



Commonwealth  
Climate and  
Law Initiative

A photograph of the Washington Monument in Washington, D.C., silhouetted against a vibrant sunset sky. The monument is the central focus, with its reflection visible in the water of the reflecting pool in the foreground. The sky transitions from a deep orange near the horizon to a pale blue at the top. In the background, the silhouettes of other buildings and trees are visible against the bright sky. A thick orange vertical bar runs along the right edge of the image.

**Review of public comments to US Securities and  
Exchange Commission regarding the proposed rule  
for climate change disclosures**

## Summary of review of public comments to US Securities and Exchange Commission regarding 'The Enhancement and Standardization of Climate-Related Disclosures for Investors' proposal

### 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**) by companies, trade associations, lawyers and law firms, academics, and other organizations in response to its request for comments in respect of its proposal on climate change related disclosures, '[The Enhancement and Standardization of Climate-Related Disclosures for Investors](#)' (the **Proposal**).
- 1.2 The purpose of the review was to identify prudential and, in particular, legal arguments made in the submissions in favor of and against the Proposal. Each comment published by the SEC as of 14 July 2022 has been reviewed by a team of law students and coded to identify:
  - A) The type of commentator;
  - B) Whether the commentator is generally 'For', 'Against' or 'Neutral' on the SEC's proposed climate-related financial disclosures (such categorization necessarily involves a degree of simplification; for example, an entity may have supported the Proposal generally, but had a number of criticisms of elements of the proposed rules); and
  - C) The type of argument(s) or issues raised by the commentator.
- 1.3 In order to streamline the review process and in an effort to capture the most relevant comments to the particular issues which were the focus of this review, individual commentators unaffiliated with interested organizations have been excluded from the review. The universe of reviewed comments consisted of all those from academics, asset managers and investment companies, institutional asset owners, companies, financial institutions, investor coalitions, lawyers and law firms, NGOs and third-sector organizations, politicians, professional organizations, regulators, standards bodies, trade associations, and other interested entities.
- 1.4 The review focused on three kinds of arguments: those relating to the SEC's authority to promulgate the Proposal; materiality; and Scope 3 emissions. This approach aligns with the expertise of the CCLI, and is not intended to overlook the importance of other arguments that have been raised in response to the Proposal.
- 1.5 The SEC's consultation period concluded on 17 June 2022, and comments published to the SEC website after this date have not included in the results discussed below. This version of the report summarizing the findings of the review was published on 5 September 2022.
- 1.6 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. Where specific entities are referenced, this is done by way of example only.
- 1.7 This document has been prepared by the Commonwealth Climate and Law Initiative (CCLI) for research and educational purposes only. This document is not, and is not intended to be, legal advice. The CCLI, its founders, and partner organizations 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

