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June 17, 2022

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

Attention: Ms. Vanessa Countryman, Secretary

Re: Request for Comments on *The Enhancement and Standardization of  
Climate-Related Disclosures for Investors Proposal—File No. S7-10-22*

Dear Ms. Countryman:

We appreciate the opportunity to comment on the Securities and Exchange Commission's ("SEC") recently proposed rules on *The Enhancement and Standardization of Climate-Related Disclosures for Investors* (Release Nos. 33-11042; 34-94478; File No. S7-10-22) (the "Proposed Rules"; the SEC's proposing release, the "Proposing Release").

While we are supportive of the SEC's goal of facilitating investment decisions by increasing consistency, transparency and rigor in climate-related disclosures included in filings with the SEC, numerous aspects of the Proposed Rules extend well beyond what is necessary or even useful for investors, and at the same time create unprecedented burdens on registrants with disclosure requirements that in some instances would be impossible to comply with. Moreover, the uncertainty and potential unreliability of the data and processes needed to comply with certain elements of the Proposed Rules would not result in complete, accurate or timely disclosures.

We share the concerns expressed by others that certain aspects of the Proposed Rules exceed the scope of the SEC's rulemaking authority. While this letter does not address these concerns with specificity, we believe that our recommendations for improving the Proposed Rules would not only better serve investors, but also could substantially decrease the risk that any challenges to the adoption and implementation of final rules will prove successful. Therefore, we respectfully submit the following recommendations for the SEC's consideration:

## ***Focus on Material Information***

- **Limit Mandatory Disclosures by Materiality.** We urge the SEC to limit mandatory disclosures under the Proposed Rules to *material* information based on the long-standing definition articulated by the Supreme Court that serves as a fundamental tenet of the disclosure requirements under the federal securities laws. Deviating from the principle of materiality would result in extensive disclosure of non-material information that is not useful to investors, while imposing disproportionate costs, challenges and liability exposure on registrants. The SEC's rulemaking is voluminous and suggests that climate-related disclosures are more important to an investor than disclosure relating to a registrant's business, legal proceedings and analysis of its financial condition and results of operations. The Proposed Rules also proceed under the assumption that climate information is material for every company, when that simply is not the case. The Proposed Rules fundamentally need to be streamlined in order to elicit climate-related information that is material to investors. This is critically important particularly given the variability across registrants and industries of the impact of, and risks posed by, climate change. To the extent that climate-related information is material

to a registrant's financial performance or gives investors insight into financially material risks, registrants should have an obligation to provide appropriate climate disclosures. If the SEC is concerned that registrants may not be clear as to when climate-related disclosures would be material and thus would be required to be disclosed, we urge the SEC to establish, in consultation with market participants, industry-specific guidance to assist registrants in evaluating the materiality of such information.

- **Further Align with the Core Recommendations of the Task Force on Climate-Related Financial Disclosures (“TCFD”).** The general alignment between the Proposed Rules and the TCFD framework should increase comparability and consistency of disclosures across jurisdictions. However, we urge the SEC to eliminate or limit the requirements of the Proposed Rules that are more prescriptive than the core recommendations of the TCFD framework. By more closely aligning with the core recommendations of the TCFD on both the general categories of disclosure and the more flexible, materiality-based approach with respect to details required to be disclosed, the SEC would allow registrants to focus their attention and resources on disclosing information that is considered to be decision-useful by a broad community of registrants and investors. Further, investors will have access to disclosures that are more comparable and consistent on an industry-wide and global basis, assuming international regulators continue to adopt TCFD-aligned disclosure requirements.
- **Require Scope 1 and Scope 2 Greenhouse Gas (“GHG”) Emissions Disclosures When Material.** Given the cost and complexity associated with disclosing Scope 1 and Scope 2 GHG emissions, we recommend that the SEC require Scope 1 and Scope 2 GHG emissions disclosures only when they are material to a company's business or operations. In that light, we further urge the SEC to make certain revisions to the Proposed Rules so that registrants are not required to provide certain granular information (such as gas-by-gas reporting) unless it is material to their business or operations. Any such disclosures should be furnished rather than filed and subject to a robust safe harbor from liability.
- **Require Climate-Related Targets and Goals Disclosures When Material.** We believe that registrants should be encouraged to provide investors access to the information they need to understand a registrant's publicly-announced climate-related targets and goals. However, to avoid deterring companies from attempting to set and meet climate goals, we recommend that disclosure be required only for a registrant's publicly-announced climate-related targets and goals when such disclosures are material to the registrant's business or operations. Similar to Scope 1 and Scope 2 disclosures, material disclosures of publicly-announced climate-related targets and goals should be furnished rather than filed and subject to a robust safe harbor from liability.

***Rescind Proposed Requirements with Respect to Scope 3 GHG Emissions, Attestation, Financial Statement Notes and Climate Risk Analysis and Management Measures***

- **Rescind Proposed Scope 3 GHG Emissions Disclosure Requirements.** Given the particular challenges associated with estimating and reporting Scope 3 GHG emissions, including significant uncertainty with respect to the data and methodologies necessary for accurate and reliable reporting, we urge the SEC to rescind the proposed requirement to disclose Scope 3 GHG emissions. Registrants should be encouraged to voluntarily disclose Scope 3 GHG emissions to the extent, and in the manner, they are able to do so reliably. If the SEC nonetheless decides to retain the Scope 3 emissions disclosure requirements in the final rules, we urge the SEC to limit required Scope 3 GHG emissions disclosures to when they are material to the registrant's business or operations. In addition, registrants should only be required to estimate the categories of Scope 3 GHG emissions (as defined by the GHG Protocol) that are material to a registrant's business or operations and that can be reliably and reasonably determined. Further, as discussed below, we urge the SEC to permit any such disclosures to be furnished rather than filed and subject to a more robust safe harbor from liability.

- **Rescind Proposed Attestation Requirements.** The SEC should rescind the proposed attestation requirement for GHG emissions disclosures in light of substantial compliance challenges, including the lack of generally accepted attestation standards for climate-related disclosures and the anticipated significant costs involved in implementing the necessary assurance processes and procedures. If the SEC does nonetheless require third-party attestation in the final rules, we recommend that the SEC make certain clarifications regarding the appropriate attestation standards for climate-related disclosures and the qualifications of assurance providers. We also urge the SEC to delay implementation of the proposed requirements until broad industry consensus has emerged with respect to attestation processes, standards and methodologies.
- **Rescind Proposed Financial Statement Disclosure Requirements.** The SEC should rescind proposed Article 14 of Regulation S-X (the “Reg S-X Requirements”), an entirely novel and extremely complex requirement, as compliance would be impracticable and add substantial cost, burden and complexity to the public company reporting process. Moreover, the SEC should follow the more deliberative FASB rulemaking process and allow for the establishment of a reliable auditing standard (including potentially aligning the materiality threshold with SAB 99)<sup>1</sup> before imposing any new requirement to include climate-related disclosures in financial statements.
- **Rescind Proposed Stand-Alone Requirements for Disclosure of Scenario Analysis, Internal Carbon Price and Transition Plans (“Climate Risk Analysis and Management Measures”).** In order to avoid deterring registrants from adopting measures that could enhance their ability to assess and manage climate-related risks, the SEC should not require companies to disclose detailed information relating to Climate Risk Analysis and Management Measures, which are not linked to materiality and could expose competitively sensitive information. To the extent that the outcome of the analysis or the use of these measures is material, we expect that registrants will reflect this information or perspective in their SEC disclosures. To avoid discouraging the use of these measures, we recommend that companies be permitted to furnish, rather than file, any disclosures regarding their use of such measures on a voluntary basis, subject to a robust safe harbor from liability. This treatment is consistent with registrants’ historical practices relating to traditional key performance measures, such as internal projections and budgets.

*Provide Additional Clarity and Flexibility to Facilitate Implementation*

- **Provide Additional Clarity on Calculation Methodology and Organizational Boundaries.** We recommend the SEC clarify its expectations on calculation methodologies and organizational boundaries under the Proposed Rules to limit disclosures of a registrant’s methodology, inputs and assumptions that are unlikely to be material to investors but would impose significant additional costs on companies. Such clarification is especially necessary with respect to GHG emissions disclosures. Further, the SEC should adjust the organizational boundary for equity investees, proportionately consolidated companies and newly acquired companies.
- **Provide More Flexibility on Governance-Related Disclosures and Proposed Board Expertise.** The SEC should permit more flexibility under the governance-related disclosures to allow registrants to describe the relevant aspects of their governance structure in a manner that is consistent with the disclosure of how they manage other material risks faced in their businesses. Registrants and their boards should have flexibility to exercise their judgment on the most appropriate governance framework, and to evolve their approach based on new risks and opportunities. In addition, registrants should not be required to identify

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<sup>1</sup> SEC Staff Accounting Bulletin No. 99 – Materiality, 64 Fed. Reg. 45150 (Aug. 12, 1999), codified at 17 C.F.R. 211, *available at* <http://www.sec.gov/interps/account/sab99.htm>.

directors with climate expertise. If, however, they are so required, any such director should benefit from a similar liability safe harbor accorded to audit committee financial experts.

### ***Reconsider Treatment for Purposes of Securities Act and Exchange Act and Liability-Related Concerns***

- **Permit Certain Proposed New Disclosures to Be Furnished.** We believe that climate-related information responsive to existing disclosure requirements under Regulation S-K, such as MD&A and risk factors, or climate-related information that is otherwise material to the registrant's business, financial condition or results of operations, should continue to be reported on Form 10-K and Form 10-Q. However, we recommend that the SEC permit certain new climate-related disclosures—i.e., material disclosure of Scope 1 and Scope 2 GHG emissions and publicly-announced targets and goals, as well as information we believe should be disclosed on a voluntary basis (e.g., immaterial Scope 1 and Scope 2 GHG emissions disclosures, any Scope 3 GHG emissions disclosures and any disclosures relating to Climate Risk Analysis and Management Measures not otherwise captured in a registrant's SEC filings)—be furnished rather than filed. We believe furnishing these qualitative and quantitative climate-related disclosures would mitigate liability concerns associated with filing information that entails a significant degree of judgment and estimation. Also, the sheer volume of information called for by the Proposed Rules would render the Form 10-K less useful to investors.
- **Expand Applicability of the Safe Harbor.** Registrants should have the benefit of a safe harbor in making the new climate-related disclosures, especially if the SEC does not allow such disclosures to be furnished. Disclosures related to material climate risks (particularly those that are medium- or long-term) and their impact on a registrant's strategy, business model and outlook, as well as disclosures regarding Climate Risk Analysis and Management Measures and targets and goals, are forward-looking or require substantial estimates and assumptions based on still-evolving science and analytical methods. Given the inherent uncertainty in the timing, severity and scope of many aspects of climate change, we believe that it is inappropriate for the SEC to require registrants to not only project and disclose these matters but to then assume liability for these projections. Therefore, we urge the SEC to expand the safe harbor proposed for Scope 3 GHG emissions to cover all the new climate-related disclosures. We also urge the SEC to clarify that such safe harbor is applicable to oral representations of filed and furnished information by the registrant's management (including during an investor call or roadshow) and registrants' determinations as to whether climate-related information is material.

