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Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: File No. S7-10-22; Release Nos. 33-11042, 34-94478: *The Enhancement and Standardization of Climate-Related Disclosures for Investors*

Dear Ms. Countryman:

The National Association of Manufacturers (“NAM”) appreciates the opportunity to provide comment to the Securities and Exchange Commission (“SEC”) on File No. S7-10-22, the Commission’s proposed rule to enhance and standardize climate-related disclosures by public companies.¹

The NAM is the largest manufacturing trade association in the United States, representing manufacturers of all sizes and in all 50 states. Manufacturers in the U.S. are leaders in combatting climate change and solving the enormous problems it poses for the economy and the world. After all, it is manufacturers who will make the products and technologies needed to face this generational challenge—clean energy, carbon capture, batteries, microgrids, advanced vehicles, and more.

The NAM appreciates that the SEC is considering how best to ensure that investors have consistent access to material disclosures about public companies, including about material climate-related information. Intrinsic to the SEC’s tripartite mission to protect investors, support capital formation, and maintain efficient markets is the Commission’s role in facilitating the disclosure of decision-useful information to shareholders in public companies. To the extent that climate-related information is financially material to a company’s performance or gives investors insight into financially material risks that its business faces, issuers have an existing obligation to provide appropriate climate disclosures to the market.

As the proposing release notes, public companies have taken strides to enhance their climate-related disclosures in recent years. Manufacturers’ climate disclosures allow them to clearly communicate their climate leadership while also responding to investor interest and complying with the Commission’s 2010 guidance on climate change disclosures.² In many instances, companies disclose significantly more climate-related information than is required pursuant to the 2010 guidance. Many manufacturers publish voluntary sustainability reports detailing their diverse efforts to reduce emissions, enhance energy efficiency, and mitigate the impacts of climate change. Many others utilize aspects of third-party reporting frameworks like the recommendations published by the Task Force on Climate-related Financial Disclosures (“TCFD”). In its 2010 guidance, the SEC

¹ *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21334 (11 April 2022). Release Nos. 33-11042, 33-94478; available at <https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf>.

² *Commission Guidance Regarding Disclosure Related to Climate Change*, 75 Fed. Reg. 6290 (8 February 2010). Release Nos. 33-9106, 34-61469; available at <https://www.govinfo.gov/content/pkg/FR-2010-02-08/pdf/2010-2602.pdf>.

acknowledged that these and other reporting mechanisms “can provide important information to investors outside of disclosure documents filed with the Commission.”³ Climate change is a generational challenge, and manufacturers remain committed to leading the way in ensuring that investors have access to thorough and reliable disclosures about companies’ efforts to respond to any material risks it poses.

It is into this evolving and multi-layered climate reporting ecosystem that the SEC now proposes to set in stone its preferred approach to climate-related disclosure. According to the proposing release, the Commission believes that “the current disclosure system is not eliciting consistent, comparable, and reliable information,”⁴ so the proposed rule seeks to “augment and supplement the disclosures already required in SEC filings.”⁵ The NAM does not believe that companies’ current climate reporting practices—consisting of material disclosure in SEC filings supplemented by corporate sustainability reports and other reporting—are failing to keep shareholders appropriately informed. In our letter responding to the Division of Corporation Finance’s recent “illustrative letter” on companies’ existing climate disclosure practices,⁶ we encouraged the Division “to recognize the utility of corporate social responsibility reports, sustainability reports, third-party frameworks, and other climate reporting mechanisms that continue to serve businesses and their investors well.”⁷ A prescriptive rule runs the risk of instituting a static mandate that does not reflect the dynamic nature of climate reporting methodologies and the evolving nature of company and investor practices and preferences.

Manufacturers believe in the importance of material climate-related disclosures, and the NAM appreciates the fact that the SEC is considering whether any changes to the status quo are warranted in order to ensure that investors have access to decision-useful information. As we said in response to the Commission’s March 2021 request for public input on climate change disclosures,⁸ the NAM “supports a principles-based framework that enables publicly traded companies to efficiently report financially material climate-related metrics, as well as information about financially material climate-related risks and opportunities, to their shareholders.”⁹ The NAM supports the SEC’s stated goal of “elicit[ing] investment decision-useful information that is necessary or appropriate to protect investors.”¹⁰

However, the NAM has serious concerns about certain aspects of the SEC’s climate-related disclosures framework as currently proposed. Far from providing a roadmap to help companies identify and disclose the climate-related information that will best inform their investors, the proposed rule instead institutes a wide-ranging mandate for public companies to generate and report pages upon pages of information, much of which is not material to their operations or financial performance. In many instances the required information is not even available. Further, the proposed rule is so prescriptive in its approach that it will necessitate a breadth and granularity of

³ *Id.* at 6292.

⁴ Proposed Rule, *supra* note 1, at 21340.

⁵ *Id.* at 21338.

⁶ *Sample Letter to Companies Regarding Climate Change Disclosures* (22 September 2021). Available at <https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures>.

⁷ NAM Comments on Division of Corporation Finance Sample Letter (8 November 2021). Available at https://documents.nam.org/tax/nam_comments_corp_fin_sample_letter.pdf.

⁸ *Public Input Welcomed on Climate Change Disclosures* (15 March 2021). Available at <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.

⁹ NAM Comments on SEC Climate Disclosures RFI (8 June 2021). Available at https://documents.nam.org/tax/nam_comments_sec_climate_rfi.pdf.

¹⁰ Proposed Rule, *supra* note 1, at 21340.

data collection, analysis, tracking, assurance, and disclosure far out of step with current business practices and thus will substantially increase compliance costs and legal risks for public companies—despite limited investor benefit given the financial immateriality of many of the disclosures. Notably, investors already have access to significant amounts of relevant and decision-useful climate-related information via companies’ existing reporting practices, and companies are already required to provide material climate-related information in SEC filings pursuant to the Commission’s 2010 guidance.

In seeking to enhance climate-related disclosures, the Commission has proposed a rule that overweights the financial impact of climate change on public companies’ financial and operational results, requiring disclosure far beyond that required of other risks that companies face. Further, the proposed rule could actually *discourage* companies from committing to climate-related goals or continuing to provide voluntary climate disclosures outside of filed documents. The rule’s requirements would expose issuers to increased regulatory, legal, and reputational risks if they, for example, set ambitious emissions reduction targets, implement aggressive transition plans, or utilize tools like scenario analysis or an internal carbon price to better understand their climate impact.

The proposed rule also fails to appropriately take into account the feasibility of compliance with the proposed requirements, as well as the time and cost burden associated with the rule’s far-reaching mandates. While manufacturers are taking steps to enhance their understanding and reporting of climate-related information, the data collection, tracking, analysis, and assurance techniques that would be required by the proposed rule are still evolving and are not yet standardized across companies and industries. The uncertainty and potential unreliability of the data and processes needed to comply with certain of the proposed requirements, including the required financial statement impact metrics and Scope 3 greenhouse gas (“GHG”) emissions reporting, will make it extremely difficult for public companies to provide complete, accurate, and comparable disclosures to their investors. This lack of information infrastructure and resultant uncertainty, as well as the increased liability associated with including information in SEC filings, will impose significant costs and potential legal risks on public companies without a concomitant benefit to shareholders.

Issuers will work to develop new processes to meet these challenges over time, but at present the requisite analysis and control procedures are not designed to provide such a wide range of climate-related information in an SEC filing. The burdens associated with the proposed rule will inevitably extend to small businesses that are part of larger companies’ value chains but lack the information and resources necessary to meet the demands of the proposed rule—and the rule provides little-to-no protection for these issuers, including smaller reporting companies (“SRCs”) and emerging growth companies (“EGCs”). The proposed rule also would have a significant impact on privately held businesses outside the SEC’s regulatory purview.

The difficulties associated with the rule are exacerbated by its extraordinarily short implementation period, as compliance with virtually all of the proposed disclosure requirements would be required of large accelerated filers beginning with their fiscal year 2023 filings if the SEC promulgates a final rule on the expedited timeline described in the proposing release. This timeline would necessitate that companies *immediately* attempt to implement complex disclosure controls and procedures over a wide range of climate-related information. The timing of the required disclosures on a going forward basis will have a similarly burdensome effect, as they will be due early each year as part of a company’s Form 10-K or Form 20-F¹¹ rather than as a standalone report later in the year, as is current practice given the timing of GHG emissions reporting for both domestic and international

¹¹ Throughout this letter, we refer mostly to Form 10-K when discussing the proposed rule’s requirements with respect to issuers’ annual reports. However, foreign private issuers will be required to provide identical climate-related disclosures via Form 20-F; as such, any of the NAM’s concerns raised or suggestions made with respect to Form 10-K should be understood to also apply to Form 20-F.

jurisdictions. The timing pressures on companies working to adjust to and then comply with the proposed rule—in combination with the uncertainty and difficulty associated with the underlying data collection and analysis, the proposed rule’s new attestation requirements, and the increased legal liability associated with including such information in an SEC filing—will make compliance with the proposed rule extremely difficult for issuers and could result in less-reliable information for investors.

Finally, the breadth and depth of the proposal raises significant concerns with respect to the SEC’s authority to promulgate and enforce such a far-reaching rule. The Commission has the statutory mandate to require disclosure of material information in order to protect investors and facilitate capital formation. However, the rule as proposed exceeds this mandate. The NAM is concerned that portions of the proposed rule undermine the settled materiality standard affirmed by the Supreme Court and relied upon by thousands of public companies and their investors. Some provisions also address major policy questions that Congress did not delegate to the SEC and about which the agency lacks subject matter expertise. Moreover, manufacturers are concerned that the speed with which the Commission is attempting to finalize its proposal, including the SEC’s stated desire to complete the rulemaking process by the end of 2022, could violate basic administrative procedure requirements as well as the agency’s duty to avoid arbitrary and capricious rulemaking actions.

