



June 17, 2022

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Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: The Enhancement and Standardization of Climate-Related Disclosures for Investors (File No. S7-10-22, RIN 3235-AM87)

Ladies and Gentlemen:

Better Markets¹ appreciates the opportunity to comment on the above-captioned proposal (“Proposal” or “Release”) issued by the Securities and Exchange Commission (“SEC” or “Commission”).

The Proposal would establish a mandatory disclosure regime for registrants in response to broad investor demand for better disclosure about how the companies they own are responding to the financial risks and opportunities presented by climate change. The Proposal is fueled by the scientific consensus that anthropogenic climate change, and the necessary responses to mitigate that change, are having wide-ranging impacts that will spare almost no corner of the planet and will, directly and indirectly, affect the financial health of virtually every company.

The Proposal will enhance the transparency of registrants’ actions related to climate change, to the benefit of investors who are entitled to decision-useful information about how the companies they invest their money in are responding to one of the most urgent economic and financial risks our society faces. The Proposal will also benefit our financial system, which will come under increasing strain as the impacts of climate change and the transition away from a carbon-based economy become progressively more apparent.

¹ Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system that protects and promotes Americans’ jobs, savings, retirements, and more.

Because the proposed mandated disclosures will better protect investors and serve the public interest, they are well within the SEC’s statutory authority. And while materiality is not a legal requirement under an SEC disclosure regime, there can be no doubt that the Proposal deals in material information, as a broad range of “reasonable” investors—from individual retail investors to money managers overseeing trillions of dollars in assets—are demanding the disclosure of information about how companies are managing climate risk.

Those who claim the SEC is stepping outside its role as a financial market regulator, acting in effect as an environmental policy agency or a de facto EPA, are plainly wrong, if not disingenuous. Will the Proposal help address an increasingly desperate threat to our planet and help improve the quality and sustainability of our environment? Probably so. But is that why the SEC has embarked on the Proposal? Certainly not. With this Proposal, the SEC is engaged in the single most common and important regulatory activity it has pursued for almost 90 years: simply requiring companies that accept investors’ money to disclose all material information about their financial activities, challenges, opportunities, and prospects—all matters that climate change profoundly affects. That is precisely what Congress authorized and expected the SEC to do as the leading regulator of our capital markets.

The Proposal is generally well-designed, tailored to answer the call for more corporate disclosure about climate change risk but sensitive to the challenges that such a new disclosure regime presents. We strongly support the Proposal, although we also believe that it can and should be significantly strengthened by removing some exemptive provisions and enhancing the reliability of the disclosures, all while remaining well within the Commission’s broad authority to mandate disclosures for the protection of investors and the public interest. In the balance of this letter, we set forth important background information that is important in evaluating the Proposal, along with our comments and some specific ways in which it should be enhanced.

INTRODUCTION AND BACKGROUND

I. THE CONSENSUS IS THAT CLIMATE CHANGE IS REAL AND IF UNCHECKED, POTENTIALLY DEVASTATING.

Concerns that human-generated carbon dioxide emissions and emissions of other greenhouse gases (“GHG”) might cause a warming of the Earth’s climate date back to at least the late-19th century, with Nobel Prize winning chemist Svante Arrhenius positing the idea of a “greenhouse effect” and the notion that human activities might contribute to this phenomenon.² At that time, Arrhenius’s hypothesis, like many others in the then-nascent study of how and why the Earth’s climate changes over time, was speculative.³ However, in the ensuing decades, as

² ELIZABETH KOLBERT, FIELD NOTES FROM A CATASTROPHE 39-42 (2006).

³ See ELIZABETH KOLBERT, FIELD NOTES FROM A CATASTROPHE 41 (2006) (“By today’s standards, Arrhenius’s work seems primitive...He was missing crucial pieces of information about spectral

climatology evolved and as scientists became better able to measure and model climatic changes and discern the causes behind them, it became increasingly clear that the broad contours of Arrhenius’s hypothesis were correct—carbon in the atmosphere was increasing, and the result was higher global temperatures. By the 1980s, scientists were increasingly alarmed about the warming of the climate and the potentially catastrophic consequences, with Dr. James Hansen’s congressional testimony in 1988 as a notable example of the increasing visibility of the issue.⁴ In 1992, as part of a summit between world leaders to discuss environmental issues, more than 150 countries signed the Framework Convention on Climate Change. They agreed to work to address the issue and to meet periodically, but not much more.⁵ In 1997, those countries met in Kyoto, and the result was the 1998 Kyoto Protocols, which included the first binding commitments to reduce global greenhouse gases.⁶

At the same time, as climate change became more visible, and more people, including scientists, began advocating for aggressive policy interventions to address it, the issue also became more politicized. This was in no small part because addressing climate change would necessarily mean imposing costs on certain industries. When he was president, George W. Bush rejected the Kyoto Protocols, contending that adhering to the Kyoto Protocols would harm the U.S. economy. And, as did many climate change deniers at the time, he pointed to supposed uncertainty surrounding (1) whether the climate was warming, (2) whether, if it was, human activity was to blame, and (3) whether, assuming climate change were real and caused by humans, its adverse impact would be serious enough to justify the costs of addressing it.⁷

In the ensuing years, the scientific consensus that climate change was real, caused by humans and threatened a significant adverse impact, only increased. In 2001, the same year that President Bush withdrew the U.S. from the Kyoto Protocols, the Intergovernmental Panel on Climate Change (“IPCC”) released an assessment stating, among other things, that an “increasing body of observations gives a collective picture of a warming world,” that the 90’s were “very likely” the warmest decade on record, that there was “new and stronger evidence that most of the warming observed over the last 50 years is attributable to human activities,” and that there would

absorption, and he ignored several potentially important feedbacks.”). Arrhenius, working far before the widespread adoption of the automobile, also did not fully grasp how quickly the phenomenon he had identified would change the Earth’s climate, predicting that doubling the atmospheric concentration of carbon would take 3,000 years, but he “was off by 2800 years.” Timothy E. Wirth, *A Way Forward on Climate Change*, 2 HARV. L. & POL’Y REV. 313 (2008).

⁴ Joseph Allan MacDougald, *Paris, Policy, and the Grid: History and Context*, 33 CONN. J. INT’L L. 409, 414 (2018).

⁵ See Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE J. INT’L L. 451, 454 (1993).

⁶ Joseph Allan MacDougald, *Paris, Policy, and the Grid: History and Context*, 33 CONN. J. INT’L L. 409, 415 (2018).

⁷ Riley Beggin, *The Last Time a U.S. President Dumped a Climate Deal*, ABCNews (Jun. 1, 2017), <https://abcnews.go.com/Politics/time-us-president-dumped-global-climate-deal/story?id=47771005>.

likely be significant adverse impacts as a result of climate change.⁸ In other words, despite claims that continue to persist from some about significant uncertainty surrounding the reality and impact of climate change, the scientific consensus has for decades been coalescing around the reality of the phenomenon and the need for urgent action. The IPCC's 2014 report was even more explicit: It cited unmistakable warming and "confirm[ed] that human influence on the climate is clear and growing, with impacts observed across all continents and oceans."⁹

Reflecting the widespread, global consensus regarding the need to combat climate change, in 2015 nearly every country on Earth joined the Paris Climate Agreement, pledging to reduce greenhouse gas emissions so as to limit warming to less than 2 degrees Celsius from pre-industrial levels.¹⁰ More recently, the U.S. and other nations have redoubled their commitment to combating climate change, pledging to cut emissions by even more than originally agreed; these new commitments have been described as both aggressive yet potentially insufficient, which underscores the inevitability of dramatic societal transformation in the face of climate change.¹¹

Ultimately, nearly 100% of climate scientists agree that the climate is warming, that humans are a significant driving factor in causing that warming, and that the adverse consequences, both financial and otherwise, from this warming will be significant.¹² Moreover, even in just the past few years, advances in modeling and other techniques have better enabled scientists to approximate the degree to which extreme events and disasters are being caused by climate change. Accordingly, scientists have confidently concluded that climate change has made devastating

⁸ IPCC, CLIMATE CHANGE 2001 SYNTHESIS REPORT 4-6 (https://gridarendal-website-live.s3.amazonaws.com/production/documents/:s_document/285/original/spm.pdf?1488203630).

