October 26, 2023

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: **The Enhancement and Standardization of Climate-Related Disclosures for Investors Attention: 87 FR 21334; Docket ID: SEC-2022-06342; File No. S7-10-22**

Dear Ms. Countryman:

On October 7, 2023, California Governor Newsom signed into law three new climate-related disclosure provisions for certain entities doing business in California. Attached is a report published by Americans for Financial Reform Education Fund (AFREF), Public Citizen, and the Sierra Club estimating the overlap between reporting companies under two of these laws and the Commission's proposed climate-related risk disclosure rule.

Using a conservative methodology, the report finds that:

- 75% of Fortune 1000 companies will likely be required to disclose their Scope 1, 2, and 3 greenhouse gas (GHG) emissions pursuant to California SB 253;
- 73% of Fortune 1000 companies will likely be required to disclose their climate risks and strategies pursuant to California SB 261.

Furthermore, although it is outside the scope of the report, a third law, California AB 1305, will require disclosures from certain entities that market, sell, purchase or use voluntary carbon offsets or make emissions-related marketing claims. As with SB 253 and SB 261, the disclosures required by AB 1305 overlap with disclosures that would be required under the Commission's proposed climate-related risk disclosure rule.

The Fortune 1000 is a good proxy for the largest public companies which will be subject to the Commission's proposal.[1] For at least 75% of these companies, which are likely covered by SB

[1] Our study focuses on Fortune 1000 companies with stock tickers, which covers the large majority of the total list (969 entities). It excludes the 31 entities without stock tickers from the count of overlapping firms but not from the full count of Fortune 1000 companies for purposes of our calculated percentages. A full description of our methodology is contained with the attached report. According to the SEC, approximately 5,248 exchange-listed companies are subject to its disclosure rules for public companies. https://www.sec.gov/strategic-plan/about. Fortune 1000 companies are the largest of these companies

253, the cost of compliance with the SEC's prospective Scope 1, 2, and 3 requirements should be de minimis, and the costs of compliance with other provisions of the proposed rule will be reduced substantially due to overlap with California's new laws.

In light of this development, the Commission should update its economic analysis and finalize a rule that includes Scope 1, 2, and 3 GHG emissions disclosures.

The Commission should update its economic analysis to reflect the impact of California's laws.

The Commission notes in its guidance on economic analysis that when identifying the "appropriate economic baseline" for a rulemaking, staff should describe the state of the world "in the absence of the proposed rule."[2] This includes not just characteristics of relevant markets, but the "existing regulatory structure," including "state law."[3]

Under California's SB 253, many SEC registrants will already be required to disclose their Scopes 1 and 2 GHG emissions at a limited assurance level by 2026; Scopes 1, 2, and 3 GHG emissions at a limited assurance level by 2027; and Scopes 1, 2, and 3 GHG emissions at a reasonable assurance level by 2030.[4]

Because these laws will require emissions reporting with assurance for many SEC registrants, the cost of compliance with the Commission's proposed rule is substantially diminished relative to the baseline costs without the rule. In addition, the enhanced data environment resulting from more disclosure from public and private companies doing business in California will lead to higher data quality and further cost savings in the future. For companies covered by SB 253, the report points out,

> *the removal of Scope 3 emissions from the final SEC rule would not reduce their overall compliance costs. Conversely, retaining Scope 3 emissions in the rule will require nothing more than disclosure of figures already known to these companies.*

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with individual annual revenues over $2 billion and combined revenues typically around two-thirds of U.S. GDP, https://www.investopedia.com/terms/f/fortune-1000.asp.

[2] SEC, *Memo: Current Guidance on Economic Analysis in SEC Rulemakings*. 16 Mar. 2012. https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf

[3] *Ibid.*

[4] California SB 253. https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240SB253

California's action on Scope 3 emissions also does not justify removal of Scope 3 from the SEC rule. The ongoing benefits of the Commission requiring Scope 1, 2, and 3 emissions disclosures include:

- leveling the playing field and obtaining comparable disclosures from companies not doing business in California;
- improving comparability by requiring a standard methodology that the SEC defines for the whole market;
- improving data accessibility, discoverability, and useability by making sure all the data is located in one place, the EDGAR system, and freely accessible to all investors;
- streamlining of the audit process, as the same auditor will be able to attest to the company's GHG inventory, assess the company's 10-K and consolidated financial statements, and ensure consistency across the filing;
- ensuring a federal right of action for defrauded investors based on securities law; and
- improving disclosure quality and accountability resulting from disclosure review by the SEC's Division of Corporation Finance.

