

What Public Comments on the SEC's Proposed Climate-Related Rules Reveal—and the Impact They May Have on the Proposed Rules

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On March 21, 2022, the Securities and Exchange Commission (“SEC”) published for comment its much-anticipated proposed rules on climate disclosures, entitled “The Enhancement and Standardization of Climate-Related Disclosures for Investors.”^[1] The SEC invited public comments on these rules, and the response was overwhelming—nearly 15,000 comments were published on the SEC’s website over the course of three months, from individuals and organizations representing all aspects of modern American society. Few, if any, of the SEC’s rule proposals have ever received such voluminous, significant, and diverse comments. And the comments themselves range from brief statements to complex legal arguments either in support or in opposition, as well as detailed proposals for further changes to the proposed climate disclosures. The comment period closed on June 17, 2022, and further action by the SEC to finalize the proposed rule is anticipated this fall.

This article provides a brief summary of the comments, and analyzes and summarizes the key points the comments conveyed.

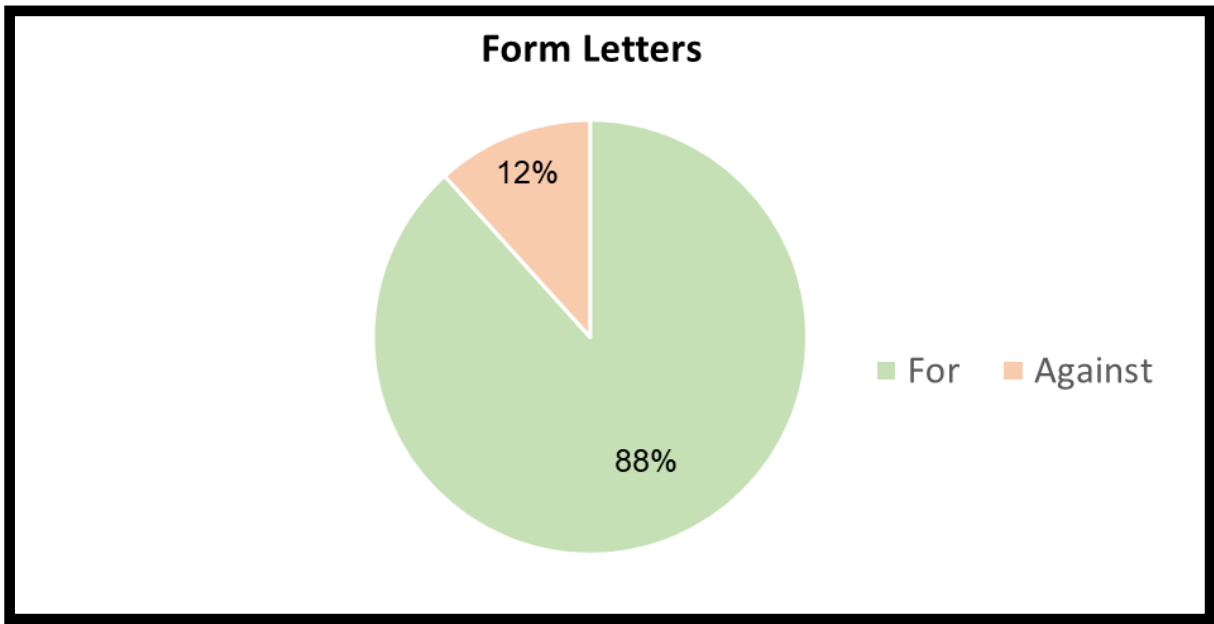
Statistical Analysis of Form and Individualized Submissions

Since the beginning of the public comment period, the SEC has received 14,645 comments on the proposed climate disclosure rules.^[2] To provide some context for how massive that figure is, the SEC has only received [144 comments](#) on its proposed cybersecurity risk management rules, which were announced two weeks before the proposed climate disclosures and have also been the subject of

extensive commentary in the press. Yet despite the prominence of the SEC’s cybersecurity proposal, it has received fewer than 1% of the comments offered on the climate disclosure rule.

Of the 14,645 comments, approximately 12,304, or 84% of the total, are form letters. This includes 10,589 comments that the SEC itself identified as form letters, and another 1,715 apparently individualized comments that were actually form letters. However, even when removing these form letters from consideration, fully 2,341 individualized comment letters remain—a substantial number, and a significant percentage (16%) of the volume.[3]

