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[redacted]

June 11, 2021

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

Re: Request for Public Input Regarding Climate Change Disclosures

Dear Chairman Gensler:

The American Petroleum Institute ("API") is pleased to offer responses to the request for public input concerning the Securities and Exchange Commission's ("SEC" or "Commission") consideration of issuers' disclosure of consistent, comparable, and reliable information on climate change. API represents all segments of the US oil and natural gas industry and its member companies conduct business in nearly every country worldwide. API's member companies are involved in exploration, production, refining, marketing, distribution, and marine activities. API was formed in 1919 as a standards-setting organization and has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability.

The SEC's request, dated March 15, 2021, provides a list of general and more specific questions focusing on considerations that the Commission should assess regarding the potential regulation of climate change disclosures. API's responses are intended to provide general feedback and suggestions and do not necessarily address all of the questions posed in the request for public input. Throughout the SEC's process of assessing whether and what climate change disclosures might be required, API seeks to serve as a resource and an active participant. We appreciate the engagement with Commissioners' offices and SEC staff and look forward to continued discussion. While the viewpoints contained in this letter represent the general views of many oil and natural gas companies, individual API member companies may submit their own responses to the SEC regarding issues they wish to further elaborate upon, specific operational issues, or company-specific views not addressed by these comments.

Industry and Reporting

As the SEC considers the issue of climate reporting, it is important to note that there is already a substantial body of information from existing climate reporting actions and efforts taken by the industry for nearly two decades. Since 2005, the oil and natural gas industry has developed and updated sustainability reporting guidelines to help companies that prepare public reports on their environmental, social and governance issues, including climate performance. The 4th Edition of the *IPIECA/API/IOGP Sustainability Reporting Guidance for the Oil and Gas Industry* ("Industry Guidance") helps an individual company convey to its stakeholders – including, increasingly, investors -- its approach to climate change and energy. The prevalence of our members furnishing sustainability reports has increased continuously year-on-year. Some of our members were among the first companies in any sector to produce sustainability reports, including information on climate risks and opportunities. As the area has evolved over time, the Industry Guidance and individual oil and natural gas company reporting have evolved and improved continuously, often informing and being informed by other cross-sector sustainability and climate risk/opportunity reporting frameworks.

The oil and natural gas industry is continuing to enhance its own guidance for reporting of climate-related information through an ongoing reporting initiative highlighted in API's recently announced Climate Action Framework.[1] This initiative's goal is to develop more consistent and comparable reporting of key greenhouse gas ("GHG") indicators in a template form (the "Template") for voluntary use by individual companies. An initial version of this Template (see Attachment 1) has been developed by API member companies to provide common definitions for a core set of GHG indicators to guide individual company reporting of these indicators. API will continue to evolve the Template while also engaging with stakeholders, including a constructive and positive dialogue already underway with key members within the financial sector, on the GHG indicators in the Template. This API initiative is modeled on the work of US electric and natural gas utilities, through their trade associations the Edison Electric Institute and the American Gas Association, to produce a similar template of indicators, including several on GHGs. API's initiative will guide API member companies to report consistently, comparably, and transparently on GHG emissions, GHG mitigation, and GHG intensity on a normalized basis. API's Template will also prompt an individual company to indicate if it has GHG reduction targets in place, if it publishes a TCFD-informed report covering four key areas (i.e., governance, strategy, risk management, and metrics and targets), as well as prompt to indicate the level of verification it commissions for its GHG reporting.

Given the continuing evolution of guidance and standardization for the reporting of climate-related information, as well as the unique nature of different industries, we believe the SEC should give significant consideration to these individual industry sector efforts by using them as reference points on the current state of companies' disclosures. Further, while there may be some common aspects that could be considered by the SEC in its policy making against the materiality standard (see the *Concept of Materiality* section below), requiring specific, one-size-fits-all metrics for issuers regardless of sector, may not be appropriate due to inherent differences among the sectors. Large commercial banks, institutional investors, and credit rating agencies have quickly developed particular methodologies to assess companies' long-term management of climate risks and opportunities, which continue to evolve within the marketplace. Supporting ongoing efforts by industries/companies and their financial stakeholders to define decision useful approaches, emphasize the most relevant climate-related items of importance to the marketplace, and enhance consistency and comparability would increase the effectiveness of any required investor disclosure effort.