⁹ IPCC, CLIMATE CHANGE 2014 SYNTHESIS REPORT v, https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf

¹⁰ UNITED NATIONS, PARIS AGREEMENT (last visited Jun. 7, 2021), <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>. Reflecting the ongoing politicization of climate issues in the U.S., in 2017 former President Donald Trump withdrew America from the Paris Agreement. Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (Jun. 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>. Reflecting the fact that the arguments against acknowledging the reality of climate change and the necessity of combating it are not based in anything approaching fact or reality, Trump's speech announcing the withdrawal was littered with falsehoods. Vanessa Schipani, et al., *FactChecking Trump's Climate Speech*, FACTCHECK.ORG (Jun. 1, 2017), <https://www.factcheck.org/2017/06/factchecking-trumps-climate-speech/>. As one of his first acts in office, President Biden rejoined the Paris Agreement. Nathan Rott, *Biden Moves to Have U.S. Rejoin Climate Accord*, NPR (Jan. 20, 2021), <https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958923821/biden-moves-to-have-u-s-rejoin-climate-accord>.

¹¹ Brad Plumer & Nadja Popovich, *The U.S. Has a New Climate Goal. How Does it Stack Up Globally?*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/interactive/2021/04/22/climate/new-climate-pledge.html>.

¹² David Herring, *Isn't There a Lot of Disagreement Among Climate Scientists About Global Warming*, CLIMATE.GOV (Feb. 3, 2020), <https://www.climate.gov/news-features/climate-qa/isnt-there-lot-disagreement-among-climate-scientists-about-global-warming>.

wildfires, such as those that have raged in Australia, California, and other places in recent years, more likely to occur and more damaging when they do occur.¹³ Scientists have also pointed to climate change as a likely contributing factor behind 2020's record-shattering hurricane season, in which there were so many named storms that the World Meteorological Organization's list of names for the season was exhausted and the organization had to resort to naming storms using the Greek alphabet.¹⁴ Ultimately, the number of ecological and climate disasters causing at least \$1 billion in damage has increased, with 2020 seeing an astonishing and record-setting 22 such events costing \$95 billion in damage and over 250 lives, a trend scientists attribute to climate change.¹⁵ As time goes on, the urgency of climate change only becomes more apparent. For example, it was recently reported that in 2021, that **40% of Americans live in counties hit by climate-related disasters.**¹⁶

All of which is to say, not only is it clear that climate change is occurring and will have a significant impact, it is also clear that **we are already living through the impact, and the impact is indeed severe.** Ultimately, scientists broadly agree that there needs to be a drastic reduction in greenhouse gas emissions in a short period of time, with the U.N. estimating in 2019 that emissions will need to drop by 7.6% **each year** from 2020-2030 to prevent the Earth from warming more than 1.5 to 2 degrees Celsius above pre-industrial levels. Scientists believe this is the essential target we must reach to avoid the worst effects of climate change.¹⁷

II. CLIMATE CHANGE POSES MAJOR THREATS NOT ONLY TO THE ENVIRONMENT BUT ALSO TO BUSINESSES, THE ECONOMY, AND THE FINANCIAL SYSTEM.

Because, as explained above, the impact from both the effects of climate change itself, and the significant policy changes required to forestall the worst of those effects, will be broad,

¹³ Henry Fountain, *Climate Change Affected Australia's Wildfires, Scientists Confirm*, N.Y. TIMES, (Mar. 4, 2020), <https://www.nytimes.com/2020/03/04/climate/australia-wildfires-climate-change.html>; Henry Fountain, *In a Warming California, a Future of More Fire*, N.Y. TIMES (Dec. 7, 2017), <https://www.nytimes.com/2020/09/08/climate/california-wildfires-climate.html>.

¹⁴ James H. Ruppert, Jr. & Allison Wing, *This Year's Record Breaking Hurricane Season is Raising More Concerns About Climate Change*, PBS NEWSHOUR (Dec. 1, 2020), <https://www.pbs.org/newshour/science/this-years-record-breaking-atlantic-hurricane-season-is-raising-more-concerns-about-climate-change>.

¹⁵ Thomas Frank, *Billion-Dollar Disasters Shattered U.S. Record in 2020*, SCIENTIFIC AMERICAN (Jan. 11, 2021), <https://www.scientificamerican.com/article/billion-dollar-disasters-shattered-u-s-record-in-2020/>.

¹⁶ Sarah Kaplan & Andrew Ba Tan, *More than 40 percent of Americans live in counties hit by climate disasters in 2021*, WASH. POST (Jan. 5, 2022), <https://www.washingtonpost.com/climate-environment/2022/01/05/climate-disasters-2021-fires/>.

¹⁷ Brady Dennis, *In Bleak Report, U.N. Says Drastic Action Is Only Way to Avoid Worst Effects of Climate Change*, WASH. POST (Nov. 26, 2019), <https://www.washingtonpost.com/climate-environment/2019/11/26/bleak-report-un-says-drastic-action-is-only-way-avoid-worst-impacts-climate-change/>.

touching nearly every aspect of society. Of clear relevance to the Proposal, this of course includes the economic impacts, which one study confirmed will be negative and will apply broadly “to poor or rich, and hot and cold countries alike, as economic growth is affected not only by higher temperatures but also by the degree of climate variability.”¹⁸ By one estimate, the impact of climate change could result in a loss to the American economy of 2% of GDP per year.¹⁹ Another study determined that climate change could wipe off **\$23 trillion in global wealth** by 2050.²⁰ Indeed, we are already seeing the consequences of climate change play out commercially and economically, as the “price of homes the U.S.’s eastern seaboard battered by fiercer storms and higher seas is lagging behind those inland” while the “price of farmland is rising in North America’s once-frigid reaches, partly because of bets it will become more temperate.”²¹ Ultimately, climate change and the efforts to ameliorate its worst effects will have a significant on where and how people live and work, their travel patterns, patterns of energy consumption, the value and insurability of assets, how goods move, and every other aspect of the economy. Such significant dislocations to economic and commercial activity can be expected to have a noticeable impact on nearly every business and commercial enterprise operating in what is a globally interconnected economy.

Thus, it has long been recognized in the business community that businesses need to have a plan to account for the risks posed by climate change. In a 2007 issue of the Harvard Business Review dedicated to climate change, the editors explained that as the widespread impacts from climate change make themselves felt, “businesses that continue to sit on the sidelines will be badly handicapped relative to those that are now devising strategies to reduce risk and find competitive advantage in a warming, carbon-constrained world.”²² In that same issue, business academics explained that climate change had transitioned from a “social responsibility” issue to an issue that will directly impact a business’s competitiveness and, ultimately, bottom line:

“Companies that persist in treating climate change solely as a corporate social responsibility issue, rather than a business problem, will risk the greatest

¹⁸ See Matthew E. Kahn, et al., *Long-Term Macroeconomic Effects of Climate Change: A Cross-Country Analysis* at 4, (NBER Working Paper No. 26167) (Aug. 2019) (finding that climate change has a negative impact on long-term growth and that “our empirical findings apply equally to poor or rich, and hot or cold countries”), https://www.nber.org/system/files/working_papers/w26167/w26167.pdf.

¹⁹ The Hamilton Project and the Stanford Institute for Economic Policy Research, *Ten Facts about the Economics of Climate Change and Climate Policy* 7 (2019), https://www.brookings.edu/wp-content/uploads/2019/10/Environmental-Facts_WEB.pdf.

²⁰ Christopher Flavelle, *Climate Change Could Cut World Economy by \$23 Trillion in 2050, Insurance Giant Warns*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/04/22/climate/climate-change-economy.html>.

²¹ Bradley Hope & Nicole Friedman, *Climate Change Is Forcing the Insurance Industry to Recalculate*, WALL ST. J (Oct. 2, 2018), https://www.wsj.com/graphics/climate-change-forcing-insurance-industry-recalculate/?mod=article_relatedinline.

