June 11, 2021

VIA ELECTRONIC SUBMISSION
Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F St. NE
Washington, DC 20549

Re: Public Input on Climate Change Disclosures

Dear Ms. Countryman:

The American Investment Council (the "AIC") appreciates the opportunity to submit this letter in response to the March 15, 2021 request for public comments regarding whether the Securities and Exchange Commission (the "SEC") should adopt new rules, or modify existing rules, concerning climate change disclosure.

The AIC is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by promoting responsible long-term investment. In this effort, the AIC develops, analyzes, and distributes information about the private equity and private credit industry and its contributions to the U.S. and global economy. Established in 2007 and formerly known as the Private Equity Growth Capital Council, the AIC is based in Washington, DC. The AIC's members are the world's leading private equity and private credit firms, united by their commitment to growing and strengthening the businesses in which they invest.[1]

The AIC commends the SEC's recent and ongoing efforts to address climate-related disclosures for issuers and supports those efforts as they relate to an issuer's obligation to provide full and fair disclosure of its business and operations and of the material risks of investing in its securities. The AIC supports a regulatory approach that recognizes the importance of environmental, social and governance ("ESG") matters, including climate change, to the investing public.

Private equity and private credit are a major source of investment for sustainable energy companies and green jobs nationwide. The capital provided by these funds plays a critical role in mitigating the growing effects of climate change, and these funds are proud to support thousands of renewable energy companies nationwide that are creating strong jobs. In fact, private equity

[1] For further information about the AIC and its members, please visit our website at http://www.investmentcouncil.org.

investment in renewable energy surged to $23.7 billion in 2020, up from roughly $5 billion in 2019, representing nearly 50% of all clean energy investment in the United States last year.[2]

We note that as part of the SEC's efforts to address climate change disclosure, the SEC specifically requested comments on how the SEC's rules should "address private companies' climate disclosures, such as through exempt offerings, or its oversight of certain investment advisers and funds." The AIC believes in the value of considering the interplay between climate-related and ESG matters and the private equity and private credit markets. From a regulatory perspective, the AIC believes that the existing private offering framework, under the federal securities laws, adequately facilitates disclosure by private equity and private credit firms. We look forward to working with the SEC on climate-related and other ESG disclosure topics as the SEC considers this framework.

Private issuers generally and, specifically, private equity and private credit firms and the funds they sponsor, are subject to a legal and regulatory framework that results in disclosure requirements appropriate for participants in private securities offerings.[3] Private issuers in the U.S. are customarily exempt from specific disclosure requirements in connection with private offerings of their securities, while public issuers are subject to a registration regime that, by design, is fundamentally different. This is because offerings exempt from registration under the Securities Act of 1933, as amended[4] (the Securities Act) have long been recognized as precisely that – exempt – generally because the risk to the public is mitigated by the private nature of the offering and, very often, because of the sophistication of the investors in the offering.[5]

Investors in private issuers are nonetheless afforded important protections under the federal securities laws. Private issuers, such as private equity funds and the issuers in which they invest, are subject to obligations under the Securities Exchange Act of 1934 that result in liability for issuers that make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. This standard of materiality, woven into the legal regime by judicial and regulatory interpretation over time, strongly incentivizes issuers to disclose facts (including risks) that would be material to a reasonable investor.

---

[2] See Investment in US clean energy to total $55 bil in 2020: Generate Capital | S&P Global Platts (spglobal.com) *available at* https://www.spglobal.com/platts/en/market-insights/latest-news/electric-power/112320-investment-in-us-clean-energy-to-total-55-bil-in-2020-generate-capital.

[3] For purposes of this letter, we consider private equity and private credit to be substantially similar, although differences in their respective investment programs may require a private equity fund to approach materiality determinations with respect to its disclosure obligations differently than a private credit vehicle.

[4] Such as private placements that meet the requirements of Section 4(a)(2) of the Securities Act or a safe harbor thereunder.

[5] See e.g., *SEC v. Ralston Purina Co* . 346 U.S. 119, 124-125 (1953) (citing from H.R. Rep. No. 85, 73d Cong., 1st Sess. 5 (1933) ("Exemption from the registration requirements of the Securities Act is the question. The design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions. The natural way to interpret the private offering exemption is in light of the statutory purpose. Since exempt transactions are those as to which "there is no practical need for [the bills'] application, " the applicability of [Section 4(a)(2) of the Securities Act] should turn on whether the particular class of persons affected needs the protection of the Act."

The legal and regulatory regime is buttressed by the sophistication of the parties and the negotiations that underpin private securities transactions. The commercial considerations in a private offering incentivize an issuer (and a private fund in particular) to create an attractive transaction for sophisticated investors. These elements distinguish private securities transactions (with sophisticated participants) from public securities transactions (with retail investors), reflecting the different legal regimes at play and the expectations of the participants. Requiring private issuers to make specific climate disclosures thus would be inconsistent with the existing regulatory framework. Such a change would introduce a slippery slope that could undermine this existing private offering framework and that may not, in practical terms, result in any additional protections for investors.

Nonetheless, we understand the SEC's impetus to consider a different framework relative to climate-related disclosure. If the SEC sees fit to make any changes that would affect the existing framework, we encourage a clear, narrowly-tailored solution that is not inconsistent with current requirements.