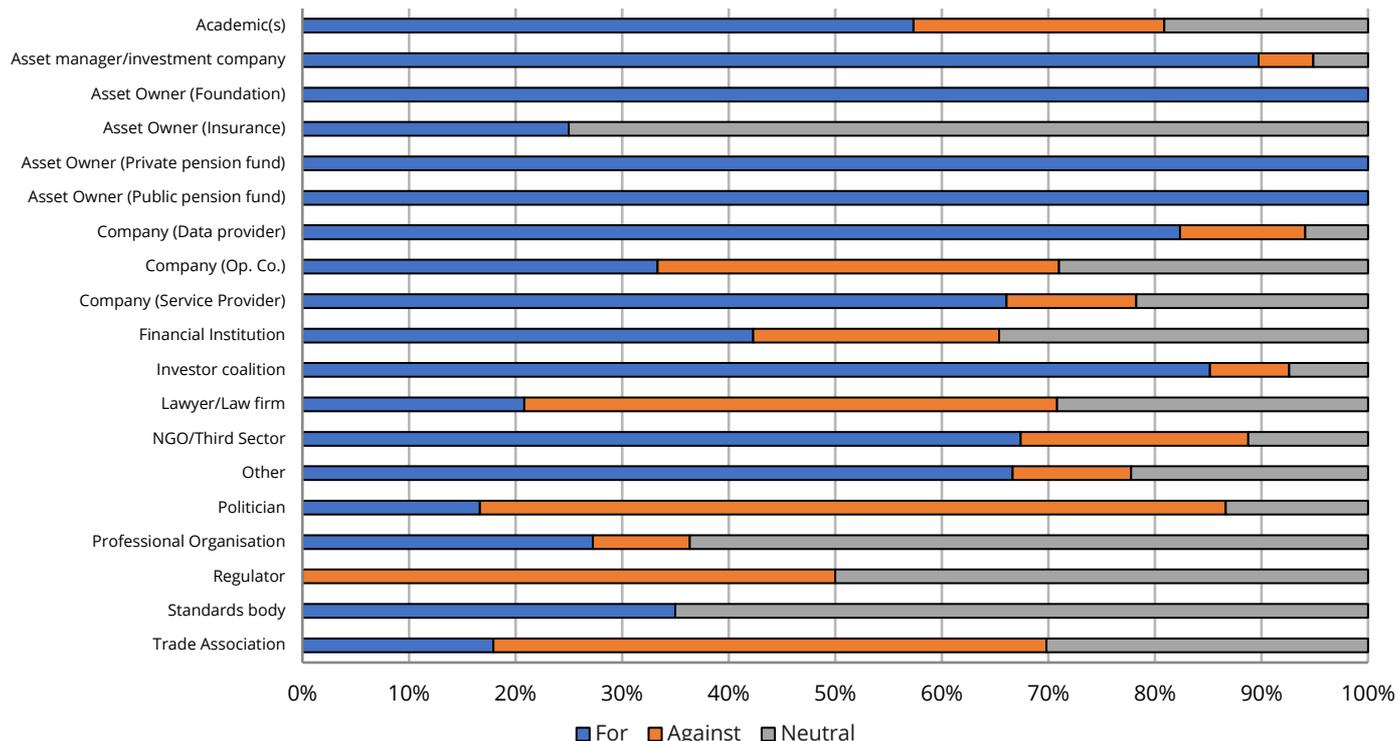
free from errors and omissions, this document should not be, and is not intended to be, relied upon for any purposes and readers are advised to conduct their own research and analysis and obtain their own legal advice.

## **2 General findings and methodology**

- 2.1 The majority of non-individual, substantive comments submitted are in support of the SEC's proposed rulemaking; of a total of 1,056 such comments submitted as of 17 June 2022, 528 are in favor, 284 are against, and 226 are neutral. (In addition to some duplicate submissions, the remainder of the non-individual comments on the Proposal simply requested an extension in the comment period and were thus not categorized as for, against, or neutral).
- 2.2 It should be noted that the degree to which each commentator is in favor of or against further disclosure varies; for example, many commentators expressed support for the rule with no changes, while many others expressed support for the Proposal in general but requested changes, such as more or less stringent disclosure requirements with respect to Scope 3 emissions or stronger materiality qualifications for various requirements set forth by the Proposal. Similarly, many commentators fully opposed the Proposal, while many others expressed opposition by stating that the Proposal should not go into effect until certain recommended changes were made. Other commentators simply stated alterations they would like to see made to the Proposal. Where commentators recommended changes without stating or clearly adopting a position on the Proposal generally, or wrote to highlight certain information for the SEC without taking a position on the Proposal, the comments were coded as Neutral.
- 2.3 The highest number of non-individual comments (228) were from trade associations. Trade associations were generally against or neutral on the Proposal, with just 38 expressing support. Trade associations most often argued that: (i) the Proposal's Scope 3 emissions requirements should be made less stringent or abolished altogether; and that (ii) the Proposal should require disclosures only of material climate-related information rather than require any disclosures without respect to materiality.
- 2.4 The next highest number of comments came from NGO/Third Sector organizations (which encompasses think-tanks), the vast majority of which (120 out of 178) supported or took a neutral position on the Proposal.
- 2.5 Operating companies were relatively evenly split, while asset managers and "service provider" companies such as accountants, software firms, and consulting companies strongly supported the Proposal in general.
- 2.6 Most substantive comments, irrespective of their support for, neutrality on, or opposition to the Proposal, were in favor of adapting or adhering fully to an existing, internationally recognized framework as the basis for US climate-related financial disclosure requirements, to the extent such requirements are ultimately promulgated. The most frequently referenced frameworks in this regard were the TCFD framework, on which the Proposal is substantially based, the SASB standards and the ISSB standards (while these have currently only been issued in draft, a number of commentators stated that the SEC rule should allow alignment with any ISSB framework).