²² Editor’s Note in *Climate Business/Business Climate*, HARVARD BUSINESS REVIEW (Oct. 2007), <https://hbr.org/2007/10/climate-business-business-climate>.

consequences. Of course, a company's climate policies will be affected by stakeholder expectations and standards for social responsibility. But the effects of climate on companies' operations are now so tangible and certain that the issue is best addressed with the tools of the strategist, not the philanthropist."²³

Unsurprisingly, the direct link between the necessary steps to address climate risk and businesses' bottom line has only become clearer since the admonitions of the Harvard Business Review in 2007. One catalyst for this was the 2015 Paris Accords, in which nearly every country on Earth committed to significant reductions in carbon emissions in an attempt to limit warming to 1.5 to 2 degrees Centigrade and avoid the worst effects of climate change. This resolve signaled that policymakers around the world were committed to taking drastic action to combat climate change, drastic action that will clearly have a commercial impact.²⁴

Another catalyst has been the extent to which the physical risks of climate change have become apparent in the last few years, in a way in which they were not previously evident. As explained above, there has been a significant increase in costly environmental disasters, including large storms, severe droughts, and devastating wildfires, which improvements in modeling have allowed scientists to tie to climate change.²⁵ This has had an impact on businesses' assessment of climate change in at least two related ways. First, it illustrated the degree to which climate change makes sudden, catastrophic events that could pose an existential threat to a company more likely, challenging assumptions that the threats from climate change would be more gradual and, perhaps, less widespread.²⁶ Deloitte recently explained that climate change and extreme weather alone "directly impact 70% of all economic sectors worldwide routinely."²⁷ Second, it made the impacts of climate change more concrete and real for consumers, investors, and other individuals whose dollars companies are ultimately trying to attract. As one CEO cogently explained, businesses

²³ Michael E. Porter & Forest L. Reinhardt, *Grist: A Strategic Approach to Climate* in *Climate Business/Business Climate*, HARVARD BUSINESS REVIEW (Oct. 2007), <https://hbr.org/2007/10/climate-business-business-climate>.

²⁴ David Hodari, *For Business, Climate Change Has Become Real*, WALL ST. J. (Dec. 17, 2019) ("The turning point for business came in 2015, with the United Nations Climate Change Conference in Paris... Activists were already calling for more government oversight on industry, and investors were pressuring companies on environmental issues. The agreement accelerated those trends, and was a crucial driver in making the corporate sector take climate change into account when doing business."), https://www.wsj.com/articles/business-worries-about-climate-intensify-their-actions-less-so-11547643600?mod=article_inline.

²⁵ *Supra* notes 12-16

²⁶ See Russell Gold, *PG&E: The First Climate-Change Bankruptcy, Probably Not the Last*, WALL ST. J. (Jan. 18, 2019), <https://www.wsj.com/articles/pg-e-wildfires-and-the-first-climate-change-bankruptcy-11547820006>.

²⁷ Kristen Sullivan, et al., *Climate Change 101 for Business Leaders*, DELOITTE INSIGHTS (Jan. 6, 2021), <https://www2.deloitte.com/us/en/insights/topics/strategy/economic-impact-climate-change.html>.

need to abandon merely symbolic gestures because consumers now know more clearly than ever what is at stake:

“Consumers had first-hand exposure to the real-life impacts of climate change this year with record-breaking wildfires and the worst air pollution the U.S. has ever seen. Now that they’re painfully aware that this is directly affecting them, they will no longer be amused by far-off climate initiatives with symbolic names like ‘Vision 2030.’”²⁸

This has led to a widespread recognition that businesses must account for climate change as a part of their primary mission of maximizing profits. At a recent conference on climate change, the impact on businesses was put in stark terms:

“The climate-related shift could be as transformational as the advent of the internet. Businesses that do not adapt will be at risk, while those that embrace change will see greater opportunities. Dr Bell [the Asia-Pacific climate change and sustainability services leader for Ernst & Young] describes climate change as ‘the greatest economic transformation in our lifetime, because it impacts on every single industry sector. Nobody’s immune.’”²⁹

One important thing to note about these warnings regarding the potential impact of climate change on businesses’ bottom line is they are not being urged by environmental activists or liberal or progressive politicians, but by members of the business community itself.

In addition, given that climate change is expected to “impact nearly every facet of the economy, including infrastructure, agriculture, residential and commercial property, as well as human health and labor productivity,” it does not only pose a threat to individual businesses but poses a broader threat to financial stability.³⁰ This has been widely recognized by regulators across the U.S. and the globe who have a responsibility to address risks to financial stability. The Market Risk Advisory Committee of the Commodity Futures Trading Commission (“CFTC”) has explained that climate change poses potential risk to financial stability in the form of “disorderly

²⁸ Edward Segal, *Here’s How Climate Change Crisis Could Impact Business Operations And Policies In 2022*, FORBES (Jan. 1, 2022), <https://www.forbes.com/sites/edwardsegal/2022/01/01/heres-how-climate-change-crisis-could-impact-business-operations-and-policies-in-2022/?sh=717e57fc1568>.

²⁹ Lucy Colback, *The Role of Business in Climate Change*, FIN. TIMES (Dec. 17, 2020), <https://www.ft.com/content/7ab0bfb0-b37c-463d-b132-0944b6fe8e8b>.

³⁰ Managing Climate Risk in the U.S. Financial System: Report of the Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission (2020), <https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>.

price adjustments in various asset classes, with possible spillovers into different parts of the financial system, as well as potential disruption of the proper functioning of financial markets.”³¹

The Financial Stability Oversight Council (“FSOC”)—which as its name implies is directly responsible for monitoring the financial system and identifying risks to financial stability—has specifically identified climate change as an emerging threat to financial stability, as the escalating “adverse effects from climate change to households, communities, and businesses will exacerbate climate-related risks to the U.S. and global financial systems if not addressed.”³² Similarly, the Financial Stability Board (“FSB”), has recognized that the “manifestation of physical risks” from climate change “as well as a disorderly transition to a low-carbon economy could have destabilizing effects on the financial system.”³³ Indeed, the FSB referred to the threat climate change poses to financial stability as different from other risks to financial stability because it is “global in nature, and will have effects across all entities, sectors, and economies.”³⁴

Importantly, each of these agencies—CFTC, FSOC, and FSB—have specifically identified lack of transparency as a key driver of climate-related risk to the financial system. Accordingly, they have emphasized the importance of enhanced corporate disclosures about climate-related risks to mitigating risks to the financial system. For example, the CFTC identified as a major concern for regulators “what we don’t know,” and therefore emphasized that

“building on the firm-level disclosures provided by issuers, U.S. financial regulators would be better able to understand the impacts of climate change on financial markets. This greater understanding would allow them to issue relevant guidance or regulation needed to improve the resilience of financial markets in the face of this risk and uncertainty. By the same token, state and local governments—and community members themselves—would be better able to understand how

³¹ Managing Climate Risk in the U.S. Financial System: Report of the Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission (2020), <https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>.

³² FSOC, Report on Climate Related Financial Risk 11 (2021), <https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf>.

³³ FSB Roadmap for Addressing Climate-Related Financial Risks 1 (Jul. 7, 2021), <https://www.fsb.org/wp-content/uploads/P070721-2.pdf>.

³⁴ FSB Roadmap for Addressing Climate-Related Financial Risks 1 (Jul. 7, 2021), <https://www.fsb.org/wp-content/uploads/P070721-2.pdf>.

companies in their localities are preparing for climate risks and opportunities that could impact the local economy, labor force, and tax base.”³⁵

Similarly, FSOC has explained that enhanced disclosure of climate-risks by companies, along the lines of the Proposal, will not only “better inform investors and market participants about the climate-related risks to those entities,” but also, in combination “these disclosures can also better inform market participants and regulators about climate-related risks to industry sectors and the financial system.”³⁶ And the FSB, for its part, has explained that “[h]igh-quality corporate disclosures enable market participants to make better informed decisions, such as on pricing and allocation of capital, and they help financial authorities to better assess the resilience of financial institutions and the overall financial system to climate-related risks.”³⁷

III. GIVEN THE ENORMOUS FINANCIAL IMPACT OF CLIMATE CHANGE, INVESTORS ARE DEMANDING CLIMATE-RELATED DISCLOSURES.

As a general matter, investors are a broad and diverse group with a diverse array of interests and goals, some purely financial, some not. Yet common to all of them is the need and desire for reliable and accurate information on which to base their investment decisions, whatever their personal motivations may be.³⁸ And rarely has the demand for better disclosures from the companies they invest in about the climate-risk they face been so broad and strong.

The SEC has exhaustively documented some evidence of this demand in the Release. This investor demand has come in a variety of forms. In 2019, 630 institutional investors representing more than \$37 trillion in assets under management sent a letter urging governments to mandate climate-related financial reporting. And in 2021, 733 institutional investors representing \$52

³⁵ Managing Climate Risk in the U.S. Financial System: Report of the Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission i, 88 (2020), <https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>.

³⁶ FSOC, Report on Climate Related Financial Risk 67 (2021), <https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf>.

³⁷ FSB Roadmap for Addressing Climate-Related Financial Risks 1 (Jul. 7, 2021), <https://www.fsb.org/wp-content/uploads/P070721-2.pdf>.