The NAM believes that the SEC can achieve its stated goal of enhancing and standardizing climate disclosures for the benefit of investors in a manner consistent with the agency’s statutory role. To that end, we support specific and targeted changes to narrow the scope of the proposed rule, reduce burdens on public companies, reinforce the importance of financially material disclosures, acknowledge the evolving nature of climate reporting, and ensure sufficient time for companies to meet their compliance obligations. Our suggested improvements will enable the SEC to re-propose an appropriate climate disclosure framework that supports manufacturers’ efforts to address climate change and to inform their investors about this critical work. The NAM respectfully encourages the SEC to:

- **Allow companies’ GHG emissions to be disclosed via a separate form**—a new “Form GHG”—furnished to the SEC after the second fiscal quarter, rather than being filed in the Form 10-K;
- **Rescind the proposed Scope 3 emissions reporting requirement**, or at a minimum apply the requirement based on traditional materiality assessments rather than quantitative tests, allow companies to disclose data only from material categories and sources of Scope 3 emissions, and protect small and privately held businesses;
- **Rescind the proposed amendments to Regulation S-X** that would require companies to analyze the impact of climate-related risks, weather events, and transition activities on each of the line items in their consolidated financial statements;
- **Right-size the proposed Regulation S-K climate-related risk disclosures** to require less-prescriptive reporting, limit the mandate to material information, reduce compliance costs, and protect competitively sensitive information;
- **Rescind the proposed disclosure requirements that would require companies to expose competitively sensitive information** about their internal carbon prices, scenario analyses, and transition plans;
- **Tailor the proposed targets and goals disclosure requirement** to avoid penalizing companies pursuing ambitious climate-related goals;

- **Ease compliance with the proposed Scope 1 and Scope 2 emissions reporting requirements** by granting companies the flexibility to determine their organizational boundaries, allowing companies to continue existing practices with respect to intensity metrics and *de minimis* emissions, and rescinding the proposed reasonable assurance requirement;
- **Rescind the proposed rule’s retroactive requirements**, which would obligate companies to attempt to ascertain and disclose GHG emissions information and conduct financial statement impact analyses for fiscal years prior to the proposed rule’s compliance dates;
- **Provide robust liability protections for all climate-related disclosures made pursuant to the proposed rule**, including by strengthening the proposed safe harbor for Scope 3 emissions disclosures (if the Scope 3 mandate is included in a final rule), applying a similar safe harbor to any financial statement disclosures (if included in a final rule) and to Scope 1 and Scope 2 emissions disclosures, and continuing to emphasize the protections for forward-looking statements related to companies’ climate-related risks, transition plans, and targets and goals;
- **Exempt small, newly public, mid-size, and recently acquired companies from the proposed rule**, including by exempting SRCs, EGCs, other newly public companies prior to their first annual report, and other companies that meet the EGC size thresholds and by providing a two-year transition period into compliance for recently acquired companies; and
- **Delay the compliance dates for each of the rule’s provisions** such that the earliest disclosure obligations for large accelerated filers would be associated with the third fiscal year following the promulgation of a final rule (as opposed to the first fiscal year after finalization, as proposed), while also allowing the rule’s requirements to phase in over a longer period of time for certain classes of issuers (i.e., accelerated filers and, if not exempted from the rule, SRCs) and for the most complicated individual provisions (i.e., if not rescinded, Scope 3 GHG emissions disclosures and Regulation S-X financial statement metrics).

The NAM believes that these and other targeted changes would significantly ease compliance burdens and reduce investor confusion while still preserving the spirit of the proposed rule. They also would ensure that any final rule is grounded within the SEC’s statutory authority. Manufacturers respectfully encourage the SEC to incorporate these amendments into any final rule, and the NAM looks forward to working with the Commission to ensure that its climate-related disclosures framework focuses on material and accurate information, for the benefit of issuers and investors alike.

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I. Greenhouse Gas Emissions Reporting

A central focus of the proposed rule is the new requirement that public companies report their GHG emissions on an annual basis in their Form 10-K. All issuers would be required to provide data on their Scope 1 and Scope 2 emissions. Issuers, with the exception of SRCs, also would be required to provide data on their Scope 3 emissions if those emissions are material or if the issuer has set a GHG emissions reduction target that includes its Scope 3 emissions. The NAM appreciates that the

SEC is considering how best to ensure that investors can access information about public companies' GHG emissions.

Manufacturers have made significant strides in measuring and reporting their GHG emissions. Most large public companies have at least some ability to identify at the local source level their Scope 1 and Scope 2 emissions, and some are able to aggregate this data on a company-wide basis. Many companies thus voluntarily publish relevant emissions data from operations owned or controlled by the company (Scope 1) and the utility usage attributable to those operations (Scope 2). Some companies also have begun tracking the indirect emissions that result from activities within their value chain (Scope 3), though the methodologies and data sources for Scope 3 reporting are still evolving. Manufacturers are leading efforts to better understand this complex web of climate relationships, report their GHG emissions, and set targets to reduce emissions.

The NAM strongly supports appropriate transparency with respect to companies' GHG emissions. Understanding issuers' emissions can benefit investors to the extent the data is relevant to companies' operations—which is why many public companies already provide this information in their sustainability reports. Many others follow the recommendations of TCFD, which historically has suggested reporting Scope 1, Scope 2, and Scope 3 emissions to the extent material, but which last year amended its recommendations to suggest Scope 1 and Scope 2 reporting irrespective of materiality.¹² TCFD and most other third-party frameworks recommend utilizing the Greenhouse Gas Protocol (“GHG Protocol”) to guide GHG emissions reporting decisions, and the GHG Protocol has been widely adopted by companies that track and report their emissions. Additionally, certain large facilities are also subject to the Greenhouse Gas Reporting Program (“GHGRP”) administered by the Environmental Protection Agency (“EPA”).

These efforts are important to manufacturers, and the NAM does not agree with the SEC that company reports under these frameworks feature “a lack of consistency, comparability, and reliability”¹³ or otherwise fail to meet investor expectations. Manufacturers strive to report the most accurate, reliable data—and private ordering, including close coordination with investors, has in recent years led to a high degree of alignment with respect to the processes and frameworks companies utilize to disclose their GHG emissions. Additionally, providing this information outside of an SEC filing allows companies to be nimble and modify their data collection and analysis procedures as emissions reporting methodologies evolve. Given the significant efforts already underway to convey GHG emissions data to investors and the potential costs and liability associated with translating emissions data from other reports to SEC filings, the NAM urges the SEC to exercise caution as it seeks to finalize a prescriptive rule mandating GHG emissions reporting by public companies. An inflexible framework that does not reflect current disclosure practices and information infrastructure could create substantial compliance costs and burdens without achieving its stated objectives.

With certain targeted reforms, especially with respect to the timing, location, and methodology of the disclosures, the NAM believes that disclosure of Scope 1 and Scope 2 emissions can provide useful information to investors that highlights manufacturers' critical efforts to reduce GHG emissions and address the risks of climate change. Given the current state of Scope 3 data collection and aggregation practices, however, we do not believe that mandatory disclosure of Scope 3 emissions would provide similarly useful or accurate information. The NAM respectfully encourages the SEC to adjust its approach to the proposed GHG reporting provisions to more accurately reflect current practices and information infrastructure with respect to Scope 1 and Scope 2 reporting and to protect issuers and investors alike from the cost and confusion that would ensue under a Scope 3 mandate.

¹² *2021 Implementing Guidance*. Task Force on Climate-related Financial Disclosures (October 2021). Available at https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf.

¹³ Proposed Rule, *supra* note 1, at 21375.

A. Timing and Location of GHG Emissions Disclosures

Under the proposed rule, Scope 1, Scope 2, and Scope 3 GHG emissions disclosures would be included in a special “Climate-Related Disclosure” section in an issuer’s annual Form 10-K. Generally, issuers’ Form 10-K reports are due early in the year, either 60 (large accelerated filers), 75 (accelerated filers), or 90 (non-accelerated filers) days after the end of the previous fiscal year. In 2022, these due dates fell on March 1, March 16, and March 31, respectively, for calendar year filers.¹⁴ Many companies file their Form 10-K well in advance of the SEC’s deadlines, often as early as the first half of February for calendar year filers. As such, data included in these filings must be finalized very quickly after the fiscal year end to allow for assurance and other review processes associated with SEC filings.

This timeline does not align with current practices with respect to GHG emissions reporting, which have been developed over the years in response to the wide array of mandatory and voluntary emissions disclosure obligations that companies face. As noted, many public companies track and report relevant Scope 1 and Scope 2 emissions, and some disclose information on one or more of the 15 categories of Scope 3 emissions, but this data is not generally ready for publication early in the following year. The due date to report under the EPA’s GHGRP, which only includes Scope 1 emissions from large stationary sources, is March 31. Scope 1 emissions from small facilities below the reporting threshold are not included, nor are mobile sources of Scope 1 emissions. The EPA’s process for verifying and reporting the data often does not conclude until much later. Most sustainability reports are published in the late spring or early summer. A recent review found that more than 80% of these releases occur in the second quarter or later, with the most common months being June (32%), April (27%), and May (22%).¹⁵ In 2022, the deadline for voluntarily submitting data to the Carbon Disclosure Project (“CDP”), which evaluates companies’ alignment with TCFD, is July 27.

These deadlines fall where they do for a reason. Put simply, it takes time to collect, aggregate, analyze, and assure the quality of GHG emissions data. After all, only an issuer’s Scope 1 emissions data is available internally. Scope 2 information from utility providers and Scope 3 information from value chain partners is simply not available in time to include in a Form 10-K filing. And the SEC’s proposed rule likely will *increase* the time needed to report GHG emissions data given the addition of an assurance requirement for Scope 1 and Scope 2 disclosures.