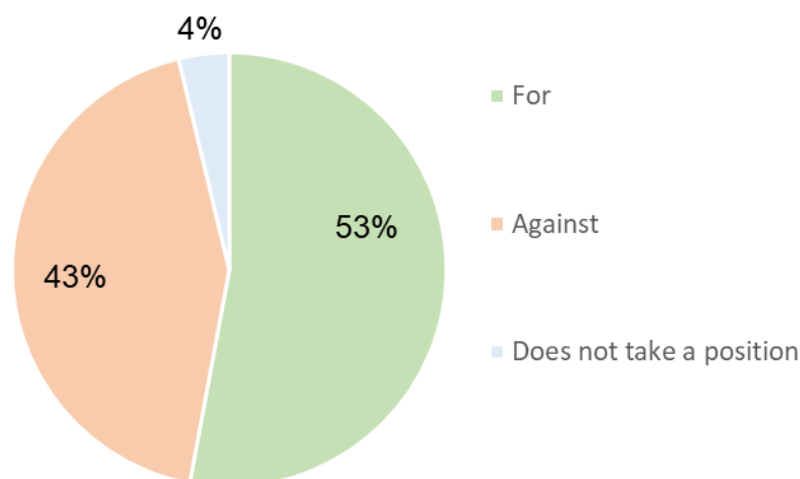
The form letters are worth exploring in more detail. Of the 12,304 comments, fully 10,861 (88%) broadly express support for the proposed climate disclosure rule, and only 1,443 (12%) are in opposition. This disparity in the level of support for the two positions is best conveyed by the chart below.



Notably, it has been possible to identify some, although not all, of the organizations that sponsored the form letter writing campaign. In particular, form letters proposed by the Union of Concerned Scientists in support of the proposed climate disclosures were submitted 6886 times—more than 55% of the total volume of form letters. Additionally, the form letters proposed by the Climate Action Campaign and the National Wildlife Federation in support of the SEC’s proposed disclosures were also quite voluminous among the submissions—1208 and 956 comment letters, respectively. The most frequent form letters submitted in opposition to the proposed climate disclosure rules—e.g., those proposed by FreedomWorks (348 letters) and the Club for Growth (172 letters)—did not achieve nearly the same volume of submissions.

But the apparent overwhelming majority in favor of the proposed SEC climate disclosure rules, as conveyed by the form letters, is belied by the individualized submissions, which were far more closely divided. Of the 2341 individualized comment letters submitted, approximately 53% (1238 comment letters) expressed support, about 43% (1015 comment letters) were opposed, and a handful—around 4% (88 comment letters)[4]—did not express a position. The below chart demonstrates the levels of support expressed by the individualized submissions:

Individualized Submissions



Besides the mere volume of submissions, however, the most noteworthy aspect of the individualized submissions are the substantive arguments—both factual and legal—that these comment letters articulate, whether in support or opposition to the proposed rules, as well as the identity of those making these submissions.

Arguments in Support of the Proposed SEC Climate Disclosure Rules

The organizations and individuals that chose to offer support for the SEC's proposed climate disclosures represent a wide swathe of society. Broadly speaking, these proposed climate disclosures attracted support from, among others: [Democratic politicians](#), [civil society organizations](#) (such as environmental NGOs), [individual corporations](#), [professional services organizations](#), and [academics](#). While the rationales offered by these different groups varied considerably, in part due to their varying perspectives (e.g., environmental NGOs were more concerned with the impact on the transition to a clean-energy environment, while corporations often focused on the consequences of particular aspects of the rules), the individualized comments in support of the proposed disclosures nonetheless shared some common features.

Specifically, there are a number of common arguments that are frequently featured among the 1239 individualized submissions in support of the SEC's proposed climate disclosures. Six arguments appear in over 10% of the submissions. In order of prevalence, these are:

1. *Environmental Protection* (347 submissions, 28%): that the proposed rules will help protect the environment
2. *Investor Choice* (280 submissions, 23%): that the proposed rules will enable investors to make more informed choices
3. *Investor Protection* (263 submissions, 21%): that the proposed rules will enable investors to protect themselves and their investments from climate-related risk

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4. *Standardization of Climate Disclosures* (259 submissions, 21%): that the proposed rules will enable the standardization of climate disclosures, making data comparable
 5. *Increased Transparency* (171 submissions, 14%): that the proposed rules will increase transparency and hold companies accountable for their emissions
 6. *Alignment with International and Foreign Regulatory Frameworks* (169 submissions, 14%): that the proposed rules will bring the United States into alignment with both international frameworks and other countries (e.g., the EU)

No other argument appeared in more than 6% of the individualized submissions in support of the SEC's proposed climate disclosures.

Notably, the most common arguments in favor of the proposed climate disclosures share a common feature: these are all *policy* arguments, focusing on the benefits to investors and the broader economy from the adoption of the SEC's proposed disclosures. Only a single argument among the top ten most frequent arguments in support was a legal argument—namely that the proposed rules fall within the SEC's statutory authority—and that argument appeared in only around 3% of the submissions (41 submissions).[5] This focus on policy benefits among supporters of the SEC's proposed climate disclosures is unsurprising, as these public policy rationales were a key factor in encouraging the Biden Administration to pursue this regulatory agenda. However, the reluctance to engage with critics of the proposed climate disclosures on a legal basis may signal the difficulties that the SEC's proposed climate disclosures may encounter in future court challenges.