### ***Extend Implementation Timeline and Reduce Ongoing Burdens***

- **Extend Initial Compliance Date, Phase-in Periods and Limit Update Requirements.** The difficulties associated with the Proposed Rules are exacerbated by the extremely short proposed implementation period. It is critical to allow registrants sufficient time to develop appropriate controls, procedures and processes to enable them to prepare accurate and reliable information (both for initial compliance and on an annual basis). Accordingly, we urge the SEC to implement a longer initial phase-in period. We also recommend the SEC rescind the requirement to provide historical climate-related information in the first two years of the applicable compliance date of the rules. In addition, we recommend that registrants be given additional time each year to finalize their climate-related disclosures. We believe registrants should be given at least until the later of 180 days after their fiscal year-ends and the deadline of their second quarter quarterly reports to publish their climate-related disclosures.<sup>2</sup> This timing is more consistent with the current practices of registrants that make sustainability or climate reports publicly available and is critical given the time needed to gather and assess the information, a portion of which may come from third

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<sup>2</sup> If the SEC requires the disclosure of material Scope 3 emissions, registrants will need much longer than 180 days to finalize the necessary data.

parties. We also urge the SEC to eliminate the obligation of registrants to provide intra-year updates of their climate disclosures.

- **Provide Accommodation for Newly Public and Newly Acquired Companies as well as Certain Other Types of Registrants.** The SEC should provide for a longer phase-in period and other accommodations for newly public companies and newly acquired companies to avoid chilling IPOs and other transactions involving the public capital markets. Not only will many newly public companies or acquisition targets of public companies have limited experience with climate reporting, but they may be disincentivized from engaging in public capital market transactions due to the significant compliance burden under the Proposed Rules. The SEC should also exempt business development companies (“BDCs”) and other pooled investment vehicles from the Proposed Rules and consider a more tailored approach for registrants that are in the business of sponsoring BDCs and other pooled investment vehicles.
- **Compliance with Home Country Reporting Requirements Should be Permitted for Foreign Private Issuers (“FPIs”).** In lieu of the Proposed Rules, FPIs should be permitted to comply with the reporting requirements of their home country (such as the UK and EU Member States) that adopt TCFD-aligned disclosure requirements, including frameworks based on the International Sustainability Standards Board’s (“ISSB”) climate-related disclosure standard. We agree with the SEC that FPIs should be allowed to disclose information on Form 6-K (to the extent such information is disclosed pursuant to home country disclosure requirements) on a furnished basis.

We believe that these recommended changes and clarifications will give registrants greater ability to execute on the SEC’s goals in the near term, while enhancing investors’ access to material and reliable climate-related information. Below, we provide additional detail on, and rationale for, our recommendations.

## 1. Focus on Material Information

Many elements of the Proposed Rules are not qualified by the SEC’s long-standing definition of materiality as articulated by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*<sup>3</sup> and *Basic Inc. v. Levinson*,<sup>4</sup> which serves as a fundamental tenet of the disclosure requirements under the federal securities laws. The principle of materiality ensures that the information disclosed to investors is customized to the unique characteristics of each registrant, taking into account the specific facts and circumstances of each company. Deviating from this principle can lead to “information overload”, which makes “it difficult for investors to focus on information that is material and most relevant to their decision making as investors in our financial markets.”<sup>5</sup> The Proposed Rules would require registrants to provide detailed climate-related information, in many instances, regardless of such information’s materiality. In addition, we have concerns that areas of the Proposing Release seek to modify the legal standard for materiality. For example, the SEC’s suggestion that registrants should disaggregate disclosure of financial impacts of climate-related events and transition activities because such separate disclosure could help

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<sup>3</sup> *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (“[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote... Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”).

<sup>4</sup> *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988) (“[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information.”).

<sup>5</sup> See Mary Jo White, *The Importance of Independence* (Oct. 3, 2013), available at <https://www.sec.gov/news/speech/spch100113mjw>.

investors evaluate portfolio risk<sup>6</sup> reflects an approach to materiality at odds with the traditional standard of materiality applied elsewhere under Regulation S-K and Regulation S-X. Information should be deemed material only if it is material to a company's business, financial condition or results of operations and therefore material to investment decision making, rather than if material to a hypothetical investor's portfolio as a whole. Deviating from this long-standing definition of materiality would result in extensive disclosure of non-material information that is not useful to investors and would impose disproportionate costs, challenges and liability exposure on registrants.

In addition, provisions of the Proposed Rules prescribe disclosures that go meaningfully beyond the scope and level of detail set forth under the core recommendations of the TCFD framework. With respect to these elements of the Proposed Rules that prescribe such detailed disclosures, we urge the SEC to take a more flexible, materiality-based approach, as further discussed below.

***a. Limit Mandatory Disclosures by Materiality***

We urge the SEC to adhere to its long-standing definition of materiality, which we believe sets the appropriate parameters for the new climate-related disclosures and alleviates the confusion that would result if multiple or unclear standards were applied to new disclosure requirements. The SEC observed in the Proposing Release that the Proposed Rules build on the SEC's existing rules and guidance on climate-related disclosures but seek to improve the consistency, comparability and reliability of those disclosures.<sup>7</sup> However, taking a different approach to climate-related risks from other financial, operational and market considerations would dilute SEC filings with non-material information and would not result in disclosures that are more consistent, comparable and reliable.

Under the Proposed Rules, each registrant, regardless of its business, carbon footprint, number of employees or scope of operations, and regardless of materiality, would be required to disclose: (i) all Scope 1 and Scope 2 GHG emissions; (ii) Scope 3 GHG emissions if included in a registrant's GHG emissions reduction target or goal; (iii) Scope 1, Scope 2 and, in certain circumstances, Scope 3 GHG emissions by disaggregated constituent greenhouse gases; (iv) certain aspects of the methodology, significant inputs and significant assumptions the registrant uses to estimate its GHG emissions; (v) the proposed financial statement metrics if the aggregate impact is over a threshold of 1% of the applicable line item; and (vi) prescribed information regarding the registrant's use of Climate Risk Analysis and Management Measures and targets and goals. The Proposed Rules treat an internet company the same as a steel producer, multinational oil company or financial institution. The Proposed Rules apply to registrants with no manufacturing facilities and limited physical offices. More fundamentally, unless this information is relevant to a registrant's business, financial condition or results of operations, there is no reason or need to impose these disclosure requirements. The Proposed Rules proceed on the assumption that climate-related information is material for every company, when that is not the case. Providing investors with climate-related information regardless of materiality would make it more difficult for investors to identify and react to the material information about a registrant's key climate risks. In contrast, limiting such disclosures to the traditional standard of materiality would not only help investors identify key risks, but would also reduce the likelihood of uneven and unwieldy annual reports and registration statements in which immaterial climate-related information buries and dilutes material information on all topics, including climate.

To the extent that climate-related information is material to a registrant's financial performance or gives investors insight into financially material risks, registrants should have an obligation to provide appropriate climate disclosures. By limiting required disclosures in SEC filings to climate-related information that is material to a registrant, for which disclosure decisions on climate risk oversight, strategy, risk management and governance are

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<sup>6</sup> See Proposing Release at 127.

<sup>7</sup> See Proposing Release at 13.

informed by the detailed considerations outlined in the Proposed Rules, we believe that investors would benefit from clear and reliable disclosure of information. If the SEC is concerned that registrants may not be clear as to when climate-related disclosures would be material under this standard or otherwise have not been adequately disclosing material climate-related information, we believe that the SEC should, as it has in other areas such as MD&A, provide industry-specific guidance regarding potential topics and factors that should be considered in evaluating the materiality of certain information. In particular, such industry-specific guidance can serve to address the variation in content and detail of climate-related disclosures by registrants in the same industry as the SEC observed in the Proposing Release.<sup>8</sup>

***b. Further Align with the Core Recommendations of the TCFD***

We commend the SEC's decision to align certain aspects of the Proposed Rules to the core recommendations of the TCFD,<sup>9</sup> which serves as the foundation for many companies' existing voluntary disclosures and is generally consistent with current and/or proposed regulations in the EU, UK and Japan and other major financial markets, as well as the International Sustainability Standards Board's ("ISSB") newly proposed standards.<sup>10</sup>

However, the Proposed Rules exceed the scope of the TCFD framework in several significant areas, such as (i) including the proposed climate-related financial statement disclosure requirements under Regulation S-X and (ii) requiring third-party attestation of Scope 1 and Scope 2 GHG emissions disclosure under proposed Item 1505. Other elements of the Proposed Rules (e.g., the proposed disclosure requirements regarding Climate Risk Analysis and Management Measures and targets and goals) are far more prescriptive as compared to the TCFD's core recommendations, and even as compared to the more granular implementation guidance of the TCFD's core recommendations reflected in the TCFD's 2021 annex.<sup>11</sup> As a result, companies that already disclose climate-related information under the recommendations of the TCFD would nevertheless need to meaningfully expand their disclosures to comply with the Proposed Rules and, in many cases, develop new internal systems for collecting data that may bear little relevance to the company.

We urge the SEC to more closely align the Proposed Rules with the core recommendations of the TCFD in a manner that ultimately reflects the overriding principle of materiality. By doing so and following the

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<sup>8</sup> See Proposing Release at 30-31 (finding "there is significant variation across companies and industries with regard to the content of current climate disclosures").

<sup>9</sup> When we discuss alignment with the TCFD, we are referencing the core recommendations of the TCFD, which organize climate-related disclosures around the pillars of governance, strategy, risk management and metrics and targets, and which, in particular with respect to strategy, metrics and targets, generally recommends materiality-qualified disclosures. See TCFD, Recommendations of the Task Force on Climate-related Financial Disclosures (June 2017), available at <https://www.fsb.org/wp-content/uploads/P290617-5.pdf>.

<sup>10</sup> See IFRS, *ISSB Delivers Proposals that Create Comprehensive Global Baseline of Sustainability Disclosures* (Mar. 31, 2022), available at <https://www.ifrs.org/news-and-events/news/2022/03/issb-delivers-proposals-that-create-comprehensive-global-baseline-of-sustainability-disclosures/>.

<sup>11</sup> TCFD, *Implementing the Recommendations of the Task Force on Climate-Related Financial Disclosures* (Oct. 2021) available at [https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing\\_Guidance.pdf](https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf).

more flexible, materiality-based approach, we believe that the final rules would more effectively promote consistent, comparable and cost-effective climate-related reporting.<sup>12</sup>

***c. Require Scope 1 and Scope 2 GHG Emissions Disclosures When Material***

Proposed Item 1504 of Regulation S-K would require *every* registrant to disclose their Scope 1 and Scope 2 GHG emissions regardless of the materiality of those disclosures to a registrant's business, financial condition or results of operations. The Proposed Rules reflect an assumption that GHG emissions are relevant to all registrants, when they are not, and do not distinguish between those industries and registrants for which GHG emissions are material. Put simply, if Scope 1 and Scope 2 disclosures are not material to a particular company, that company should be permitted to omit such disclosures. For some sectors, Scope 1 and Scope 2 GHG emissions may be immaterial or de minimis, and the disclosure of such information would offer little additional value to investors, particularly when assessed against the cost of estimating such emissions and implementing requisite disclosure procedures. Therefore, we urge the SEC to require Scope 1 and Scope 2 GHG emissions disclosures only when they are material, and to permit registrants to make such disclosures on a furnished basis subject to a robust safe harbor from liability, as further discussed below in Section 4.