We understand that these industry efforts generate data that may be of relevance to certain investors. API encourages the SEC to view the oil and natural gas sector's pre-existing voluntary

[1] https://www.api.org/climate

disclosures and reporting as evidence that the industry seeks to be a partner that, in some cases, has already tackled key areas raised in the request for information. We are committed to working with the SEC to clarify what is important in considering the need for climate-related disclosure requirements and help define information that may be of most relevance to investors and that issuers can accurately disclose.

Considerations Around Requiring Disclosure

As the SEC contemplates the potential for required reporting, we believe there are certain initial considerations to be weighed. First, we believe that there are some fundamental questions about what uniquely important information or information specific to the SEC's regulatory goal is not otherwise being disclosed or generated under other existing requirements. Our members appreciate investor requests for information and have been actively engaged in providing information on climate risks and opportunities, but it is not clear what information is broadly needed and how that information would be used by investors. Again, before embarking on broad changes or imposing additional reporting requirements, we wish to work with the SEC to clearly articulate a need to be addressed and then the path to comparability and reliability for investors to avoid potential confusion in this evolving area.[2]

Second, any consideration of imposing additional reporting obligations on issuers must be weighed against numerous factors, including the cost of compliance for all issuers, the ability of smaller issuers to manage additional disclosures due to limited resources, and the uncertainty of forward projections. The potential cost of compliance with a new reporting regime, that could go well beyond what may already be reported to other government agencies or voluntarily to stakeholders can be dramatic even when considered against experiences with other financial reporting rules. For example, during the development of the section 1504 resource extraction disclosure rules, the SEC stated the new compliance regime would likely cost filers anywhere from $96 to $591 million per year collectively.[3] The rules being contemplated under a new climate disclosure regime would likely be far more extensive than the section 1504 rules, which were limited to only those companies engaged in resource extraction globally. In the case of climate disclosures, every issuer likely will be subject to the new rules, which obviously increases the overall costs of compliance.

Based on the potential scope of a new disclosure effort and a review of similar efforts in the past, such as implementing the Sarbanes-Oxley Act, we would also not expect compliance costs to be shared equally among issuers.[4] The SEC's assessment of disclosure requirements should consider the compliance burden, especially the burden on small- to mid-sized issuers. While major multinational corporate issuers may have dedicated company resources to gather, measure, and report climate indicators, smaller issuers are less likely to have those same capabilities. In the past, the SEC has recognized this distinction and provided reporting relief or consideration to smaller and mid-size issuers in order to avoid inequitable or disproportionate impacts.

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[2] *See* Why is Corporate Virtue in the Eye of The Beholder? The Case of ESG Ratings; Dane M. Christensen; George Serafeim; Anywhere Sikochi, The Accounting Review TAR-2019-0506, April 8, 2021

[3] See SEC Final Rules 2016, https://www.sec.gov/rules/final/2016/34-78167.pdf, pg. 191.

[4] GAO Report to the Committee on Small Business and Entrepreneurship, U.S. Senate, Consideration of Key Principles Needed in Addressing Implementation for Smaller Public Companies, April 2006. https://www.gao.gov/assets/gao-06-361.pdf.

We have also seen that complex reporting and assurance requirements can take significant time to finally implement. We note that the rules around section 404 of the Sarbanes-Oxley Act, addressing controls and procedures for financial reporting were implemented over a multi-year period, including various implementation dates that were staggered and postponed for various issuers. Of course, there were a number of pieces to the Sarbanes-Oxley Act that the SEC considered separately and were implemented over time. We think that this effort could be informative to what the SEC is considering around climate reporting and that a phased or step approach could help both the SEC and issuers, especially those mid- and small-sized issuers, to determine the most efficient method for reporting and obtaining information.

While the SEC's current request for public input may highlight some of these considerations, we note that the Commission's effort will benefit from following the Administrative Procedure Act's ("APA") full process for notice-and-comment rulemaking before finalizing any next steps.[5] After the Commission has had an opportunity to review and evaluate the answers provided to the Commission's March 15 request for information, a specific proposal and opportunity for public comment will foster the degree of public input appropriate for any significant and new policymaking. This input will help identify the applicability of proposed approaches to meeting goals outlined by the SEC, as well as the potential for cost or burdensome impacts on issuers. Following the notice and comment process, consistent with the APA, would be especially important for any rulemaking to achieve a balanced perspective in what the SEC might seek to impose.[6]

Discussion of Principles to be Applied to Potential Climate Disclosures

Concept of Materiality

Of paramount importance to API is the application of the materiality standard to any future required climate disclosures. Materiality is a long-established concept, derived from financial accounting, that has underpinned SEC directed disclosure. Applicable here, any climate change related disclosure requirements should be limited to information that is considered material by the issuer and its shareholders.