The SEC is aware of the difficulties associated with finalizing GHG emissions data for inclusion in the annual Form 10-K. The proposed rule would allow a company to use a “reasonable estimate” of its GHG emissions for its fourth fiscal quarter if necessary to meet the filing deadline. Companies then would be required to disclose in a subsequent filing any material differences between the estimate and their actual Q4 emissions. Unfortunately, the NAM does not believe this after-the-fact accommodation is sufficient to address issuers’ concerns with the timing of the proposed GHG disclosures.

The potential liability exposure from publishing incomplete or inaccurate emissions data—and then correcting the data in a subsequent filing—is likely to dissuade companies from taking advantage of

¹⁴ In promulgating a final rule, the SEC should take care to ensure that any filing deadlines (with respect to GHG emissions disclosures or otherwise) are equitable for calendar year and fiscal year filers. The SEC should avoid fixed deadlines based on specific dates in the calendar year; instead, any deadlines pursuant to a final rule should be based on individual companies’ fiscal years.

¹⁵ Filosa, Matt, Faten Alqaseer, and Morgan McGovern. *The State of U.S. Sustainability Reporting*. Harvard Law School Forum on Corporate Governance (2 November 2021). Available at <https://corpgov.law.harvard.edu/2021/11/02/the-state-of-u-s-sustainability-reporting/>.

the ability to provide a Q4 estimate.¹⁶ The proposed requirement to seek assurance with respect to Scope 1 and Scope 2 emissions likely will have a similar effect. Additionally, most issuers track GHG emissions on an annual basis without quarterly breakdowns, so they would not have separate data available covering the first three quarters of the year. Switching to quarterly tracking would require significant investments in new systems for most companies. There would also be a significant administrative burden associated with reviewing and potentially revising previously disclosed Q4 estimates. Ultimately, issuers and investors would be better served if companies have the time necessary to collect and verify emissions information for a single, annual report. Furnishing a single report due after all emissions data has been collected, aggregated, and audited is the best way to ensure that investors have access to complete and accurate GHG information.

In light of these practical realities, the NAM respectfully encourages the SEC to allow companies to provide their GHG emissions data to investors outside of Form 10-K. While it is reasonable to require disclosure of climate-related risks alongside other non-climate risks in Form 10-K, there is no benefit to dictating that GHG emissions data must be included in the annual report as well. Pulling the GHG emissions disclosure requirement out of Form 10-K and allowing emissions data to be reported later in the year would ease the compliance burden for issuers and improve the reliability of this important information for investors.

The NAM believes the most practical forum for GHG reporting would be a standalone report—a theoretical “Form GHG”—due after the second fiscal quarter of the following year. An annual standalone GHG report aligned with the current due date for the Q2 Form 10-Q (due in August for calendar year filers) would give companies more time to collect GHG emissions data and then to compile and organize the information pursuant to their internal control procedures. The external audit required by the proposed rule for Scope 1 and Scope 2 emissions would follow the completion of these internal processes. Midyear GHG emissions reporting would more closely align the SEC’s requirements with existing practices and thus ease the compliance burden on public companies and ensure that investors are receiving the most accurate and reliable data possible. A standalone “Form GHG” would also make it easier for investors to locate and evaluate an issuer’s emissions data. The NAM respectfully encourages the SEC to remove its proposed GHG emissions disclosures from Form 10-K and to instead allow GHG emissions reporting later in the fiscal year.

Another benefit of a theoretical “Form GHG” is that the SEC could allow such a form to be furnished to, rather than filed with, the Commission. In general, companies can be held liable for any material misstatement or omission in a statement filed with the SEC; by comparison, statements furnished to the SEC must themselves be materially misleading to trigger potential liability. This reduced liability standard is critical to protecting public companies, especially in the context of Scope 3 GHG emissions.¹⁷ The evolving and uncertain nature of Scope 3 measurement and tracking capabilities (and, for some smaller companies, the novelty of Scope 1 and Scope 2 reporting) could make it extremely difficult for issuers to reach the degree of certainty necessary to assume the liability burden associated with reports filed with the SEC. Allowing GHG emissions information to be furnished, on the other hand, would better reflect evolving investor preferences and would grant

¹⁶ Notably, Scope 1 and Scope 2 emissions data under the proposed rule is not even eligible for the safe harbor for Scope 3 emissions data. And, for Scope 3 emissions data, the NAM is concerned that the proposed safe harbor is not sufficient to protect issuers from potential liability.

¹⁷ As discussed in further detail below, the NAM opposes the proposed rule’s requirement that companies report Scope 3 emissions to the SEC, largely because of the evolving and uncertain nature of Scope 3 data and the associated reporting processes and procedures. We support furnishing rather than filing the “Form GHG” irrespective of whether Scope 3 disclosures are required—but the inclusion of a Scope 3 reporting requirement in any final rule would make it all the more critical that the SEC limit liability exposure for public companies, including by allowing GHG emissions data to be furnished rather than filed.

public companies the flexibility and protection necessary to navigate the uncertainty associated with GHG emissions disclosures.

If the SEC decides that GHG emissions data must be included in Form 10-K, the final rule could allow for a one-year lag time for GHG emissions disclosures. The proposed rule requires, for example, GHG emissions data from fiscal year 2025 to be included in the FY 2025 Form 10-K (due in early 2026). The SEC could instead allow GHG data from 2025 to be included in the FY 2026 Form 10-K (due in early 2027), which would grant companies additional time to collect, analyze, and audit their emissions data. This would also ensure that any GHG data included in companies' SEC filings would align with the information available via the EPA's Facility Level Information on GreenHouse gases Tool ("FLIGHT") website, which generally has updated Scope 1 information by early in the fourth quarter of each year.

It is critical that the SEC grant public companies the time they need to provide accurate and useful GHG emissions disclosures to their shareholders. Modest delays from the SEC's proposed reporting timeline (whether extending the due date by six months ("Form GHG") or twelve months (the following year's Form 10-K)) would not negatively impact information availability for investors and in fact would improve data quality.

Irrespective of the timing and location of any GHG emissions disclosures, the SEC should also allow flexibility for companies whose fiscal years and/or GHG emissions reporting years do not neatly align with the calendar year or with each other. At a minimum, the SEC should not insist upon a fixed reporting date in the calendar year that would not align with current practices of fiscal year filers. Additionally, the SEC should acknowledge that not all issuers' GHG reporting practices align with their fiscal year.¹⁸ For example, some companies may be fiscal year SEC filers but report GHG emissions on a calendar year basis to align with other frameworks. Any GHG emissions reporting requirements in the final rule should allow such companies to elect a reporting period that is most reflective of their current practices. Other issuers may conduct non-fiscal year GHG emissions reporting (e.g., a November through October GHG emissions year for a calendar year filer). These companies should be allowed to include said data in the reports associated with the fiscal year in question, not forced to rework their reporting processes to align their GHG emissions reporting with their fiscal year. As we have discussed, manufacturers have spent years developing processes to track, understand, and report GHG emissions. The SEC's framework should provide for appropriate disclosure of this existing work—not mandate a new approach to GHG emissions reporting.

B. Historical Fiscal Years

Under the proposed rule, an issuer would be required to provide GHG emissions data for its most recently completed fiscal year, as well as for "the historical fiscal years included in its consolidated financial statements."¹⁹ Depending on their size, public companies are generally required to include two or three years of historical financial statements in their annual filings. The NAM is concerned that, in the early years following the promulgation of a final rule, companies would be forced to provide historical GHG emissions data for years in which the proposed GHG emissions disclosure requirements were not in effect. The NAM opposes this retroactive requirement.

¹⁸ The proposing release solicits comment on this topic, asking whether the SEC should "require the calculation of a registrant's Scope 1, Scope 2, and/or Scope 3 emissions to be as of its fiscal year end." See Proposed Rule, *supra* note 1, at 21382. The NAM does not believe that the SEC should dictate its preferred substantive approach to GHG emissions reporting by mandating that companies disclose GHG emissions based on their fiscal year. Rather, the SEC should structure the rule's reporting requirements to allow for disclosure based on companies' existing practices.

¹⁹ Proposed Rule, *supra* note 1, at 21468.

As discussed in further detail below, the SEC's proposed GHG emissions reporting regime differs in several key respects from current practices. Among other things, the proposed rule's standards for organizational boundaries, intensity metrics, assurance, and the timing of disclosures sets the SEC's approach to Scope 1 and Scope 2 emissions apart. Scope 3 emissions reporting, meanwhile, would be an entirely new undertaking for many public companies. Even companies currently working to understand their indirect emissions would experience less flexibility and more burden than they do at present if the SEC's approach to Scope 3 is finalized as proposed. As such, it would make little sense to require issuers to apply the SEC's new standards for tracking and reporting GHG emissions data to fiscal years prior to the rule's compliance dates for GHG emissions disclosures. Under a retroactive standard, issuers with emissions disclosure practices already in place could be forced to recalculate and re-report previous years' data pursuant to the new methodology, potentially resulting in different results that could confuse investors. Issuers without current practices could be forced to build a system to somehow estimate previous years' emissions. Such efforts would be costly and ineffective—and would not result in reliable, decision-useful information for investors.

The SEC should not require companies to disclose GHG emissions data from historical fiscal years prior to the compliance date of any final rule. Once a number of years have passed after the compliance dates of any GHG emissions reporting requirement, including previous years' data alongside information from the most recently completed fiscal year will not present an additional challenge. But the requirement to include historical data should not apply in the first several years during which compliance with the GHG emissions disclosure provisions is required. The NAM respectfully encourages the SEC to make clear that historical GHG emissions data would only be required for fiscal years that fall after the compliance dates for the GHG emissions disclosure provisions in any final rule.