³⁸ In some cases, coordination problems can lead to investors not demanding particular information even when those actions would seem to be broadly beneficial to investors of all types. See Sean J. Griffith, *Uncovering A Gatekeeper: Why the Sec Should Mandate Disclosure of Details Concerning Directors' and Officers' Liability Insurance Policies*, 154 U. Pa. L. Rev. 1147, 1189 (2006) (“In this way, the absence of voluntary disclosure of D&O policy details does not point to the irrelevance of the information, but rather to a coordination problem among investors. All investors would prefer that D&O policy information generally be disclosed, but the investors of any one firm may be disinclined to cause it to disclose since that firm will not fully capture the value of its disclosure.”).

trillion in assets under management similarly issued a statement calling on governments to address climate change, in part, by mandating corporate disclosures.³⁹

Investors have also formed groups with the express goal of combating climate change.⁴⁰ Evidence of consistent and widespread investor demand for better climate disclosures is also evidenced by the array of third-party vendors and voluntary frameworks (with significant issuer participation) that has arisen in the absence of a mandatory disclosure regime to provide more information about climate-risks.⁴¹ However, as the Release explains, the proliferation of vendors and frameworks to enhance disclosure of climate risks has come at a cost, leading to significant fragmentation in climate disclosures, undermining their utility for investors and others.⁴² Nevertheless, this evidences both significant and broad investor demand for climate-related disclosures and, importantly, issuer recognition of that demand.

Finally, multiple polls have revealed that an overwhelming majority of investors want mandatory disclosure of climate-risk.⁴³ At the same time, there is virtually no evidence that investors are affirmatively opposed to enhanced, mandatory climate disclosures. In short, investors are demanding, in a variety of ways and through a variety of channels, more and better disclosures related to climate risk.

IV. THE SEC HAS BECOME INCREASINGLY ENGAGED IN ADDRESSING THE NEED FOR DISCLOSURE OF CLIMATE RELATED RISKS.

As noted in the Release, the SEC first addressed environment-related disclosures in the 1970s, explaining in an interpretive release that “registrants should consider disclosing in their SEC filings the financial impact of compliance with environmental laws.”⁴⁴ In 1982, the SEC adopted rules “mandating disclosure of information relating to litigation and other business costs arising out of compliance with” environmental protection laws.⁴⁵ In 2010, in response to investor demand and in light of the fact that companies were disclosing possibly material climate-related information outside of SEC filings, the SEC released guidance specifically addressing companies’ obligation to disclose climate-related risks under existing disclosure obligations.⁴⁶ Finally, in 2021, then-Acting Chair Allison Lee sought public input on climate disclosures.⁴⁷

³⁹ Release at 21,340-41.

⁴⁰ Release at 21,340-41.

⁴¹ Release at 21,341-42.

⁴² Release at 21,342.

⁴³ Public Citizen, *Survey Reveals Retail Investors Want SEC to Require Climate Disclosure* (Apr. 29, 2022), <https://www.citizen.org/news/survey-reveals-retail-investors-want-sec-to-require-climate-disclosure/>.

⁴⁴ Release at 21,338.

⁴⁵ Release at 21,338.

⁴⁶ Release at 21,338.

⁴⁷ Release at 21,338.

OVERVIEW OF PROPOSAL

The Proposal would require that registrants disclose a variety of relevant data and information on climate-related risks, metrics to assess climate-related risks, and strategies for addressing climate-related risk. Specifically, the Proposal would require that registrants disclose:

- How the registrant’s board and management identify, assess, and manage climate-related risk, and whether those processes are integrated into the registrant’s overall risk management process;
- How the registrant’s board and management oversee climate-related risks;
- How any identified climate-related risks have had, or are likely to have, an impact on its business and consolidated financial statements over the short-, medium-, and long-term;
- How any identified climate-related risks have affected or are likely to affect the registrant’s strategy, business model, and outlook;
- If it has adopted a transition plan, a description of the plan, including the relevant metrics and targets used to identify and manage any physical and transition risks;
- If it uses scenario analysis to assess the resilience of its business strategy to climate-related risks, a description of the scenarios used, as well as the parameters, assumptions, analytical choices, and projected principal financial impacts;
- If it uses an internal carbon price, information about the price and how it is set;
- The impact of climate-related events, such as severe weather and wildfires, and transition activities on the line items of a registrant’s consolidated financial statements, as well as the financial estimates and assumptions used in the financial statements;
- Scope 1 and Scope 2 GHG emissions, separately disclosed, expressed both by disaggregated constituent greenhouse gases and in the aggregate, and in absolute terms, not including offsets, and in terms of intensity (per unit of economic value or production), and Scope 3 emissions if material, or if the registrant has established an emissions target that includes Scope 3 emissions;⁴⁸
- If the registrant has publicly set climate-related targets or goals, information about:
 - The scope of activities and emissions included in the target, the timeframe time horizon the target is intended to be achieved, and any interim targets;
 - How the registrant intends to meet its climate-related targets or goals;

⁴⁸

Scope 1 emissions are “are direct GHG emissions that occur from sources owned or controlled by the company,” Scope 2 emissions “are those emissions primarily resulting from the generation of electricity purchased and consumed by the company,” and Scope 3 emissions “are all other indirect emissions not accounted for in Scope 2 emissions,” i.e. emissions that “are a consequence of the company’s activities but are generated from sources that are neither owned nor controlled by the company.” Release at 21,344-45.

- Relevant data to indicate whether the registrant is making progress toward meeting the target or goal and how such progress has been achieved, with updates each fiscal year; and
- If carbon offsets or renewable energy certificates (“RECs”) have been used as part of the registrant’s plan to achieve climate-related targets or goals, certain information about the carbon offsets or RECs, including the amount of carbon reduction represented by the offsets or the amount of generated renewable energy represented by the RECs.

These disclosures would be required to be provided in registration statements and annual reports. Disclosures mandated by Regulation S-K would be required to be made in a separate, captioned section of the relevant report; the climate-related financial metrics mandated by Regulation S-X would be required to be provided in a note to the registrant’s consolidated financial statements. Also, subject to a phase-in period, registrants that are accelerated or large accelerated filers will be required to obtain third-party verification of Scope 1 and Scope 2 emissions disclosures, to a level of “limited assurance” for disclosures made in 2025 by large accelerated filers and 2026 by accelerated filers, and to a level of “reasonable assurance” for disclosures made in 2027 by large accelerated filers and in 2028 for disclosures made in 2028. Forward-looking statements in the registrant’s climate risk disclosures would be subject to the safe harbor in the Private Securities Litigation Reform Act.⁴⁹

COMMENTS

The Proposal will significantly advance the SEC’s goal of protecting investors and serving the public interest. And it falls well within the Commission’s statutory authority. Those who insist that the SEC has stepped outside its proper role as a financial market regulator are mistaken. In fact, these arguments misconstrue the scope of the Commission’s authority to mandate disclosures, the nature of investor demand for climate-related disclosures, the enormous financial and economic impact that climate change is now having and threatens to inflict on an increasingly grand scale, and the scope and objectives of the Proposal. Any court that fairly read the SEC’s statutory authority, and fairly assessed the actual evidence about the impact of climate change on the economy and the financial system and the connection of that impact to investor demand for better climate-related disclosures, would readily conclude that the SEC’s authority to issue the Proposal is clear.

⁴⁹ See generally SEC, *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosures* (Mar. 21, 2022), <https://www.sec.gov/files/33-11042-fact-sheet.pdf>. “Limited assurance” is “a form of negative assurance that the attester is unaware of any material issues,” while “reasonable assurance” is “an affirmative attestation that the information is fairly presented in all material respects.” Commissioner Allison Herren Lee, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk* (Mar. 21, 2022) <https://www.sec.gov/news/statement/lee-climate-disclosure-20220321>.

If anything, the overwhelming demand from investors for enhanced climate-related disclosures, along with the scientific consensus about the broad financial impacts of climate change and the significant effort required to prevent the very worst impacts, would suggest that to fulfill its mandate to protect investors and the public interest, the SEC must *strengthen* the Proposal by closing the various exemptions and other loopholes it has proposed out of apparent concern about the burden of the Proposal on registrants. Indeed, any tension between the Proposal and the SEC’s authority arises from the various exemptions and safe harbors the Proposal contains, which indicate the SEC has not entirely fulfilled its statutory duty to protect investors and promote the public interest.

I. THE SEC HAS CLEAR AUTHORITY TO ISSUE RULES MANDATING ENHANCED CLIMATE DISCLOSURES FOR THE PROTECTION OF INVESTORS AND THE PUBLIC INTEREST

One of the primary strategies deployed by some companies and their allies against the Proposal has been to attack it as beyond the SEC’s authority.⁵⁰ But whatever the underlying concern animating this argument may be—fears over the costs of compliance, embarrassing transparency over some registrants’ failure to address climate-related risks,⁵¹ or even doubts about the scientific evidence surrounding climate change—this assault on the Proposal holds no water.