2.7 The position of each type of commentator as classified is shown in the chart below.

Breakdown of position by type of commentator



### 3 Types of commentator

3.1 This section summarizes some general arguments used by and in relation to the key groups of commentators. It does not cover each category of commentator, 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 Academics frequently commented on legal arguments regarding the SEC's authority to promulgate climate change-related financial disclosures, or the need for such disclosures. Of 68 academic commentators, 39 were in favor of the Proposal, with 16 against and 13 neutral.

3.3 Academics supportive of or neutral toward the Proposal raised arguments defending the SEC's legal authority to promulgate it, across a number of different areas of law. For example, a group of [six law professors led by Prof. Rebecca Tushnet \(Harvard Law School\)](#), [Professor Sarah Haan \(Washington and Lee University\)](#), as well as a group of legal scholars at the [Knight First Amendment Institute](#), argue that the disclosures required under the Proposal may not fall within the scope of the First Amendment to the United States Constitution, and to the extent they would, the SEC would not be precluded from requiring them by the First Amendment. Expressing a contrary view, a group of academics with lead author [Prof. Lawrence A. Cunningham \(George Washington University\)](#) argue that the Proposal may compel speech on climate change as a political issue, contrary to the First

Amendment (see also, for example, comment by [Associate Prof. J.W. Verret \(George Mason University Antonin Scalia Law School\)](#)).

- 3.4 A large group of academics and former securities law officials labeled the "[Working Group on Securities Disclosure Authority](#)" concludes that "*there is no legal basis to doubt the Commission's authority to mandate public-company disclosures related to climate,*" though the group does not take a position on the policy wisdom of the particular disclosure requirements embodied in the Proposal.
- 3.5 Other academic commentators raised arguments regarding the materiality of the proposed disclosures and the costs and benefits they would impose and produce. For instance, [Prof. Amanda M. Rose](#) argues that the SEC should clarify its view of materiality and the definition of the "reasonable investor" in the context of climate-related disclosures, and consider litigation risk arising to issuers out of securities fraud class actions in a more fulsome fashion. Relatedly, [Prof. Daniel A. Taylor](#) of the Wharton School argues that statistical evidence from the public markets shows that the markets do not in fact consider greenhouse gas (GHG) emissions to be material investment considerations.

#### *Asset managers / Investment companies*

- 3.6 Asset managers and investment companies are overwhelmingly supportive of increased disclosures (105/117). In particular, a number of asset managers with a particular ethical focus (such as faith-based investing organizations or ESG-focused entities) generally supported the rule. A typical example of this kind of comment comes from [the Unitarian Universalist Association and the Unitarian Universalist Common Endowment Fund, LLC](#).
- 3.7 Generally, submissions in support of increased climate change disclosures state that current disclosures are insufficient to meet their requirements as investors. A few, such as [Amalgamated Financial Corp.](#) also stated that they need increased disclosures in order to meet their fiduciary obligations.
- 3.8 Commonly, these commentators 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). Commentators frequently 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](#)).
- 3.9 Submissions commonly support leverage of existing disclosure frameworks, in particular focusing on materiality, as defined by the US Supreme Court, as a benchmark.
- 3.10 Asset managers and investment company commentators also often commend the SEC's alignment with existing voluntary frameworks (mostly the TCFD recommendations) to assist with the comparability of disclosures, and sometimes request even greater alignment or continued evolution of alignment on this front. For example, [Breckinridge Capital Advisors](#) commends the SEC on the Proposal's alignment with the TCFD framework and argues that, moving forward, the SEC should ensure alignment with ISSB standards.
- 3.11 Institutional asset owners and investor coalitions, which are categorized separately, are generally similar in their approach to asset managers, with 21 of 24 institutional asset owner commentators supporting the Proposal and 23 of 27 investor coalitions doing so.