C. Scope 1 and Scope 2 Emissions Reporting

As discussed, the NAM supports appropriate transparency with respect to companies' GHG emissions. Many companies have processes in place to track and report emissions directly attributable to their operations, so Scope 1 and Scope 2 reporting pursuant to the proposed rule should prove achievable for these issuers. However, not all companies have enterprise-wide emissions tracking procedures in place. Scope 1 and Scope 2 emissions disclosures could prove difficult both for smaller companies (which may not yet disclose emissions information) and for larger global companies (which face the challenge of collating data from a wide range of sites and sources).

The NAM appreciates that the SEC is working to enhance and standardize Scope 1 and Scope 2 GHG emissions reporting, and we expect manufacturers to continue to lead the way in providing this information to their investors. In order to support a maximally workable Scope 1 and Scope 2 reporting requirement, the NAM respectfully encourages the SEC to make several targeted changes to the proposed rule in order to provide clarity to and increase flexibility for public companies.

i. Organizational Boundaries

Though many companies' experience and expertise with Scope 1 and Scope 2 reporting should make the proposed requirements relatively straightforward, the NAM is concerned that the methodology required for the setting of organizational boundaries differs from the GHG Protocol with which many companies are familiar.

The GHG Protocol allows companies to elect either an "equity share approach" or a "control approach" when setting their organizational boundaries for the purpose of determining their Scope 1

and Scope 2 emissions.²⁰ Many companies utilize a version of the control approach, which generally requires entities to claim 100% of the GHG emissions attributable to joint projects over which they have operational control and 0% of the GHG emissions from joint projects which they do not control. This straightforward approach prevents companies from having to subdivide assets and projects when evaluating Scope 1 and Scope 2 emissions, as would be required under the equity share approach.

The proposed rule would require most companies to follow the U.S. Generally Accepted Accounting Principles (“GAAP”) standards for consolidation, which generally mirror the GHG Protocol’s equity share approach. Because an equity-based methodology does not align with many companies’ existing practices under the GHG Protocol, these issuers would be forced to overhaul their approach to Scope 1 and Scope 2 disclosures—including those companies that are industry leaders in emissions reporting. This could potentially include re-calculation of prior years’ emissions to allow for data comparisons.²¹ The NAM understands the SEC’s desire for consistency with GAAP, but we believe that the Commission should defer to existing practices in finalizing its Scope 1 and Scope 2 reporting requirements. Requiring a new method of tracking GHG emissions data could impact companies’ existing baselines, targets, and goals and generally interfere with ongoing efforts to measure and report GHG emissions. Mandating equity-based reporting could also represent a significant duplication of effort for many companies given that they might still need to utilize the control approach to report under other regulatory frameworks.

The NAM respectfully encourages the SEC to grant companies the flexibility to determine (and disclose) the appropriate method for setting their organizational boundaries—whether an equity-based approach, a control-based approach, or another methodology. Some issuers may choose an equity-based approach in order to align with GAAP, but the SEC should not mandate any particular approach or dictate that companies depart from existing standards for GHG emissions reporting. Companies should be free to utilize their existing practices developed over time to provide the most relevant, useful data for issuers and investors alike.

ii. Limited and Reasonable Assurance

The proposed rule would require “limited assurance” of large accelerated filers’ and accelerated filers’ Scope 1 and Scope 2 emissions disclosures one year after compliance with the Scope 1 and Scope 2 reporting requirements, followed by “reasonable assurance” two years later. If compliance with the Scope 1 and Scope 2 reporting requirements is required of large accelerated filers for FY 2023 reports, as proposed, limited assurance would be required for FY 2024 and reasonable assurance would be required for FY 2026. Accelerated filers would benefit from an additional year before each level of attestation is required, with limited assurance required for FY 2025 reports and reasonable assurance required for FY 2027 reports. The assurance provisions would not apply to SRCs.

The NAM has previously encouraged the SEC “not to mandate third-party assurance” of climate-related information given the “evolving nature of the...information and assurance infrastructure” for

²⁰ See *Greenhouse Gas Protocol Corporate Accounting and Reporting Standard, Revised Edition*. Available at <https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf>.

²¹ In fact, re-calculation could be required if the SEC retains its proposed requirement that companies disclose GHG emissions information for historical fiscal years—a requirement the NAM opposes. If a final rule maintains the requirement that companies report GHG emissions data from historical fiscal years before the provision’s compliance date and also maintains the mandate that companies use an equity-based approach to determine their organizational boundaries, the SEC should at a minimum clarify that companies would not be required to re-calculate previous years’ data based on the new standard for determining organizational boundaries.

climate data²²—and we remain concerned by the potential for significant cost increases under the proposed attestation requirements. However, many manufacturers have taken significant steps to move toward an assurance framework for their Scope 1 and Scope 2 emissions in recent years. As such, we believe that limited assurance of Scope 1 and Scope 2 emissions data could be practicable for many public companies. Assuming the SEC retains the proposed phase-in periods for limited assurance and does not extend the attestation requirement to Scope 3 emissions (which the NAM would strongly oppose), the NAM believes that a limited assurance requirement for Scope 1 and Scope 2 emissions could be workable.

The NAM appreciates that the proposed rule would allow for a “broad spectrum” of “GHG emissions attestation providers” beyond just traditional audit firms registered with the Public Company Accounting Oversight Board (“PCAOB”).²³ We also appreciate that the proposed rule does not prescribe a particular attestation standard, choosing instead to “recognize[] that more than one suitable attestation standard exists and that others may develop in the future.”²⁴ However, we respectfully encourage the SEC to clarify that attestation standards commonly used by non-accountants, including ISO 14064-3, would meet the criteria of the proposed rule. ISO 14064-3 in particular is a widely used standard for providing assurance with respect to companies’ GHG emissions reporting, and the SEC should specifically state that issuers can continue to rely on it and other similar standards to comply with the assurance requirements under any final rule.²⁵

Despite the workability of the proposed limited assurance requirement, the NAM does not believe that reasonable assurance is necessary or appropriate for GHG emissions reporting. Generally, limited assurance allows for a “negative” opinion (e.g., that the auditor did not find evidence of material misstatements), whereas reasonable assurance requires a “positive” opinion (e.g., that the auditor can confirm that the data is accurate in all material respects). Though some manufacturers are working toward subjecting their Scope 1 and Scope 2 emissions data to this higher standard, adoption of reasonable assurance is not yet widespread—and mandating it would be unduly costly and burdensome with minimal added value for investors. Even with the proposed transition periods for implementation of the higher level of assurance, the NAM has significant questions about the appropriateness of reasonable assurance in the GHG emissions reporting context, and we are concerned about the significant costs and burdens associated with seeking reasonable assurance. The NAM respectfully encourages the SEC to allow companies to transition to reasonable assurance if they so choose—but to avoid mandating a universal reasonable assurance requirement for all large accelerated and accelerated filers.

iii. Compliance Dates

The proposed rule sets the compliance dates for its Scope 1 and Scope 2 GHG emissions disclosure requirements based on an issuer’s filer status. Assuming the SEC finalizes a rule in 2022, reporting on Scope 1 and Scope 2 emissions will be required in large accelerated filers’ FY 2023 annual reports, accelerated filers’ FY 2024 annual reports, and SRCs’ FY 2025 annual reports.

The NAM is concerned that the proposed compliance dates would not provide companies with sufficient time to adjust to the new rule and implement the new processes or controls necessary to comply with the Scope 1 and Scope 2 disclosure requirements. This is particularly true for large

²² NAM Comments on SEC Climate Disclosures RFI, *supra* note 9, at 10.

²³ See Proposed Rule, *supra* note 1, at 21395.

²⁴ *Id.* at 21401.

²⁵ The proposing release solicits comment on this topic, asking whether ISO 14064-3 “would meet the due process and public[] availability requirements” for attestation standards under the proposed rule. See *id.* at 21403. The NAM believes that it would.

accelerated filers, as a finalization date in 2022 could mean that these issuers have just a few weeks to put in place any new data collection, tracking, or analysis procedures (as well as any associated internal controls) by the beginning of FY 2023. As discussed, the proposed rule's approach to GHG emissions differs in several key respects from current practice, especially with respect to the determination of organizational boundaries—so it may take time for some issuers to come into compliance with the new standard.

In order to allow a reasonable and workable amount of time for companies to adjust to the new requirements and prepare to provide accurate and reliable information to their investors, the NAM respectfully encourages the SEC to delay the compliance dates for Scope 1 and Scope 2 GHG emissions reporting. The NAM believes that large accelerated filers should be required to report Scope 1 and Scope 2 data no sooner than the third fiscal year following the promulgation of a final rule (as opposed to the first fiscal year after finalization, as proposed). The SEC should retain its proposed phase-in approach for accelerated filers and, if not exempted from the rule, SRCs by allowing these filers to disclose Scope 1 and Scope 2 data beginning with the fourth and fifth fiscal years after the rule's finalization, respectively. If a final rule is promulgated in 2022, this would require Scope 1 and Scope 2 disclosures to be included in annual reports for FY 2025 for large accelerated filers, FY 2026 for accelerated filers, and FY 2027 for SRCs. Providing GHG emissions information in an SEC filing is a new undertaking for many public companies, and the SEC should ensure that companies have the requisite time to get it done right.

Similarly, the SEC should allow companies time to create or align GHG emissions reporting processes following an acquisition. Combining two companies' GHG emissions data, or beginning GHG emissions tracking for a company that was not previously reporting its emissions, is a significant effort. The SEC should provide a post-acquisition transition period by exempting newly acquired entities from the GHG reporting requirement for the first two full fiscal years following an acquisition. The SEC should also clarify that issuers would not be required to provide historical GHG emissions data from any recently acquired entities.