The Commission should finalize its proposed rule swiftly with the requirement to disclose Scope 1, 2, and 3 GHG emissions from all large registrants, moving from limited to reasonable assurance on an expeditious timeline.

The Commission's comment file is clear: 95% of investors who commented on the proposal want Scope 3 disclosures as part of any final SEC rule.[5] Investors have said Scope 3 emissions inventories, calculated using reasonable estimates where necessary, are the most comparable metric for assessing climate-related transition risks and opportunities. This is fast becoming the expectation for investors, companies, and financial regulators around the world.

Thank you for your continued attention to this important issue. We urge you to swiftly update your economic analysis and finalize the rule.

Sincerely,

Americans for Financial Reform Education Fund
Public Citizen
Sierra Club

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[5] Ceres, "Analysis shows that investors strongly support the SEC's proposed climate disclosure rule," 11 Oct. 2022.
https://www.ceres.org/news-center/blog/analysis-shows-investors-strongly-support-secs-proposed-climate-disclosure-rule

October 2023

How might California's new climate disclosure laws impact federal rulemaking?

Estimating the overlap between California climate disclosure laws and the SEC's proposed climate disclosure rule

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California SB 253 and SB 261 will change the landscape of corporate climate disclosures.

In September 2023, the California State Legislature passed SB 253 and SB 261,[1] which mandate climate-related disclosures for public and private companies doing business in California.[2] SB 253 applies to businesses with annual revenues over $1 billion and requires them to disclose their Scope 1, 2, and 3 greenhouse gas (GHG) emissions annually. SB 261 applies to businesses with annual revenues over $500 million and requires them to file biennial reports disclosing their climate-related financial risk and measures they have adopted to reduce and adapt to that risk. California Governor Newsom signed these bills into law on October 7, 2023.

These new laws require covered entities to begin making climate-related disclosures by January 2026. Many of the entities covered by the California laws would also be covered by a proposal from the Securities and Exchange Commission (SEC) that the agency has indicated is near finalization.[3] Certain companies and trade groups have raised concerns with the proposal's inclusion of Scope 3 emissions disclosures, which they argue are difficult and costly to quantify. It has been reported that this pushback has contributed to delays as the SEC considers whether to omit Scope 3 emissions from the final rule.[4] The SEC's proposal includes mandatory reporting of Scope 1 and 2 emissions for large companies, but would allow them to avoid reporting Scope 3 emissions they deem "immaterial" representing a more lenient approach compared to California's mandatory Scope 3 requirement.

The new California laws, and SB 253 in particular, change the context for decision-making at the SEC. California is a major economic force, a critical market for many large companies, and home to many prominent public companies like Apple, Wells Fargo, and Chevron. For companies covered by SB 253 that would also be subject to the forthcoming SEC rule, the question of whether they will be required to calculate and disclose Scope 3 emissions to the public has already been answered by the State of California. As a result, the cost of complying with SEC's

[1] California Senate Bill 253. https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB253; California Senate Bill 261. https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB261
[2] California SB 253 and SB 261: What Businesses Need to Know. Persefoni. October 11, 2023. https://www.persefoni.com/learn/california-sb253-sb261
[3] SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors. March 21, 2022. https://www.sec.gov/news/press-release/2022-46
[4] SEC Chair Says Climate Disclosure Rule Feedback Pushes Back on Scope 3 Reporting as Less Developed, Unreliable. ESG Today. Sept 28, 2023. https://www.esgtoday.com/sec-chair-says-climate-disclosure-rule-feedback-pushes-back-on-scope-3-reporting-as-less-developed-unreliable/

disclosure requirements, including disclosing Scope 3 emissions, will be substantially lower than was previously expected.

For many companies, the removal of Scope 3 emissions from the final SEC rule would not reduce their overall compliance costs. Conversely, retaining Scope 3 emissions in the rule will require nothing more than disclosure of figures already known to these companies. The SEC's final economic analysis must reflect this new reality as it pertains to the rule's costs and benefits.

> **"For companies covered by SB 253 that would also be subject to the forthcoming SEC rule, the question of whether they will be required to calculate and disclose Scope 3 emissions to the public has already been answered by the State of California."**

The magnitude of the reduction in the cost of compliance will depend largely on how many companies that will be covered by the SEC rule are already subject to the California laws. That is the question this analysis aims to answer.