Arguments in Opposition to the Proposed SEC Climate Disclosure Rules

Those entities and individuals that submitted individualized comment letters opposing the SEC's proposed climate disclosures also represent a broad range of American society, albeit with a somewhat different focus. Generally, individualized letters in opposition to the SEC's proposed climate disclosures tended to be submitted by, among others: [Republican politicians](#), [individual corporations](#), [trade industry groups](#), and [NGOs](#). (Unsurprisingly, the fossil fuel industry and extractive industries were particularly well-represented among the commenters.) These individualized submissions—frequently lengthy and extensively analyzing the SEC's regulatory practices and authority—shared a number of common themes.

In particular, there are a number of common arguments that featured frequently among the 1014 individualized submissions to the SEC in opposition to these proposed climate disclosures. Three (3) arguments appeared in more than ten (10) percent of these submissions:

1. *Ultra vires* (322 submissions, 32%): that the SEC lacks the ability to issue these disclosures as the proposed rule is beyond the scope of the SEC's legal authority
2. *Compliance Costs* (218 submissions, 21%): that compliance with the proposed rule will impose unreasonable and extensive costs on businesses
3. *Climate Science Skepticism* (123 submissions, 12%): that the science concerning climate change is unsettled and therefore the proposed rule is inappropriate

Although no other common argument appeared in more than 7% of the individualized letters in opposition, it should still be noted that there were a large number of letters that objected to the increased burdens placed on particular types of businesses, whether farmers (53 submissions, 5%), fossil fuel companies (49 submissions, 5%), or small businesses (36 submissions, 4%).

Overall, it is striking that around a third of the comments submitted in opposition stated that the SEC had acted beyond its authority (*ultra vires*) in proposing this new rule. While this critique is hardly novel—it has been a [frequent refrain](#) of the Republican SEC Commissioners ever since this topic was first broached—the prevalence of this argument among the individualized comments suggests that both the public and sophisticated market actors perceive this issue as a key vulnerability in the SEC’s proposal, and that this legal argument will likely be emphasized in the inevitable legal challenge to this SEC rule. And, based on [recent decisions](#) by the Supreme Court, it is altogether likely that this line of attack may find a sympathetic audience in the courts.

Potential Changes to the SEC Climate Disclosure Rules Resulting from Public Comments

Despite the differences between the advocates and opponents of the SEC’s proposed climate disclosures, both sides submitted proposals to the SEC to change or adjust the proposed rules. Although there was often substantial disagreement about the content of these proposed changes, there were also significant areas of convergence.

Some of the changes to the SEC’s proposed climate disclosures frequently submitted by supporters of the rule included:

1. *ISSB*: that the SEC should further align its proposal with the ISSB and help create a global standard (76 comments);
2. *Extended Phase-In Period*: to extend the phase-in period for these new disclosure requirements (72 comments);
3. *Alignment with International and Foreign Standards*: that the SEC should further align its proposal with international and foreign standards, such as the EU or TCFD (66 comments);
4. *Enhance Scope 3 GHG Emissions*: to eliminate exemptions so that all companies must disclose Scope 3 GHG emissions (55 comments);
5. *Principles-Based Approach to Materiality*: to adopt a principles-based approach to materiality rather than bright-line rules (53) comments;
6. *Remove Scope 3 GHG Emissions*: to remove the requirement that Scope 3 GHG emissions be disclosed (36 comments);
7. *Furnish, Not File*: that the disclosures be provided in a document that is “furnished” to the SEC, rather than filed (which impacts potential liability) (26 comments).

Although certain proposed changes by proponents of the SEC’s proposed climate disclosure rule are undeniably expected (e.g., removing exemptions for disclosure of Scope 3 GHG emissions), there are others that seem somewhat surprising on initial review (e.g., extending the phase-in period or

removing Scope 3 GHG emissions entirely). This can most easily be explained by the fact that supporters of the SEC's proposed rule include corporations and other business interests, which will [resist](#) certain burdensome regulations even if generally offering support for the overall thrust of the proposal. There are also academics and others who continue to [express skepticism](#) concerning the utility of disclosing Scope 3 emissions, or even whether it can be adequately measured.

It should be emphasized that these changes proffered by supporters of the SEC's proposed rule, many of which are designed to render the proposed rule less onerous, may indicate that the support for the proposed rule—or at least the most stringent aspects of it—is relatively weak (or at least among the corporate interests nominally aligned with the SEC).