In fact, the SEC has broad legal authority, and significant discretion, in mandating disclosures in registration statements,⁵² periodic filings, and other documents⁵³ that it determines are “necessary or appropriate in the public interest or for the protection of investors.”⁵⁴ The SEC has properly exercised that authority here. And it has satisfied the legal requirements surrounding the rulemaking process under the Administrative Procedure Act. Under those tests, the Proposal must be “rational, based on consideration of the relevant factors and within the scope of the authority delegated to the agency by the statute,” and the SEC must articulate a “rational connection between the facts found and the choice made.”⁵⁵ The SEC has clearly, and exhaustively, done so here.

⁵⁰ See, e.g. Commissioner Hester M. Peirce, *We Are Not the Securities and Environmental Commission—At Least Not Yet* (Mar. 21, 2022) (“Peirce Dissent”) (dissenting from Proposal), <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>.

⁵¹ See Georgina Rannard, *Climate Change: Top Companies Exaggerating Their Progress—Study*, BBC (Feb. 7, 2022), <https://www.bbc.com/news/science-environment-60248830>.

⁵² 15 U.S.C. § 77g(a)(1).

⁵³ 15 U.S.C. § 78m(a); see also Commissioner Allison Herren Lee, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk* (Mar. 21, 2022) (“We have broad authority to prescribe disclosure requirements as necessary or appropriate in the public interest or for the protection of investors.”), <https://www.sec.gov/news/statement/lee-climate-disclosure-20220321>.

⁵⁴ 15 U.S.C. § 77g(a)(1).

⁵⁵ *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, (1983).

A. The Proposal Will Protect Investors By Meeting Their Unmet Demand for Enforceable and Comparable Climate-Related Disclosures from the Companies They Own

The SEC has broad authority to mandate disclosures “for the *protection of investors*.”⁵⁶ There is overwhelming evidence that the Proposal will protect investors by supplying them with more reliable, uniform, and readily available information that will enable them to more meaningfully evaluate investment opportunities while avoiding the risks that invariably come with the current patchwork of voluntary disclosures.

As discussed above, hundreds of institutional investors representing tens of trillions of dollars of assets under management have demanded such disclosures. A broad array of investors of all different types are insisting, directly and indirectly, that they require precisely the sort of climate disclosures that the Proposal would mandate as investment tools.

At the same time, the current solutions for providing investors with the climate-related risk information they are demanding are imperfect at best. A variety of frameworks have arisen that attempt to increase transparency and accountability into companies’ climate-related risks, and third-party vendors have emerged that provide the sort of information the Proposal would require registrants to provide.⁵⁷ But those sources are not mandatory; they are not uniform or comparable, and they are not subject to the same level of accountability or liability that accompanies mandatory disclosures.⁵⁸ While some investors seek to obtain climate-related risk information on registrants from these alternative sources, much of it is unavailable at any cost and what is attainable is apt to be unreliable and non-uniform.

Thus, absent the requirements in the Proposal, investors will either lack the information they need to optimize their capital allocations or expend considerable time and effort in attempts to secure a poor substitute through alternative channels. Addressing this huge informational gap will clearly protect and serve the interests of investors.

⁵⁶ 15 U.S.C. 77g(a)(1).

⁵⁷ Release at 21,340-43. Commissioner Peirce curiously derides this collection of private and voluntary solutions that have arisen to account for the lack of mandatory climate-related risk disclosures as the “climate industrial complex.” Peirce Dissent. Whatever one wants to term it, however, that so many resources are being devoted to providing investors with useful climate disclosures is itself compelling evidence of the widespread demand for such disclosures, which bolsters, rather than undermines, the case for the Proposal.

⁵⁸ See Release at 21,342.

B. The Proposal Will Also Promote the Public Interest By Sustaining Trust in the Capital Markets and Mitigating Systemic Risk.

The SEC also has broad authority to require disclosures in the *public interest*. The Proposal will serve the larger public interest by promoting trust in the capital markets and mitigating systemic risks to the financial system.

If investors trust that companies are disclosing complete and accurate information about financial risks and other factors that affect their futures prospects, then investors will be more inclined to invest because they will be able to make investment decisions that reflect their own risk appetite and their own perception of value. If, by contrast, investors do not believe that companies are being forthright about the risks they face and other aspects of their operations, many will be more reluctant to invest in the capital markets; they will not believe they can make informed decisions because they will not have all the information necessary to assess the value of particular companies. This dynamic is why trust is “a critical, if not the critical, ingredient to success in the capital markets.”⁵⁹ Thus, by mandating the disclosures that investors are demanding, the Proposal will not only protect those investors but also promote capital formation and protect the integrity of the capital markets.

The Proposal also has a critical role to play in controlling larger threats to the markets and the financial system as a whole. Climate change poses risk to the financial markets. Finance and the economy do not exist separate and apart from the myriad of natural and man-made trends, developments, innovations, disruptions, and challenges that constantly appear. Climate change amply demonstrates the point. The massive changes in society that will result from climate change and from attempts to combat it will almost certainly result in significant economic disruptions that could threaten the stability of the financial system, particularly if regulators and others are not aware of those risks and prepared to address them. As discussed above, this risk has been recognized by a variety of regulators and others tasked with preserving the stability of the financial system, including FSOC, which specifically highlighted climate change as an emerging threat to the financial system and also specifically highlighted enhanced mandatory disclosures, along the lines of the Proposal, as one way to mitigate this risk.⁶⁰

Thus, mandating climate disclosures will not only protect investors by giving them information they need to make better informed investment decisions according to the criteria that matter to them. It will also promote capital formation by making climate disclosures more complete and trustworthy and promote the stability of the financial system by making climate-related risk more transparent for policymakers and the public.

⁵⁹ See generally Ronald J. Colombo, *Trust and the Reform of Securities Regulation*, 35 DEL. J. CORP. L. 829, 830 (2010).

⁶⁰ FSOC, Report on Climate Related Financial Risk 67 (2021), <https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf>.

C. Opponents’ Arguments Are Unavailing Because They Misinterpret the Law and Ignore the Essentially Financial Threat That Climate Change Poses.

Instead of addressing the SEC’s broad statutory authority to protect investors, and the fact that the Proposal clearly falls within that authority, opponents of the Proposal attempt to graft an extra-statutory restriction on the Commission’s authority, arguing that it may only mandate disclosure of *material financial* information. As Commissioner Peirce argues in her dissent, the SEC’s authority to mandate disclosure is purportedly limited to “what information is material to an objectively reasonable investor in her capacity as an investor in the company supplying the information seeking a financial return on her investment in the company.”⁶¹ These opponents go further, suggesting that even where investors clamor for the disclosures offered by the Proposal, the SEC must fathom precisely why they want the information⁶² and before mandating its disclosure, must make some affirmative determination that investors want that information for the “right” reasons.

This argument fails for two reasons. As a threshold matter, it misstates the law. As Commissioner Lee has explained, the assumption that the SEC’s authority to mandate disclosure is limited to “material” information of any particular sort is a common misconception.⁶³ Most importantly, however, critics of the Proposal cannot escape the fact that *the mandated disclosures in the Proposal are, in fact, financially material to investors.*

As one member of the business community explained, “if leaders have not considered all the ways a changing climate could impact their business, they could be failing to see big risks. All companies are potentially exposed to climate impacts—even companies with low or no carbon emissions.”⁶⁴ As McKinsey explained, the “distance between low-carbon leaders and high-carbon laggards will widen. Companies in the latter group may not have a viable business.”⁶⁵ And

⁶¹ Peirce Dissent.

⁶² Peirce Dissent.

⁶³ Commissioner Allison Herren Lee, *Living in a Material World: Myths and Misconceptions about “Materiality”* (May 24, 2021), <https://www.sec.gov/news/speech/lee-living-material-world-052421>. As she further explained, the SEC routinely mandates disclosure of “information that is important to investors but may or may not be material in every respect to every company making the disclosure.”⁶³ In fact, no provision of the securities laws that authorizes the SEC to mandate disclosure for the protection of investors conditions that authority on the materiality of the information or the motivations of the investors. Congress made an appropriate policy choice that the SEC should have broad authority to require disclosures for the purpose of protecting investors and the public interest, and it did not condition that authority on the SEC making a determination that investors are demanding material information for an acceptable reason.

