

Companies that have been promoting their climate mitigation efforts, ultimately already engaging in transparent disclosures, are supporting the initiative. Alphabet, Amazon, Autodesk, eBay, Facebook, Intel, and Salesforce jointly responded to the RFPI supporting principles-based disclosures incorporating existing frameworks, such as the Task Force on Climate-Related Financial Disclosures (TCFD). The group of technology companies also requested liability protection by having disclosures *furnished* to the SEC, not *filed* in annual, quarterly, or other regulatory filings.

Many companies already voluntarily report climate statistics, which is not filed or reviewed by regulators. 90% of S&P 500 companies report climate statistics, but only 16% of them report them in regulatory filings.

The U.S. does not want to fall behind the rest of the world either. Countries in Europe already require that companies doing business there abide by local government's demands for climate disclosures. Most recently in August 2021, large Swiss companies will have to disclose climate risk data in line with recommendations from the TCFD. Switzerland is the latest country, following the European Union, UK, and China that have proposed or finalized climate disclosures. Additionally, at the Group of Seven gathering this past June 2021, unanimously called for mandatory climate-related financial disclosures.

In a client update this summer, Davis Polk summarized comments submitted by thirty institutional parties around six topics that the firm thought were the most pertinent. The RFPI requested comments on a total of fifteen questions.

As mentioned above, there were comments submitted by a wide range of parties. The below summarizes the breakdown of commentor types:

Standard Setter & Nonprofit / Sustainability Group	**25.9%**
Asset Managers / Investors	**22.9%**
Other Corporation / Trade Group	**22.2%**
Academics / Think Tanks	**11.4%**
Banking and Financial Organization / Trade Associations	**10.4%**
Account Firm / Trade Associations	**3.4%**
Government Officials	**2.7%**
Law Firm	**1.0%**

The Davis Polk update focused on six of the fifteen questions that were included in the RFPI and summarized how these thirty institutions responded to the specific questions.

1. Does the SEC have authority to mandate climate disclosures, and would doing so survive the cost-benefit analysis required for rulemaking?

ARGUES COMPLIANCE COSTS WILL BE HIGH AND/OR WARNS SEC COST-BENEFIT-ANALYSIS MAY BE UNABLE TO JUSTIFY ACTION

	Percent of Respondents	Number that Answered
Yes	22%	2
No	33%	3
Mixed	45%	4

ARGUES SEC MAY NOT HAVE JURISDICTION OR AUTHORITY TO MANDATE CLIMATE DISCLOSURES

	Percent of Respondents	Number that Answered
Yes	43%	3
No	57%	4
Mixed	0%	-

2. Given a perceived desire for both meaningful and comparable climate disclosure, which types of disclosure standards (e.g., general or industry-specific standards, a single global standard, or multiple standards around the world and a standard drawing on existing third-party frameworks or a novel framework) should the SEC use for any mandatory climate disclosure regime?

ARGUES IN FAVOR OF INDUSTRY-SPECIFIC STANDARDS

	Percent of Respondents	Number that Answered
Yes	87%	13
No	0%	-
Mixed	13%	2

ARGUES IN FAVOR OF HAVING A SINGLE GLOBAL STANDARD

	Percent of Respondents	Number that Answered
Yes	39%	7
No	5%	1
Mixed	56%	10

ARGUES IN FAVOR OF DRAWING ON EXISTING FRAMEWORKS (E.G., TCFD, SASB)

	Percent of Respondents	Number that Answered
Yes	72%	18
No	16%	4
Mixed	12%	3

3. If the SEC mandates climate disclosures, what information should the SEC require to be disclosed?

ARGUES IN FAVOR OF REQUIRING DISCLOSURE OF QUANTIFIABLE DATA

	Percent of Respondents	Number that Answered
Yes	71%	12
No	6%	1
Mixed	23%	4

ARGUES IN FAVOR OF MANDATING DISCLOSURE OF SCOPE 3 EMISSIONS

	Percent of Respondents	Number that Answered
Yes	50%	7
No	14%	2
Mixed	36%	5

4. Should the SEC provide protection from liability, whether through a safe harbor, having climate disclosures be furnished rather than filed or by requiring disclosures on a specialized form outside of 10-Ks and 10-Qs?

ARGUES FOR A SAFE-HARBOR OR OTHER LIABILITY PROTECTION

	Percent of Respondents	Number that Answered
Yes	**87%**	**13**
No	**13%**	**2**
Mixed	**0%**	**-**

ARGUES DISCLOSURES SHOUD BE FURNISHED, RATHER THAN FILED

	Percent of Respondents	Number that Answered
Yes	**62%**	**10**
No	**25%**	**4**
Mixed	**13%**	**2**

ARGUES FOR DISCLOSURES SHOULD BE MADE OUTSIDE OF 10-KS AND 10-QS

	Percent of Respondents	Number that Answered
Yes	**50%**	**8**
No	**25%**	**4**
Mixed	**25%**	**4**

5. Should climate disclosures be subject to the same level of rigor as other types of SEC disclosures, such as financial and accounting disclosures by imposing requirements for audit or assurance or internal controls?

ARGUES IN FAVOR OF AN AUDIT/ASSURANCE REQUIREMENT

	Percent of Respondents	Number that Answered
Yes	62%	8
No	23%	3
Mixed	15%	2

ARGUES MANAGEMENT'S ANNUAL REPORT ON INTERNAL CONTROLS OVER FINANCIAL REPORTING SHOULD DISCUSS CONTROLS OVER CLIMATE REPORTING

	Percent of Respondents	Number that Answered
Yes	78%	7
No	11%	1
Mixed	11%	1

6. If the SEC creates a new disclosure mandate, should its scope include not only public companies but also private companies, and not only climate disclosures but also ESG disclosures more broadly?

ARGUES SEC DISCLOSURE MANDATE SHOULD INCLUDE PRIVATE COMPANIES

	Percent of Respondents	Number that Answered
Yes	34%	3
No	33%	3
Mixed	33%	3

ARGUES SEC ACTION SHOULD COVER ESG BROADLY, NOT CLIMATE ALONE

	Percent of Respondents	Number that Answered
Yes	65%	11
No	6%	1
Mixed	29%	5

Sources: Stern Commentary, Environmental Finance, WSJ, CBI, Bloomberg, Davis Polk, Morningstar / Member FNRA, MSRB, & SIPC