There are additional ways the California laws will reduce the cost of complying with the proposed SEC rule and improve the quality of the resulting disclosures. For example, the laws will spur the development of more precise and lower-cost methods and services for collecting data and making the relevant disclosures for a broad range of U.S. companies. Even firms that are not covered by the California laws will benefit from these developments and will be able to comply with the SEC rule more easily and inexpensively, and investors will benefit from higher-quality disclosures. This analysis does not attempt to estimate these benefits or cost reductions.

Findings

We estimate that at least 75% of Fortune 1000 companies are covered by SB 253, while 73% are covered by both SB 253 and SB 261.

Using publicly available data, we sought to estimate the overlap between the Fortune 1000 (which includes the largest publicly traded U.S. companies that would be subject to the SEC rule)[5] and the companies covered by SB 261 and SB 253 ("the California laws"), which will be required to disclose their climate-related risks and their Scope 1, 2, and 3 emissions regardless of the contours of the final SEC rule. Both laws apply to companies "doing business in California," and SB 261 excludes insurance companies (SB 253 does not). The laws do not define the phrase "doing business in California."

This analysis finds that roughly 73% of Fortune 1000 companies (727) are covered by both SB 261 and SB 253, and an additional 2% (24 insurers) are covered by SB 253 but not SB 261. Exact coverage will depend on the definition of "doing business" that applies under the laws, but our methodology is conservative such that, if anything, actual coverage should be broader. The 751 companies expected to report emissions under SB 253 include 130 companies headquartered in California and 621 headquartered elsewhere but registered with the California Secretary of State (SOS).[6] The firms span a diverse range of sectors, from telecommunications and media to industrials and metals. For both laws, the largest represented sectors include Technology (15.5% of reporting firms are Technology companies), Financials (10.2%), Healthcare (8.9%), and Energy (6.5%).

Our analysis suggests that a substantial portion of large SEC registrants will fall within the scope of the new California laws and will be required to disclose Scope 3 emissions and other risks. For these companies, the costs of complying with the SEC's proposed rule will be substantially reduced by the California laws. Our estimate that 75% and 73% of the largest U.S. public

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[5] *Federal Register* Vol 87, No 69. 21407 - 21408
https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf
[6] These estimates are not intended to implicate any specific company's obligations, but to estimate at a high level the extent of overlap between SB 261 and SB 253's requirements and the forthcoming SEC rule.

companies could be covered by SB 253 and SB 261 respectively also aligns with existing commentary[7] on the breadth of the California laws.[8]

We anticipate that our analysis has produced a conservative estimate of overlap between the California laws and the draft SEC rule even among the limited set of companies we evaluated (those in the Fortune 1000). That is because the analysis omits companies that are not in the SOS database but may still qualify as “doing business” in California for purposes of the disclosure laws (see the methodology discussion below). In addition, there are likely numerous companies outside the Fortune 1000 that will be covered by the California laws and the SEC rule. Our data is available here.

Methodology

To produce our estimates, we used a publicly available Fortune 1000 dataset,[9] the California SOS Business Search,[10] and undertook web searches of company information as needed.[11] The Fortune 1000 includes the largest public U.S. companies by revenue and is updated on an annual basis. [12] We used data for 2022. The California SOS Business Search includes the filing documents and status of companies registered to do ongoing business in California, with some exceptions (for example, general partnerships are not included).

All companies in the Fortune 1000 substantially exceed the revenue thresholds of the California laws ($1 billion for SB 253 and $500 million for SB 261); the lowest-ranked company on the Fortune 1000 list has revenues over $2 billion. Therefore, the methodology does not capture the full list of public companies subject to both the SEC climate rule and the California laws.

[7] New California Legislation Would Be a Major Step Forward for Climate Disclosure. Climate Law: A Sabin Center Blog. August 8th, 2023. https://blogs.law.columbia.edu/climatechange/2023/08/08/new-california-legislation-would-be-a-major-step-forward-for-climate-disclosure/

[8] #DeloitteESGNow—The Sweeping Impacts of California’s Climate Legislation. https://dart.deloitte.com/USDART/home/publications/deloitte/heads-up/2023/california-climate-legislation-sweeping-impacts?