Consistent with our general recommendation to require only material Scope 1 and Scope 2 GHG emissions disclosures, we recommend that the SEC eliminate the requirement to disclose disaggregated emissions on a gas-by-gas basis. The Proposed Rules would require registrants to disclose their Scope 1, Scope 2 and (if required) Scope 3 GHG emissions on both an aggregated and disaggregated, or gas-by-gas, basis.<sup>13</sup> The requirement to disaggregate emissions on a constituent gas basis would apply regardless of the materiality of the particular gas to a company's business or operations. This requirement would require companies to change the manner in which they track emissions and would increase the complexity and volume of data collection without a corresponding benefit to investors. Detailed disclosures on a gas-by-gas basis may also reveal certain competitively sensitive information regarding a registrant's operational and manufacturing processes. If the SEC does not eliminate this disaggregation requirement for Scope 1, Scope 2 and especially Scope 3 GHG emissions (if Scope 3 is included in the final rules), we recommend applying a materiality standard to such disclosures. Under this alternative approach, registrants would only be required to disclose the emission of an individual gas when such disclosure is material. A materiality standard for disclosure of disaggregated gases could provide investors with useful information about potential risks facing a company due to the particular makeup of its GHG emissions, without requiring that all registrants prepare and disclose immaterial disaggregated data.

***d. Require Climate-Related Targets and Goals Disclosures When Material***

Proposed Item 1506 of Regulation S-K would require registrants to disclose *any* targets or goals related to the reduction of GHG emissions, or any other climate-related target or goal, as well as detailed information regarding such target or goals (e.g., unit of measurement) and the registrant's implementation thereof (e.g., interim targets, implementation strategy and specific data demonstrating progress), regardless of the materiality of such disclosures to a registrant. We believe that, if a company has publicly announced a climate-

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<sup>12</sup> In addition, many registrants may also be subject in the near future to novel reporting standards in jurisdictions outside the U.S. For example, registrants headquartered in Europe, or with certain securities listed in Europe, or with significant subsidiaries in Europe may be subject (or have consolidated subsidiaries that are subject to) to the EU's proposals under the Corporate Sustainability Reporting Directive. Greater alignment on proposed sustainability-related disclosure requirements between the different rule setters would allow for global consistency of information disclosed to investors and reduce cost and complexity for the companies reporting.

<sup>13</sup> See proposed Section 1504(a) of Regulation S-K.

related target or goal, some level of detail may be appropriate for investors to understand such target or goal, and to understand the registrant's progress towards achieving the target or goal. However, many climate-related targets and goals (in particular ones with a long or indefinite horizon) are aspirational at this time and are unlikely to be material. In addition, many of the granular disclosure requirements under Item 1506 far exceed what is necessary for investors to understand and assess registrants' climate-related targets and goals. Not only would the requirements under proposed Item 1506 be unlikely to generate useful information for investors in many instances, they would also likely deter some registrants from setting a target or goal, particularly when the registrant could be subject to increased litigation risks as a result of the disclosure requirements triggered by taking such an action.

To encourage companies to continue setting and working toward targets and goals to mitigate the effects of climate change, we recommend that disclosure be required only for a registrant's publicly-announced, climate-related targets and goals when such disclosures are material to a registrant's business, financial condition or results of operations. Similar to Scope 1 and Scope 2 GHG emissions disclosures, any disclosures on climate-related targets and goals, regardless of whether mandatory or voluntary, should be furnished subject to a robust safe harbor from liability, as further discussed below in Section 4. We believe that this approach would incentivize registrants to both continue setting targets and goals and to make voluntary disclosures on those targets and goals even if such disclosure would not yet be material, rather than subjecting registrants to disproportionate liability for aspiring to achieve climate-related improvements and thereby chilling the pursuit of these improvements.

*e. Allow Registrants to Make the Disclosures Under Proposed Item 1504(e) in a Manner that is More Closely Aligned with the Core Recommendations of the TCFD*

Proposed Item 1504(e) would require registrants to describe the methodology, significant inputs and significant assumptions used to estimate GHG emissions, in many cases regardless of materiality and beyond the level and scope of detail set forth in the TCFD recommendations. Because estimating GHG emissions is a complex and resource-intensive process, requiring detailed disclosures would create a significant burden for registrants and dilutive disclosures for investors. For example, as noted by the SEC, "the evolving and unique nature of GHG emissions reporting involves, and in some cases, warrants varying methodologies, differing assumptions, and a substantial amount of estimation."<sup>14</sup> Proposed Item 1504(e)(1) would require the disclosure of each emissions factor used, the source of any such emissions factor and any calculation tools used to determine GHG emissions. Requiring prescriptive disclosure in this context is guaranteed to generate voluminous disclosures that provide dubious value to investors. We urge the SEC to provide registrants the flexibility to disclose against the specific prongs of proposed Item 1504(e) that are material (in the traditional sense), and we urge the SEC to more closely align the disclosure requirements with the TCFD framework with which many registrants and investors are familiar.

**2. Rescind Proposed Requirements with Respect to Scope 3 GHG Emissions, Attestation, Financial Statement Notes and Climate Risk Analysis and Management Measures**

Considering the evolving nature of climate science and climate data reporting, we firmly believe that certain requirements of the Proposed Rules should be rescinded. As further described below, some disclosures mandated by the Proposed Rules cannot be accurately and consistently prepared under existing scientific and data limitations, and we urge the SEC not to require registrants to report on information that is likely to be imprecise, cumbersome and inherently unreliable. Certain requirements under the Proposed Rules—i.e., Scope 3 GHG emissions disclosures, attestation of GHG emissions and proposed Regulation S-X financial statement disclosures—would be extraordinarily challenging, if not impossible, for registrants to implement at a level of accuracy that would yield information that is reliable and useful to investors. In addition, in light of the absence of methodological maturity and consensus, the detailed information required under the Proposed Rules with respect to Climate Risk Analysis and Management Measures would also create burdensome disclosure and update requirements for

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<sup>14</sup> See Proposing Release at 220.

registrants that are not justified by a corresponding benefit to investors. For the reasons detailed below, we urge the SEC to rescind these proposed requirements.

***a. Rescind Proposed Scope 3 GHG Emissions Disclosure Requirements***

As the SEC acknowledges, registrants face inherent difficulties in estimating and disclosing Scope 3 GHG emissions given the existing data and methodological limitations, among other practical hurdles.<sup>15</sup> This is the case both for large companies with complex value chains, as well as smaller registrants with fewer internal resources to conduct the required data collection, analysis and disclosure review.

Under the Proposed Rules, Scope 3 GHG emissions disclosure is required only if material or if Scope 3 GHG emissions are included in a registrant's targets and goals. However, these two exceptions would not meaningfully reduce the burden or complexity of the requirements on registrants. Many registrants would need to estimate Scope 3 GHG emissions even if they are not ultimately disclosed in order to determine whether such emissions are material and would also need to be prepared to justify any determination that Scope 3 GHG emissions are immaterial. Performing even a preliminary analysis would require substantial effort, as estimating Scope 3 GHG emissions would require heavy reliance on, and assistance from, third parties to gather and analyze Scope 3 GHG emissions data.

Registrants also would be required to disclose Scope 3 GHG emissions if they include such emissions in their targets and goals, even if Scope 3 GHG emissions are immaterial or the target or goal has not been publicly announced. However, many companies' existing Scope 3 GHG emissions targets and goals are limited in ways that do not align with the Proposed Rules. For some registrants, their Scope 3 GHG targets cover only certain portions of the value chain (e.g., upstream only or business travel only) and often exclude, for example, Scope 3 GHG emissions from equity-accounted investments or joint ventures over whose operations a registrant has limited control and from other investments (which would capture emissions from customers, including what are commonly referred to as "financed emissions" for banks and "insured emissions" for insurers).

It will be impossible, at least in the near term, for investors to reliably compare registrants' Scope 3 GHG emissions disclosures, because calculating Scope 3 GHG emissions will depend substantially on the different estimates and assumptions made, and methodologies used, throughout a registrant's value chain and inevitably will be inconsistent across registrants.<sup>16</sup> For example, while certain standards and methodologies developed by financial sector participants, such as the Partnership for Carbon Accounting Financials, are beginning to gain traction, there is still no consensus on standards and methodologies for calculating financed emissions and other categories of Scope 3 GHG emissions. In addition, disclosure of the assumptions made in connection with such Scope 3 GHG emissions is likely to be lengthy, complex and difficult to compare across registrants, including as a consequence of the current lack of established and accepted standards for Scope 3 reporting.

Given the challenges associated with preparing and disclosing Scope 3 GHG emissions data, we urge the SEC to rescind the proposed requirement to disclose Scope 3 GHG emissions and allow registrants to voluntarily publish this information on a furnished basis subject to a more robust safe harbor from liability, as

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<sup>15</sup> See Proposing Release at 208-09 (noting that the calculation and disclosure of Scope 3 emissions may pose difficulties, including the difficulty in obtaining activity data from suppliers and other third parties in a registrant's value chain and verifying the accuracy of that information, and recognizing that "the task of calculating Scope 3 emissions could be challenging"). We submit that "challenging" is euphemistic, partially for registrants that have many thousands of suppliers and other third-parties, most of which are not public companies.

<sup>16</sup> See Proposing Release at 150.

further discussed below in Section 4. Many larger registrants voluntarily disclose certain categories of their Scope 3 GHG emissions in their sustainability and climate reports, even though they do not view them as material to their business or financial condition or results of operations. By mandating disclosure, we anticipate companies may decide not to set targets that include Scope 3 GHG emissions and may no longer voluntarily provide information out of concern that it may be viewed as an admission of materiality. Registrants should be encouraged to voluntarily disclose Scope 3 GHG emissions to the extent, and in the manner, they are able to do so reliably. Encouraging, rather than chilling, the continued evolution and expansion of these disclosures is critical to achieving the SEC's objectives.

If the SEC decides to retain the Scope 3 disclosure requirements in its final rules, we encourage the SEC to adopt the following clarifications and limitations:

i. Clarify the "Materiality" Trigger

Under the Proposed Rules, a registrant would be required to disclose its total Scope 3 GHG emissions if they are material, but the applicable materiality standard is unclear. The Proposing Release indicates that registrants should consider whether Scope 3 GHG emissions make up a relatively significant portion of their overall GHG emissions when assessing the materiality of Scope 3 GHG emissions and references both quantitative and qualitative materiality thresholds. However, a quantitative threshold based on total GHG emissions (e.g., 40% of a company's total GHG emissions as referenced in the Proposing Release)<sup>17</sup>—without regard as to whether total GHG emissions are material to a registrant and investment decision making—is overbroad and not consistent with traditional standard of materiality.<sup>18</sup> If a company has limited Scope 1 and Scope 2 GHG emissions, Scope 3 GHG emissions would represent a large portion of total GHG emissions as a mathematical matter, even though Scope 3 GHG emissions may not be material to the company's business, financial condition or results of operations. In those cases, the resulting disclosure and compliance costs would substantially outweigh potential value to investors. In addition, the Proposing Release references several qualitative tests, again deviating from the SEC's traditional materiality standard, which would require registrants to speculate about time horizons far beyond normal business planning horizons. The referenced qualitative standards are based on "whether Scope 3 represents a significant risk, is subject to significant regulatory focus, or if there is a substantial likelihood that a reasonable investor would consider it important." The "subject to significant regulatory focus" prong, for example, would require public companies to speculate on potential regulatory priorities in some cases, and may also effectively function as an automatic trigger in other cases, given the current focus by certain regulators on climate-related risks.<sup>19</sup> Moreover, in

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<sup>17</sup> See Proposing Release at 165, 174 n.471, 176 (discussing potential quantitative threshold to require disclosure of Scope 3 emissions).

<sup>18</sup> At these quantitative levels, the referenced quantitative thresholds would be the equivalent of an automatic trigger for banks and other financial institutions. According to a report published by the CDP, a climate nonprofit, GHG emissions associated with financial institutions' investing, lending and underwriting activities are on average over 700 times higher than their direct emissions. Given these numbers, financial institutions' Scope 3 emissions almost certainly would exceed the 40% quantitative threshold referenced in the Proposing Release. See CDP, *Finance Sector's Funded Emissions Over 700 Times Greater than its Own* (Apr. 28, 2021), available at <https://www.cdp.net/en/articles/media/finance-sectors-funded-emissions-over-700-times-greater-than-its-own>.