The United States Supreme Court has established that information is material for purposes of the securities laws if there is "a substantial likelihood that the . . . fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[7] The Court has been "careful not to set too low a standard of materiality," for fear that management would "bury the shareholders in an avalanche of trivial information."[8] Issuers consider whether the "reasonable

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[5] 5 U.S.C. 553.

[6] For rules to have binding legal effect on private parties, an agency must provide notice "of the terms or substance of the proposed rule or a description of the subject and issues involved," and an opportunity for the public to comment. *Id.* The current disclosure requirements under Regulation S-K do not address methods or requirements for assessing and disclosing GHG emissions or risks from them. Regulation S-K may, as the SEC articulated in its February 8, 2010 Interpretive Release No. 33-9106, provide bases for companies to "consider climate change and its consequences as they prepare disclosure documents to be filed." But it does not address the types of information or evaluation methods that would be necessary to establish enforceable frameworks or standards governing GHG emissions disclosures.

[7] *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976). *See also Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

[8] *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011) (cleaned up).

investor would have considered [the facts] significant in making investment decisions."[9] This does not create a duty to disclose information "merely because a reasonable investor would very much like to know that fact."[10] Rather, material facts generally relate to discernable economic or financial impact on a company's earnings or operations.

The current mandatory disclosure requirements in Regulation S-K do not explicitly require disclosure of greenhouse gas emissions or impacts from emissions, though issuers may address such items in risk factor disclosures under Item 105 of Regulation S-K. Additionally, providing information about climate-related issues has increased on a voluntary basis. But debate persists about whether this type of nonfinancial reporting is material.[11] The materiality of any particular climate-related statement remains very much a case-by-case inquiry, focused on the statements a particular issuer provided in the context of the "total-mix" of information available to reasonable investors about that issuer.

Any effort by the SEC that seeks to impose a major new climate disclosure regime but deviates from the well-established grounding in materiality could raise significant concern about whether the SEC has strayed far beyond its authority to regulate the securities markets. To be sure, Congress has vested the SEC with broad authority to regulate securities issuers to protect investors and the public. But the courts will not "presume that the act of delegation, rather than clear congressional command, work[s] . . . vast expansion[s]" of agency power to new subjects.[12] Under the major-questions doctrine, the Congress "speak[s] clearly if it wishes to assign to an agency decisions of vast 'economic and political significance'" heretofore untouched by the agency.[13] For example, the Congress, through the Dodd-Frank Act, enacted several specific provisions authorizing the SEC to promulgate rules to require greater disclosure from public companies concerning "conflict minerals,"[14] and "extractive industries" issues,[15] as well as connections with Iran,[16] in order to address social and governance matters. In the absence of new Congressional authority[17], we believe it is important that the SEC adhere to established precedents regarding materiality -- which is an inherent requirement in protecting investors and evaluating costs and benefits -- to ensure that any eventual rule is on sound legal footing. A normal rulemaking process will provide input to help the SEC navigate these issues.

In addition, a significantly expanded disclosure requirement beyond the well-established doctrine of materiality could raise serious First Amendment issues under recent precedent applying strict scrutiny

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[9] *Ganino v. Citizens Utilities Co*., 228 F.3d 154, 161 (2d Cir. 2000)

[10] *Meyer v. Jinkosolar Holdings Co.*, 761 F.3d 245, 250 (2d Cir. 2014).

[11] *See* J. Robert Brown, Jr. & Stacey L. Bowers, The Regulation of Corporate Disclosure § 7.02 (4th Ed. 2020-2 Supp.). Some have gone as far as petitioning the SEC for "mandatory rules" governing disclosure in this area. *Petition for a Rulemaking on Environmental, Social and Governance*, Rulemaking Petition 4-730 (Oct. 1, 2018) *available at* https://www.sec.gov/rules/petitions/2018/petn4-730.pdf

[12] *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849 (2020).

[13] *Util. Air Regulatory Grp. v. EPA,* 573 U.S. 302, 324 (2014 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000), and citing *MCI Telecomms. Corp. v. Am. Tel. & Telegraph Co.*, 512 U.S. 218, 231 (1994)); *see also, e.g., King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *Gonzales v. Oregon,* 546 U.S. 243, 267 (2006).

[14] 15 U.S.C. § 78m(p).

[15] *Id.*

[16] *Id.* § 78m(s).

