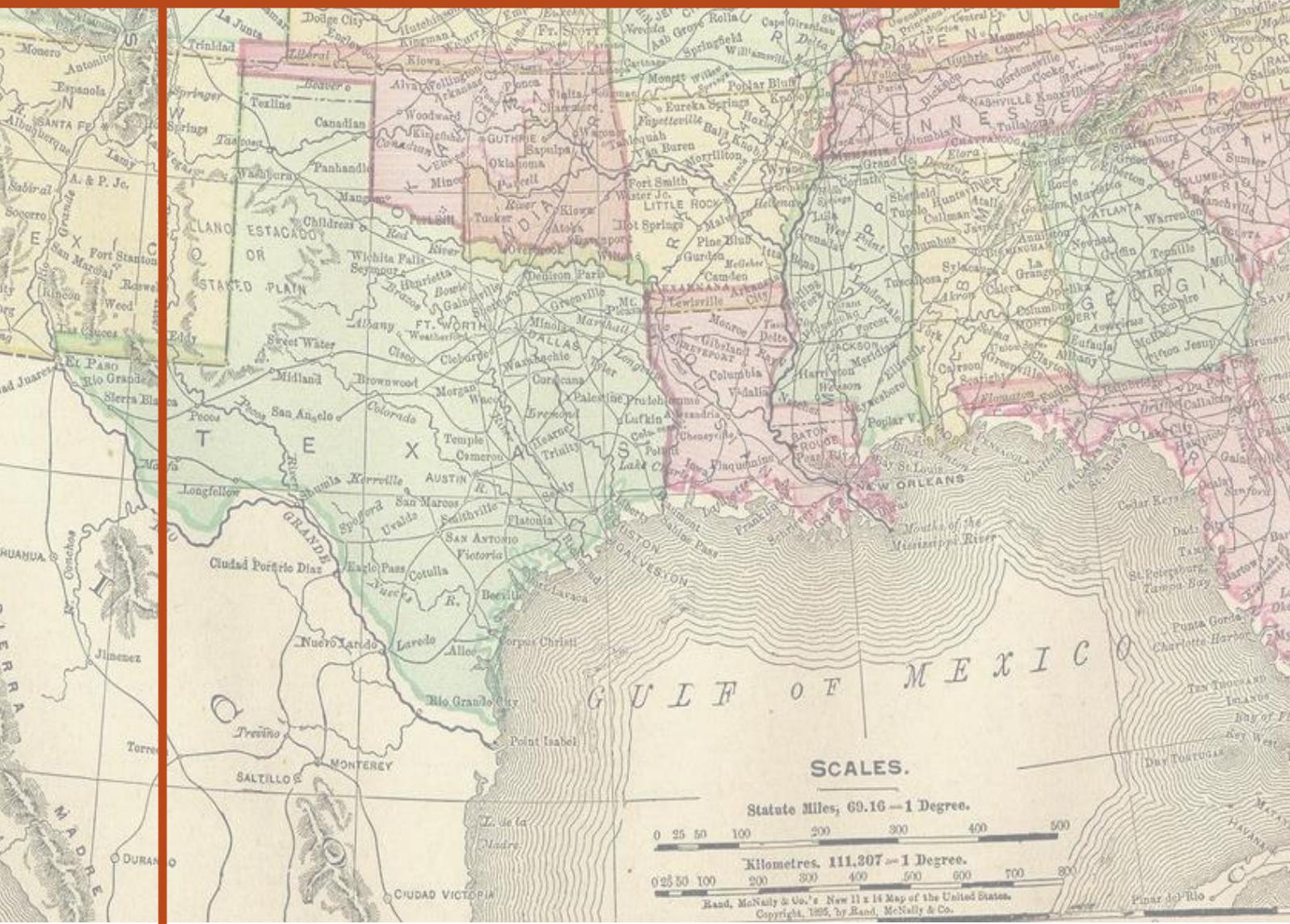




Commonwealth
Climate and
Law Initiative

Review of public comments to US Securities and Exchange Commission regarding proposed climate change disclosures



SCALES.
Statute Miles, 69.16 = 1 Degree.
0 25 50 100 200 300 400 500
Kilometres, 111.307 = 1 Degree.
0 25 50 100 200 300 400 500 600 700 800
Rand, McNally & Co.'s New 11 x 14 Map of the United States.
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Summary of review of public comments to US Securities and Exchange Commission regarding proposed climate change disclosures

