Professor Becky Jacobs' Comments on Dean Anderson's Presentation

I'll go quickly. As all know, ESG-related topics have been the subject of many conferences as well as countless articles and studies across disciplines, including law, economics, business, and the social sciences. However, since I only have 5 minutes, I have decided to abandon any attempt at profundity and will focus more on data to respond to the questions that Dean Anderson raised concerning the SEC's Proposed Climate-Related Disclosures Rule.[1]

I'm going to frame my remarks by saying that the SEC's proposed rule is largely an exercise in standardization at this point. According to one analysis, 96.9% of the 100 largest U.S. companies by revenue discussed ESG policies to some degree in their proxies in 2022,[2] and, in 2021, 86% of S&P 500 firms issued some kind of ESG-related report.[3] They did this in response to market interest in ESG initiatives by retail and institutional investors, fund managers, public and private corporate entities, non-profits, and asset owners. Sources report that, as of July 2021, over 6,000 investors, including asset managers and financial firms, had over $30 trillion of sustainable investments, over one-quarter of the total global assets under management. [4] That is, a

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[1] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pt. 210, 229, 232, 239, and 249) [hereinafter SEC's Proposed Climate-Related Disclosures Rule].

[2] Amit Batish, *ESG Disclosure Prevalence Soared in 2022*, EQUILAR (Feb. 27, 2023), https://www.equilar.com/blogs/552-esg-disclosure-prevalence-soared-in-2022 [https://perma.cc/LH95-8Z5Q].

[3] Rachel Layne, *Are Companies Actually Greener—or Are They All Talk?*, HARV. BUS. SCH. WORKING KNOWLEDGE (Jan. 13, 2023), https://hbswk.hbs.edu/item/are-companies-actually-greener-or-are-they-all-talk-esg-greenwashing [https://perma.cc/NYS3-4JE5].

[4] *See, e.g.*, GSIA Resources and Research, GLOB. SUSTAINABLE INV. ALL., https://www.gsi-alliance.org/members-resources/ [https://perma.cc/PX7P-LJYD] (reporting on the Global Sustainable Investment Alliance, with assets under management in the ESG sector that topped $30 trillion in 2020); *see also* SEC's Proposed Climate-Related Disclosures Rule, *supra* note 1, at 21340–41 (mentioning briefly the Net Zero Asset Managers Initiative, with 128 signatories that manage $43 trillion in assets; the investor-led Climate Action 100+, with 617 global investors managed more than $60 trillion in assets; the Glasgow Financial Alliance for Net Zero (GFANZ), with 450+ financial firms from 45 countries responsible for assets of over $130 trillion; the 630 investors managing more than $37 trillion: signed the Global Investor Statement to Governments on Climate Change; the 733 global institutional investors with more than US $52 trillion in assets that signed the Investor Agenda's 2021 Global Investor Statement to Governments on the Climate Crisis; and the over 4,000 signatories managing assets of $120+ trillion signed the UN Principles for Responsible Investment ("PRI")); Veronika Henze & Samantha Boyd, *ESG May Surpass $41 Trillion Assets in 2022, but Not Without Challenges, Finds Bloomberg Intelligence*, BLOOMBERG (Jan. 24, 2022),

significant segment of the market. It cannot be ignored, and it is not going away no matter the sound and fury coming from detractors and skeptics.

Investors in sustainable investments complain that the existing U.S. market for ESG financial instruments is highly inefficient because investors lack consistent, comparable, and reliable data on which to evaluate a company's climate-related risks. The numerous third-party (and primarily voluntary) reporting frameworks[5] and commercial, third-party ESG ratings providers[6] that evolved to satisfy this demand, however, rely upon different methodologies and varying interpretations of ESG performance to collect, measure, produce their data, making comparisons difficult and producing results that often are inconsistent and unreliable.[7]

Dean Anderson acknowledges that the SEC already requires some climate-related disclosures and appears to be satisfied that, thereunder, firms have the discretion to "uniquely assess how they will uniquely be affected by what they anticipate [regarding 101, 105, and 303-related climate risks],"[8] all while the Dean also questions the SEC's authority to promulgate the new rule. Others, however, are not as sanguine about the current state of regulatory

https://www.bloomberg.com/company/press/esg-may-surpass-41-trillion-assets-in-2022-but-not-without-challenges-finds-bloomberg-intelligence/ [https://perma.cc/TS9E-V9V7].