[17] *Cf. Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 460 (D.C. Cir. 2017) (Kavanaugh, J.) ("Congress's failure to enact general climate change legislation" cannot expand the scope of existing statutes).

to content-based laws compelling speech.[18] Requiring issuers to provide truthful, material information to investors regarding their business to protect investors from fraud and deceptive practices does not violate the First Amendment. But compelling issuers to speak on information that is not material to financial performance-- or that may be inherently inaccurate, highly controversial, or subject to honest debate -- might not satisfy the compelling interest and least-restrictive means requirements of strict[19] or even intermediate scrutiny under the *Central Hudson* doctrine.[20] Again, following the notice-and-comment process by providing specific proposals for the public to gauge and comment upon would help inform the SEC of any potential legal infirmities of a new reporting rule.

Engaging with Industry on Proposed Approaches

The SEC correctly identifies that industry issuers may be best positioned to define the standard for required climate disclosures.[21] API strongly supports the SEC utilizing issuer-developed frameworks such as the Industry Guidance and working with issuers and other industry participants as partners in the development of industry standards regarding what climate-related information should be disclosed. The oil and natural gas sector is extremely complex and best exemplifies why any new reporting effort should be developed in conjunction with industry issuers. For example, financial accounting methods for the sector have been developed over nearly a century of experience and take into account the characteristics that make the sector far different from others, including the high-risk nature of the work involved, the high cost of investment, the lack of a consistent correlation between the amount of costs and value of resulting reserves, the protracted nature of when costs are first incurred until the benefits are recorded, and various cost-sharing agreements. Similarly, when the reporting of reserves was reviewed and developed in the early 2000's, industry worked with the SEC to educate on industry practices and explore concerns the SEC had on providing clear information to investors. The complexities associated with that single area of the industry still took significant time to develop into the current reserve reporting rules, and that experience should inform the development of any required reporting around emissions or climate impacts by firms.

Furnished vs. Filed

Given the concerns about materiality and the evolving nature of shareholder engagement, API believes that any required climate-related disclosures made by issuers should be considered "furnished" rather than "filed."[22] Allowing disclosures to be furnished rather than filed encourages broader disclosure. Should information provided be considered filed, it would be subject to section 18 liability and incorporated by reference into a filing under the Securities Act of 1933 (the "Securities Act") and potentially subject the issuer to strict liability under section 11 of the Securities Act. Under that scenario, some issuers would be incentivized to disclose in the manner most limited to meet the specific requirement and avoid more robust explanation. Furnishing information, on the other hand, allows

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[18] *NIFLA v. Becerra*, 138 S. Ct. 2361, 2365-66 (2018).

[19] *Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020); Reed v. Town of Gilbert, 576 U.S. 155, 159 (2015).

[20] *National Ass'n of Mfrs.*, 748 F.3d 359, 371-72 (D.C. Cir. 2014) (invalidating SEC's conflict minerals rule under the intermediate scrutiny standard).

[21] *See* Acting Chair Allison Herren Lee, Public Statement – Public Input Welcome on Climate Change Disclosures – Question 3 (2021), *available at* https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

[22] *See* Acting Chair Allison Herren Lee, Public Statement – Public Input Welcome on Climate Change Disclosures – Question 7 (2021), *available at* https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

companies to expand on information in reports and provide additional perspective or context. The material included in furnished statements, though, is still covered by federal securities laws and existing anti-fraud provisions ensuring the information reported will be reliable and accurate.[23]

Additionally, while some climate-related disclosures can provide valuable and material information to investors, certain types of climate-related disclosures are inherently different than traditional financial information filed with quarterly and annual reports. The nature of disclosures related to emissions or climate risks and opportunities are intended to provide investors information necessary to assess how companies are addressing climate-related matters. Requiring issuers to extend their internal controls relating to financial reporting to all climate-related disclosures would likely require issuers to significantly alter and expand their existing internal control framework. Such information is captured outside the established financial reporting process due to how the information is accessed or developed within the member companies. Much of the assessment of potential climate risks and/or opportunities is qualitative in nature, and specific GHG emission information is calculated based upon models and accepted technical factors related to GHG emissions sources. As a result, the collection of this type of information and discussion of potential risks and opportunities is very different than putting a balance sheet and income statement together.

We recognize it is likely that there will be climate-related information that does not reach the proposed material standard, but may still be seen as important by investors. We believe that only information meeting the materiality standard to investors should be subjected to a filed disclosure. While permitting information to be furnished as opposed to filed will offer a degree of protection for issuers from strict liability, furnishing investor relevant information should not create concerns among investors as to the accuracy or nature of the data. There are related anti-fraud statutes with respect to furnished information that will ensure all climate-related disclosures meet industry developed approaches and provide accurate information to investors. Including climate related disclosures as part of a filing would likely subject the information to additional internal controls, but it is unclear what value the disclosure of the internal controls leading to climate reports will add especially given their potential cost and impact on businesses.

