

November 9, 2023

The Honorable Gary Gensler
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Chairman Gensler:

The current regulatory agenda of the Securities and Exchange Commission (SEC) indicates the SEC will soon finalize its climate disclosure rule.¹ Putting aside the substantive issues underlying this rulemaking,² the effort to finalize the March 2022 proposal³ is concerning because recent developments should compel the SEC to solicit further public feedback on certain assumptions and the economic analysis underlying its proposal.

In October 2023, California enacted a new law that will require companies with over \$1 billion in annual revenues and that do business in California to publicly disclose – on an annual basis – their Scope 1, 2, and 3 emissions.⁴ These mandates would apply to both publicly-traded and private companies, with disclosures for Scope 1 and 2 being required by 2026 and Scope 3 in 2027. An estimated 5,300 companies would be subject to the new rules.⁵ California enacted a separate law that will require certain companies to provide biennial disclosures regarding climate-related financial risks and steps taken by those companies to reduce climate risks,⁶ estimated to impact more than 10,000 companies.⁷

You have recently acknowledged that the California emissions laws “may change the baseline” and affect how the SEC estimates the costs of compliance and economic impacts of its own climate change disclosure rule.⁸ The interconnectedness of the California requirements and the SEC’s proposal is undeniable: thousands of businesses would end up being subject to *both* the California requirements and the SEC’s rule, if finalized. However, key differences between the two approaches raise significant compliance questions that the SEC should thoroughly review.

¹ See Spring 2023 Unified Agenda of Regulatory and Deregulatory Actions (indicating a final rule to be issued in October 2023).

² See Letter from 12 Senate Banking Committee Republicans to SEC Chair Gary Gensler (June 15, 2022), available at <https://www.sec.gov/comments/s7-10-22/s71022-20133994-303877.pdf>

³ See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022).

⁴ See SB 253, Climate Corporate Data Accountability Act.

⁵ See SB 253 Bill Analysis, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240SB253.

⁶ See SB 261, Greenhouse Gases: Climate Related Financial Risk.

⁷ See SB 261 Bill Analysis, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202320240SB261

⁸ Douglas Gillison, “SEC chief says new California law could ‘change baseline’ for coming SEC climate rule,” Reuters (Sep. 27, 2023), available at <https://www.reuters.com/sustainability/sec-chief-says-new-california-law-could-change-baseline-coming-sec-climate-rule-2023-09-27/>.

For example, under the California emissions laws, all covered entities will be required to disclose Scope 3 emissions by 2027, while the SEC’s proposal would only apply Scope 3 mandates to companies in which such information is material or an issuer has established a greenhouse gas emission reduction goal. In addition, the California State Air Resources Board is required to adopt regulations to implement the greenhouse gas emissions data reporting requirements by January 1, 2025, which would further complicate the ability of companies to come into compliance with two overlapping but differing regimes. Because it is clear that the California laws have “change[d] the baseline” for any further action by the SEC, the SEC should reopen the comment period to solicit public feedback on its assumptions and economic analysis.

The application of the California emissions law to private businesses is also a significant difference from the SEC’s proposal. You have stated on several occasions that the SEC’s proposal is only intended to establish new rules for public companies, notwithstanding the inevitable costs that would fall on thousands of private businesses that are part of a public company’s value chain and would have to produce emissions information.

The only way for the SEC to properly assess these questions in accordance with its obligations under the Administrative Procedure Act (APA) is to reopen the climate disclosure proposal for further public comment. The SEC took a similar step when it reopened the public comment period for its stock buyback disclosure rule in December 2022 after passage of the Inflation Reduction Act, which included an excise tax on stock buybacks.⁹

A general review of the SEC’s proposed Scope 3 mandates – particularly given the enactment of the California emissions laws – is critical. In the 18 months since the climate disclosure proposal was first released, Congress has become increasingly alarmed at the likely true costs of the Scope 3 requirements on small businesses and agricultural producers that the SEC has no authority to regulate. If the SEC cannot justify its costs – or its authorities – on Scope 3 emissions disclosure, the SEC must drop Scope 3 disclosures from the final rule, irrespective of the actions taken by the state of California.

The SEC must not deviate from its tripartite mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation, as well as its longstanding and well-established procedures in furtherance of that mission. Thank you for your attention to these matters.

Sincerely,

Bill Hagerty



Joe Manchin III



⁹ See Reopening of Comment Period for Share Repurchase Disclosure Modernization, 87 Fed. Reg. 75,975 (Dec. 12, 2022).