With regard to private equity and private credit fund managers specifically, pursuant to judicial and SEC interpretations under the Investment Advisers Act of 1940 (the "Advisers Act"), all investment advisers are subject to an affirmative, unwaivable fiduciary duty that requires them to serve the best interests of their clients. This fiduciary duty includes a duty of loyalty that requires an adviser to make full and fair disclosure of all material facts and all material conflicts of interest regarding its business.[6] Thus, private equity and private credit advisers must disclose all information that is material to clients' and investors' investment decisions. This would include the effect of climate-related factors on the adviser's business, to the extent these factors are material.

Additionally, SEC-registered advisers are explicitly required to disclose in their Form ADV the material risks of their significant investment strategies. This requirement is based on the materiality of the particular risk, not on whether the risk is specific to an industry, or an issuer or an investment practice. As such, an investment adviser already has a duty to disclose the effect of climate-related issues if they are material to the adviser's investment strategy.

Imposing climate-specific disclosure requirements on investment advisers could frustrate the current principles-based disclosure framework that recognizes that advisory businesses differ across the industry and these businesses should not be subject to specific content-based requirements that may be relevant to some, but not all investment advisers. The SEC itself recognizes that a principles-based disclosure approach is appropriate for investment advisers, having stated in 2019 that:

> *"[t]he relationship between an investment adviser and its client has long been based on fiduciary principles not generally set forth in specific statute or rule text. We believe that the Commission*

---

[6] SEC v. Capital Gains Research Bureau, Inc. 375 U.S. 180 (1963); *See also* Securities and Exchange Commission, *Commission Interpretation Regarding Standard of Conduct for Investment Advisers* ("Fiduciary Interpretation"), Release No. IA-5428 at 21-22 ("To meet its duty of loyalty, an adviser must make full and fair disclosure to its clients of *all material facts* relating to the advisory relationship.") (June 5, 2019) (emphasis added)

> *should not deviate from this principles-based approach, as it expresses broadly the standard to which investment advisers are held while allowing them flexibility to meet that standard in the context of their specific services."*[7]

Of course, to the extent a private equity fund or private credit vehicle is invested in a public company, that public company will comply with relevant public company disclosure requirements relating to climate risk. If the investment is in a private issuer, the disclosure framework for private issuers should control. Thus, the federal securities laws applicable to investment advisers already require a fund manager to disclose all material facts in connection its business and all material facts and risks inherent in any investment in a fund it manages. As noted above, these risks include climate-related issues just as they could include other risks relating to current events such as political conflict, global health events, and human rights events. As a result, the AIC believes that disclosure requirements that single out climate risks associated with an investment in a private fund would be duplicative of current obligations.

Our members take seriously their fiduciary obligation and the disclosure obligations that flow from it and that apply to the funds they manage, as well as the legal and practical effect the federal securities law requirements impose on their diligence, selection and ongoing monitoring of the investments they manage on behalf of their clients. Moreover, the AIC and its members are acutely aware of the potential effects that climate-related risks may have on their clients and investors, and seek, consistent with their fiduciary and regulatory obligations, to design proper compliance and regulatory systems to address that risk based the current framework discussed above.

The SEC staff has acknowledged the strength of this framework, and the success that fund managers have had in applying it to ESG and climate-related risks, in a recent risk alert highlighting the Division of Examinations' observations from recent examinations of investment advisers and private funds.[8] The SEC staff's statements and findings support the view that the existing framework is effective in assessing and disclosing relevant ESG risks, which includes climate risks. However, to the extent the SEC deems it appropriate and in the public interest to adopt new regulations concerning disclosure of climate-related risks (and ESG risks), the AIC recommends that any such changes be tailored appropriately for private fund advisers, (and, private equity and private credit advisers in particular) consistent with the existing framework. For example, we encourage the SEC to consider the influence that private equity and private credit managers have on the portfolio companies in which the managers' funds invest to recommend and shepherd effective and relevant climate-related practices. We believe that the disclosure regime discussed above, which would necessarily include material risks and attributes of any investment in an issuer subject to any such conduct standards, is the proper mechanic by which to advance the SEC's mission of investor protection.

As the SEC considers a uniform ESG disclosure regime in the context of private funds, the AIC notes that even the Sustainable Finance Disclosure Regime ("SFDR"), which became

[7] *See* Fiduciary Interpretation at 5

[8] Securities and Exchange Commission, Division of Examinations Risk Alert, "The Division of Examinations' Review of ESG Investing," April 9, 2021.

effective in Europe in March 2021, did not broadly apply a single ESG or climate disclosure standard to all funds. Rather, SFDR implemented disclosure requirements on incremental levels that are tied to the extent of a fund's use of ESG and impact investing in its strategy and marketing. Even the European Union did not implement a comprehensive climate disclosure regime on private funds as a means to impose disclosure requirements on private companies regardless of how the fund markets itself or represents the role of ESG factors in investment decisions.

Our members continue to evaluate climate-related issues and risks in real-time as they apply to the private equity and private credit industry, and seek to evolve their practices as necessary to address both their legal obligations and the needs of their clients and investors. As stated above, we look forward to engaging with the SEC on this important issue. Our members appreciate the importance of ESG and climate change to the investing public and we intend to work closely with the SEC and key industry participants to contribute to the evolution of regulation that is relevant and appropriately tailored, while preserving the aspects of the existing framework that have worked in favor of investor protection over the last several decades.

*****

The AIC appreciates the ability to highlight its views on these issues and would be pleased to answer any questions that you might have concerning our views.

Respectfully submitted,

Jason Mulvihill
Chief Operating Officer & General Counsel
American Investment Council