Finally, the SEC should also clarify that companies would be under no obligation to provide Scope 1 and Scope 2 data for historical fiscal years prior to the compliance date for the proposed emissions reporting requirements. Assuming a delay in the provision's compliance date until the third fiscal year following the promulgation of any final rule, as the NAM has suggested, large accelerated filers' FY 2025 reports would include Scope 1 and Scope 2 data only from FY 2025; FY 2026 reports could include a one-year lookback, FY 2027 reports could include two historical years, and so forth. This approach would ensure that companies are not subject to retroactive disclosure requirements for historical fiscal years.

iv. Flexibility and Ease of Compliance

As noted, many manufacturers have processes in place to track and report emissions directly attributable to their operations, so Scope 1 and Scope 2 reporting pursuant to the proposed rule should prove achievable for these issuers. However, the NAM respectfully encourages the SEC to adopt several targeted changes to its proposed approach to Scope 1 and Scope 2 GHG emissions reporting in order to align the proposed requirements with existing practices, increase companies' flexibility, and reduce compliance and liability burdens on manufacturers:

- The SEC should provide a *de minimis* exception for facilities with insignificant GHG emissions or for individual greenhouse gases that are inconsequential to an issuer's Scope 1 and Scope 2 emissions. In some cases, large companies with sophisticated GHG emissions reporting practices apply a *de minimis* threshold to avoid the cost of tracking information attributable to trivial sources of GHG emissions. Such a threshold could apply to a small facility with minimal emissions or to an individual greenhouse gas that is not a natural result

of the company's operations. The EPA's GHGRP, for example, only requires reporting of facilities emitting more than 25,000 metric tons of carbon dioxide equivalent ("CO₂e") per year. The SEC should mirror these existing practices by making clear that tracking *de minimis* sources or types of emissions, which do not significantly impact an issuer's top-line Scope 1 or Scope 2 data, is not necessary to comply with the proposed reporting requirement.

- The SEC should allow for greater flexibility with respect to the requirement that companies report their Scope 1 and Scope 2 emissions in terms of GHG intensity. In addition to gross emissions, the proposed rule would require GHG reporting in terms of GHG intensity, which would encompass disclosure of both CO₂e per unit of total revenue and CO₂e per unit of production. Either, both, or neither of these two intensity metrics may be more appropriate for a given company, yet the proposed rule would require all companies to utilize both metrics. The target-setting manual published by the Science Based Targets initiative ("SBTi"), which many companies utilize to set GHG-related goals, specifically notes that physical intensity and economic intensity metrics have disparate "strength[s] and limits" as applied to different sectors.²⁶ SBTi's manual further notes that, for some companies, absolute emissions metrics are preferable to either intensity metric.²⁷ The NAM supports increased flexibility in order to allow companies to choose and disclose a single GHG intensity metric, or to forgo intensity reporting, depending on the metrics' relevance to their operations and emissions.
- The proposing release solicits comment on whether the SEC should add a requirement that issuers provide "location data" for any sources of Scope 1, Scope 2, or Scope 3 emissions.²⁸ The proposing release suggests that such information could help investors understand the physical climate-related risks a company faces, but in reality the physical risks associated with a specific site are unrelated to the emissions generated by operations at that location. As such, the NAM believes that information disclosed under a location data requirement would not benefit investors. Further, providing location data would be unduly burdensome given the breadth and diversity of potential emissions sources associated with multinational companies' operations and the difficulty of ascribing location data to some individual emissions sources (e.g., non-stationary assets).
- The SEC should extend its proposed safe harbor for Scope 3 disclosures to include Scope 1 and Scope 2 disclosures.²⁹ While less complex than Scope 3 reporting, including Scope 1 and Scope 2 information in an SEC filing is still a new undertaking for many companies. As mentioned above, the SEC's framework for disclosing Scope 1 and Scope 2 emissions differs in several key respects from many companies' existing practices. Moreover, not all issuers report Scope 1 and Scope 2 data at present—the finalization of an SEC rule will impose a brand-new disclosure requirement on these companies. Additionally, though more well-established than the methodology for Scope 3 reporting, the processes and procedures for Scope 1 and Scope 2 reporting will continue to evolve over time. For these reasons, a

²⁶ *Science-Based Target Setting Manual Version 4.1*. Science Based Targets initiative (April 2020). Available at <https://sciencebasedtargets.org/resources/legacy/2017/04/SBTi-manual.pdf>.

²⁷ See *id.* at 27.

²⁸ See Proposed Rule, *supra* note 1, at 21382.

²⁹ As discussed in more detail below, the NAM believes the SEC should strengthen its proposed Scope 3 safe harbor if it intends to retain a Scope 3 mandate in any final rule. Specifically, the SEC should condition the safe harbor only on companies' efforts to disclose accurate information in "good faith" (i.e., by removing the requirement that issuers make or reaffirm GHG emissions-related statements with a "reasonable basis"); the SEC should also make clear that any allegations of fraud, unreasonable basis, or bad faith with respect to GHG emissions disclosures must be made with the requisite "particularity." These changes should be incorporated into any safe harbor for Scope 1 and Scope 2 disclosures as well.

robust legal safe harbor is necessary and appropriate to protect companies from undue liability that could arise in connection with reporting Scope 1 and Scope 2 GHG emissions.

The NAM respectfully encourages the SEC to adopt these targeted reforms, which will enhance flexibility for public companies and support their efforts to provide accurate, timely, and useful Scope 1 and Scope 2 GHG emissions disclosures to their investors.

D. Scope 3 Emissions Reporting

The proposed rule would require all issuers other than SRCs to track and disclose their Scope 3 GHG emissions (i.e., indirect emissions that result from activities within a company's value chain) if they are material or if the company has set an emissions reduction goal that includes Scope 3 emissions.

As noted, some manufacturers already voluntarily report Scope 3 emissions, though many only disclose information on a subset of relevant categories. Many companies do not report Scope 3 emissions at all. Further, there is significant uncertainty with respect to the data and methodologies necessary for accurate and reliable Scope 3 reporting. Even the companies that track and report Scope 3 data often take individualized approaches to data collection, estimation, and reporting in order to account for the availability and relevance of various sources and types of data. Further, companies often have neither control over nor access to data from upstream and downstream emissions sources in their value chain. As such, companies often rely on a range of emissions factors, assumptions, and methodologies to estimate data not readily accessible to them. These tools are not generally standardized across companies and industries. Given this constantly evolving reporting ecosystem, which inherently results in non-comparable data from company to company, it is simply not practical for the SEC to mandate that Scope 3 emissions information be disclosed in an issuer's annual reports. This is especially true given that the SEC's proposed Scope 3 reporting requirement does not provide companies with sufficient flexibility to customize their Scope 3 reports to include only available, calculable, and/or reliable information.

The NAM respectfully encourages the SEC to rescind its proposed Scope 3 disclosure requirement. In our view, an across-the-board mandate to provide Scope 3 emissions data in an SEC filing is not a necessary step for investors to understand all companies' and all industries' climate-related risks. This is especially true given that the companies and industries for which Scope 3 has the most relevance already comply with requirements or disclose voluntary data with respect to Scope 3 emissions. The SEC's stated goal is to provide consistent, comparable data to investors, but the GHG Protocol makes clear that the Scope 3 disclosure framework on which most companies rely is "not designed to support comparisons between companies based on their Scope 3 emissions."³⁰

Further, the SEC's proposed approach to Scope 3 reporting would undermine the settled materiality standard, provide insufficient flexibility given the uncertainties associated with Scope 3 data, and impose tremendous and widespread burdens on manufacturers of all sizes. These impacts will even extend to small and privately held businesses supposedly exempt from the requirement, given that these companies may be forced to provide data to public companies so that they can comply with the new SEC mandate.

Many of these difficulties arise because Scope 3 emissions are by definition outside of a company's direct control, ultimately limiting an issuer's ability to access, verify, and report such data. For many issuers, it would be extremely difficult to access downstream information on customers' use of their

³⁰ *Corporate Value Chain (Scope 3) Accounting and Reporting Standard*. Greenhouse Gas Protocol (October 2011). Available at https://ghgprotocol.org/sites/default/files/standards/Corporate-Value-Chain-Accounting-Reporting-Standard_041613_2.pdf.

products; for others, upstream emissions attributable to commodity production would present the biggest challenge. The unifying theme is that Scope 3 emissions are outside of a company's control. The NAM supports the efforts of those manufacturers working to understand the indirect emissions attributable to their value chain, and we are hopeful that Scope 3 methodologies will continue to evolve and improve in the future. But at present the requisite processes are simply not sufficiently mature or standardized for most companies to comply with an SEC-imposed Scope 3 disclosure mandate.

For these reasons, the NAM respectfully encourages the SEC to rescind its proposed Scope 3 reporting requirement. Companies should of course be allowed to disclose Scope 3 information if they think it would be beneficial to their investors—and for these issuers the SEC should provide the flexibility and robust safe harbor protection necessary to make Scope 3 disclosures accurate and reliable. But for most companies, Scope 3 reporting would be overly burdensome and would not provide comparable, decision-useful information for investors.

i. Scope 3 Emissions as a Proxy for Transition Risk Exposure

The SEC justifies its inclusion of a Scope 3 mandate by claiming that emissions reporting from a company's value chain is “necessary to present investors a complete picture of the climate risks—particularly transition risks—that a registrant faces.”³¹ Given the extensive climate-related risk disclosures envisaged by the proposed rule, as well as companies' existing obligations to disclose information about material risks, the NAM does not agree that Scope 3 emissions are always necessary for investors to understand all companies' exposure to climate-related risks.