### *Companies*

- 3.12 Companies were split into three categories in the review: 'operating companies' (such as public utilities, airlines, chemical makers, etc.), 'service providers' (such as accountants, consultants, and software firms), and 'data providers'. Operating companies were quite evenly split on the Proposal, with 46/138 in favor, 52/138 against, and 40 neutral.
- 3.13 Some, like the oil company [Continental Resources](#), argued that the Proposal goes beyond the SEC's statutory and constitutional authority and that current disclosure requirements are sufficient to elicit material climate-related information. Others, like [Wal-Mart](#), argued that the Proposal may be well-intentioned but too-greatly departs from traditional securities law regulation to elicit comparable and useful disclosures, and would impose substantial costs. Still others, like [BP America, Inc.](#), supported the Proposal and requested additional clarification as to the operation of some of its key provisions. In the oil and gas sector, many companies based outside the US support the Proposal, while most based in the US were neutral or opposed, with larger US companies like [Exxon Mobil](#) tending to take a moderate approach and recommending concrete changes in the Proposal while highlighting their own efforts on climate and sustainability.
- 3.14 Generally, corporates recommend that the Proposal:
- A) Be more deeply rooted in the traditional materiality standard, rather than categorically requiring disclosures across various categories of emissions and in other areas;
  - B) Be phased in gradually, often with a request for a delayed implementation timeline;
  - C) Be subject to robust safe harbor provisions, particularly with respect to Scope 3 emissions;
  - D) Do away with or substantially alter the requirements to add climate-related financial metrics to issuers' audited financial statements as part of the annual Form 10-K, which as written is based on a 1% financial impact threshold for each line item;
  - E) Be less stringent with respect to Scope 3 emissions requirements, which they frequently argue will impose extremely high costs without commensurate benefits;
- 3.15 In contrast to operating companies, companies providing data and accounting, engineering, consulting, and other services generally supported the Proposal, with 15 of 18 data providers in support and 78 of 118 services providers in support. These companies raised a wide array of arguments with respect to the rule. Some, like [Deloitte & Touche LLP](#), provided detailed suggestions about how the SEC might make the rules more practicable based on their experiences of the current capabilities and goals of operating companies. A number of companies in the carbon and environmental credits industries, such as [Alder Metrics LLC](#), raised questions and recommendations pertaining to definitions and disclosures regarding renewable energy credits and carbon offsets.

### *Lawyers/law firms*

- 3.16 This category contains law firms and practicing lawyers. These comments often focused on the SEC's legal authority to promulgate disclosures as well as interests and considerations specific to certain categories of issuers. Most lawyers and law firms opposed the Proposal, with 12 against, 5 in favor and 7 neutral.
- 3.17 Many attorney comments focus on the extent to which climate change disclosures are material. Most lawyers, even those against the proposal, did not argue that the SEC does not have the authority to compel *any* non-material information, but many did argue that: (i) material disclosures are sufficient to achieve the SEC's goals in the Proposal, and (ii) the specific disclosure scheme set forth in the Proposal (including its aspects not limited to materiality) was so broad and expensive as to be outside

the SEC's statutory authority, particularly in light of the U.S. Supreme Court's recent decision in *West Virginia v. EPA*. [Sullivan & Cromwell LLP](#) provides a good example of the former kind of argument, while a [coalition of state Attorneys General led by Ken Paxton of Texas](#) well exemplifies the second. Still others, like a [coalition of Attorneys General led by Rob Bonta of California](#), argued the opposite, in line with many academic commentators.

- 3.18 Many lawyers and law firms recommend curtailing the Proposal in significant respects based on the burden the disclosures would impose on companies. Scope 3 emissions were a particular target in this regard, with 10 of 27 attorney commentators arguing that Scope 3 disclosures should be further limited or eliminated.

#### *NGOs/Third Sector*

- 3.19 This is a broad category, and encompasses a wide range of types of organizations and a wide variety of responses. Of 178 NGO/Third-sector commentators, 120 were in favor of the Proposal, 38 were against, and 20 were neutral.
- 3.20 Many of the NGO and third sector commentators have an environmental mission. Most of these commentators supported the Proposal, some without changes (for instance, the [Nature Conservancy](#)), while some requested that the SEC go further and require more stringent emissions disclosures and other disclosures. For example, [Friends of the Earth](#) argued that Scope 3 emissions disclosures should be mandatory without respect to materiality, and that disclosures related to industrial impacts on Indigenous peoples and frontline communities should also be required (which was also an argument made separately by a number of asset managers). However, third sector commentators were by no means homogenous. Some, such as the [American Enterprise Institute](#), argued that the rule represented a major regulatory overreach.