<sup>19</sup> See *Executive Order on Climate-Related Financial Risk* (May 20, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/>; *Biden Administration Roadmap to Build an Economy Resilient to Climate Change Impacts* (Oct. 15, 2021), available at <https://www.whitehouse.gov/briefing-room/statements->

the case of comprehensively regulated institutions, there are many subjects of regulatory focus, and presumably, they are not all material as a result. Instead of creating a new standard for the materiality of Scope 3 GHG emissions and causing confusion for both registrants and investors, we recommend that, consistent with our general recommendation above, the SEC apply its long-standing materiality standard if the SEC nevertheless decides to require “material” Scope 3 GHG emissions under its final rules.

ii. Eliminate the “Target or Goal” Trigger

Under the Proposed Rules, if a registrant has set a GHG emissions reduction target or goal that includes its Scope 3 GHG emissions (whether or not such target or goal has been publicly announced), the registrant would be required to disclose Scope 3 GHG emissions even if they are not material to its business. This would almost certainly disincentivize some registrants from setting Scope 3 targets or goals altogether. To avoid the foreseeable chilling effect, we recommend that all Scope 3 GHG emissions disclosures be subject to the materiality standard described above.

iii. Limit Disclosures on Categories of Scope 3 GHG Emissions to Those That Are Material and Can Be Reliably and Reasonably Determined

The Proposed Rules could be interpreted to require disclosure of Scope 3 GHG emissions from *all* upstream and downstream activities in a registrant’s value chain without regard to the materiality of the activity itself or its emissions, or the proximity of the registrant to that particular portion of the value chain. It is not feasible for a registrant to accurately estimate (or even identify) all of these emissions, especially at the degree of accuracy required for disclosure in SEC filings.

One clear example of a Scope 3 category for which registrants, in particular financial institutions, would have significant compliance burdens exacerbated by a lack of methodological clarity is the “investments” category, which covers financed emissions for banks.<sup>20</sup> As noted by the Bank Policy Institute in its 2021 letter to the SEC, companies in the financial sector are “dependent upon information from their clients to understand the emissions profile” of their lending activities, and the gathering of such information from clients, who themselves will require time to develop the ability to gather reliable quantitative data, will take a significant amount of time.<sup>21</sup> These institutions do not have the contractual right to obtain climate data from their existing customers, and in many cases, customers will be private companies that would not be subject directly to the Proposed Rules. These challenges will be amplified in the early years of any adoption of the Proposed Rules. Many registrants beyond the financial sector also are constrained by the lack of contractual right to obtain data from existing customers, particularly those that may be private companies not subject to a regulatory obligation to produce and report such information.

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releases/2021/10/15/fact-sheet-biden-administration-roadmap-to-build-an-economy-resilient-to-climate-change-impacts/.

<sup>20</sup> See Greenhouse Gas Protocol, *Technical Guidance for Calculating Scope 3 Emissions*, 141, available at [https://ghgprotocol.org/sites/default/files/standards/Scope3\\_Calculation\\_Guidance\\_0.pdf](https://ghgprotocol.org/sites/default/files/standards/Scope3_Calculation_Guidance_0.pdf) (noting that to calculate Category 15, “Investments” emissions, a company would need to collect Scope 1 and 2 emissions of investee companies).

<sup>21</sup> Bank Policy Institute, *Re: Request for Public Input on Climate Change Disclosures* (June 9, 2021), available at <https://bpi.com/wp-content/uploads/2021/06/BPI-Final-Comment-Letter-re-SEC-RFI-Climate-Disclosure-2021.06.09.pdf>.

In addition, certain categories of Scope 3 GHG emissions would require registrants to rely particularly heavily on data supplied by third-parties, such as transportation, distribution and downstream leased assets. The lack of current consensus regarding the methodologies for collecting and analyzing Scope 3 GHG emissions, especially in these downstream categories, could ultimately lead to one registrant receiving vastly different Scope 3 GHG emissions data from vendor to vendor. Thus, registrants should only be required to estimate the categories of Scope 3 GHG emissions that are material to a registrant's business, financial condition and results of operations and that can be reliably and reasonably determined. Furthermore, we urge the SEC to engage in discussion with market participants on the categories or subcategories of Scope 3 GHG emissions that can be reliably and reasonably estimated with a sufficient level of consistency. If the data cannot be estimated consistently, it simply is not reasonable to require registrants to disclose the data, particularly when they would be subject to heightened liability and increased litigation risks.

iv. Rescind Proposed Requirement to Describe Data Sources

Proposed Item 1504(c)(2) would require registrants to provide substantial disclosures regarding the data sources used to estimate Scope 3 GHG emissions, including emissions reported by parties in the value chain, data concerning specific activities as reported by parties in the value chain and third-party sources from which the registrant derived data, such as economic studies, industry averages of emissions activity and other sources. Registrants would also need to disclose whether emissions reports by parties in the value chain were verified by the registrant or a third party. For various business and legal reasons, registrants often keep the identity of key suppliers, customers and commercial counterparties in their value chain confidential. Requiring the detailed third-party disclosure under proposed Item 1504(c)(2) (even on an anonymized basis) could cause competitive harm, result in breaches of confidentiality agreements or increase operational and transaction costs.<sup>22</sup> This requirement could also cause substantial delays, particularly for companies with complex value chains. Third parties whose information is being included in an SEC filing (especially those required to disclose the same information to the SEC directly) may also insist on reviewing any proposed disclosure prior to filing, which could further complicate and delay disclosure, which (as proposed) is already on an accelerated implementation schedule.

***b. Rescind Proposed Attestation Requirements***

We urge the SEC to rescind the proposed requirement for registrants to obtain third-party attestation of their Scope 1 and 2 GHG emissions disclosures. As the SEC noted in the Proposing Release, "current voluntary ESG assurance practices have been varied with respect to the levels of assurance provided (e.g., limited versus reasonable), the assurance standards used, the types of service providers, and the scope of disclosures covered by the assurance."<sup>23</sup> More fundamentally, voluntary ESG assurance practices have not been widely adopted. There are not yet recognized and generally accepted emissions calculation and attestation standards, which stand in contrast to the well-defined accounting and auditing standards under U.S. Generally Accepted Accounting Principles ("GAAP") and International Financial Reporting Standards ("IFRS") with respect to financial disclosures. Given this lack of settled standards, companies would be required to expend significant resources just to determine whether and how they can implement data collection processes that are adequate to satisfy attestation under relevant and shifting professional standards. Moreover, attestation may provide an undue sense of comfort and reliability.

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<sup>22</sup> See Greenhouse Gas Protocol, *Corporate Value Chain (Scope 3) Accounting and Reporting Standard*, 82, available at <https://ghgprotocol.org/standards/scope-3-standard>; see also Proposing Release at 389 (noting that another potential indirect cost of the Proposing Release is the possibility that certain provisions may force registrants to disclose proprietary information).

<sup>23</sup> Proposing Release at 224.

As the SEC acknowledged, attestation over GHG emissions is a relatively new and evolving field.<sup>24</sup> Registrants would face significant challenges and risks in connection with making determinations as to the qualification of attestation providers. The number of qualified providers would likely be insufficient to meet the demand for their services prompted by the Proposed Rules, at least in the near term. Although an industry of qualified third-party providers likely would develop, the current lack of qualified attestation providers would prove challenging and costly for companies, especially smaller registrants, to adhere to the proposed attestation requirements, particularly given the short proposed implementation period.

For these reasons, we recommend that the SEC rescind the proposed attestation requirements. If the SEC nevertheless requires third-party attestation in the final rules, we urge the SEC to delay the implementation of such requirements until broad industry consensus has emerged with respect to attestation processes, standards and methodologies. In addition, if the SEC requires third-party attestation in the final rules, we urge the SEC to make the following clarifications and changes:

i. Provide Additional Guidance on Attestation Standards

Registrants and their attestation providers need significant additional guidance with respect to GHG attestation.<sup>25</sup> Though the Proposing Release compares the new GHG attestation requirements to existing financial statement attestation requirements, the GHG standards are significantly less developed and standardized. Before mandating assurance (at any level), the SEC should work with industry participants and standard setters to develop generally accepted climate disclosure attestation principles.

ii. Smaller Reporting Companies Should Be Excluded

We support the SEC's decision to exclude non-accelerated filers from the proposed attestation requirement. However, in light of the significant burdens associated with the proposed attestation requirement, we believe that the SEC should similarly exclude smaller reporting companies ("SRCs")<sup>26</sup> from this requirement. As noted above, the burden and cost required to comply with the Proposed Rules will be significant and will disproportionately impact smaller registrants. The SEC should not require SRCs to expend additional resources to comply with the attestation requirements.

c. ***Rescind Proposed Financial Statement Disclosure Requirements***

Proposed new Article 14 of Regulation S-X, an entirely novel and extremely complex requirement, would require granular climate-risk disclosures in a note to a registrant's audited financial statements if the affected amount is 1% or more of *any* line item on a disaggregated basis, regardless of the size or nature of that line item.<sup>27</sup> This represents a meaningful departure from the SEC's traditional materiality-based disclosure regime

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<sup>24</sup> See Proposing Release at 220.

<sup>25</sup> See International Federation of Accountants, *The State of Play in Sustainability Assurance*, 3 (June, 2021), available at <https://www.ifac.org/knowledge-gateway/contributing-global-economy/discussion/state-play-sustainability-assurance> (noting the lack of consistent standards for sustainability assurance). Among other topics, guidance will be needed on the consistent application of the concept of materiality in the context of attesting on GHGs.

<sup>26</sup> "Smaller reporting company" is defined in Rule 10(f)(1) of Regulation S-K. 17 C.F.R. § 229.10.

<sup>27</sup> See proposed Section 14-02(b) of Regulation S-X.

and current GAAP requirements.<sup>28</sup> The SEC should rescind proposed Article 14 as it would result in the disclosure of immaterial information that would not be decision-useful to investors, would involve significant complexity and cost, and would be impractical to implement.

First, separate financial statement disclosures are not necessary to inform registrants of the material financial impacts of climate-related risks and activities because companies are already required to do so under existing GAAP standards as well as in the MD&A section.<sup>29</sup> Second, much of the information that would be called for requires significant judgment and estimation from registrants, more so than other areas of financial reporting that call for estimates based on assumptions. This could lead to significant disparity in approaches across registrants, making financial statements less consistent and less comparable, rather than more. Moreover, these estimates would be subject to audit and internal control over financial reporting, resulting in substantial resources expended to develop appropriate procedures to capture, report and audit information for which precision may be elusive and that is arguably immaterial to most users of a registrant's financial statements. Third, unlike some of the other requirements of the Proposed Rules, these requirements are not included in any mainstream voluntary framework such as TCFD or the GHG Protocol, which means there is not even an established starting point or an emerging market practice for companies to consider when attempting to prepare these disclosures.