The proposed Item 1502 of Regulation S-K would require issuers to disclose their climate-related risks, which include actual or potential impacts on a company's financial statements, operations, or *value chains*. According to the proposing release, the risk disclosures include value chain impacts in order to “capture the full extent of a registrant's potential exposure to climate-related risks, which can extend beyond its own operations to those of its suppliers, distributors, and others engaged in upstream or downstream activities.”³² It is not clear why Scope 3 value chain emissions data is necessary to “provide[] insight into a registrant's exposure to climate-related risks, and transition risks in particular”³³ when companies are separately required to describe any climate-related risks, including transition risks, associated with their value chain. Indeed, the proposing release acknowledges that the proposed Item 1502 risk disclosures “capture the full extent” of companies' transition risk exposure.

The release also claims that Scope 3 reporting will “help investors assess...whether [registrants] have developed a strategy to reduce their carbon footprint in the face of regulatory, policy, and market constraints.”³⁴ Yet a company's Item 1502 risk disclosures would be required to include any “actions or plan to mitigate or adapt” to a given risk;³⁵ the proposed rule would also institute a separate reporting requirement for companies' transition plans covering their “strategy and implementation...to reduce climate-related risks.”³⁶ Once again, the insights allegedly enabled by Scope 3 disclosures are fully covered elsewhere in the proposed rule.

³¹ Proposed Rule, *supra* note 1, at 21337.

³² *Id.* at 21349.

³³ *Id.* at 21375.

³⁴ *Id.* at 21378.

³⁵ *Id.* at 21350.

³⁶ *Id.* at 21361.

The text and effect of the proposed rule make clear that Scope 3 information is not always necessary for investors to understand companies' climate risks. The NAM is concerned that, absent a clear link to issuers' transition risk exposure, the proposing release highlights policy justifications for the proposed rule's Scope 3 disclosure requirement far afield from the Commission's statutory mission. These justifications include helping institutional investors reduce the carbon footprint of their holdings and preventing issuers from "outsourcing carbon intensive activities."³⁷ These and other such policy goals clearly fall outside the SEC's mission to inform and protect investors.

The NAM respectfully encourages the SEC to remain within its statutory authority and stay true to its statutory mission of facilitating the provision of material information to investors. If Scope 3 emissions for some companies would provide helpful insight into their transition risk exposure, then those issuers should be free to describe or even report their Scope 3 emissions data as part of their transition risk disclosures pursuant to the proposed Item 1502 of Regulation S-K. But a comprehensive, quantitative Scope 3 mandate is not necessary to inform and protect investors—especially given the significant cost and uncertainty associated with Scope 3 reporting.

ii. Materiality of Scope 3 Emissions

a. Issuer Materiality Assessments

The proposed rule purports to require the disclosure of Scope 3 emissions only if those emissions are material or if an issuer has set a GHG emissions reduction target that includes Scope 3 emissions. The NAM appreciates that the SEC has acknowledged the need to conform to the Supreme Court's definition of materiality, but we are concerned that the proposed rule's application of this definition in the context of Scope 3 emissions disclosure actually expands and thus undermines the settled definition of that term.

In our June 2021 comment letter in response to the Commission's request for public input on climate disclosures, the NAM explained that the SEC "can enhance the utility and comparability of public company reporting, better protect investors, and support useful, relevant disclosures by adhering to the financial materiality standard."³⁸ The NAM continues to believe that the SEC should "require disclosure of only those metrics that are financially material to a business's investors."³⁹ As the proposing release notes, the Supreme Court's standard for materiality focuses on whether "there is a substantial likelihood that a reasonable investor would consider [the disclosures] important when making an investment or voting decision."⁴⁰ This emphasis on the *reasonable* investor focuses public company disclosures on metrics that actually drive value creation and long-term shareholder return.

As noted, the proposed rule says that its Scope 3 disclosure requirement is based on the traditional materiality standard. However, the guidance included in the proposing release intended to help companies make their Scope 3 materiality determinations tells a different story. First, the release expresses the Commission's view that Scope 3 emissions may be material "for many registrants" given their "relative magnitude" and importance to helping investors "assess the registrants' exposure to climate-related risks."⁴¹ It also highlights specific industries for which the Commission believes Scope 3 emissions are "likely to be material."⁴² The release further reminds companies that

³⁷ *Id.* at 21379.

³⁸ NAM Comments on SEC Climate Disclosures RFI, *supra* note 9, at 4.

³⁹ *Id.* at 3.

⁴⁰ Proposed Rule, *supra* note 1, at 21378.

⁴¹ *Ibid.*

⁴² *Ibid.*

any doubts about the materiality of Scope 3 emissions should be resolved in favor of increased disclosure.⁴³ Later, it suggests that issuers determining that Scope 3 emissions are not material should provide disclosure justifying their decision in order to enable investors “to understand the basis for that determination.”⁴⁴ These factors all point in the same direction: toward a presumption of materiality that may make it difficult for issuers to actually conduct a context-specific materiality analysis. One likely outcome of this approach is that companies may be pressured to disclose Scope 3 emissions data when such data is truly not material to their business—incurring significant costs despite a lack of utility for investors.

The proposing release describes evaluation approaches that further bolster this presumption of materiality. The most significant of these is the suggestion that companies make a determination as to “whether Scope 3 emissions make up a relatively significant portion of their overall GHG emissions.”⁴⁵ The release even suggests a bright-line test, implying that Scope 3 emissions are likely to be material if they exceed 40% of an issuer’s total GHG emissions.⁴⁶

In the NAM’s view, a quantitative test for determining Scope 3 materiality is not appropriate. The proposing release implies that a company’s Scope 3 emissions are material if they are significant as *compared to its Scope 1 and Scope 2 emissions*—but the traditional materiality standard would focus on Scope 3’s significance *to the company itself*. For “materiality” to have any meaning in the Scope 3 context, public companies must be allowed to conduct a robust materiality assessment as to Scope 3’s impact on the financial condition of their business and their exposure to Scope 3-related transition risks—not just evaluate the relative size of Scope 3 as compared to Scope 1 and Scope 2. In some cases, this assessment may result in a determination that the company should not expend the time and resources necessary to report Scope 3 emissions—an entirely appropriate outcome under the traditional materiality standard. Unfortunately, the implied presumption of materiality found throughout the proposing release will limit companies’ willingness to make such a determination. Furthermore, basing the materiality determination on a quantitative test would effectively force companies to calculate their Scope 3 emissions in order to determine Scope 3’s relative size—imposing a significant cost burden (given the complexities associated with Scope 3 data, as discussed) even for companies for which Scope 3 emissions are not ultimately material. The NAM believes that companies should not be pressured into tracking and reporting information that is not material to their operations, and that the SEC lacks a statutory directive to require such disclosures.

It is of no comfort to a regulated entity that the guidance regarding Scope 3 materiality assessments, including the suggested 40% bright-line test, appears in the proposing release and not the proposed rule text itself. As the Commission knows, SEC staff and the courts regularly rely on language included in rule releases to interpret and administer SEC rules. Indeed, language in rule releases, even if not explicitly incorporated into the rule text itself, is given particular weight because such releases are viewed as statements of the Commission. As such, the SEC should take care not to suggest, whether in the adopting release or in the final rule itself, a new materiality standard for Scope 3 emissions that would undermine the settled materiality definition.

If the SEC persists in requiring Scope 3 GHG emissions disclosures, it should remove from the adopting release any language that suggests a particular outcome with respect to companies’

⁴³ *Ibid.*

⁴⁴ *Id.* at 21379.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.* Notably, the release does not contemplate instances where Scope 3 emissions above 40% could be *immaterial*, but it takes care to mention that emissions below 40% may well be material, in the Commission’s view, based on “an assessment of qualitative factors.”

materiality determinations or attempts to compel Scope 3 disclosures. A true materiality test should allow an issuer—not the SEC—to evaluate the impact of Scope 3 emissions on its business and financial condition and make a corresponding disclosure decision.

b. Immateriality of Certain Categories and Sources of Scope 3 Emissions

The NAM also believes that the SEC should allow companies to conduct materiality assessments with respect to individual categories of Scope 3 emissions and relevant sources of Scope 3 emissions within those categories, as opposed to the top-line materiality determination envisaged by the proposed rule. The proposed rule suggests that companies may be allowed to classify certain categories of Scope 3 emissions as material or immaterial—for instance, Item 1504(c)(1) says that issuers must “identify the categories of upstream or downstream activities that have been included in the calculation of the Scope 3 emissions,”⁴⁷ which implies that certain categories might *not* be included in such a calculation. Item 1504(c)(1) also requires companies to identify “any category of Scope 3 emissions [that is] significant to the registrant,”⁴⁸ which, again, acknowledges that some categories may not be significant. However, the proposed rule is not explicit as to whether companies would actually be allowed to conduct category-level materiality analyses and potentially forgo reporting about certain immaterial categories or sources of Scope 3 emissions.

As noted above, the NAM believes that the proposed Scope 3 reporting regime should be rescinded. However, if a Scope 3 reporting requirement is included in any final rule, the NAM respectfully encourages the SEC to make clear that issuers would be allowed to conduct materiality assessments and make the associated disclosure decisions based on the materiality of individual categories or sources of Scope 3 emissions. The same standard should apply to issuers that have set a target or goal with respect to a particular category or source. For many companies, only certain categories or sources will be material to their operations, and many issuers may have published emissions reduction targets tailored to just these segments of their Scope 3 emissions. The SEC should be explicit that companies can and should review the 15 categories of Scope 3 emissions outlined by the GHG Protocol and determine which categories may be material to their investors.