1 Introduction

- 1.1 This document is intended to capture high-level findings of a review of the [public comments](#) submitted to the US Securities and Exchange Commission (SEC) in response to its [request for comments](#) in respect of potential climate change related disclosures.
- 1.2 The purpose of the review was to identify legal arguments made in the submissions in favor of and against the proposed disclosures. Each comment published by the SEC as of 10 March 2022 has been reviewed by a team of law students and coded to identify:
 - A) The type of commentor;
 - B) Whether the commentor is 'For', 'Against' or 'Neutral' on whether the SEC mandates climate change disclosures; and
 - C) The type of argument used by the commentor.
- 1.3 The review was subject to a quality control process. However, there may be some variability in the coding of the comments.
- 1.4 The review of public comments concluded on 10 March 2022, and comments published to the SEC website after this date have not been reviewed or included in the results discussed below. This version of the report summarizing the findings of the review was published on 13 June 2022.
- 1.5 This document represents a good-faith attempt to summarize the detailed results of our review, and is intended to capture high-level findings only. It is not intended to be a full analysis of the contents of the comments. It is not, and are not intended to be, legal advice. Nor does it contain an analysis of the merits of the legal arguments made in the submissions in favor of and against the proposed disclosures.
- 1.6 This document has been prepared by the Commonwealth Climate and Law Initiative (CCLI) for educational purposes only. This document is not, and is not intended to be, legal advice. The CCLI, its founders, and partner organisations make no representations and provide no warranties in relation to any aspect of this document, including regarding the advisability of investing in any particular company or investment fund or other vehicle. While we have obtained information believed to be reliable, we shall not be liable for any claims or losses of any nature in connection with information contained in this document, including but not limited to, lost profits or punitive or consequential damages. While efforts have been made to ensure that this document is accurate and free from errors and omissions, this document should not be, and is not intended to be, relied upon for any purposes and readers are advised to conduct their own research and analysis and obtain their own legal advice.

2 General findings

- 2.1 The majority of comments submitted are in support of the SEC's proposed rulemaking; of a total of 586 comments (as of 10 March 2022), 414 were in favor, 107 were against, and 51 were neutral. The remaining 14 comments were anomalous (duplicates, unclear or apparently erroneously submitted). It should be noted that the degree to which each commentator was in favor of further disclosure will vary; for example, some commentators are in favor only to the extent that further disclosure rules are limited to information which is deemed material, a large number request a mixture of a mandatory baseline of information (such as scope 1-3 emissions) and additional material information, and some request fully mandatory climate change disclosures (although do not always set out how they perceive these disclosures as taking effect).
- 2.2 The highest number of comments received were from individuals and individual investors. These were split fairly evenly between being for and against further rulemaking, and varied significantly in terms of relevance and/or the sophistication of the arguments used in support. The next highest number of comments came from NGO/Third Sector organizations (which encompasses think-tanks), the majority of which were in favor of increased disclosures, followed by Asset Managers/Investment Companies, which again were overwhelmingly in favor of increased climate change disclosures.
- 2.3 Whether or not a comment is in favor of the SEC's proposed rulemaking, the majority of comments submitted which commented substantively on the proposal support adapting or supporting an existing framework - mostly the TCFD frameworks, or a mix of TCFD and SASB (to judge materiality).
- 2.4 Generally, there appears to be a demand for mandatory disclosures of some climate change metrics, including an issuer's scope 1-3 emissions (although a number of commentators recognize the difficulties in measuring scope 3 emissions), and additional qualitative disclosures of material information. As one example (of many), see Capital Research and Management Company's [comment](#), pp.3-4.

3 Types of commentor

- 3.1 This section summarizes the general arguments used by and in relation to the key groups of commentors. It does not cover each category of commentor, but focuses on those which are most relevant to the identification of legal arguments in favor of and against the proposed disclosures.