If the SEC retains the proposed climate-related financial statement disclosure requirements, we recommend that the SEC amend the 1% disaggregated threshold. In establishing an appropriate threshold, the SEC should follow the typical, deliberative FASB rulemaking process, incorporating robust input from industry participants and standard setters (including potentially aligning the materiality threshold with SAB 99), before imposing any requirement to include climate-related disclosures in financial statements. We believe the SEC should use this process to provide additional guidance on how companies should identify impacts and expenditures related to climate, including how registrants should report on the novel concepts of lost revenue (e.g., lower sales as a result of a climate event) or cost reduction (e.g., lower costs as a result of having made investments that qualify as a transition event), which are not otherwise determined under GAAP or IFRS. The Proposed Rules do not provide sufficient guidance with respect to preparing the proposed climate-related financial metrics and would be impracticable to implement. Registrants would be unable to classify consistently and reliably impacts and expenditures to be disclosed against individual line items. In addition, it would be extremely difficult to reliably audit the proposed financial statement disclosures in the absence of standards developed by an SEC-designated standard-setting body under which registrants and their auditors can determine the completeness of the information being audited and assess the processes, judgments and assumptions implicated in the disclosures contemplated by the Reg S-X Requirements.

For example, earmarking expenditures and impacts as related to climate would require companies to exercise significant judgment, which would necessarily lead to differences across issues and industries. Given the broad definition of transition risks in particular, companies may take widely different approaches to identifying

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<sup>28</sup> See Proposing Release at 111. The SEC acknowledged that a number of existing accounting standards could elicit climate-related disclosures in the financial statements as highlighted by the FASB in a Staff Educational Paper. See FASB, *Intersection of Environmental, Social, and Governance Matters with Financial Accounting Standards* (Mar. 19, 2021), available at [https://www.fasb.org/Page/ShowPdf?path=FASB\\_Staff\\_ESG\\_Educational\\_Paper\\_FINAL.pdf&title=FASB%20Staff%20Educational%20Paper-Intersection%20of%20Environmental](https://www.fasb.org/Page/ShowPdf?path=FASB_Staff_ESG_Educational_Paper_FINAL.pdf&title=FASB%20Staff%20Educational%20Paper-Intersection%20of%20Environmental) (hereinafter "FASB Staff Education Paper"). Despite this, the SEC asserted that the Proposed Rules "would benefit registrants by specifying when to provide such disclosures." Proposing Release at 111.

<sup>29</sup> See SEC Release Nos. 33-9144; 34-62934 (Sept. 17, 2010); see also FASB Staff Education Paper, *supra* note 28 (providing examples of how an entity may consider effects of material ESG matters when applying current accounting standards).

expenditures and impacts related to transition activities, which may give investors a false sense of this metric's precision. Companies that produce high-carbon products may not be able to disaggregate or distinguish the revenue impact of a decline in demand for the products as a result of efforts to reduce GHG emissions by customers from the impact of changing demand for their products due to economic trends during the particular reporting period. Similarly, we expect that registrants may struggle to disaggregate expenditures related to climate from expenditures that may also appropriately be characterized as ordinary-course business expenses. Expenditures on building energy-efficient facilities, for example, might be characterized as an expenditure on a transition activity. It is not clear whether expenditures in subsequent years to repair and maintain such energy-efficient facilities should be characterized as a transition activity. Likewise, if a wildfire or flood destroys a non-energy-efficient facility, and a registrant uses that as an opportunity to rebuild a more energy-efficient facility, it is not clear if that would be appropriately characterized as an expenditure related to a climate-related event, or to climate-related transition activity, or split between the two (and, if split, on what basis).

Given the current lack of guidance, requiring the proposed financial statement disclosures without providing registrants with clear, comprehensive and industry-specific guidance would undoubtedly lead to inconsistent disclosures that are ultimately non-comparable and unhelpful to investors.

***d. Rescind Proposed Stand-Alone Requirements for Disclosure of Climate Risk Analysis and Management Measures***

The Proposed Rules include prescriptive and granular disclosure requirements related to Climate Risk Analysis and Management Measures that are not linked to materiality and could expose competitively sensitive information.<sup>30</sup> To the extent that the outcome of the analysis or use of these measures is material, we expect that registrants will reflect this information or perspective in their SEC disclosures. For example, regardless of whether the SEC requires specific disclosure of the outcomes of scenario analysis or how an internal carbon price affects a registrant's management of climate-related risks, registrants would be required to disclose information under proposed Item 1502(a) regarding the material risks facing a company. This required risk factor disclosure would ensure that if a company identifies material risks through its use of scenario analysis or other analytical tools, investors would remain fully informed about the nature of such risks and the potential impact of those risks. Not only are the more granular disclosure requirements in proposed Item 1502(f) (relating to scenario analysis) and proposed Item 1502(e) (relating to internal carbon price) unnecessary for apprising investors of material risks that may be identified by those Climate Risk Analysis and Management Measures, they could ultimately lead to a chilling effect on the wide adoption of scenario analysis and internal carbon pricing. Ultimately, if fewer registrants engage in these measures, the speed at which the underlying science and methodologies advance and industry standards develop will also slow down.

Similarly, the detailed disclosures required under proposed 1503(c) of Regulation S-K (relating to transition plans) will create immense burdens and potentially implicate competitively sensitive information for registrants, without adding valuable information to the total mix of information available to investors. Material information regarding a registrant's business, including any material changes to a previously disclosed business strategy, is already required under Item 101 of Regulation S-K.<sup>31</sup> Under proposed Item 1502(c), registrants would also be required to disclose information that helps investors understand "whether the implications of the identified

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<sup>30</sup> See proposed Item 1502(f) of Regulation S-K (relating to scenario analysis); proposed Item 1502(e) of Regulation S-K (relating to internal carbon price); proposed Item 1503(c) of Regulation S-K (relating to transition plans).

<sup>31</sup> See Item 101 of Regulation S-K. 17 C.F.R. § 229.101.

climate-related risks have been integrated into the registrant’s business model or strategy, including how any resources are being used to mitigate climate-related risks.”

As methodologies, industry standards and the underlying science for each of these measures continue to emerge, for the reasons described below, the SEC should eliminate the stand-alone disclosure requirements with respect to these measures. Instead, the SEC should provide registrants with the flexibility to provide details on their use of such measures on a voluntary basis. To avoid discouraging the use of these measures, we recommend that companies be permitted to furnish rather than file any disclosures regarding their use of such measures, subject to a robust safe harbor from liability. We discuss each measure in further detail below:

i. Scenario Analysis

Analytical tools, including scenario analysis, may be useful in helping companies assess and understand the emerging risks posed by climate change. In the banking sector, for example, the Office of the Comptroller of the Currency (the “OCC”) and the Federal Deposit Insurance Corporation (the “FDIC”) have issued proposed guidance for large banks (over \$100 billion in total assets) on management of climate-related financial risk, noting that management should develop and implement climate-related scenario analysis frameworks.<sup>32</sup> Federal Reserve Vice Chair Lael Brainard also indicated the importance of scenario analysis for informing risk management at the level of individual financial institutions.<sup>33</sup>

Registrants across industries are still in the early stages of implementing scenario analysis, if at all. For example, companies may run limited scenario analysis focused on customer demand or physical risk to facilities, which could yield valuable information about physical and transition risks, although a registrant may not internally prepare comprehensive information on financial impacts of those risks. Further, as the SEC notes in the Proposing Release, scenario analysis methodologies and climate science continue to advance and develop. Therefore, requiring companies that use scenario analysis to provide the detailed disclosures specified in proposed Item 1502(f) in the first applicable SEC filing after they begin to use scenario analysis would be impracticable and inappropriate. The substantial cost of conducting a full scenario analysis may already be beyond the reach of smaller companies,<sup>34</sup> and the added liability and compliance challenges associated with developing detailed disclosure regardless of materiality, then updating such disclosure on an ongoing basis as the analytical framework continues to evolve at a rapid pace, would likely further discourage some companies from using this analytical tool until they are required to do so by regulators or until methodologies and standards have matured. Moreover, registrants that are or may in the future be required or encouraged by their regulators to conduct scenario analysis could be in an untenable position under the Proposed Rules. These registrants would simultaneously face a regulatory mandate to conduct scenario analysis in a rapidly evolving area using novel and emerging methodologies and a disclosure obligation to present detailed, granular information on the scenario analyses. This disclosure obligation would be triggered even

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<sup>32</sup> OCC, Bulletin 2021-62 (Dec. 16, 2021), available at <https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-62.html>; *Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions*, 80 F.R. 19507 (Apr. 4, 2022).

<sup>33</sup> See Lael Brainard, *Building Climate Scenario Analysis on the Foundations of Economic Research* (Oct. 7, 2021), available at <https://www.federalreserve.gov/newsevents/speech/brainard20211007a.htm>; see also Financial Stability Oversight Council, *Report on Climate-Related Financial Risk* (Oct. 21, 2021), available at <https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf>; New York Department of Financial Services, *Guidance for New York Domestic Insurers on Managing the Financial Risks from Climate Change* (Nov. 15, 2021), available at [https://www.dfs.ny.gov/system/files/documents/2021/11/dfs-insurance-climate-guidance-2021\\_1.pdf](https://www.dfs.ny.gov/system/files/documents/2021/11/dfs-insurance-climate-guidance-2021_1.pdf) (the “NYDFS Guidance”).

<sup>34</sup> See Proposing Release at 86, 407.

though the required disclosures may not be material, well understood by investors or comparable to the disclosures by any other company, and could potentially expose sensitive information. For these reasons, any disclosure of scenario analysis should be voluntary and should be furnished rather than filed, and benefit from a robust safe harbor from liability to encourage voluntary disclosure.

ii. Internal Carbon Pricing

We believe that the SEC should not mandate disclosure of internal carbon pricing. Mandating the disclosure of *any* internal carbon price(s) used, as well as the rationale for selecting such price, may disincentivize companies from using internal carbon pricing, which can otherwise be a useful tool in addressing and implementing long-term strategies and catalyzing investments in energy-efficient infrastructure and practices.<sup>35</sup> Mandating the disclosure of all internal carbon prices used also may raise competitive concerns for companies that would otherwise use such techniques as an internal evaluation and planning tool (such as in evaluating potential business opportunities, adjusting the cost and return of potential investment decisions or comparing potential energy sources).<sup>36</sup> Moreover, requiring disclosure of the reasons for using different carbon prices may deter companies from updating their methodologies to consider new pricing techniques or evaluate scenarios under multiple prices out of concerns as to how changes (probably multiple changes over time as methodologies develop) may be perceived.

iii. Transition Planning

The SEC noted that “[t]ransition plans may also be important to registrants and their shareholders to the extent transition risk arises from changes in customer or business counterparty preferences, technological change, or changes in market prices.”<sup>37</sup> Currently, the Proposed Rules would require fulsome disclosure of the details of any transition plan a registrant has adopted,<sup>38</sup> with “transition plan” defined broadly as “a registrant’s strategy and implementation plan to reduce its GHG emissions in line with its own commitments or commitments of jurisdictions within which it has significant operations.”<sup>39</sup> The broad definition of “transition plan,” combined with the fact that most registrants have and continue to refine transition plans as the realities of climate change become more clear, will create significant compliance cost and risks for registrants. In addition, the proposed disclosures regarding transition plans may require companies to disclose business plans that are still being internally discussed and are not ripe for disclosure, or which implicate competitively sensitive business information. To the extent material to a registrant, aspects of a transition plan, such as anticipated financial commitments and expenditures, potential impacts to business operations and other elements, would already be required to be disclosed in a registrant’s SEC filings.

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<sup>35</sup> Ethan Addicott, et al., *Internal Carbon Pricing*, available at <https://cbey.yale.edu/sites/default/files/2019/04/Internal%20Carbon%20Pricing%20Report%20Feb%202019.pdf>.

<sup>36</sup> *Id.* at 9. This method of carbon pricing, known as “shadow pricing,” involves a hypothetical carbon price and helps companies to make choices about capital investments and to estimate costs throughout the investment’s lifecycle.