For example, some manufacturers’ value chains may only include material Scope 3 emissions from Category 11 (Use of Sold Products) or Category 12 (End-of-Life Treatment of Sold Products). Some companies in the service industry may only utilize Category 6 (Business Travel) and Category 7 (Employee Commuting). Financial services issuers may only need to focus on Category 15 (Investments). Making materiality determinations based on these well-understood categories would be more useful to investors than a top-line materiality determination with respect to the entirety of Scope 3. Such an approach also would allow companies to focus on only the categories of Scope 3 emissions about which they have reliable and relevant data, reducing the burden of the reporting requirement. Similarly, companies should be allowed to evaluate the materiality of individual sources of Scope 3 emissions (e.g., specific suppliers) in order to focus their data collection and analysis efforts on only those sources that have a material impact on their business. The SEC should be clear that a company’s determination that a given category or source of Scope 3 emissions is material would necessitate reporting of *only that category or source*—and that such a determination would not subject the company to a disclosure requirement with respect to each and every category and source of Scope 3 emissions.

Explicitly allowing companies to exclude immaterial categories and sources of Scope 3 emissions would significantly improve the SEC’s proposed Scope 3 reporting requirement. The NAM believes that the SEC should not mandate Scope 3 emissions disclosure, but refining the requirement to only

⁴⁷ *Id.* at 21468.

⁴⁸ *Ibid.*

include the material categories and sources of Scope 3 emissions, or categories and sources subject to a publicly announced target, would at least prevent companies from being forced to undertake the costly and burdensome process of tracking categories and sources of Scope 3 emissions that are ultimately irrelevant to their operations.

iii. Difficulties Associated with Scope 3 Emissions Reporting

The SEC's proposed Scope 3 reporting requirement would impose significant costs and burdens on public companies—despite the fact that, as discussed, information about Scope 3 emissions is not always necessary to ensure that investors are well-informed about issuers' climate-related risks. Indeed, it is difficult to overstate the difficulty associated with tracking and reporting Scope 3 emissions data.

First and foremost, the critical challenge associated with Scope 3 reporting is that the emissions in question are outside of an issuer's control. While a company may have some insight into the activities of the entities upstream and downstream in its value chain, the interconnected nature of the modern economy virtually assures that most information about these activities remains out of reach. Many large manufacturers have tens of thousands of suppliers and create goods that are utilized by countless customers around the globe. The sheer magnitude of the number of potential inputs for a Scope 3 calculation is simply overwhelming. A comprehensive and inflexible Scope 3 disclosure mandate like the requirement included in the proposed rule would require far-reaching and detailed tracking of emissions far beyond sources that public companies can reasonably access. Such a requirement also raises significant legal questions regarding the SEC's authority to mandate collection and reporting of data related to activities outside of an issuer's control.

Additionally, suppliers, vendors, and customers have no obligation to share emissions data with issuers. While a large company may attempt to, as the proposing release suggests, "mitigate the challenges of collecting the data required for Scope 3 disclosure" by "working with its suppliers and downstream distributors,"⁴⁹ there is not currently an accepted process by which they might do so, nor a guarantee that these supply chain partners would be willing or able to provide the requisite data. For example, many small and privately held businesses do not yet track their Scope 1 and Scope 2 emissions, as emissions data collection requires sophisticated equipment and expertise that impose significant costs on smaller companies. This reality significantly limits the ability of larger public companies to include such data in their Scope 3 calculations. In practice, this will lead to a high degree of estimation and modeling rather than actual data tracking. Further, outsourcing Scope 3 data collection to suppliers would simply increase costs and burdens for companies elsewhere in the value chain—including privately held companies, effectively imposing a regulatory burden on entities outside of the SEC's jurisdiction. A Scope 3 mandate could also incentivize companies to prioritize larger suppliers who have emissions data more readily available, at the expense of small businesses powering local economies across the country.

Even assuming *arguendo* that public companies could access from their supply chain partners the emissions data necessary to comply with the proposed Scope 3 disclosure requirement, there is no guarantee that said data would be accurate or reliable. Companies are all at different stages on the path toward standardized climate reporting, and many smaller entities do not yet have a complete picture of their own emissions or the ability to commit significant funds toward the equipment and expertise necessary to develop such an understanding. Similarly, there are not standardized methodologies for larger companies to verify any data received from small or privately held companies. Smaller businesses' knowledge about their emissions will continue to evolve over time, and the NAM applauds and supports these companies' ongoing work to track and reduce GHG emissions—as well as larger companies' efforts to engage with smaller entities in their value chain in

⁴⁹ *Id.* at 21377.

pursuit of the same goal. However, the necessary data collection and verification processes are simply not yet sufficiently available and mature to enable the required Scope 3 analysis.

It is also important to note the “double counting” inherent in Scope 3 reporting. Put simply, an issuer’s Scope 3 emissions are its suppliers’ and customers’ Scope 1 and Scope 2 emissions. In many instances, those suppliers’ Scope 1 and Scope 2 emissions will be incorporated into multiple companies’ Scope 3 calculations. Under the SEC’s proposed rule, this dynamic will result in disclosure overload, with companies’ emissions being reported to investors over and over again as different entities up and down the value chain manufacture, sell, buy, and use the same products. Comparison of Scope 3 information across companies will thus be extremely difficult. Moreover, aggregating multiple issuers’ emissions will generate a number far in excess of the actual emissions associated with those companies’ operations because of this “double counting” dynamic. Further, it is not clear how companies are expected to subdivide their Scope 1 emissions so that their value chain partners know which portions should be incorporated into the proposed Scope 3 calculations.

Given the potential unavailability and unreliability associated with Scope 3 information, many manufacturers that already track Scope 3 emissions utilize emissions factors, assumptions, and methodologies to estimate data not readily accessible to them. Despite manufacturers’ best efforts to understand indirect GHG emissions, these metrics and methods are still maturing. They also are not standardized across companies and industries. This reliance on indirect estimates and complex modeling will present a significant challenge for investors to understand the resulting data. The NAM appreciates that the proposing release acknowledges that it may be necessary “to rely heavily on estimates and assumptions to generate Scope 3 emissions data;”⁵⁰ however, the scrutiny and liability associated with SEC filings may limit companies’ ability to use these tools or customize their approach to calculating Scope 3 emissions. This dynamic may also have the effect of diverting both issuer and investor funds to third-party service providers, including proxy advisory firms and ESG ratings agencies (both of which are in significant need of greater SEC oversight⁵¹), to help prepare and/or analyze this complex data.

Considering the evolving and uncertain nature of Scope 3 reporting, the required disclosures could ultimately be misleading to investors, or at a minimum they could create investor confusion. Companies will of course take care to verify data to the extent possible, but the breadth and depth of modern global supply chains and the lack of mature tracking and reporting infrastructure among suppliers and customers will inevitably result in instances of imprecise or incorrect data being incorporated into Scope 3 calculations. The proposing release states that the SEC is requiring GHG emissions reporting because the data “is quantifiable and comparable across industries.”⁵² In the case of Scope 3 emissions, this is simply not true. Manufacturers are making significant strides in improving Scope 3 methodologies so they can better understand the indirect emissions in their value chain, but at present this data is not yet fully reliable—and thus is not comparable for investors. The SEC should allow issuers that have a high degree of confidence in their Scope 3 collection and verification processes to include their emissions data in their SEC filings (or, per the NAM’s suggestion, in their midyear “Form GHG”), but the SEC should not require every large accelerated or accelerated filer to meet this prescriptive, difficult to calculate, and potentially unreliable standard.

⁵⁰ *Id.* at 21390.

⁵¹ In the NAM’s 2020 comment letter in support of the SEC’s then-proposed rule on proxy voting advice, we noted that proxy firms exercise “significant influence on corporate policies and shareholder voting decisions” despite their “significant conflicts of interest, errors and methodological mistakes, one-size-fits-all policies, and lack of engagement with issuers.” We also called for “appropriate oversight from the SEC on ESG ratings agencies’ methodologies, sources of information, and influence on proxy voting decisions.” See NAM Comments on File No. S7-09-22 (3 February 2020), available at <https://documents.nam.org/tax/namproxyfirmrulecomments.pdf>.

⁵² Proposed Rule, *supra* note 1, at 21373.

Despite manufacturers' ongoing efforts to improve their understanding of their Scope 3 emissions, the requisite processes are not yet sufficiently mature to enable across-the-board compliance with the proposed Scope 3 disclosure requirement—and the costs and liability associated with including Scope 3 information in SEC filings would be substantial. As a result, the NAM opposes the SEC's proposed Scope 3 reporting requirement, and we respectfully encourage the Commission to refrain from imposing such a broad and prescriptive mandate.

iv. Scope 3 Targets and Goals

The NAM understands that the SEC believes it is important to require the disclosure of Scope 3 emissions if an issuer has adopted a GHG emissions reduction target or goal that includes Scope 3 emissions. The NAM agrees that transparency around companies' climate-related targets and goals could be beneficial to investors, as discussed in further detail below. However, we do not believe that setting Scope 3 emissions targets should subject companies to the prescriptive and burdensome Scope 3 disclosure requirement set forth in proposed Item 1504(c). Such detailed reporting obligations could ultimately disincentivize companies from adopting targets or goals related to Scope 3 emissions. It may be appropriate for companies to discuss and disclose Scope 3 emissions as part of their Item 1506 targets and goals disclosure, but Item 1504(c) disclosure is more detailed and burdensome than necessary to understand an issuer's Scope 3 emissions targets.

The prescriptive framework of proposed Item 1504(c) would impose a burdensome, far-reaching mandate on companies that adopt targets or goals that include Scope 3 emissions. The targets and goals disclosures required under proposed Item 1506, on the other hand, would allow for more tailored reporting of information necessary to understand a given target or goal. If an issuer has set a GHG emissions reductions target that includes Scope 3 emissions, Item 1506 would require disclosure of the relevant emissions baseline as well as ongoing reporting as the company works to achieve its goal. These disclosures could include information on which categories and sources of Scope 3 emissions are relevant to the target and what data collection or estimation methodologies a company utilizes. Critically, the approach to disclosure under Item 1506 would provide useful information to investors without exposing issuers to the SEC's proposed Item 1504(c) framework for prescriptive Scope 3 reporting. The NAM respectfully encourages the SEC to allow for Scope 3 emissions disclosures under Item 1506 if such information would be necessary for investors to understand a target or goal—but not to mandate compliance with the prescriptive framework of Item 1504(c) when a company adopts a Scope 3 target or goal.