The most frequent changes suggested by opponents of the rule included:

1. *Remove Scope 3 GHG Emissions*: to remove the requirement that Scope 3 GHG emissions be disclosed (69 comments);
2. *Principles-Based Approach to Materiality*: to adopt a principles-based approach to materiality rather than bright-line rules (35 comments);
3. *Extended Phase-In Period*: to extend the phase-in period for these new disclosure requirements (25 comments);
4. *Furnish, Not File*: that the disclosures be provided in a document that is “furnished” to the SEC, rather than filed (which impacts potential liability) (18 comments).

These proposed changes (and others) advanced by opponents of the SEC's proposed rule are generally designed to make the rules less stringent and also to reduce costs and potential legal liability.

As can be seen by comparing the above lists, there are certain areas where suggested changes to the proposed rule converged. In particular, there are issues where both opponents of the SEC's proposed rule and some of its supporters would try to render it less intrusive or impactful, particularly with respect to the elimination of the requirement to report Scope 3 GHG emissions and to extend the phase-in period further. (Although, as noted, this apparent convergence between opponents and supporters of the SEC's proposed rule may be due to divergent interests among the supporters of the SEC's proposed rule with respect to its implementation.)

But, regardless of the specific content of the particular proposed changes, what is undoubtedly significant is that these proposed changes have highlighted the aspects of the SEC's proposed climate disclosure rule that are likely most sensitive to regulated corporations. Such an insight reveals not only the areas where active lobbying is most likely to take place, but also previews probable priorities for corporate compliance departments. In effect, focusing on the aspects of the proposed rule where changes were proposed is a means to identify the key issues from the perspective of the regulated entities and the public at large.

Conclusion

The level of engagement with the SEC's proposed climate disclosures, as demonstrated by the

number and detail of the public comments offered, is extraordinary. This degree of attention indicates the significant impact that is expected to result from the ultimate promulgation of these rules (or a revised version thereof).

Of course, the key question here is what changes, if any, are likely to be made to the SEC's proposed rule based upon the public comments submitted to the SEC. In this context, it is noteworthy that a handful of key issues have been identified by both proponents and opponents of the proposed disclosures as especially ripe for potential revision. As noted above, these include, among others, the length of the phase-in period and the disclosure of Scope 3 GHG emissions. If any changes are to be made to the SEC's proposed climate disclosure rule, it is likely that such changes will be related to these issues.

However, given the relative lack of forward momentum with respect to other aspects of the Biden Administration's climate agenda, there may well be political pressure not to weaken or otherwise rollback the SEC's proposed rule, as this is one of the few areas where significant—and publicly-recognized—progress has been made with regulations designed to address the issue of climate change. Further, the Biden Administration's SEC has certainly recognized the inevitability of a legal challenge to these proposed climate disclosures, and, since no degree of alteration would suffice to preempt such a lawsuit, the SEC may conclude that it is better to seek to implement all aspects of the proposed regulation for the political benefit that can be achieved in the short term, since the substantive aspects of the proposed disclosure may not ultimately survive judicial scrutiny. The SEC may also prefer to send a strong signal to the market by maintaining its original proposed rule. Recognizing these pressures, it seems unlikely that the public comments submitted to the SEC will have a significant impact on the final rule promulgated in the coming months—and improbable that the SEC will make the proposed disclosures less robust.

Luke Haubenstock also contributed to this article.

FOOTNOTES

^[1] These proposed rules are discussed more fully in our prior publication: <https://www.mintz.com/insights-center/viewpoints/2451/2022-03-30-brief-summary-secs-proposed-climate-related-rules>

^[2] Although the total number of comments, when including both form letters and individualized letters, is 14,739, there are 94 comment letters on the SEC website that are duplicates, and have thus been removed from the calculation.

^[3] For comparison, the proposed SEC rule on disclosing compensation ratios drew about 300,000 form letters and around 1500 individualized comment letters. In this case, the individualized comment letters represented only about 0.5% of the total volume. <https://www.sec.gov/comments/s7-07-13/s70713.shtml>

^[4] The eighty-eight comment letters that did not adopt an express position on the proposed climate disclosure rules instead conveyed a number of different points, including proposing narrow changes to the proposed rule without taking a stance on the rule as a whole, or offering further context for the SEC's actions (e.g., comparing the SEC to other regulators, whether domestic or international). This category also includes a number of early comments that simply requested that the SEC extend the deadline for submitting comments.

^[5] There are public comments in support of the proposed rule that focus on the legal issues. In particular, the submission of Prof. John Coates of Harvard Law School, a former SEC official, is devoted exclusively to defending the legal authority of the SEC to issue the proposed climate disclosure rule. <https://www.sec.gov/comments/s7-10-22/s71022-20130026-296547.pdf>

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