[9] Kaggle. 2022 Fortune 1000. https://www.kaggle.com/datasets/winston56/fortune-500-data-2021

[10] California Secretary of State Business Search. https://bizfileonline.sos.ca.gov/search

[11] Our use of the 2022 Fortune 1000 is meant to proxy the largest public SEC registrants subject to a potential rule and the actual list of companies covered by the SEC’s rule will vary.

[12] Investopedia. The Fortune 1000: Annual List of Largest American Companies. https://www.investopedia.com/terms/f/fortune-1000.asp

Under the California tax code, an out-of-state company is considered to be “doing business” in California if it engages in any transaction for pecuniary gain or profit in the state and exceeds minimum thresholds of sales, property, or payroll in the state.[13] Those thresholds are the lower of 25% of the company’s sales, property, or payroll, or annually defined amounts, which in 2022 were $610,144 for sales or $69,015 for property or payroll.[14] There is no readily available list of companies “doing business” in California. Instead, we used the list of companies registered with the California Secretary of State to transact business in the state, which provides a conservative estimate of those “doing business” there.

The number of registered businesses should be smaller than that of firms “doing business” in the state because the standard for registration is narrower: A firm is required to register if it “enter[s] into repeated and successive transactions of its business in this state, other than interstate or foreign commerce.”[15] It is possible that some, or even many, firms do not meet this requirement but are considered to be “doing business” in California because they exceed one of the tax code thresholds.[16] For example, a firm that sells a single $611,000 item in California, or sells nothing in California and owns no property there but pays a single employee $70,000 in California, is “doing business” there for tax purposes but might not need to register with the Secretary of State to transact business there.

Using the Fortune 1000 list and the SOS list, we assessed whether a company is likely to be covered by the California laws in the following manner: First, we identified which companies in the Fortune 1000 are headquartered in California. From there, we searched for the remaining Fortune 1000 company names under active entities in the California SOS business database. We marked an entity as “in business search database” if the company name was present. Most of these entities are out-of-state stock corporations or out-of-state limited liability companies. At times, judgment was required in determining what to accept. For instance, if there were multiple entities with a similar name, or if entity names were unclear, we undertook a web search and checked the company headquarters location. If an entity address in the SOS database matched with the listed business headquarters, we accepted it. Where we could not match an address, or if the company name was not present, we marked it “not in business

[13] Cal. Rev. & Tax. Code § 23101.
[14] Franchise Tax Board, State of California, Doing business in California, https://www.ftb.ca.gov/file/business/doing-business-in-california.html.
[15] Cal. Corp. Code § 191(a).
[16] The agency implementing SB 261 and SB 352, the California Air Resources Board, may have the authority to define “doing business” differently from the Franchise Tax Board and may choose to do so. However, there is no obvious reason why it would not use the existing definition. Indeed, floor analysis of SB 253 identified the tax code definition of “doing business” as the definition included in that bill. See https://trackbill.com/s3/bills/CA/2023/SB/253/analyses/senate-floor-analyses.pdf. In any event, the analysis offered here is conservative, using a set of companies that is, if anything, narrower than those covered by the tax code definition.

search database.” We exclude insurance companies from our estimates of companies covered under both SB 253 and SB 261, since SB 261 does not apply to companies that are regulated by the California Department of Insurance or insurance companies in other states. For our estimate of companies covered by SB 253, we identified insurance companies in the Fortune 1000 and separately cataloged those firms following the same steps, then added them to the initial tally. This includes companies that may have other business lines or subsidiaries besides insurance. We also exclude firms without stock tickers from both lists, to align most closely with firms that are likely covered by the SEC’s rule. We sought a consistent and conservative methodology that could be applied across both laws to produce our estimates.

Acknowledgment

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Public Citizen is a nonprofit consumer advocacy organization that champions the public interest in the halls of power. We defend democracy, resist corporate power, and fight to make government work for the people—not big corporations. Founded in 1971, we have 500,000 members and supporters throughout the country.

Americans for Financial Reform Education Fund (AFREF) is a nonpartisan, nonprofit coalition of more than 200 civil rights, community-based, consumer, labor, business, investor, faith-based and civic groups, along with individual experts. Our mission: fighting to eliminate inequity and systemic racism in the financial system in service of a just and sustainable economy.

The Sierra Club is America’s largest and most influential grassroots environmental organization, with millions of members and supporters. In addition to protecting every person's right to get outdoors and access the healing power of nature, the Sierra Club works to promote clean energy, safeguard the health of our communities, protect wildlife, and preserve our remaining wild places through grassroots activism, public education, lobbying, and legal action.