<sup>37</sup> *See* Proposing Release at 103.

<sup>38</sup> *See* proposed Section 1503(c) of Regulation S-K.

<sup>39</sup> *See* proposed Section 1500(s) of Regulation S-K.

### **3. Provide Additional Clarity and Flexibility to Facilitate Implementation**

With respect to certain elements of the Proposed Rules, we believe that registrants are unlikely to be able to comply on a consistent and reliable basis unless the SEC provides additional clarity and flexibility. We note several examples below. In addition, if Scope 3 GHG emissions disclosures, attestation requirements, financial statement disclosure requirements and/or stand-alone disclosure requirements related to Climate Risk Analysis and Management Measures are included in the final rules, we also urge the SEC to make the clarifications or adjustments recommended under Section 2 above.

#### ***a. Eliminate or Clarify the Requirement to Provide Intensity Information***

Under the Proposed Rules, registrants would be required to disclose GHG intensity in terms of metric tons of CO<sub>2</sub>e per unit of total revenue and on a per-unit-of-production basis. We recommend that the requirement for registrants to estimate and disclose intensity be eliminated. With respect to CO<sub>2</sub>e per unit of total revenue, investors could readily estimate intensity per unit of total revenue by dividing the Scope 1 and Scope 2 GHG emissions data by the registrant's total revenue. In addition, third-party assurance providers would need to include this disclosure within their attestation reports, even though the calculation of the registrant's total revenue would be outside their remit. The third-party attestation provider may thus need to add additional qualifications or procedures to their report or would need to coordinate with the registrant's outside auditors or internal finance function, adding incremental cost without corresponding benefit to investors who could estimate this figure independently. With respect to CO<sub>2</sub>e per unit of production, this metric may not be easily comparable between registrants, given the discretion that each registrant must exercise in choosing which units of production to use under the instruction that the unit must have "relevance to the registrant's industry."<sup>40</sup> Registrants may also have difficulty identifying an appropriate unit to use, particularly those who have multiple different business lines or those who offer a range of different products, or those who offer services, which cannot be easily measured by units of production.<sup>41</sup> Given the significant degree of variability, whether within a registrant's business lines or across an industry, without clear, industry-specific guidance, the resulting disclosures would lack comparability and consistency, and could mislead investors even when a registrant has made a good-faith determination as to the relevant unit of production. Therefore, we recommend that the intensity disclosure be omitted from the final rules and, if not, we urge the SEC to provide the necessary guidance to facilitate registrants' implementation of such a requirement.

#### ***b. Provide Additional Clarity on Calculation Methodology and Organizational Boundaries***

Under the Proposed Rules, the organizational boundaries for calculating Scope 1, Scope 2 and Scope 3 GHG emissions could inadvertently deter potential investees from engaging with U.S. public investors and limit the ability of emerging companies to access U.S. public markets. The Proposed Rules also could have a chilling effect on acquisition activity. For the following reasons, we urge the SEC to adjust the organizational boundary for equity investees, proportionately consolidated companies and newly acquired companies.

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<sup>40</sup> See proposed Section 1504(d)(1) of Regulation S-K (instructing registrants to "disclose GHG intensity in terms of metric tons of CO<sub>2</sub>e per unit of total revenue (using the registrant's reporting currency) and per unit of production relevant to the registrant's industry for each fiscal year included in the consolidated financial statements").

<sup>41</sup> The SEC notes in the Proposing Release that if a registrant does not have a unit of production, it may use another measure of economic output "depending on the nature of its business" such as data processing capacity, volume of products sold, or number of occupied rooms. See Proposing Release at 181. However, the measurements proposed in this alternative approach similarly lack clarity and uniformity. *Id.*

i. Equity Investees and Proportionately Consolidated Companies

Under the Proposed Rules, a company would need to include its proportionate share of emissions from entities that are either accounted for on the equity method or with respect to which the registrant consolidates on a proportionate basis. As a result, that company would be required to obtain Scope 1 and Scope 2 GHG emissions information from each such entity. That company would also potentially be required to obtain Scope 3 information to determine whether its own Scope 3 GHG emissions are material or to disclose Scope 3 GHG emissions as part of its overall emissions disclosure. Some companies would simply be unable to obtain the information required to make such disclosures from all its investees on a timely basis (if at all). For example, under the Proposed Rules, even the smallest private investees would be called upon to provide Scope 1 and Scope 2 GHG emissions (and potentially Scope 3 GHG emissions) data to their public company investors, and many of these companies would simply not have the resources or ability to produce such information. Ultimately, the Proposed Rules could deter potential investees from engaging with U.S. public companies in favor of non-U.S. registered companies or private companies that may not require such granular and resource-intensive information from their investees. In addition, the Proposed Rules could deter registrants from making new investments in equity investees, which also could have a significant impact on smaller private companies seeking capital. Conversely, smaller private companies may view U.S. public companies as less desirable investment sources in light of the compliance burden.<sup>42</sup>

For these reasons, the SEC should reconsider the Proposed Rules' applicability to equity investees and proportionately consolidated entities, whether by eliminating the requirement altogether, providing an accommodation for entities for which the information is not readily available (e.g., for entities in specific jurisdictions and/or in locales facing extenuating circumstances whether legal or otherwise that may prevent the collection of the requisite data), or limiting the requirement applicable to equity investees and proportionately consolidated entities to Scope 1 and Scope 2 GHG emissions.

ii. Business Development Companies and Pooled Investment Vehicles; Sponsors of Business Development Companies and Other Funds

The Proposed Rules as written would apply to BDCs and certain other types of pooled investment vehicles that are SEC registrants, and the SEC has requested comments on whether BDCs should be exempted from some or all of the Proposed Rules.<sup>43</sup> We urge the SEC to exempt BDCs and other pooled investment vehicles that are SEC registrants from the Proposed Rules, as these types of registrants would face significant challenges in collecting accurate data for Scope 3 GHG emissions, in particular because they primarily exist to invest in assets and other companies that in almost all cases would not be subject to the Proposed Rules.

Similarly, registrants in the business of sponsoring BDCs and other pooled investment vehicles, including investment vehicles that would not be subject to the Proposed Rules, such as private funds, mutual funds and other registered investment companies, would face unique challenges in complying with the Proposed Rules. Moreover, these firms are subject to regulation under the Investment Advisers Act of 1940 (the "Advisers Act"), which imposes its own disclosure and other requirements on investment advisers, and does not apply generally to other registrants that would be subject to the Proposed Rule. We urge the SEC to carefully consider the costs and

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<sup>42</sup> The Proposed Rules are also inconsistent with the flexibility permitted by the GHG Protocol to adopt an operational-control approach, employed by many companies currently in their voluntary disclosures. See Greenhouse Gas Protocol, *The Greenhouse Gas Protocol for the U.S. Public Sector*, 16-23, available at <https://ghgprotocol.org/public-sector-protocol-0>.

<sup>43</sup> See Proposing Release at 275, 278.

burdens that would apply to these firms of any disclosure requirement that would apply at the portfolio-company level and consider a more tailored approach in light of these challenges.

In addition, the SEC recently proposed a separate series of amendments to rules and forms promulgated under the Advisers Act and the Investment Company Act of 1940 that would impose ESG disclosure requirements on certain investment advisers, registered investment companies and BDCs.<sup>44</sup> Although we express no view on these proposed amendments here, we urge the SEC to consider the unique costs that would apply to BDCs and registrants that sponsor BDCs and other funds if they are required to comply with multiple, overlapping disclosure regimes.

*c. Provide More Flexibility on Governance-Related Disclosures and Proposed Board Expertise*

The Proposed Rules would require a registrant to disclose whether any of its directors has expertise in climate-related risks.<sup>45</sup> As an initial matter, we have concerns with the governance approach resulting from a disclosure requirement that would likely increase the concentration of responsibility regarding climate risk oversight to one person. Appointing one individual board member with expertise in climate-related risks does not, in itself, ensure robust oversight of climate issues, and requiring that individual be designated the “climate expert” on the board could have the unintended consequence of making one person the sole or final voice on climate matters. Rather, we believe that companies could more effectively manage climate-related risks through a collaborative approach that would not place the oversight of climate-risk management function solely or largely as the responsibility of one “climate expert.” Climate-related risks and impacts affect companies in a variety of ways, including the financial statements within the remit of the audit committee, the recruitment and retention of individuals with the capacity to manage such risks within the remit of the compensation committee, and the ongoing consideration of governance enhancements and policy updates within the remit of the nominating and governance committees. Thus, we believe that an overarching oversight framework that engages the full board will lead to more effective and collaborative discussion and engagement on climate risk. Moreover, it has long been a tenet of good governance for directors to have robust discussions on important matters facing the company and for the resulting strategy to benefit from a diversity of perspectives. Disclosure rules that create pressure to designate a climate expert are likely to inhibit the holistic consideration of climate issues by boards. To the extent disclosure rules shape governance priorities, the final SEC rules should encourage increasing the overall climate-related knowledge of the board through appropriate training.

In addition to the governance implications of the disclosure requirements, we believe that it would be challenging for registrants and potentially confusing for investors for the SEC to impose certain aspects of Items 1501 and 1503 as currently proposed. Therefore, we urge the SEC to adopt the following adjustments to permit more flexibility and allow registrants to describe the relevant aspects of their governance and risk management frameworks.

*i. Prescriptive Elements of Proposed Items 1501 and 1503*

Compared to the core recommendations of the TCFD, which are both less detailed and more flexible than the Proposed Rules, the prescriptive lists of disclosure requirements under proposed Items 1501 and 1503 would restrict registrants’ flexibility to disclose the relevant aspects of their governance and oversight structure in a manner consistent with the disclosure of how they manage other material risks faced in their businesses.<sup>46</sup> As an

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<sup>44</sup> See SEC Release No. IA-6034; IC-34594 (May 25, 2022).

<sup>45</sup> See proposed Section 1501(a)(1)(ii) of Regulation S-K.

<sup>46</sup> While the TCFD framework provides recommendations for disclosures about governance and risk management of climate-related risks and opportunities, even the more detailed 2021 implementation

example, proposed Item 1501 of Regulation S-K would require companies to disclose granular information about board and management oversight of climate-related risks, including the processes by which the board receives information about and discusses climate-related risks, how the board sets and oversees climate-related goals and the frequency with which directors, members of management and committees are informed about climate-related risks. We believe some of these requirements could harm the overall effectiveness of governance by reducing the flexibility of registrants' boards and management to exercise their judgment on the most appropriate governance framework for responding to climate-related risks and opportunities, and to evolve their approach based on new risks developments.

We therefore urge the SEC to provide registrants with flexibility to disclose against the specific elements of proposed Item 1501 only to the extent relevant to their governance framework and to more closely align the disclosure elements with the core recommendations of the TCFD to avoid confusing registrants and investors. For similar reasons, we also urge the SEC to take a similar approach with respect to the prescriptive list of disclosure items under proposed Item 1503 with respect to risk management. Requiring registrants to disclose governance and risk management information with more granularity inappropriately places greater emphasis on climate risk oversight compared to the oversight of other business risks that are equally (and in some cases, more) deserving of the attention of a registrant's board and management.

ii. Climate Expert Director

We note that, unlike the recently proposed rules on Cybersecurity Risk Management, Strategy, Governance and Incident Disclosure,<sup>47</sup> under which a director identified as having cybersecurity expertise would be afforded a similar liability safe harbor afforded to audit committee financial experts, the Proposed Rules do not provide a safe harbor for the climate expert director. As a result, directors with such expertise may be viewed as having greater responsibility with respect to climate-change oversight and be exposed to greater liability due to their identified expertise. If the SEC does retain the requirement that a registrant identify those board members with climate expertise, those individuals should be accorded the same safe harbor proposed to be provided for cybersecurity experts.