[5] These include the CDP (formerly the Carbon Disclosure Project); the Climate Disclosure Standards Board (CDSB); the Global Reporting Initiative (GRI), the International Integrated Reporting Council (IIRC); the GHG Protocol's Corporate Accounting and Reporting Standard; the Value Reporting Foundation (formed from a merger of the Sustainability Accounting Standards Board (SASB) and the International Integrated Reporting Council (IIRC); and the Task Force on Climate-Related Financial Disclosures (TCFD). SEC's Proposed Climate Related Disclosures Rule, *supra* note 1, at 21341, 21344; *see also* Brian Tayan, *ESG Ratings: A Compass without Direction*, HARV. L. SCH. F. ON CORP. GOV. (Aug. 24, 2022), https://corpgov.law.harvard.edu/2022/08/24/esg-ratings-a-compass-without-direction/ [https://perma.cc/WG8N-JUAJ].

[6] *See* Tayan, *supra* note 5. Ratings providers include MSCI, formerly a subsidiary of Morgan Stanley; ISS ESG, a subsidiary of a large proxy advisory firm; Sustainalytics, owned by Morningstar; Refinitiv, a subsidiary of the London Stock Exchange Group; the FTSE Russell, also owned by the London Stock Exchange Group; RobecoSAM, owned by S&P Global; Vigeo Eiris, owned by Moody's Investor Services; and TruValue Labs, owned by FactSet Research.

[7] Florian Berg et al., *Aggregate Confusion: The Divergence of ESG Ratings*, 26 REV. FIN. 1315, 1317, 1319–20 (2022).

[8] *See* Dean Anderson, *Dean Anderson's Presentation: "Weighting the Costs of, and Authority for, a Mandatory Climate Disclosure Regime"*, 25 TENN. J. OF BUS. L. 463, 466 (2024).

affairs, and many market participants, again including asset managers, retail and institutional investors, and other financial institutions are broadly supportive of the SEC's Proposed Climate-Related Disclosure Rule, only objecting to various of its technical aspects, in particular those pertaining to Scope 3 emissions.[9] Numerous securities law experts, including UT's own Joan Hemingway, Rick Rose Distinguished Professor of Law, disagree with the Dean's conclusions regarding the SEC's authority, asserting confidently that the agency has clear statutory authority in this sphere and that the proposal was consistent therewith and with judicial interpretations of the securities law.[10] Their contention is that the proposed rule is well within the

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[9] *See, e.g.*, United Airlines, Comment Letter on Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investor (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132197-302713.pdf ("The inclusion of these 'value chain' concepts in the Proposed Rules would require registrants to analyze and factor into their reporting controls the climate-related risks of third parties and disclose information that they do not control or may not be able to reasonably assess. In addition, even obtaining the necessary data would be challenging as, for example, a third party may not be willing to disclose the information required by the Proposed Rules to a registrant for competitive purposes."). Note, however, that disclosure of Scope 3 emissions already are, or will be, mandated elsewhere: "[M]ultiple jurisdictions, foreign and domestic, have adopted, or are considering adoption of, emission disclosure regulations that compel monitoring, verification, and public disclosure of Scope 1, Scope 2, and Scope 3 emissions. In several instances, these regimes compel disclosures that are more expansive than those described in the Proposing Release. They also propose verification obligations that are comparable to or more stringent than those described in the Proposing Release." Devon S. Wilson, Comment Letter on Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors (Sept. 6, 2023), https://www.sec.gov/comments/s7-10-22/s71022-255859-594402.pdf; *see also*, FIN. CONDUCT AUTH., PROPOSALS TO ENHANCE CLIMATE-RELATED DISCLOSURES BY LISTED ISSUERS AND CLARIFICATION OF EXISTING DISCLOSURE OBLIGATIONS (Dec. 2020), https://www.fca.org.uk/publication/policy/ps20-17.pdf [https://perma.cc/A7BE-WK9F].