Additional Liability Concerns

It is clear there are distinct differences between the financial data gathered for disclosure and climate-related information - raising potential liability concerns. First, API member companies anticipate being a proactive part in developing climate change solutions and reducing GHG emissions. This could include issuers planning for and setting targets for GHG emissions reductions based on the best technology available, reasonable assumptions, and anticipated energy demand, among many other factors. However, unplanned events could alter the trajectory for reaching planned reductions. Ensuring that statements made in climate-related disclosures are provided liability protection for forward-looking statements is essential for this type of information, especially to encourage issuers to set and report on more aggressive targets and goals.

Second, the scope of liability protection generally afforded forward-looking statements should be considered for any required disclosures pertaining to the social impact of climate-related matters. It is unclear whether the SEC is considering an effort to extend climate disclosures to cover the social impact

[23] See, 17 C.F.R. Section 240.10b-5(b).

of climate issues. API believes that the proper scope of disclosures should be limited to material information necessary for a reasonable investor to base his or her decisions. However, if the agency decides to extend reporting to social impact statements, it should provide for additional liability protection. Requiring an issuer to project global energy needs, societal situations, political regimes and consumer impacts years, or decades, into the future will be difficult and naturally uncertain. Such projections should not be subject to traditional liability as a result. Rather, as the SEC considers a reporting regime in this area, it should be careful to balance generating information to investors that will be necessary to understand the impact of issuers operations on climate-related issues in conjunction with the need for liability protection such as a reporting safe harbor or phased reporting – especially at early stages of any disclosure requirement.

Current Information Flows

As the SEC contemplates the structure of potential climate information disclosure by issuers, we believe that it should take under consideration two important factors. First, there is already a large amount of activity in this area through existing climate reporting regimes. The Commission should be careful not to pile on potentially inconsistent information requirements. Second, the Commission should take care to allow each issuer to express its unique approach to engaging with the challenge of addressing the risks of climate change.

Currently, the Greenhouse Gas Reporting Program ("GHGRP") overseen by the Environmental Protection Agency ("EPA") requires the tracking of facility-level Scope 1 emissions[24] from large greenhouse gas emitters. Companies with facilities that meet the EPA GHGRP threshold for facility-level GHG emissions report these data, and the EPA makes such data public in a timely manner. The GHGRP should be recognized and leveraged in the development of any SEC climate-related disclosure. These standards reflect the best science available, and extensive public stakeholder input, and have evolved over numerous years to reflect the types of data understood as most relevant to climate-related issues. The information provided through the GHGRP by oil and natural gas companies is also extremely detailed and provides logical distinctions based upon numerous factors including industry segment (e.g., onshore vs. offshore), process emission sources (e.g., flare stacks, distribution mains, and dehydrators), and geographic location by basin.[25]

The SEC further should catalogue and understand what is already required by other governmental agencies to ensure any SEC-related disclosure process is as efficient as possible. We recognize that there may be some limitations to the GHGRP scope in relation to some factors the SEC may consider important – specifically non-U.S. emissions and facilities owned by issuers that are not large greenhouse gas emitters. However, use of the GHGRP with limited adjustments should provide an important source of relevant information that would not require a new reporting regime. First, use of the GHGRP to cover Scope I emissions would be the most reliable set of projections by all issuers because they are directly traceable to the activities of the issuer. Second, the concepts and approach could be a base for broader SEC reporting (e.g., non-U.S. based emissions). The SEC should take care not to require disclosures that

[24] Emissions that are direct from sources owned or controlled by a company.
[25] See 2011 – 2019 GHGRP Industrial Profile, https://www.epa.gov/sites/production/files/2020-11/documents/subpart_w_2019_industrial_profile.pdf.

may conflict with the pre-existing GHGRP requirements to avoid creating additional cost and compliance obligations without any benefit.