Academics

- 3.2 These generally deal with legal arguments regarding the SEC's authority to promulgate disclosures regarding climate change, or the need for such disclosures. Some respond directly to the SEC's request, while others are relevant papers which have been submitted. The majority of comments are in favor of increased climate change disclosures (18/26, with 4/26 against).
- 3.3 Arguments in favor of SEC rulemakings focus on the sufficiency of existing disclosures. For example, [Kenya Rothstein](#) argues that the SEC has authority to ratify and endorse standards used by industry professionals (as demonstrated by its adoption of FASB), and that it should therefore do so in order to fulfil investor demands for increased ESG disclosures (which, in turn, demonstrate that such information is material).
- 3.4 Some arguments focus on whether 'materiality' should be determined to relate only to financial information. Commentors such as [Amanda Rose](#) and [Paul and Julia Mahoney](#) argue that a 'reasonable investor' gives primacy to the financial performance of his or her investments, while the focus on ESG disclosures has arisen due to demand from institutional investors, who have wider interests.

Asset managers / Investment companies

- 3.5 These are overwhelmingly supportive of increased disclosures (80/83). In particular, a number of asset managers with a particular ethical focus (such as religious organizations or ESG-focused entities) are supportive.
- 3.6 Generally, submissions in support of increased climate change disclosures state that current disclosures are insufficient to meet their requirements as investors. A small number also state that they need increased disclosures in order to meet their fiduciary obligations.
- 3.7 Commonly, commentors state that they view climate change information as financially material (either explicitly stating that climate change information generally or in relation to specific sectors is material, or stating that they use it to inform their decisions). Commentors request that the SEC mandate the disclosure of a 'baseline' of quantifiable climate change information, such as scope 1, 2 and (either where appropriate or material or in any event) scope 3 emissions, as well as requiring qualitative disclosures on material issues (for example, see the comment by [The Vanguard Group](#)). Indeed, a majority (57/83) of commentors in this category explicitly requested that the SEC require issuers to disclose their scope 1, 2 and 3 emissions. Submissions commonly support leverage of existing disclosure frameworks, in particular focusing on materiality, as defined by the US Supreme Court, as a benchmark.
- 3.8 Commentors also request alignment with existing voluntary frameworks (mostly the TCFD recommendations) to assist with comparability. In particular, asset managers and investors which operate globally are very keen for the SEC to work towards a globally aligned framework (in most cases, in line with a TCFD-style approach, but in some cases investors request alignment with IFRS or other standards). For example, see comments from [PIMCO](#), and [Keramida, Inc.](#)
- 3.9 Asset owners and investor coalitions, which are categorized separately, are generally similar in their approach to asset managers.

Companies

- 3.10 Operating companies generally state an opinion on a spectrum. A minority state that the SEC should not conduct rulemaking, as the current materiality-linked and voluntary disclosures are sufficient. Corporations also warn of the increased costs incurred by new disclosures (although very few corporates raise this argument directly, some groups of corporations make this point).
- 3.11 However, the majority support some kind of climate change-related disclosure, to varying degrees.
- 3.12 Generally, corporates recommend that any SEC rulemaking:
- A) Follow a principles-based approach;
 - B) Be rooted in materiality (many commentors note that what is material will vary from entity to entity);
 - C) Be phased in gradually, for example, with larger corporations required to report on them first etc.;
 - D) Be subject to safe harbor provisions;
 - E) Be furnished (as standalone disclosures, or in a separate climate change report), rather than filed as part of a Form-10K. Most corporations state that this is to reduce the risk of liability; and
 - F) Some corporates state that GHG emissions should be disclosed (most limit this to scopes 1 and 2; some state that scopes 1 - 3 should be disclosed).

- 3.13 Comments in this vein include [United Airline Holdings, Inc.](#), [Oshkosk Corporation](#), and [Cisco Systems Inc.](#)
- 3.14 Corporations in the oil and gas sector tend to be more supportive of voluntary disclosure regimes being allowed to continue; or alternatively, support voluntary disclosure regimes since they have been developed through dialogue between investors and issuers (for example, see [ConocoPhillips](#)). However, this is not true of all oil and gas sector commentators – in particular, those based outside the US (and which may already be subject to climate change disclosure regimes) may be more supportive – see comments from [BP](#), [Eni SpA](#) and [TotalEnergies](#).
- 3.15 Other comments from corporates were by companies which provide data on climate change or ESG issues, and companies which operate as service providers (such as accountants and auditors). These companies are generally supportive of disclosures which are aligned with existing frameworks (for example, see comments by [KPMG](#), [Deloitte](#) and [Grant Thornton](#)).