[10] Working Group on Securities Disclosure Authority on Climate-Related Disclosures for Investors, Comment Letter on Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors (June 16, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131670-302060.pdf ("The Working Group on Securities Disclosure Authority respectfully submits these comments on the Commission's recent proposal related to mandated, standardized climate-related disclosures for investors. We write to make clear the view among experts in securities law that [the SEC] has statutory authority to promulgate disclosure rules in this area."); Jill E. Fisch et al., Comment Letter on Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors (June 6, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf ("Accordingly, we are unanimous in our conclusion that the Commission has the statutory authority to promulgate climate-related disclosure rules of

SEC's statutory remit to address investor concerns by providing access to more efficient valuation of ESG securities and capital formation with more consistent, comparable and reliable climate-related risk disclosures, which is one of the agency's stated goals for this proposed rule.[11]

There certainly are those in politics, in the business community, and in the academy who contend, like the Dean, that the rule "is not within the SEC's mission to protect investors, maintain orderly and efficient markets, and facilitate capital formation"[12] and that it requires the disclosure of information that is immaterial to a reasonable investor. These criticisms appear designed to turn back what already is taking place in the market. Given the sheer volume of investors calling for regulatory intervention and commenting favorably overall on the proposed SEC rule, arguments that purport to predetermine materiality for "the reasonable investor" in the rule seems misplaced. Substantial numbers of investors have made that decision and are speaking for themselves, both in their comments and with their investments.

Dean Anderson also refers to those in opposition who argue that the SEC's Proposed Climate-Related Disclosures Rule compels speech in violation of the First Amendment. However, noted Constitutional scholars soundly rejected this argument, noting that regardless of one's normative position on the causes of climate change and how to respond thereto, the data that the

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the kind currently under consideration."). *But see* Lawrence A. Cunningham et al., Comment Letter on Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors (Apr. 25, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132133-302619.pdf ("The undersigned, a group of professors of law and finance, are concerned that the SEC's recent proposal to impose extensive mandatory climate-related disclosure rules on public companies (the 'Proposal') exceeds the SEC's authority. In addition, rather than provide 'investor protection,' the Proposal seems to be heavily influenced by a small but powerful cohort of environmental activists and institutional investors, mostly index funds and asset managers, promoting climate consciousness as part of their business models.").

[11] *See* SEC's Proposed Climate-Related Disclosures Rule, *supra* note 1, at 21347.

[12] Kevin Cramer et al., Comment Letter on Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors (Apr. 5, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131192-301362.pdf; *see also* Patrick McHenry, Comment Letter on Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors (June 15, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131300-301417.pdf.

SEC's disclosure requires includes facts that do not become controversial simply because they "can be tied in some way to a controversial issue[.]"[13] Regardless of one's position on climate change,[14] I hope that everyone can agree that firms should compete for investor capital based upon transparent and complete information. However, much of the data that purports to document the ESG performance of a wide array and significant number of firms currently lacks consistency, comparability, and reliability.[15]

Dean Anderson raises several other questions: whether the concerns that the SEC is attempting to address in its proposed rule can be accomplished under

[13] Rebecca Tushnet et al., Comment Letter on Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132173-302670.pdf. The First Amendment argument is ironic considering that many of those asserting this argument are among the State Attorney Generals from the thirty-seven states that introduced 165 pieces of legislation to prevent the consideration of ESG criteria in the management of government funds, contracts, and pensions sectors, some of which passed. *See* Connor Gibson & Frances Sawyer, *2023 Statehouse Report: Right-Wing Attacks on the Freedom to Invest Responsibly Falter in Legislatures*, PLEIADES STRATEGY (2023), https://corpgov.law.harvard.edu/wp-content/uploads/2023/07/2023-Anti-ESG-Statehouse-Report-on-legislative-attacks-on-the-freedom-to-invest-responsibly-and-their-opposition-1.pdf [https://perma.cc/W3U9-KP4N] (including contracting bills that blacklist financial institutions engaging in ESG investment then ban state agencies from contracting therewith; bills precluding companies engaged in using ESG criteria from government procurement contracts; or bills banning the use of ESG criteria by private companies as part of risk assessment before lending money, providing insurance, or making procurement decisions). Two of the Texas anti-ESG laws forced five of the largest bond underwriters out of the market there in 2021, and it resulted in an estimated $303 million to $532 million in higher interest payments on municipal bonds.