To avoid duplication or creating conflicting data, and to account for changing circumstances and maximize efficiency, the SEC should consider actions that the industry already is undertaking. For the oil and natural gas industry this would include consideration of the Industry Guidance as well as our ongoing efforts to develop comparable industry GHG indicators. There also are some broader frameworks, such as those published by the Task Force on Climate-Related Financial Disclosures ("TCFD"), that could be leveraged as appropriate for more consistent information flows to investors. These approaches provide companies flexibility in explaining how their operations align with the multitude of risks and opportunities inherent with a changing climate. This is important for our industry as oil and natural gas will remain an important energy source in the future. In recent years, many aspects of the industry have significantly evolved. For example, development of sophisticated technology and processes have allowed companies to access natural gas that can reduce emissions in power generation and support hydrogen development. Further, exports of natural gas were a marginal component of the industry in the early 2000s, but have become a major component of the business model today and can support emission reductions in other countries. Companies need flexibility to explain these and other approaches they may be taking to address climate concerns.

We also recognize that some issuers, within the industry and in other industries, may be providing shareholders GHG emissions information beyond their direct, or Scope 1, emissions. This presents additional complexities and data gathering that currently may not be adoptable by all issuers. While additional reporting can always be an option for issuers and may be part of the discourse between management and shareholders, we believe the SEC should remain prudent in its consideration of disclosure requirements. As noted above, when commenting about other significant SEC required disclosures, the SEC should consider the benefits of a phased approach. In the case of climate reporting where calculation approaches and issuer capacity may evolve over time, a planned or phased approach to additional emission indicators might be appropriate depending upon the materiality of the identified metric.

Reporting Standards and Third Parties

As stated above, the SEC should consider ongoing efforts by various economic sectors and their stakeholders as it contemplates any climate-related disclosure goals.[26] The Industry Guidance is the product of over fifteen years of collaboration and covers issues such as performance indicators for sustainability, the advent of new technologies, and suggestions regarding corporate governance.[27] Industry-developed guidance such as these concern the most important information for stakeholders, including investors and will directly speak to how the impact of the industry affects climate-related goals. API encourages the SEC to view these resources as key starting points for evaluating the need to develop new reporting requirements.

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[26] *See* Acting Chair Allison Herren Lee, Public Statement – Public Input Welcome on Climate Change Disclosures – Question 3 (2021), *available at* https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.
[27] Sustainability reporting guidance for the oil and gas industry (2020), *available at* https://www.ipieca.org/media/5115/ipieca_sustainability-guide-2020.pdf.

In addition to the Industry Guidance and reporting framework, API encourages the SEC to leverage frameworks from well-known third parties such as the TCFD. The TCFD in particular has helped develop a framework that now plays an important role in the development in climate reporting by some companies. The TCFD prompts for reporting that covers four thematic areas – (1) governance, (2) strategy, (3) risk management, and (4) metrics and targets – yet provides companies flexibility in addressing these themes as they apply specifically to each company. As stated above, we believe that the SEC could give balanced consideration to leveraging some of those approaches as to how issuers engage with investors on climate reporting and can also serve as a reference point for developing the standards for required disclosures.[28]

Although understanding and leveraging the approaches taken in third party reporting frameworks is strongly encouraged, API would have concerns with the SEC outright delegating any comprehensive standard setting authority or specific indicator definition to non-industry third parties at this time for a few reasons. First, we do not believe that some existing third parties have the broad knowledge to adequately understand relevant or specific reporting indicators on an industry specific basis. Entities such as the Financial Accounting Standards Board ("FASB") and International Financial Reporting Standards Foundation have extensive knowledge of financial accounting matters; and, while some are working to broaden into sustainable indicators[29], time would be needed to build the capability to oversee such reporting.

Second, it is unclear that third party or non-U.S. authorities in this space have the clear governance to transparently and judiciously reflect on climate reporting for various issuers to the level that exists within the SEC. Deferring to organizations that have had limited input from industries or their assessment process is not entirely transparent would create concerns when defining disclosures between issuers and their shareholders. We recognize that this stands in contrast to groups such as the FASB that establishes accounting policy used by issuers in developing financial statements. However, the SEC's engagement with FASB has been established by statute and adheres to a well-developed process that is open to the general public and goes through two iterations prior to a final rule being issued.[30] Further, adoption of non-U.S. based approaches could be problematic in that the aims may not be consistent with the SEC's regulatory mission. For example, despite some organizations claiming their efforts reflect material items, it is unclear whether they have a consistent understanding of the concept of materiality and how it applies to issuers for SEC reporting.

Finally, the U.S. Constitution imposes several limitations on the SEC's ability to require that companies comply with privately developed climate disclosure frameworks. Under the current nondelegation doctrine, the Congress may vest rulemaking authority with administrative agencies so long

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[28] *See* Sustainability Accounting Standards Board "SASB Implementation Supplement – Greenhouse Gas Emissions and SASB Standards" (September 2020); see also Task Force on Climate-Related Financial Disclosures "Recommendations of the Task Force on Climate-Related Financial Disclosures" (June 2017).