⁶⁴ Emma Cox, Global Climate Leader, PricewaterhouseCoopers, *See Your Climate Blind Spots* (May 25, 2022), <https://www.weforum.org/agenda/2022/05/see-your-climate-blind-spots/>.

⁶⁵ Daniel Pachod & Dickon Pinner, *Time is Running Out for Business Leaders Who Don’t Have a Net Zero Strategy*, McKinsey Sustainability Blog (May 11, 2021), <https://www.mckinsey.com/business-functions/sustainability/our-insights/sustainability-blog/time-is-running-out-for-business-leaders-net-zero-strategy>.

ultimately, as the New York Times explained in 2019, companies increasingly see climate change as a direct threat to their bottom lines.⁶⁶ The upshot of all of this is clear: businesses themselves recognize that they need to account for climate-related risks not as part of a socially conscious effort unrelated to profits and losses, but precisely because those risks directly impact their financial health.

In fact, the climate disclosures investors are demanding, and that the Proposal would require, have a direct and obvious connection to a company's bottom line, and thus are clearly financially material to investors. Companies that have not attempted to account for how climate change will threaten physical assets, disrupt supply chains, influence their workforce, or transform consumer behavior will undoubtedly be at a competitive disadvantage compared to those companies that do.⁶⁷

II. THE PROPOSAL IS GENERALLY COMMENDABLE IN SCOPE, BUT IT SHOULD BE STRENGTHENED.

A. The Proposal Includes Many Important and Positive Requirements.

The SEC appropriately models the Proposal on the Task Force on Climate-Related Financial Disclosures ("TCFD") established by the FSB and the Greenhouse Gas Protocol ("GHG Protocol"). Both of these standards for climate-related risk and GHG emissions disclosures are well-established and have been recommended by investors and registrants alike as the basis for any climate disclosure regime.⁶⁸ Similarly, these standards include concepts and vocabulary

⁶⁶ Brad Plumer, *Companies See Climate Change Hitting Their Bottom Lines in the Next 5 Years*, N.Y. TIMES (Jun. 4, 2019), <https://www.nytimes.com/2019/06/04/climate/companies-climate-change-financial-impact.html>.

⁶⁷ By enhancing comparability, the information required by the Proposal will be material to investors' decision-making in a variety of other scenarios, including those looking to make comparisons between companies and those seeking, wisely, to pursue a diversified portfolio. Release at 21,336. Commissioner Peirce takes issue with this justification, arguing that it departs from the Commissioner's typical "company-specific" approach to disclosure. *See* Peirce Dissent. But to the extent the SEC has a "company-specific approach to disclosure," the Proposal does not depart from it. It requires company-specific disclosures, and the justification articulated in the Release does not imply otherwise, but simply explains that those company-specific disclosures will help investors who are seeking to diversify their portfolios.

⁶⁸ *See* Release at 21,343 n.96 ("A number of registrants recommended basing the Commission's climate-related disclosure rules on the TCFD framework. *See, e.g.,* letters from Adobe; Alphabet Inc. et al.; BNP Paribas (June 11, 2021); bp; Chevron (June 11, 2021; ConocoPhillips; and Walmart. Similarly, numerous investors and investor groups recommended the TCFD framework. *See* letters from Alberta Investment Management Corporation; BlackRock; CalPERS; CALSTRS (June 4, 2021); Impact Investors, Inc.; and San Francisco Employees Retirement System; *see also infra* Section II.A.1 for further discussion of the many commenters that recommended basing the

familiar to many companies that are currently using these standards in various disclosures to investors.⁶⁹ While the Proposal incorporates important aspects of both the TCFD and GHG Protocol in its own climate disclosure rule, the SEC has carefully crafted the Proposal in a way that advances its mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.

By utilizing the TCFD as a basis for the climate-related risk disclosures, the Proposal will leverage a proven framework with which registrants and investors are already familiar. Additionally, TCFD-like disclosures will serve the ultimate purpose of the Proposal, which is to produce “consistent, comparable, and reliable”⁷⁰ disclosures for investors to better understand the risks climate change poses to publicly traded companies. The Proposal includes many important aspects of the TCFD, including disclosure of a registrant’s:

- Governance of climate-related risks;
- Material climate-related impacts on strategy, business model, and outlook;
- Climate-related risk management;
- GHG emissions metrics;
- Climate-related targets and goals, if any; and
- Actual and potential financial impacts driven by climate-related risks and opportunities.⁷¹

Specifically, the narrative discussion and analysis required by the Proposal of a company’s climate-related risks and metrics in a separate section in Regulation S-K, similar to existing sections such as Risk Factors and Management’s Discussion and Analysis, will provide disclosures in a format investors already have experience with and understand. By basing many of the climate-related disclosures on the TCFD, the SEC is enlisting established best practices while simultaneously crafting those existing standards to fit within the U.S.’s securities law framework.

Similarly, by utilizing an existing accounting reporting standard for GHG emissions in the GHG Protocol, the SEC is leveraging an existing reporting framework that mitigates compliance costs for registrants yet at the same time provides investors with a full picture of a registrant’s

Commission’s climate-related disclosure rules on the TCFD framework”); Release at 21,344 n. 111 (“See, e.g., letters from Apple, Inc. (June 11, 2021); bp (June 11, 2021); Carbon Tracker Initiative (June 14, 2021); Consumer Federation of America (June 14, 2021); ERM CVS (June 11, 2021); Ethic Inc. (June 11, 2021); First Affirmative Financial Network; Regenerative Crisis Response Committee; MSCI, Inc. (June 12, 2021); Natural Resources Defense Council; New York State Society of Certified Public Accountants(June 11, 2021); Paradise Investment Management (June 11, 2021); Stray Dog Capital(June 15, 2021); and Huw Thomas (June 16, 2021)”).

⁶⁹ Release at 21,343.

⁷⁰ Release at 21,347.

⁷¹ Release at 21,347.

Scope 1 and Scope 2 emissions, and in some cases, Scope 3 emissions. While we would recommend that the SEC more fully align the Proposal with the GHG Protocol and strengthen the Proposal's Scope 3 emissions disclosure requirements, as discussed further below, generally speaking the GHG emissions requirements in the Proposal will enable investors to adequately assess the financial risks of direct and indirect emissions within a company's business lines.

As discussed in the Proposal, investors are already utilizing available GHG emissions data to make investment decisions.⁷² Likewise, the GHG emissions data will provide another quantitative metric for advisers to Environmental, Social, and Governance ("ESG") funds and investors who invest in those funds. The Proposal also recognizes that the GHG Protocol's scope and methodology have "become the most commonly referenced measurements of a company's exposure to climate change."⁷³ Again, by leveraging existing best practices such as the GHG Protocol's scopes and methodology, the Proposal will provide investors with consistent, comparable, and reliable data about the direct and indirect emissions of a company and the financial risks those emissions may pose to a company's bottom line.

B. The SEC Should Strengthen the Critically Important Scope 3 Disclosure Requirements.

As previously discussed, the SEC has the clear and broad authority to mandate climate-related disclosures for the protection of investors and in the public interest. This includes the authority to mandate disclosure of GHG emissions as outlined in the Proposal in the form of Scope 1, 2, and 3 emissions. Despite this authority, the Proposal would treat Scope 3 emissions disclosures very differently from those of Scope 1 and Scope 2 emissions disclosures. Specifically, the Proposal only requires disclosure of Scope 3 emissions if they are material, or if the registrant has set an emissions target that includes Scope 3 emissions. Additionally, the Proposal would provide a safe harbor, in perpetuity, to protect registrants from liability for Scope 3 disclosures as long as there was a reasonable basis for the statement or it was made in good faith. These are both unnecessary and counterproductive limits on the disclosure obligation. The SEC should require Scope 3 emissions disclosures for all large, accelerated, and non-accelerated filers similar to the proposed Scope 1 and Scope 2 emissions disclosures without regard to a registrant's determination of materiality and without a safe harbor.

1) The materiality proviso should be eliminated.

The Proposal would be significantly strengthened if registrants were required to disclose their Scope 3 emissions regardless of a registrant's subjective and potentially self-serving belief about their materiality. The principal reason the Proposal cites for treating Scope 3 emissions differently from Scope 1 and Scope 2 emissions is that the methodology for calculating Scope 3

⁷² Release at 21,376.

⁷³ Release at 21,377.

emissions is “evolving” and the collection of this data could be “potentially” more difficult.⁷⁴ This explanation falls short for several reasons.