[14] A 2021 survey of 88,125 climate-related studies reported that more than 99.9% of peer-reviewed scientific papers agree that climate change is mainly caused by humans. According to one paper on the subject, "it's pretty much case closed for any meaningful public conversation about the reality of human-caused climate change." Krishna Ramanujan, *More than 99.9% of Studies Agree: Humans Caused Climate Change*, CORNELL CHRON. (Oct. 19, 2021), https://news.cornell.edu/stories/2021/10/more-999-studies-agree-humans-caused-climate-change [https://perma.cc/9GEQ-4EX7]; *accord* Mark Lynas et al., *Greater than 99% Consensus on Human Caused Climate Change in the Peer-Reviewed Scientific Literature*, 16 ENV. RES. LETTERS 114005, 114010 (Oct. 19, 2021). However, one need not take any position on the policy issues with respect to the SEC's ESG disclosure in order to understand that emissions are an environmental issue, and the SEC has been regulating environmental issues since the mid-70's. *See* Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, Exchange Act Release No. 5627, 8 SEC Docket 73 (1975); 40 Fed. Reg. 51613, 51660–63 (Nov. 6, 1975) (summarizing disclosure provisions adopted in 1973)*; see also* Fisch et al., *supra* note 10.

[15] *See* Tayan, *supra* note 5, at 13.

existing requirements; what a new disclosure requirement would cost, both directly and indirectly; and would the benefits of the requirements outweigh these costs and other risks? It appears that these questions have been answered by many investors in this sector that have publicly called for measures to reduce their exposure to risks, as well as by the high percentage of members of the regulated community that already are mandatorily and voluntarily disclosing their ESG performance in a variety of forms. There is a lack of consistent sets of standards and multiple types and levels of risk, making it challenging for both those disclosing and for investors to evaluate or compare ESG quality.[16]

A crowded field of frameworks and rating services now exists to meet the demand for ESG-related reporting, including climate-related disclosures. I touched upon the mostly voluntary frameworks and rating services,[17] but I also want to just briefly mention the official regulatory landscape. Other dominant capital market jurisdictions and institutions that set standards are ahead of the SEC on the development of climate disclosure standards. Domestically, California's legislature, which governs one of the top five economies in the world, recently passed, and Governor Gavin Newsom signed, the Climate Corporate Data Accountability Act and its companion bill, the Climate-Related Financial Risk Act.[18] Under these bills, both public and private large U.S. businesses operating in California will be required to disclose and verify their full scope GHG emissions and prepare reports on

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[16] *Id.* at 15.
[17] *Infra*.
[18] SB-253, 2023-2024 Leg. (Cal. 2023), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB253&search_keywords=corporate+climate [https://perma.cc/Q446-NMM2]; SB-261, 2023-2024 Leg. (Cal.2023), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB261&search_keywords=Climate-Related+Financial+Risk+Act [https://perma.cc/K3HA-JUT7]. Even some U.S. cities have climate-related reporting laws, such as Cambridge, Massachusetts, which has required large building owners to track, report, and make public annual energy use data. *See* Community Development Department, Building Energy Use Disclosure Ordinance, https://www.cambridgema.gov/CDD/zoninganddevelopment/sustainabledevelopment/buildingenergydisclosureordinance [https://perma.cc/RC43-9D4K].

their climate-related financial risks and their mitigation efforts.[19] Internationally, beginning in 2024, U.S. firms with business in the E.U. will have to report climate-related data pursuant to its 2022 Corporate Sustainability Reporting Directive,[20] and other major capital market jurisdictions outside the U.S.[21] are beginning to require disclosure either directly from issuers or indirectly, by imposing an information gathering and reporting mandate on asset managers.[22] Several comments on the SEC's Proposed Climate-Related Disclosures Rule raise the issue of the plethora of climate disclosure frameworks and urge the SEC to adopt a standard that

[19] *See* SB-253, 2023-2024 Leg. (Cal. 2023), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB253&search_keywords=corporate+climate [https://perma.cc/Q446-NMM2]; SB-261, 2023-2024 Leg. (Cal. 2023), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB261&search_keywords=Climate-Related+Financial+Risk+Act [https://perma.cc/K3HA-JUT7].