[29] See IFRS, *Exposure Draft: Proposed Targeted Amendments to the IFRS Foundation Constitution to Accommodate an International Sustainability Standards Board to Set IFRS Sustainability Standards*, *(April 2021),* available at https://www.ifrs.org/content/dam/ifrs/project/sustainability-reporting/ed-2021-5-proposed-constitution-amendments-to-accommodate-sustainability-board.pdf

[30] *See* Financial Accounting Standards Board, *Standard-Setting Process Rules of Procedure*, (Dec. 2013) available at https://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1351027215692.

as it provides "an intelligible principle" to guide the agency's exercise of that authority.[31] But neither Congress nor an agency may delegate to private entities unfettered power to establish the content of regulatory requirements that are binding upon third parties.[32] In addition, granting regulatory power to private parties is restricted by the Appointments Clause of Article II, the Due Process Clause of the Fifth Amendment, and circumvents the provisions of the Administrative Procedure Act.[33] Private parties may play a role in the rulemaking process, such as by recommending standards through comments, but either the Congress or a federal agency must retain the ultimate decision[34] authority and must exercise that authority. In other words, the SEC may not outsource GHG standard setting to third parties.

Assurance Process and Climate-Related Disclosures

We understand that regulators and investors want to assure the reliability of any company disclosures including processes by which disclosed information is gathered. Of course, current public reports and disclosures furnished by companies cannot be fraudulent and companies develop internal processes to assure accuracy. Climate-related information is quite different from traditional financial reporting disclosures, but many companies have been providing this information to the public and shareholders on a voluntary basis. Should the SEC establish climate-related disclosure requirements, currently existing company internal controls processes could be utilized in the disclosure developmental process. We understand that additional assurance or attestation may provide benefit in some circumstances where issuers seek to align their reporting to specific frameworks. However, we believe that most companies' current processes for assuring the reliability of information that they regularly file with various regulators, or already voluntarily disclosure, can be leveraged in considering whether each company's internal controls and disclosure controls and procedures are deemed sufficient for any new SEC disclosure requirements.

The SEC should also weigh the cost of efforts to expand assurance levels for information or processes against the potential benefits of the information to be provided to investors. There may be technical issues and training that becomes necessary and potential coordination with firms outside of existing relationships. It should be examined as to whether traditional accounting firms may be currently staffed to provide positive assurance services across all issuers. A gap in this regard could create further disparity among large and small issuers competing for available resources. A deliberate, phased in process may alleviate some of these potential market constraints and will take into account the evolving nature of this topic.

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[31] *E.g.*, *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). And there may be stricter constitutional limits on the power of the Congress to "delegate" its legislative power to executive branch agencies. *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, concurring in the judgment) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); *see id.* at 2131-48 (Gorsuch, J., dissenting) (joined by The Chief Justice and Justice Thomas). Under this view, there may be an impermissible delegation of legislative power if the extant securities statutes were construed to permit the SEC to conjure a novel climate change and ESG disclosure regime, untethered to materiality, without any further congressional involvement.

[32] *E.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935)*; Dept. of Transp. v. Ass'n of Am. RR,* 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring).

[33] *E.g.*, *Association of Am. RR. v. Department of Transp.*, 821 F.3d 19, 36-39 (D.C. Cir. 2016); *Association of Am. RR. v. Department of Transp.*, 721 F.3d 670-74 (D.C. Cir. 2014), *rev'd on other grounds*, 135 S. Ct. 1225.

[34] *See, e.g., Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940).

Equivalency of Foreign Reporting Regimes

The SEC should also carefully coordinate any reporting regimes it considers with existing international requirements. Many foreign reporting regimes already require a great amount of disclosure. Setting a single set of global standards applicable to companies around the world without considering these existing requirements would further complicate compliance with any climate-related disclosures.[35] Any new requirements from the Commission should allow for direct or alternative compliance by meeting the requirements of a foreign jurisdiction's climate-related reporting regime, provided the SEC has determined the alternative reporting regime requires disclosure that meets or exceeds that which is prescribed in the rulemaking process. This approach will reduce the compliance burden on issuers who are subject to foreign reporting regimes, such as those in the UK and European Union. API is prepared to provide a list of reporting regimes we believe meet these criteria once proposed rules have been released.