Lawyers/law firms

- 3.16 This category contains law firms and individual lawyers, as well as lawyers in official roles, such as Attorney Generals. These comments tend to be more focused on the SEC's legal authority to promulgate disclosures, and are split evenly (5 comments each way) between being for and against further disclosures.
- 3.17 The majority of arguments focus on the extent to which climate change disclosures are material, and therefore whether and to what extent the SEC has authority to promulgate disclosures. Those against increased disclosures argue that the SEC does not have authority to compel non-material disclosures, while those for increased disclosures often argue that climate change information is material and the SEC has authority to require disclosure as such (see [Rob Bonta, California Attorney General, et al.](#)).
- 3.18 There are also arguments raised regarding the application of the First Amendment; these are usually raised against increased disclosures, arguing that compelling disclosures is the same as compelling speech (see, for example [Patrick Morrissey, West Virginia Attorney General](#) and [Eric S. Schmitt, Missouri Attorney General](#)).
- 3.19 Some law firms recommend additional guidance on materiality in lieu of further disclosure rules (for example, [Morrison & Foerster LLP](#)).

NGOs/Third Sector

- 3.20 This is a broad category, and encompasses a wide range and variety of responses. Some NGOs appear to have specific aims in mind, and 'piggyback' on the SEC request for comments on climate change disclosures to air views on these aims (for example, a number of comments request that the SEC require issuers to disclose whether they have received political donations).
- 3.21 NGOs / Third Sector Organizations which are in favor of SEC rulemaking are more common than those which are against. However, many of these state their support in general terms, rather than dealing with specific points of law or investor preference.
- 3.22 NGOs / Third Sector Organizations which are against SEC rulemaking generally focus their arguments on the need for disclosures and the authority of the SEC to promulgate disclosure requirements. These commonly argue that the SEC is straying into political territory, and has no mandate to operate thus. Less commonly, these NGOs argue that climate science is unfounded (either completely, or that anthropogenic climate change is unproven), or that taking action on climate change is unsupported (for instance, arguing that the benefits of fossil fuels outweigh the costs of climate change). Examples of such arguments include those by the [Natural Resources Defense Council](#), and [The Heritage Foundation](#).

- 3.23 First Amendment concerns are also raised in opposition to any proposed rulemaking, including in comments by the [Competitive Enterprise Institute](#), and [Americans for Prosperity](#).

Politicians

- 3.24 This is a small category comprising members of congress, senators and representatives. There are four commentors, three of which are in favor, and one against.

- 3.25 The arguments against are advanced by various members of congress ([French Hill, Member of Congress, et al.](#)). They argue that the SEC has not followed the process required by the Administrative Procedures Act (see also comments from [American Fuel Petrochemical Manufacturers](#), and [Americans for Prosperity](#)).

- 3.26 Arguments in favor are focused on the adequacy of the current disclosure regime to provide adequate information for investors (see [Elizabeth Warren, United States Senator and Sean Casten, United States Representative](#) and [Brian Schatz, U.S. Senator and Sheldon Whitehouse, U.S. Senator](#)).

Professional organizations

- 3.27 This category comprises organizations which act as professional membership bodies or other organizations of individual workers. It contains groups such as the American Retirement Association (membership of which contains actuaries and pensions advisers) and the Society of Corporate Governance (membership of which contains general counsel and in-house attorneys). 18/24 are in favor of increased disclosures, and 6/24 are against.

- 3.28 A majority of comments in this category are focused on the materiality standard, and request that the SEC retain this standard. This is the case regardless of whether the commentor is in favor or against new disclosure rules – in the former case see comments by [Business Roundtable](#) and [Financial Executives International](#); in the latter, see comments by [Society for Corporate Governance](#) and [Committee on Securities Law of the Business Law Section of the Maryland State Bar Association](#).

Standards bodies

- 3.29 These commentors are generally standard setters of voluntary climate disclosure frameworks. These comments either take the form of providing information to the SEC to assist them in their own rulemaking, or recommend that their standards are incorporated into any eventual rulemaking. For example, [SASB](#) proposes that its standards are adapted by the SEC, and that it would be a good choice for a third-party standard setter.

- 3.30 This category also contains a comment by the [American Petroleum Institute](#), which argues that the fact that many organizations in the petroleum sector use voluntary standards indicates that there is no need for mandatory disclosures.