[20] *See generally* Council Directive 2021/0104, of the European Parliament and the Council of 16 November 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting, 2022 O.J. (L 322), https://data.consilium.europa.eu/doc/document/PE-35-2022-INIT/en/pdf (requiring certain sized companies that operate in the EU to report sustainability data as specified as perquisite the European Sustainability Reporting Standards (ESRSs)). The CSRD must be distinguished from the EU Corporate Sustainability Due Diligence Directive (CSDDD/CS3D Directive). *See* Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final, https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF (last visited Mar. 17, 2022). The CS3D was first published by the European Commission on February 23, 2022, was intended to harmonize corporate ESG due diligence across EU Member States, and was adopted in a modified form by the EU Council on March 15, 2024. *See, e.g.*, Mark Segal, *EU Council Approves Scaled-Back Environmental, Human Rights Sustainability Due Diligence Law*, ESGTODAY.COM, Mar. 15, 2024, [https://perma.cc/79VZ-G26M].

[21] *See, e.g.*, Regulation Asia, *Japan's FSA to Mandate Climate Disclosures from April 2022*, ESG INVESTOR, (Oct. 11, 2021), https://www.esginvestor.net/japans-fsa-to-mandate-climate-disclosures-from-april-2022/ [https://perma.cc/2WWJ-8M5Q]. Japan revised its Corporate Governance Code in June 2021 regarding sustainability issues, including metrics for evaluating climate-related risks and opportunities such as GHG emissions data.

[22] *See, e.g.*, The Enhancement and Standardization of Climate-Related Disclosures For Investors, Securities Act Release No. 11042, Exchange Act Release No. 94478, Fed. Sec. L. Rep. (CCH) ¶ 83,434 (Mar. 16, 2022).

would align with a more global baseline, such as the International Sustainability Standards Board's (ISSB) Proposed Exposure Drafts.[23]

Regarding the Dean's questions about the costs of compliance associated with the proposed rule, my observation is that the comments on costs diverged wildly, even among those who generally supported the SEC's efforts. On other matters, disagreements focused on specific technical aspects of the proposal, such as the definitional issues regarding, and the difficulty of calculating, Scope 3 emissions. Even some commenters that support the SEC's proposed rule more generally expressed reservations about mandating Scope 3 disclosure.[24] Although time does not permit a more thorough discussion of their reasoning (or of the materiality objections), the reservations pertaining to mandatory Scope 3 emissions disclosures are compelling, more so than objections to the SEC's authority.

To conclude, unless one is arguing that it is preferable to leave a highly inefficient system in place, one that both investors and the regulated community have complained produces inconsistent and unreliable ESG data, it would seem that SEC cannot satisfy the demands of a significant number of its stakeholder investors' needs without some kind of change that standardizes the methodologies "companies apply in disclosing climate-related information."[25] Incomplete and low-quality data impacts market efficiency, capital formation, the overall integrity of U.S. capital markets, and, potentially, the overall competitiveness of U.S. firms. Rather than argue about the SEC's authority or launch First Amendment attacks, it seemingly would be more productive to focus on crafting a Climate-Related Disclosures

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[23] *See, e.g.*, David Oestreicher & Gabriela Infante, Comment Letter on Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors, at n. 4 (June 16, 2022) (citing the Exposure Draft IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information and the Exposure Draft IFRS S2 Climate-related Disclosures). The ISSB is an independent standard-setting body within the International Financial Reporting Standards Foundation. *See* International Sustainability Standards Board, https://www.ifrs.org/groups/international-sustainability-standards-board/ [https://perma.cc/E4E7-4D68].

[24] Lee Reiners & Morgan Smith, *Summary of Comment Letters for the SEC's Proposed Climate Risk Disclosure Rule*, DUKE DEP'T ECON. (Aug. 2022), https://econ.duke.edu/dfe/climate-risk/2022/08/summary-comment-letters-secs-proposed-climate-risk-disclosure-rule [https://perma.cc/ZUG2-VG9U].

[25] *See* SEC's Proposed Climate-Related Disclosures Rule, *supra* note 1, at 21342.

Rule that responds to the commenters' Scope 3 calculation/cost and materiality concerns and that results in a framework that harmonizes domestic and international standards and produces comparable, consistent, and reliable ESG performance data.

These remarks were given in October 2023. Due to the fast-moving nature of this area of law, readers are encouraged to continue independently exploring the additional fluctuations in the law that have occurred since.