Conclusion

As the SEC considers the necessity of requiring some type of climate disclosure by issuers, we look forward to working with the SEC and acting as a resource through the rulemaking process. Given our industry's vast experience on climate reporting and other initiatives, we can help identify specific gaps in information that are important and useful to a broad range of investors while also taking into account the costs to and capabilities of issuers. This could include limiting scopes to reporting already required under other statutes as well as leveraging existing frameworks already being adopted by many companies. We emphasize that materiality must drive any disclosure consideration and requiring one-size-fits-all metrics for issuers regardless of sector may not be appropriate due to inherent differences among the sectors. Given this evolving area, the SEC should maintain full control of any disclosure rules or requirements , and we support a furnished rather than filed approach. We also believe that any additional assurance effort should remain voluntary or be phased in as rules, while processes and the market itself continue to develop in this area.

Should you have any questions or wish to follow-up on any of these points, please do not hesitate to reach out to me.

Sincerely,

Frank J. Macchiarola

[35] *See* Acting Chair Allison Herren Lee, Public Statement – Public Input Welcome on Climate Change Disclosures – Question 9 (2021), *available at* https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

Attachment 1

Note: Attachment 1 is a screenshot of API Template 1.0 for GHG Reporting (referred to earlier as the Template). The Template includes a set of GHG indicators for companies to consider as part of their voluntary disclosure framework, to the extent such indicators are relevant, to help drive consistency and comparability of such reporting across companies. This template is not intended to be a basis for prescriptive disclosure rules. Rather, the Template is intended to be an example of the efforts the industry is making on voluntary disclosures. API and its member companies will continue to update the Template on a periodic basis in order to complete sections which are pending and to continuously improve industry voluntary disclosure standards.

API Template 1.0 for GHG Reporting

As approved by API Executive Comitte on June 9, 2021

General

Date:	
IPCC AR GWP:	*AR4*
Basis:	*Equity*

No.	Indicator	Units	2020	2021	Comments
1. Direct GHG Emissions (Scope 1)					
1.1	**Direct GHG Emissions (Scope 1) - All GHGs**	(million metric tons CO_2e)	-		
1.1.1	**Upstream - All GHGs**	(million metric tons CO_2e)			
1.1.1.1	CH_4	(million metric tons CO_2e)			
1.1.1.2	Upstream Flaring - All GHGs (subset of Scope 1)	(million metric tons CO_2e)			
1.1.1.3	Volume of Flares	(mmcf)			
1.1.2	**Midstream - All GHGs**	(million metric tons CO_2e)			
1.1.2.1	CH_4	(million metric tons CO_2e)			
1.1.3	**Downstream - All GHGs**	(million metric tons CO_2e)			
1.1.4	**LNG - All GHGs**	(million metric tons CO_2e)			
1.1.5	**Oil and Natural Gas Field Services - All GHGs**	(million metric tons CO_2e)			
2. Indirect GHG Emissions from Imported Energy (Scope 2)					
2.1	**Indirect GHG Emissions from Imported Electricity + Heat + Steam + Cooling (Scope 2, *Market-based*)**		-		
2.1.1	**Upstream - All GHGs**	(million metric tons CO_2e)			
2.1.2	**Midstream - All GHGs**	(million metric tons CO_2e)			
2.1.3	**Downstream - All GHGs**	(million metric tons CO_2e)			
2.1.4	**LNG - All GHGs**	(million metric tons CO_2e)			
2.1.5	**Oil and Natural Gas Field Services - All GHGs**	(million metric tons CO_2e)			
3. GHG Mitigation					
3.1	**GHG Mitigation from CCUS, Credits, and Offsets**	(million metric tons CO_2e)	-	-	
3.1.1	**Carbon Capture Utilization or Storage (CCUS) - All GHGs**	(million metric tons CO_2e)			
3.1.2	**Renewable Energy Credits - (RECs for Indirect Emissions) - All GHGs**	(million metric tons CO_2e)			
3.1.3	**Offsets - All GHGs**	(million metric tons CO_2e)			
4. Intensity - Direct GHG Emissions (Scope 1)					
	Pending API member company testing of suitable options; selected set of intensity indicators will be included in a subsequent version of the template				
5. Additional Climate-Related Targets and Reporting					
5.1	**GHG Reduction Target(s)**	☐ Yes ☐ No			
5.2	**TCFD-informed reporting**	☐ Yes ☐ No			
5.3	**Additional Climate Reporting Resources**	*Include links in the Comments Box*			
6. Third-party Verification					
6.1	**Assurance Level**				
6.2	**Assurance Provider**				