Trade associations

- 3.31 This is a broad term, designed to capture groups of corporates. The degree of organization and the size of the association may vary significantly.

- 3.32 The views expressed by trade associations vary depending on the entities which comprise their membership. Generally, these views are more reticent to support new disclosure rules than those expressed by individual corporates. Perhaps reflecting this, a greater number of commentors in this category expressed neutral views (25/50 in favor, 10/50 against, and 15/50 expressing a neutral view).

3.33 For example, the [American Gas Association](#), which is against new disclosures, argues that these are not required as compliance with voluntary standards has led to sufficient material information being disclosed to the market. However, the [National Association of Manufacturers](#), which states that it supports a principles-based disclosure regime, is keen to emphasize its view that any new disclosure regime should be limited to material information, should be flexible and should not stray into policy areas.

4 Canadian entities

4.1 Canadian entities have submitted or signed on to six comments. The Canadian entities which have submitted their own comments are:

- A) The [Canadian Coalition for Good Governance](#). The CCGG notes recent developments concerning the Canadian disclosure regime, and states its support for TCFD-aligned disclosures, as well as its *prima facie* support for ISSB standards. The CCGG recommends using SASB's standards as a method of identifying material information.
- B) The [Canadian Bankers Association](#). The CBA requests that dual-listed issuers be permitted to disclose in accordance with the laws of their jurisdictions of incorporation. The CBA supports climate change disclosures, but states that they should be limited to material information, and subject to safe harbor provisions.
- C) The [Canada Pension Plan Investment Board](#). The CPP Investment Board states that it requires consistent, comparable and accurate information on climate change-related risks. It also states that scope 1 and scope 2 emissions should be disclosed.
- D) The [Pension Investment Association of Canada](#). The PIAC states that it is within the scope of the fiduciary duties of its members to consider climate change risk. The PIAC states that *"Specifically, investors need information that allows them to understand the financial implications of climate change on a company's business model, how management and the board is overseeing this risk, and allows them to assess how companies are measuring and monitoring their Scope 1, 2 and 3 emissions."*

4.2 Canada's ten largest pension plan investment managers (Alberta Investment Management Corp.; BCI; CDPQ; Canada Pension Plan Investment Board; Healthcare of Ontario Pension Plan; Investment Management Corporation of Ontario; OMERS; OPTrust; Ontario Teachers' Pension Plan; and Public Sector Pension Investment Board) have submitted a [comment](#). This comment supports the SEC's proposed rulemaking, and recommends moving beyond a principles-based approach and leveraging the recommendations of the TCFD. The pension plan investment managers also state that their ability to fulfil their mandates requires increased transparency on climate change risks.

4.3 Finally, the Canada Post Corporation Pension Plan is a signatory to the UN Principles for Responsible Investment [comment](#), which supports standardized, mandatory disclosure of ESG data.

About the Commonwealth Climate and Law Initiative (CCLI)

The CCLI is a legal research and stakeholder engagement initiative founded by Oxford University Smith School of Enterprise and the Environment, ClientEarth and Accounting for Sustainability (A4S). We are a UK non-profit organization funded by environmental philanthropy and research grants.

We apply existing company law to climate risk in order to drive a rapid and orderly transition towards a net zero carbon economy. We examine the legal basis for directors and trustees to manage and report on climate change-related risk and climate mitigation. Our legal research is at the forefront of the intersection of climate and biodiversity risks under existing companies and securities laws. We commission legal opinions from independent experts within a jurisdiction to build the authoritative evidence base on which to shift mainstream understanding of the requirements of corporate and securities laws to nature crises. We convene conferences, host webinars and stakeholder events to disseminate our findings and build capacity across the corporate, regulator and civil society ecosystem. Our approach is outcome-focused and evidence-led. We have partnered with world-leading behavioral science consultancy Influence at Work to undertake research on the role that psychology plays in understanding how boards engage with the subject of climate change in the boardroom.

We collaborate with leading organizations, such as the World Economic Forum, the Law Society of Singapore, and CD Howe.

Our Canadian partner, the [Canada Climate Law Initiative](#), convenes more than 60 experts to educate Canadian boards on climate change under the Canadian Climate Governance Experts project. They also provide an online knowledge hub for climate risk and sustainable finance resources.

More information [here](#).