In addition, given the anticipated level of demand for the limited number of individuals with particular technical climate expertise (as well as other skills necessary to serve on a registrant's board), it may be challenging for registrants to find available director candidates with the relevant expertise, at least in the near term. We urge the SEC to provide additional guidance on what constitutes sufficient "climate expertise," including whether directors can achieve it through the ongoing director training programs that many registrants have already instituted as a matter of good corporate governance.

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guidance from the TCFD requires less detailed disclosures than proposed Items 1501 and 1503 in several respects. Unlike proposed Item 1501, the TCFD's guidance on governance disclosures does not require disclosure of the identity and expertise of board members and members of management with climate-related experience, nor does it require disclosure on whether a company's board oversees the establishment of interim targets for climate-related goals. Unlike proposed Item 1503, the TCFD's guidance on risk management does not require companies that have adopted a transition plan to provide disclosures describing the plan; the TCFD's guidance also does not require disclosure related to how a company prioritizes whether to address climate-related risks and how committees responsible for managing climate-related risks interact with the committee governing general risks. *See* TCFD, *supra* note 11; proposed Section 1501 of Regulation S-K; proposed Section 1503 of Regulation S-K.

<sup>47</sup> *See* Release Nos. 33-11038; 34-94382 (Mar. 9, 2022).

#### **4. Reconsider Treatment for Purposes of Securities Act and Exchange Act and Liability-Related Concerns**

We believe that climate-related information responsive to existing disclosure requirements under Regulation S-K, such as MD&A and risk factors, or climate-related information that is otherwise material to the registrant, should continue to be reported on Form 10-K and Form 10-Q. However, preparing new, detailed and comprehensive qualitative and quantitative climate-related disclosures will be a challenging task for many, if not most, registrants. Even for those registrants already producing robust and/or TCFD-aligned climate-related disclosures, the requirement to file such disclosures with the SEC will present substantial incremental compliance costs, challenges and liability exposure. Further, many of the proposed disclosures are based on rapidly evolving climate science, procedures, standards and methodologies, which evolution will likely accelerate the speed at which prescriptive climate-related information included in a registrant's disclosures becomes stale, outdated or inconsistent with market standards. Given these challenges, we recommend that the SEC permit certain new climate-related disclosures be furnished to mitigate liability concerns associated with filing information that entails a significant degree of judgment and estimation. In addition, we urge the SEC to provide appropriate safe harbors to reduce registrants' exposure to meritless litigation, as further discussed below.

##### ***a. Permit Certain Proposed New Disclosures to be Furnished***

We urge the SEC to allow registrants to furnish rather than file (1) material Scope 1 and Scope 2 GHG emissions and targets and goals disclosures, and (2) information that we believe should be disclosed on a voluntary basis (e.g., immaterial Scope 1 and Scope 2 GHG emissions, any Scope 3 GHG emissions and any disclosures relating to Climate Risk Analysis and Management Measures that are not otherwise captured in a registrant's SEC filings). As discussed above in Sections 1 and 2, these disclosures entail a significant degree of judgment and estimation. Permitting registrants to furnish rather than file such disclosures will mitigate registrants' liability exposure with respect to information that is, in many cases, inherently less reliable and more challenging to collect than the information currently included in SEC filings, such as financial information derived from a registrant's own books and records. In addition, allowing companies to furnish these climate-related disclosures would likely incentivize companies make such disclosures even if the SEC does not mandate disclosure, which would increase investor access to information that may not be material to a registrant but may nevertheless be useful to enhance their understanding of a company's climate risks profile.

For these disclosures, we recommend the SEC permit registrants to use a separate form and be given at least until the later of 180 days after registrants' fiscal year-ends and the deadline of their second quarter quarterly reports to submit information on that form.<sup>48</sup> The use of a separate form would allow investors to access material climate-related information in SEC filings and all other climate-related disclosures in one document that is easily accessible on the EDGAR system, rather than having to review various website pages and other postings to get a full picture of a company's climate profile. This approach would also reduce the likelihood that disclosures in registrants' SEC filings become less useful as a result of the large volume of new information called for by the Proposed Rules. The delayed reporting approach<sup>49</sup> would be similar to the SEC's approach under Exchange Act Rule 13p-1<sup>50</sup> and Exchange Act Rule 13q-1<sup>51</sup> with respect to Form SD. Having more time after their fiscal year-end

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<sup>48</sup> If the SEC requires the disclosure of material Scope 3 emissions, registrants will need much longer than 180 days to finalize the necessary data.

<sup>49</sup> SEC, *General Instruction for Form SD*, available at <https://www.sec.gov/files/formsd.pdf>.

<sup>50</sup> 17 C.F.R. 240.13p-1.

<sup>51</sup> 17 C.F.R. 240.13q-1.

to prepare these new climate-related disclosures allows registrants to report on climate-related information (including information relying on third-party data) with a higher degree of accuracy, as a result of, among other things, reducing reliance on estimates for fourth-quarter data.

Furthermore, while we believe that climate-related information responsive to existing disclosure requirements under Regulation S-K or that is otherwise material to a registrant's business—i.e., information related to a registrant's material climate-related risks, the material financial impact of climate-related events and transition activities or other material aspects of its climate strategy and mitigation efforts—should generally continue to be reported on registrant's SEC filings, we understand that some of this information may not be available on the annual reporting timeline. Therefore, we believe registrants should have the option of filing such information as an amendment to a Form 10-K or incorporating the information by reference from the furnished form (if such amendment or form is submitted to the SEC by its deadline). The incorporation by reference option is analogous with the current Instruction G(3) of Form 10-K,<sup>52</sup> which permits registrants to incorporate by reference the information required under Part III of Form 10-K from their definitive proxy statement, including information related to a registrant's governance, providing registrants with a longer period to submit the furnished form after fiscal year-end, which would help alleviate compliance challenges for registrants. While we believe the abovementioned disclosure timeline is appropriate, we recognize that some investors may wish to have access to material information regarding a registrant's risk management process and the board of director's role in assessing and managing climate risks<sup>53</sup> in advance of annual general meetings and on the same timeline as proxy statements. Thus, we would also support governance and risk management disclosures (with the modifications described above) being placed in Part III of Form 10-K, which, as permitted by Instruction G(3), can be incorporated by reference into the Form 10-K from the registrant's definitive proxy statement filed within 120 days after a registrant's fiscal year-end.

***b. Expand Applicability of the Safe Harbor***

We urge the SEC to provide an appropriate safe harbor for the new climate-related disclosures in order to ensure that registrants (including newly public companies) are not exposed to liability for disclosures made in good faith. The SEC observed in the Proposing Release that much of the disclosure proposed to be required reflects discussion of a company's internal climate risk assessment and strategy, which is not dependent on external sources of information.<sup>54</sup> Our experience, however, suggests that a registrant's assessment of its own climate risk draws heavily from external sources, including scientific analysis of likely climate scenarios, research on the projected impacts of climate change at a global, regional and local level, as well as lessons drawn from peers' experiences with climate-related risks that have materialized. GHG emission calculations (even for Scope 1 and, by definition, for Scope 2) rely heavily on external data. Climate-related science, policies and market practices are evolving quickly. Providing appropriate safe harbors would incentivize registrants to provide more detailed and helpful disclosures to investors on these issues, despite lack of control over third-party data and evolving underlying processes.

Therefore, we urge the SEC to expand the safe harbor proposed with respect to Scope 3 GHG emissions data<sup>55</sup> to all of the new climate-related disclosures (especially any disclosures that are required to be filed rather than furnished), and to clarify that such safe harbor is applicable to oral statements of the same information by

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<sup>52</sup> SEC, *General Instructions for Form 10-K*, available at <https://www.sec.gov/files/2017-03/form10-k.pdf>.

<sup>53</sup> See proposed Sections 1501(a)(1) and (2) of Regulation S-K.

<sup>54</sup> See Proposing Release at 288.

<sup>55</sup> See proposed Section 1504(f) of Regulation S-K.

the registrant's management (including during an investor call or roadshow). We recommend the SEC provide clarification that the safe harbor proposed for Scope 3 GHG emissions disclosures is applicable to registrants' determinations as to whether climate-related information is material.

## **5. Extend Implementation Timeline and Reduce Ongoing Burdens**

The difficulties associated with the Proposed Rules are exacerbated by the extremely short proposed implementation period. Under the SEC's proposed compliance timeline, large accelerated filers with a calendar year-end would be required to comply with respect to the 2023 fiscal year, and would therefore have an extremely narrow window to establish the appropriate disclosure controls, procedures and processes to comply with the proposed climate-related disclosures framework given that these controls, procedures and processes would need to be effective in January 2023 for calendar year reporting companies. For smaller companies, even though there would be a longer phase-in period, many are not currently collecting the types of data that would be required to be disclosed under the Proposed Rules, and those with limited resources, in particular, would struggle to meet the compliance deadlines. For these reasons, we recommend that the SEC extend the initial compliance dates for its new climate-related disclosure requirements.

Further, once the initial phase-in period ends, private companies undertaking an initial public offering would need to prepare climate-related disclosures, including for historical periods, at the same time that they are drafting their Form S-1 filings. FPIs, many of which are subject to home country jurisdiction rules that require climate-related reporting (including in many cases, under TCFD-aligned frameworks), would need to make sure that they have the resources and processes necessary to comply with overlapping but not perfectly aligned disclosure frameworks. We are concerned that these challenges may have a meaningful impact on the overall attractiveness of accessing the U.S. public markets. In addition, registrants that are in scope for proposed EU reporting requirements are expected to be subject to such requirements for the first time at the earliest with respect to the 2024 fiscal year. For these and other reasons described below, we recommend that the SEC provide additional accommodations to newly public companies (and with respect to companies that have been newly acquired by registrants), and reduce the ongoing disclosure burdens for both U.S. registrants and FPIs as further described below.

### ***a. Extend Initial Compliance Date, Phase-in Periods and Limit Update Requirements***

The proposed compliance date and phase-in periods would require that registrants begin collecting a large volume of new qualitative and quantitative data immediately, especially since GHG emissions and other types of data would be required for historical years (unless such historical information is not available without unreasonable expense). In most cases, registrants would face an immense burden if they are required to prepare (and potentially audit) multiple years' worth of data (including collection of historical data potentially on a retroactive basis) in the short time frame proposed by the SEC. If the SEC adopts Article 14 of Regulation S-X in some form, it will be critical to have a longer phase-in period, which would be consistent with the historical approach by FASB when it has updated accounting standards. In recognition of the time-consuming nature of updating accounting processes, FASB's normal process is to take a deliberative approach to any material revisions to its standards. For example, FASB's revisions to rules around revenue recognition, ultimately adopted in 2014, took three years to progress from the initial exposure draft to the final adoption, with implementation taking a further four years. A long phase-in period would also be consistent with the SEC's approach in other rulemakings that similarly require the enhancement of data collection processes, and would allow for more time for alignment among international reporting standards. In October 2018, the SEC released final amendments to mining property disclosure requirements under Regulation S-K and required registrants to comply with the final rules when filing registration statements on or after January 1, 2021 and when filing its Form 10-K or Form 20-F annual report for fiscal years

ended on or after December 31, 2021.<sup>56</sup> Registrants with a calendar year-end thus had over three calendar years between when the rules were released in October 2018 and when they were required to publish their first annual reports containing the required disclosures. Further, in the case of the mining property disclosure requirements, the rules were of far more limited scope than the Proposed Rules, as the mining property disclosure requirements applied only to a small subset of registrants for whom such disclosures were relevant, and only required those registrants to supplement already-existing reporting requirements.