First, the SEC’s rules should focus primarily on the protection of investors, markets, and the public interest, not easing registrants’ compliance challenges.

Second, the SEC acknowledges that in order to properly assess whether or not a registrant’s Scope 3 emissions make up a relatively significant portion of their overall GHG emissions, they would need to calculate, at least to some extent, their Scope 3 emissions. In the Proposal’s own words, “[w]hen assessing the materiality of Scope 3 emissions, registrants should consider whether Scope 3 emissions make up a relatively significant portion of their overall GHG emissions.”⁷⁵ Further, the Proposal acknowledges that consistent with law and precedent for determining materiality within securities disclosure requirements, a qualitative analysis is also needed to determine if Scope 3 emissions rise to the level of material.⁷⁶ Hence, in order for a registrant to make a good-faith determination if their Scope 3 emissions are material, they need to calculate, at least in part, their Scope 3 emissions in relation to their overall emissions. This undercuts the Proposal’s concern that “collecting the appropriate data and calculating these emissions would potentially be more difficult than for Scope 1 and 2 emissions.”⁷⁷ In short, the reasoning in the Proposal for basing Scope 3 emissions disclosure on materiality because they are more difficult to calculate than Scope 1 and 2 emissions is flawed because registrants need to calculate Scope 3 emissions, at least in part, to make that determination.

Finally, the Proposal places too much discretion in the hands of registrants with respect to the obligation to report Scope 3 emissions. The reasons the Proposal cites for requiring disclosure of Scope 1 and Scope 2 emissions apply equally to Scope 3, as stated elsewhere in the Proposal.⁷⁸ The Proposal explains that the reason for requiring disclosure of Scope 1 and Scope 2 emissions is due to the fact that “investors need and many investors currently use this information to make investment or voting decisions.”⁷⁹ In response to commenters indicating that Scope 3 emissions would likely represent a large source of a registrant’s overall GHG emissions for many companies, the Proposal states, “[g]iven their relative magnitude, we agree that for many registrants, Scope 3

⁷⁴ Release at 21,377.

⁷⁵ Release at 21,379.

⁷⁶ Release at 21,379.

⁷⁷ Release at 21,377.

⁷⁸ See Release at 21,376 (“We propose requiring disclosure of registrants’ Scopes 1 and 2 emissions because, as several institutional investor commenters stated, investors need and many investors currently use this information to make investment or voting decisions...As previously mentioned, several large institutional investors and financial institutions, which collectively have trillions of dollars in assets under management, have formed initiatives and made commitments to achieve a net-zero economy by 2050, with interim targets set for 2030. These initiatives further support the notion that investors currently need and use GHG emissions data to make informed investment decisions”).

⁷⁹ Release at 21,376.

emissions may be material to help investors assess the registrant’s exposure to climate-related risks.”⁸⁰ The Proposal acknowledges that for “many registrants,” Scope 3 emissions would be material and require disclosure to investors. Yet the Proposal would place the obligation to report the admittedly important Scope 3 emissions in the hands of registrants, thus creating the potential for evasion.

The SEC proposes to exclude Scope 3 emissions from the disclosure requirements unless material, largely to save costs for registrants, even though the need for that information is clear, even though registrants must still measure Scope 3 emissions and make a qualitative materiality determination in any event, and even though the materiality decision heightens the risk of evasion. The SEC should reconsider this approach.

2) *The safe harbor should be eliminated.*

Concerned with the ability of registrants to collect the data necessary to calculate Scope 3 emissions, the Proposal includes a safe harbor from liability for Scope 3 emissions. The SEC should reconsider this proposed safe harbor, as it will undermine the reliability of the Scope 3 disclosures. At a minimum, if the SEC feels it must provide a safe harbor for Scope 3 disclosures that registrants believe are material, then it would be clearly appropriate to phase out the safe harbor as the Scope 3 emissions accounting methods and data “evolves.” The SEC recognizes that the challenge of calculating Scope 3 emissions, while new for many registrants, will recede over the coming years as companies gain more experience with the disclosure requirements. Additionally, the SEC recognizes that as more companies within a value chain disclose their Scope 1 and Scope 2 emissions data, calculating Scope 3 emissions data becomes easier because those data points act as inputs for those registrants disclosing Scope 3 emissions. The inclusion of a safe harbor in perpetuity for registrants when disclosing Scope 3 emissions, as the Proposal suggests, will become more and more unnecessary as registrants become more and more familiar with these disclosure requirements and more data becomes available.

C. **The SEC Must Strengthen the Attestation Requirements or Credibly Explain How They Serve the Public Interest As Proposed.**

1) *The SEC should apply the attestation requirement to all registrants.*

Under the Proposal, a registrant, including a foreign private issuer, that is an accelerated filer or large accelerated filer would be required to include an attestation report from an independent attestation service provider for their Scope 1 and 2 emissions disclosures, with a phase-in over time, to promote the reliability of GHG emissions disclosures for investors.⁸¹ As far as it goes, once it is fully phased in, this requirement will certainly promote the reliability of climate-related disclosures, for those companies subject to the requirement, enhancing the protection of investors and the public interest. Disclosures are only useful to investors and the

⁸⁰ Release at 21,378.

⁸¹ Release at 21,346.

public if they are reliable, and independent verification of critical disclosures helps ensure they are reliable.

However, the benefits of this provision are undermined because it does not apply to all filers, specifically the small reporting companies (“SRCs”), creating uncertainty for investors using climate-risk as a factor in their investment decisions. The SEC has not adequately justified this exemption but appears to have included it primarily out of concern for the potential burden on smaller companies.⁸² While it may sometimes be appropriate to at least consider the costs and burdens on registrants when issuing rules, since those costs and burdens *may* be passed onto shareholders, consumers, and other stakeholders, a provision of a rule cannot be justified *solely* because it will reduce costs for some registrants. This is particularly the case for a rule with such high stakes, and where the provision at issue will undoubtedly undermine one of the key goals of the rule, here the reliability of climate disclosures. We therefore urge the Commission to apply the attestation requirement to all registrants, unless it makes a credible determination that the proposed exemption would serve the public interest.

- 2) *The SEC should accelerate the assurance phase-in period, or more fully justify its proposed phase-in schedule.*

For similar reasons, the SEC should revisit its proposed phase-in of the assurance level. As Commissioner Lee explained, there are different levels of assurance that can be provided with an attestation. So-called “limited assurance,” as the term implies, provides only the limited assurance that “that the attester is unaware of any material issues.”⁸³ “Reasonable assurance,” however, “is an affirmative attestation that the information is fairly presented in all material respects.”⁸⁴ In other words, reasonable assurance provides a significantly higher level of confidence in the reliability of disclosures. For an issue as critically important as climate-risk disclosures, it is certainly appropriate to require that attestations include the more robust “reasonable assurance” standard.

However, the Proposal includes a phase-in period. Large accelerated filers would not be subject to any assurance requirement at all until disclosures made in 2025, and then would only be subject to a limited assurance requirement until the disclosures made in 2027.⁸⁵ Accelerated filers

⁸² See Release at 21,395 (“Although we have considered the challenges that mandatory assurance of GHG emissions disclosure could present, accelerated filers and large accelerated filers should have the necessary resources to devote to complying with such requirements over the proposed implementation timetable.”).

⁸³ Commissioner Allison Herren Lee, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk* (Mar. 21, 2022) <https://www.sec.gov/news/statement/lee-climate-disclosure-20220321>.

⁸⁴ Commissioner Allison Herren Lee, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk* (Mar. 21, 2022), <https://www.sec.gov/news/statement/lee-climate-disclosure-20220321>.

⁸⁵ Release at 21,392.

are subject to an even longer phase-in period—they would not be subject to any assurance requirements until disclosures made in 2026, and would not be subject to a reasonable assurance requirement until 2028.⁸⁶ Again, while transition periods for new rules *may* be appropriate, particularly in cases of new or novel requirements, such transition periods should not be solely justified by reducing costs or burdens for registrants. As with the exemptions from the attestation requirement, the SEC must justify the phase-in as proposed by explaining how it protects investors and the public interest, not just how it would reduce costs for registrants.