#### *Politicians*

- 3.21 This is a small category comprising members of congress, senators and representatives, as well as state-level and local elected officials. Most Politician commentators (21 of 31) opposed the Proposal, with 5 in favor and 4 neutral.
- 3.22 Arguments raised by commentators in this category include: concerns regarding the cost of complying with the proposed rules, especially in relation to small companies (see, for example, comments by the State Treasurers of [Pennsylvania](#) and [Missouri](#)); the necessity of the Proposal in light of the SEC's 2010 [guidance](#) on material climate change disclosures (see, for example, the comment by [Governors of Utah, Alabama, Alaska, Arizona, Arkansas, Idaho, Iowa, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, South Dakota, Texas and Wyoming](#)); the extent of investor demand for climate-related disclosures (see, for example, the comment by [Representatives and Senators of Kansas](#)); and the statutory authority of the SEC to promulgate the rules in the Proposal (see, for example, comments by [John Ashcroft, Secretary of State of Missouri](#), and by [129 Members of Congress](#), headed by Republican Leaders Patrick McHenry and Cathy McMorris Rodgers).

#### *Professional organizations*

- 3.23 This category comprises organizations which act as professional membership bodies or other organizations of individual workers. It contains groups such as the [American Academy of Actuaries](#),

the [Society of Corporate Governance](#) (membership of which contains general counsel and in-house attorneys), and the [National Association of Bond Lawyers](#). Most professional organizations maintained official neutrality on the Proposal and provided substantive recommendations based on their areas of expertise.

- 3.24 Many comments in this category are focused on the materiality standard, and request that the SEC retain the standard set by the US Supreme Court.

#### *Standards bodies*

- 3.25 These commentators are generally standard setters of voluntary climate disclosure frameworks or other forms of international standards. Of 20 such commentators, 13 were neutral on the Proposal, with 7 for it and none against it. These comments generally 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 instance, the [Global Reporting Initiative](#) highlighted developments in European climate-related financial reporting and suggested the SEC formally adopt a “double materiality” standard in the Proposal.

#### *Trade associations*

- 3.26 This is a broad term, designed to capture groups of corporations and businesses. The degree of organization and the size of the association may vary significantly.
- 3.27 The views expressed by trade associations vary depending on the entities which comprise their membership. Generally, trade associations were against the Proposal (112 of 216) or neutral toward it (65 of 216), and were generally more stringently opposed to the Proposal than individual companies.
- 3.28 Arguments raised by trade associations included limitations of the SEC’s authority, in particular in respect of materiality (see, for example, the comment by the [American Petroleum Institute](#)); criticisms of the SEC’s approach to the standard of materiality in the Proposal (see, for example, the comment by the [American Investment Council](#)); and the costs and administrative burdens of reporting in line with the Proposal, in particular regarding the Scope 2 and Scope 3 emissions disclosures (see, for example, the comment by the [American Public Power Association](#)).
- 3.29 Some argued that the SEC had not conducted an adequate cost-benefit analysis to legitimize the Proposal under the Administrative Procedure Act. Many trade associations for smaller companies, including many representing non-public companies, argued that the Proposal’s Scope 3 disclosures would adversely affect such private companies via the informational requirements of public companies with whom their members do business, and argued that the SEC should protect small businesses by limiting Scope 3 requirements.

#### *International entities*

- 3.30 Many foreign private issuers, international banks, and other non-US entities commented on the Proposal. The most common argument raised by these entities concerned the possible proliferation of differing international standards and strongly supported maintaining a consistent disclosure regime across countries to lower the burden on complying entities. In particular, many Canadian entities voiced support for allowing Multijurisdictional Disclosure System entities to be deemed compliant with any final US rule via compliance with substantially similar Canadian rules. The letter submitted by [Sun Life](#) provides a good example of this pattern.

## 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](#).