Therefore, we urge the SEC to provide an initial phase-in period for the Proposed Rules at least as long as the period for the recent updates to the mining property disclosure requirements.

***b. Registrants Should Not Be Required to Provide Data on a Retroactive Basis***

Given the scope of the required disclosures and the amount of work that would be required to include this information on a go-forward basis, registrants would be analyzing information both for existing reporting companies and for IPOs and other registrants filing for the first time. Specifically, instead of including a lookback for historical periods, the SEC should mandate disclosure only since the first reporting year for all existing companies and after a one-year phase-in period for companies going through an IPO (as further described below). In order to avoid further truncating the compliance period, we also recommend that the SEC rescind the historical period disclosures for any historical years that fall during the initial phase-in period. Alternatively, the SEC should clarify what would constitute an “unreasonable effort or expense” under Rule 409 or Rule 12b-21 to avoid concerns by registrants that the SEC could question their determination that historical-period disclosures would require unreasonable effort or expense.

***c. Rescind Proposed Requirement to Provide Intra-Year Updates***

The Proposed Rules would require that domestic registrants disclose on a Form 10-Q any material changes to the information disclosed in response to Subpart 1500 of Regulation S-K on the registrant’s latest Form 10-K, and would require that FPIs disclose certain updates by furnishing a Form 6-K. We urge the SEC to rescind the intra-year update requirement.

Registrants are not subject to a general requirement to update each element of their annual report disclosure throughout the year, and investors do not currently receive updates on a rolling basis beyond the specific and targeted requirements of Form 10-Q, Form 8-K and Form 6-K, and specific additional disclosure required in connection with a securities offering (such as updated financial statements to comply with staleness rules). However, if there is an intra-year development that results in a new and material climate-related risk, Form 10-Q already requires an update to the risk factors to be provided by registrants other than SRCs, and material financial impacts would be included in the interim period MD&A. Certain material climate-related incidents may also trigger a Form 8-K disclosure requirement. Existing Form 10-Q, Form 8-K and Form 6-K requirements are therefore sufficient to provide investors material climate-related information on an intra-year basis. Requiring registrants to provide immaterial intra-year updates on climate would create meaningful incremental costs for registrants but offers little additional value to investors.

***d. Provide Accommodations for Newly Public Companies***

The Proposed Rules do not contain an accommodation for IPO registrants or newly public companies to establish necessary internal controls and disclosure procedures. Consistent with the SEC’s mandate to facilitate capital formation, the SEC should exempt Securities Act registration statements filed in connection with an IPO from the scope of the Proposed Rules and provide newly public companies with a compliance transition period,

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<sup>56</sup> SEC Release Nos. 33-10570; 34-84509, 288 (Oct. 31, 2018).

consistent with the transition period for IPO registrants under Section 404 of the Sarbanes-Oxley Act of 2002. Without these accommodations, the Proposed Rules could have a chilling effect on initial public offerings as a means to raise capital for growth.

*e. Provide Accommodations for Emerging Growth Companies (“EGCs”)*

The SEC has requested comments on whether EGCs should be excluded from some or all of the Proposed Rules.<sup>57</sup> While the SEC notes in the Proposing Release that an EGC would only be required to disclose on each of the two fiscal years preceding the date of its most recent audited balance sheet, this accommodation would not outweigh the disproportionate compliance burden that an EGC would face relative to large or accelerated filers.<sup>58</sup> Like SRCs, EGCs typically have limited resources to dedicate to the comprehensive data collection and analysis that the Proposed Rules would require. We urge the SEC to revise the Proposed Rules to exempt EGCs from disclosure requirements in light of the disproportionate disclosure burdens that EGCs would face.

*f. Provide Accommodations for Newly Acquired Companies*

We recommend that the SEC provide the phase-in period used by FASB when it has updated accounting standards with respect to a registrant’s newly acquired company. This approach would be in line with the SEC’s recent approach in its December 2020 adoption of rules under Section 13(q) of the Exchange Act for the disclosure of payments by resource extraction registrants. In those rules, the SEC granted transitional relief for recently acquired companies and for resource extraction registrants that had recently conducted their initial public offering<sup>59</sup> on the grounds that the transitional relief provision was consistent with its “statutory duty in a public rulemaking to consider whether an action will promote efficiency, competition, and capital formation” and that “[r]educing regulatory burdens in connection with initial public offerings not only helps registrants conducting those offerings but provides investors with expanded investment opportunities.”<sup>60</sup> There, the SEC noted that requiring target companies, which were not previously subject to such reporting requirements, to implement the appropriate reporting mechanisms in a timely manner would be a significant undertaking,<sup>61</sup> and that requiring recently public registrants to comply with the new rules could impose a compliance burden on companies that did not previously prepare the reporting and could thus impede their ability to become a public company and fully gain access to U.S. capital markets.

The lack of accommodation for newly acquired companies may significantly affect the volume and cadence of acquisition activity involving U.S. public companies. For example, it is unclear whether a company that has made an acquisition toward the end of and perhaps even during the last month of its fiscal year would be required to include the proportionate share of emissions from the acquired company on a post-acquisition basis. If such a requirement did apply, a registrant could be subject to impracticable disclosure obligations in the M&A context. Moreover, in addition to having the resources necessary to collect emissions data from the target company, acquirors would need to expend significant resources to ensure that (1) it has appropriate controls and procedures in place to assess the quality of the information and (2) such information is being collected and measured on a basis consistent with the emissions calculations throughout its organization. Therefore, we urge the SEC to include

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<sup>57</sup> See Proposing Release at 278.

<sup>58</sup> *Id.*

<sup>59</sup> SEC Release No. 34-90679 (Dec. 16, 2020).

<sup>60</sup> *Id.* at 84.

<sup>61</sup> *Id.* at 82.

accommodations for newly acquired companies. For example, the final rules could permit the exclusion of newly acquired companies until the first full fiscal year after which the newly acquired company has been owned by the registrant.

Relatedly, because the Proposed Rules would require the target's climate-related disclosures to be included on Form S-4/F-4, the Proposed Rules would likely have a chilling effect on acquisitions by public companies, especially stock-for-stock or mixed cash/stock deals if the target is not already an SEC registrant. We recommend that the SEC exempt from Form S-4/F-4 the disclosure of a target's climate-related information, because requiring such disclosures would likely increase deal costs, decrease deal certainty and amplify litigation risks. Since an acquiror will almost certainly need to change a target company's climate-related operations, activities and disclosure processes as part of the integration process to align with those of the acquiror, the negative consequence of requiring climate disclosures on the target in Form S-4/F-4 filings are not justified by any value to the investors.

***g. Compliance with Home Country Reporting Requirements Should Be Permitted for FPIs***

We urge the SEC to permit FPIs that are subject to similar reporting requirements in their home country jurisdictions to comply with those rules in lieu of the Proposed Rules. The Proposed Rules and many foreign jurisdictions' climate-related reporting requirements are still being developed. Therefore, it would be premature to propose a complete list of jurisdictions whose disclosure requirements are substantially similar to the Proposed Rules. However, we urge the SEC to consider recognizing the disclosure obligations of the United Kingdom and the proposed disclosure obligations of the European Union and Canada (assuming they are adopted substantially in their proposed forms) as sufficiently similar to the SEC's.<sup>62</sup>

This approach would be consistent with how the SEC has historically permitted FPIs to comply with the home country jurisdiction rules (e.g., with respect to governance) rather than rules applicable to U.S. domestic companies. The SEC permitted substitute compliance for FPIs in other rulemakings as recently as 2020.<sup>63</sup>

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<sup>62</sup> See with respect to the UK: The Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2021, available at <https://www.legislation.gov.uk/ukdsi/2021/9780348228519/contents>; Financial Conduct Authority, *Proposals to enhance climate-related disclosures by listed issuers and clarification of existing disclosure obligations* (Dec. 2020), available at <https://www.fca.org.uk/publication/policy/ps20-17.pdf>; Financial Conduct Authority, *Enhancing Climate-Related Disclosures by Standard Listed Companies* (Dec. 23, 2021) available at <https://www.fca.org.uk/publication/policy/ps21-23.pdf> (together, requiring large UK and UK-listed companies to include climate-related disclosures in their annual financial reports in alignment with the recommendations of the TCFD); with respect to the EU, the European Commission, *Regulation on Sustainability-Related Disclosure in the Financial Services Sector Proposal for a Corporate Sustainability Reporting Directive (CSRD)* (April 21, 2021) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0189&from=> (proposing a requirement on all large EU and EU-listed companies to report according to mandatory EU sustainability reporting standards); European Financial Reporting Advisory Group (EFRAG), *Exposure Draft of the Proposed European Sustainability Reporting Standard (ESRS) E1 Climate Change* (Apr. 2022) (setting out detailed proposed climate-related disclosures expected to be adopted by the EU under the proposed CSRD); with respect to Canada, Canadian Securities Administrators, Proposed National Instrument 51-107, *Disclosures of Climate Related Matters* (Oct. 18, 2021) (proposing climate-related disclosure requirements).

<sup>63</sup> See SEC Release No. 34-90679, codified at 17 C.F.R. 240, 249b (Dec. 16, 2020) <https://www.sec.gov/rules/final/2020/34-90679.pdf> (noting that final rules adopted with respect to

Ensuring that the SEC's rules are not unnecessarily burdensome on FPIs in jurisdictions that have adopted, or are adopting, TCFD-aligned disclosures, including frameworks based on the proposed ISSB standard, is appropriate.

As part of permitting such substitute compliance, the SEC should permit a registrant to follow the submission deadline of the approved alternative reporting regime, provided that the registrant clearly states that it is complying with its home jurisdiction's reporting requirements in lieu of the SEC's and provides such disclosures in a fair and accurate English translation, if applicable.

If the SEC does not permit substituted compliance, because FPIs are subject to different (and in many cases more stringent) domestic disclosure and other obligations, FPIs would be disproportionately impacted by the SEC's disclosure requirements. For example, many FPIs in the UK and EU have (or will have under proposed new regulations) an obligation to adopt and disclose climate-related targets and goals and scenario analysis. For these FPIs, proposed Items 1506(a)(1) and 1502(f), which require a registrant that sets targets and goals or conducts scenario analysis to make granular disclosures, would automatically apply. In contrast, many US domestic issuers have the ability to decide not to take the relevant actions, and would not necessarily be required to make the onerous disclosures under those proposed items.

We agree with the SEC that an FPI would need to furnish climate-related information on Form 6-K<sup>64</sup> if, when and to the extent required by home country jurisdiction requirements to do so. We urge the SEC to retain this approach in the final rules.

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disclosure of payments by resource extraction issuers will not apply to foreign private issuers that are exempt from Exchange Act registration and reporting obligations pursuant to 17 CFR 240.12g3-2(b)).

<sup>64</sup> See Proposing Release at 276 n.692 (“While we are proposing to amend Form 6-K to add climate-related disclosure to the list of the types of information to be provided on Form 6-K, a foreign private issuer would not be required to provide the climate-related disclosure if such disclosure is not required to be furnished pursuant to subparagraphs (i), (ii), or (iii) of General Instruction B.”).

Securities and Exchange Commission

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If you would like to discuss our letter, please feel free to contact Catherine M. Clarkin at [REDACTED] or Sarah P. Payne at [REDACTED]

Very truly yours,

Sullivan & Cromwell LLP