3) *The SEC should require that attestation be from a PCAOB-regulated entity.*

As Commissioner Lee pointed out, the presence of the proposed disclosures of GHG emissions in Regulation S-K means they will not have to be provided by a PCAOB-regulated service provider.⁸⁷ While we generally agree with the requirements that the Proposal would apply to attestation service providers,⁸⁸ investors and the public would benefit from a requirement that the attestation service provider be a PCAOB-regulated entity. While there may be some marginal competitive benefits from not having such a requirement, the primary purpose of this Proposal is to provide “consistent, comparable, and reliable” climate-risk disclosures.⁸⁹ Those goals would be served by requiring that attestation service providers be PCAOB-regulated entities, because those firms “are subject to oversight and inspection whereas other types of third-party verifiers are not.”⁹⁰ Requiring that attestation service providers be PCAOB-regulated firms, then, will enhance the reliability of the disclosures themselves, thus promoting confidence in the disclosures among investors. Unless the SEC has credible evidence of significant competitive or other public benefits from not requiring attestation service providers to be PCAOB-regulated firms, it should add this requirement to the final rule.

III. THE SEC’S ECONOMIC ANALYSIS SATISFIES ALL STATUTORY REQUIREMENTS

Some opponents of the Proposal argue that it fails a cost-benefit test, and specifically that it will prove too costly.⁹¹ As a general matter, these attacks are typically misguided and unfounded. They distort the Commission’s legal obligation to conduct economic analysis; they

⁸⁶ Release at 21,392.

⁸⁷ Commissioner Allison Herren Lee, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk* (Mar. 21, 2022) <https://www.sec.gov/news/statement/lee-climate-disclosure-20220321>.

⁸⁸ Under the Proposal, an attestation service provider would have to be independent and would have to be “an expert in GHG emissions by virtue of having significant experience in measuring, analyzing, reporting, or attesting to GHG emissions.” Release at 21,470.

⁸⁹ Release at 21,335.

⁹⁰ Commissioner Allison Herren Lee, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk* (Mar. 21, 2022) <https://www.sec.gov/news/statement/lee-climate-disclosure-20220321>.

⁹¹ See, e.g., Peirce Dissent (arguing that the “Commission underestimates the cost of the proposal.”).

exaggerate the alleged costs and burdens of compliance with the new rules; and they downplay if not ignore the enormous benefits that the rules will confer, both individually and as part of a collection of rules that work together to achieve market reforms. But this strategy should not sway the Commission or persuade it to dilute the much-needed reforms in the Proposal. Throughout the rulemaking process, the Commission must be guided above all by the public interest and the protection of investors as it considers the economic impact of its rules, not by concerns over the costs of regulation imposed on the industry.

As we have explained repeatedly,⁹² under the securities laws, the Commission has no statutory duty to conduct a cost-benefit analysis. In reality, it's far more limited obligation is simply to consider, "***in addition to the protection of investors***, whether the action will promote efficiency, competition, and capital formation."⁹³ The Supreme Court has long recognized that statutorily mandated ***considerations*** "imply wide areas of judgment and therefore of discretion" as an agency fulfills its statutory duty.⁹⁴ The SEC has easily satisfied its statutory duty in the Proposal.⁹⁵ Ultimately, the SEC determined, reasonably and based on empirical evidence, that the Proposal would promote efficiency, competition, and capital formation.⁹⁶ Thus, the SEC has fully discharged its statutory duty with regard to economic analysis.

The SEC has nevertheless voluntarily undertaken its customary assessment of the potential costs and benefits of the Proposal.⁹⁷ Indeed, that discussion illustrates the insurmountable challenges involved in cost-benefit analysis, particularly when analyzing rules such as the Proposal. As stated in the Release, the Commission was "in many cases, however, . . . unable to reliably quantify these potential benefits and costs."⁹⁸ That should come as no surprise. For example, the Proposal will clearly provide real benefits to the broad spectrum of investors who seek climate disclosures to inform their investment decisions.⁹⁹ But it is difficult to even attempt to begin placing a precise dollar amount on that benefit. How do you quantify the benefit to

⁹² For example, in 2012, we issued a report examining and exposing the largely successful attempt to foist more stringent cost-benefit analysis requirements upon the SEC, even though the securities laws include no such mandate. *See, e.g.*, BETTER MARKETS, SETTING THE RECORD STRAIGHT ON COST-BENEFIT ANALYSIS AND FINANCIAL REFORM AT THE SEC (July 30, 2012), <https://bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf>. In addition, we have updated the report; BETTER MARKETS, COST-BENEFIT ANALYSIS IN CONSUMER AND INVESTOR PROTECTION REGULATION: AN OVERVIEW AND UPDATE (Dec. 8, 2020), https://bettermarkets.com/sites/default/files/Better_Markets_WhitePaper_CBA_Consumer_Investor_Protection_Dec-2020.pdf. We incorporate those two reports by reference as if fully set forth herein.

⁹³ *See, e.g.*, 78 U.S.C. § 78c(f) (emphasis added); 15 U.S.C. § 80a-2(c); 15 U.S.C. § 80b-2(c); 15 U.S.C. § 77b(b).

⁹⁴ *Sec'y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604, 611 (1950).

⁹⁵ *See* Release at 21,445-48.

⁹⁶ *Id.*

⁹⁷ Release at 21,428-45.

⁹⁸ Release at 21,428.

⁹⁹ Release at 21,429.

investors of enhancing the quality of the mix of information available to them? By the same token, the Proposal will promote the public interest by enhancing transparency into climate risks, which, among other things, will reduce the likelihood and severity of a climate change-induced financial crisis, as regulators will have better insight into the nature of climate-related risks. But how do you put a dollar amount on the reduction in the likelihood of a financial crisis? At the same time, while it is often difficult to quantify the broad-based public benefits of a rule, it is often much easier to quantify the private costs that apply to regulated entities.¹⁰⁰

These are appropriate observations about the inevitable difficulties surrounding attempts at quantitative cost-benefit analysis; they are not failings of the Commission that suggest any legal infirmities in the Proposal itself. As the D.C. Circuit has explained, in *Nat'l Ass'n of Mfrs. v. SEC*,¹⁰¹ “An agency is not required to measure the immeasurable, and need not conduct a rigorous, quantitative economic analysis unless the statute explicitly directs it to do so”—something that Congress never saw fit to impose on the Commission. Indeed, Better Markets has consistently argued that quantitative cost-benefit analysis is, for a host of reasons, a poor methodology for evaluating financial regulation: it is unreliable, speculative, and biased in favor of the industry’s relentless concerns with minimizing compliance costs while maximizing profits. Moreover, it consumes far more in agency resources than it is worth and ultimately sets the stage for a court challenge instigated by the disgruntled members of the industry.¹⁰²

The plain fact is that the Commission has no statutory duty to quantify costs or benefits, weigh them against each other, or find that a rule will confer a net benefit before promulgating it. The rationale for Congress’s decision to impose only a flexible obligation to consider three discrete economic factors is clear: requiring the Commission to conduct a resource-intensive, time consuming, and inevitably imprecise cost-benefit analysis as a precondition to rulemaking would significantly impair the agency’s ability to implement Congress’s regulatory objectives. The industry’s desire to have its costs prioritized over all other costs (what they falsely refer to as “cost-benefit analysis”) does not change the securities laws, the reasoned basis for those laws, or the underlying policy. The Commission was established for the purpose of implementing the securities

¹⁰⁰ See, e.g., Release at 21,439 (estimating cost of \$640,000 as a result of the Proposal for certain registrants in the first year of the Proposal).

¹⁰¹ 748 F. 3d 359 (D.C. Cir. 2014).

¹⁰² See, e.g., Better Markets, Cost-Benefit Analysis in Consumer and Investor Protection Regulation: An Overview and Update (Dec. 8, 2020), https://bettermarkets.org/sites/default/files/Better_Markets_WhitePaper_CBA_Consumer_Investor_Protection_Dec-2020.pdf; Better Markets, Setting the Record Straight on Cost-Benefit Analysis and Financial Reform at the SEC (July 30, 2012), <https://bettermarkets.com/sites/default/files/Setting%20The%20Record%20Straight.pdf>.

laws, and its primary duty is to achieve the legislative objectives of those laws: protecting investors and the public interest.¹⁰³

CONCLUSION

We hope you find these comments helpful.

Sincerely,

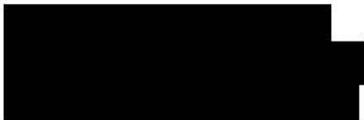


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¹⁰³ The SEC must make clear that while it is considering the costs and benefits as part of the rulemaking process, it is not doing so pursuant to its interpretation of any statutory requirements. Otherwise, the rule may be struck down for failure to “properly” conduct a quantitative cost-benefit analysis, although none is explicitly required by statute. *See, e.g., Am. Equity Inv. Life Ins. Co.*, 613 F.3d 166, 177 (D.C. Cir. 2010).