Irrespective of whether the SEC requires Scope 3 emissions disclosure pursuant to proposed Item 1504(c), proposed Item 1506, or any other provision, the Commission should make clear that only *public* adoption of a Scope 3 emissions target would necessitate reporting. Many companies set internal goals that are never publicized, and it would not be appropriate to force disclosure of these internal standards nor to require prescriptive Scope 3 disclosure as a result. Similarly, the SEC should clarify that the disclosure requirement would only apply to the extent that a company adopts an emissions target for itself (as opposed to goals set by, for example, industry groups), and to the extent that goal is material to its business under the traditional materiality standard. The NAM respectfully encourages the SEC to focus its attention just on publicly stated, material, company-specific climate goals, both with respect to the Item 1504(c) Scope 3 disclosures and the Item 1506 targets and goals disclosures.

Finally, the SEC should clarify that Scope 3 emissions reporting would only be required to the extent necessary to understand a given target or goal. For example, many companies set targets related to individual categories of Scope 3 emissions. An issuer that has announced a goal to reduce its Category 11 emissions associated with the use of the products it sells should not be required to provide data on the other 14 categories of Scope 3 emissions. Such data would be irrelevant to

informing investors about the issuer's Category 11 goal. As noted above, the NAM opposes the proposed Item 1504(c) Scope 3 disclosure regime. If the SEC maintains a reporting requirement for Scope 3 targets and goals in any final rule, the NAM respectfully encourages the Commission to only apply the requirement to Scope 3 emissions that are actually associated with an announced goal—not to unrelated data that will not provide investors with insights about a company's emissions reduction efforts.

v. Impact on Small and Privately Held Businesses

a. Small, Newly Public, Mid-Size, and Recently Acquired Issuers

The NAM is particularly concerned about the impact the proposed Scope 3 reporting requirement would have on small businesses. As a matter of first course, the proposed exemption for SRCs is relatively narrow—many smaller manufacturers with limited resources are nonetheless valued above \$250 million. As such, many small and mid-size manufacturers will be directly impacted by the proposed disclosure requirement and forced to undertake the same far-reaching data collection and verification processes required of large multinational corporations. Worse, the Scope 3 reporting requirement would apply to non-SRC small and mid-size businesses as soon as they complete an IPO (in fact, the provision would apply prior to an IPO given the application of the proposed rule to registration statements—which the NAM opposes), preventing them from taking advantage of the traditional five-year on-ramp into full public company compliance obligations traditionally available to EGCs.

As noted above, the NAM opposes the proposed Scope 3 disclosure regime. If a Scope 3 reporting requirement is maintained in any final rule, the NAM respectfully encourages the SEC to broaden its proposed SRC exemption to include EGCs, as well as any public company that meets the EGC size thresholds (i.e., those with annual revenues below \$1.07 billion and public float below \$700 million, irrespective of how long the issuer has been publicly traded). An EGC exemption would provide newly public companies with up to five years to understand and comply with the Scope 3 reporting requirement. This would align with EGCs' existing exemption from the external attestation requirement under Section 404(b) of the Sarbanes-Oxley Act ("SOX"), which similarly takes significant time and cost to implement. Further, an exemption for issuers that meet the EGC size thresholds, irrespective of how long they have been publicly traded, would ensure much-needed protections for small and mid-size companies that do not qualify as SRCs and no longer qualify as EGCs but would nonetheless struggle with the significant costs and burdens associated with Scope 3 reporting.

Separate from an EGC exemption, the SEC should also provide all newly public companies with an exemption from the Scope 3 requirement until after they have filed their first annual report, which would mirror the compliance dates associated with SOX Section 404.

Finally, the SEC should allow companies time to create or align Scope 3 emissions reporting processes following an acquisition. Combining two companies' Scope 3 data, or beginning Scope 3 tracking for a company that was not previously reporting Scope 3 emissions, is a significant undertaking. The SEC should provide a post-acquisition transition period by exempting recently acquired entities from the Scope 3 reporting requirement for the first two full fiscal years following an acquisition. The SEC should also clarify that issuers would not be required to provide historical Scope 3 data from any recently acquired entities if such data is not available.

b. Privately Held Businesses

The proposed Scope 3 requirement will also have a significant impact on privately held businesses. Though nominally exempt from the Scope 3 disclosure requirement by virtue of being exempt from SEC public reporting requirements entirely, these businesses would nevertheless experience significantly increased costs and burdens as a result of the proposed rule. Many private businesses are suppliers for larger entities, and as such they would be swept into those larger companies' obligations to track emissions throughout their value chains. Private companies could find themselves in the untenable position of choosing between incurring significant costs to report their GHG emissions and potentially losing a valuable customer. The unintended consequences of this increased compliance burden on privately held businesses could be severe, and the NAM is disappointed that the SEC has omitted these effects on private companies from its economic analysis of the proposed rule.

The consequences of the proposed Scope 3 disclosure requirement on private companies are significant and far-reaching. Any requirement to report indirect emissions from public companies' value chains will inevitably affect privately held companies outside the SEC's authority. Many larger issuers are already working with their small and privately held suppliers as part of their ongoing efforts to understand and report their Scope 3 emissions—but an SEC mandate would prevent suppliers and customers from working together productively to access some degree of emissions data while still respecting small and privately held businesses' resource constraints. The NAM respectfully urges the SEC to rescind its proposed Scope 3 mandate and instead allow greater flexibility for public companies to choose how they should track value chain emissions data—thus protecting small and privately held businesses. The SEC should also revisit its economic analysis of the proposed rule in order to consider the impact of the proposed Scope 3 reporting requirement on private companies.

The most effective protection for private companies would be for the SEC to rescind its proposed Scope 3 mandate entirely. Should a final rule include a Scope 3 reporting requirement, the NAM respectfully encourages the SEC to consider targeted improvements that would reduce the burden on privately held businesses. For example, granting public companies the flexibility and liability protection necessary to allow them to freely utilize estimates, modeling, emissions factors, and other evolving tools and methodologies to calculate Scope 3 emissions would lessen the need for issuers to seek direct emissions measurements from privately held businesses within their value chains. Similarly, clarifying that public companies would be able to exclude from their Scope 3 calculations any immaterial categories or sources of emissions would reduce the pressure on privately held businesses whose emissions may have a less-significant impact on issuers' operations and financial condition. A narrower, more well-tailored, more flexible Scope 3 reporting requirement would not completely alleviate the difficulties for privately held businesses, but the NAM nevertheless respectfully encourages the SEC to take these and other steps to minimize the burdens that private companies will face if the Commission includes a quantitative Scope 3 reporting requirement in any final rule.

vi. Scope 3 Safe Harbor and Liability Protections

The NAM appreciates that the SEC has acknowledged that it “may be difficult to obtain activity data from suppliers and other third parties in a registrant's value chain, or to verify the accuracy of that information.”⁵³ As discussed, the NAM is extremely concerned by the difficulty and uncertainty associated with Scope 3 emissions disclosure. As such, the NAM appreciates that the SEC has proposed the concept of a safe harbor intended to protect companies from liability associated with including Scope 3 emissions disclosures in SEC filings.

⁵³ *Id.* at 21390.

As noted above, the NAM opposes the proposed Scope 3 disclosure regime. To the extent that any final rule includes a Scope 3 reporting requirement, the NAM agrees with the SEC that safe harbor protections are critical to “mitigate potential liability” and “encourage more robust Scope 3 emissions information.”⁵⁴ However, the safe harbor included in the proposed rule would not provide sufficiently robust protection and instead would subject companies to liability even if their disclosures were undertaken in good faith.

As proposed, the safe harbor would clarify that a statement with respect to Scope 3 disclosures “would be deemed not to be a fraudulent statement” provided that it was both made with a reasonable basis and disclosed in good faith.⁵⁵ It is not clear, though, how companies will be able to demonstrate that they have complied with the requirement to avoid statements “made or reaffirmed without a reasonable basis”⁵⁶ short of costly litigation or enforcement processes. The evolving nature of Scope 3 emissions reporting methodologies—including the common practice of relying on estimates, assumptions, and third-party data—would reduce the utility of the proposed safe harbor given that companies could still face potential allegations that their basis for a given Scope 3 disclosure was not “reasonable.”

At a minimum, the NAM respectfully encourages the SEC to strengthen its proposed safe harbor protections by removing the requirement that issuers make or reaffirm Scope 3 statements with a “reasonable basis.” Such an approach would avoid questions about the specific methodologies that comprise the basis of an issuer’s Scope 3 emissions disclosure and instead focus on their good faith efforts to provide accurate information to investors.

However, even a safe harbor solely focused on issuers’ good faith efforts to provide accurate disclosures may not be sufficient to protect companies from unfair allegations arising from the uncertainties inherent in Scope 3 data. In light of this concern, rather than relying exclusively on a safe harbor to protect issuers from potential liability, the SEC should also make clear that any allegations of fraud, unreasonable basis, or bad faith with respect to Scope 3 disclosures be made with the requisite “particularity.”⁵⁷ Under such a standard, potential plaintiffs would be required to specifically describe the fact pattern they allege constitutes fraud, unreasonable basis, or bad faith rather than making general accusations about a company’s compliance efforts. In combination with a safe harbor for Scope 3 disclosures made in good faith, a particularity standard would bolster the SEC’s stated goals of protecting issuers from liability and ensuring robust disclosure.

Additionally, the Commission should consider allowing companies’ GHG emissions disclosures, including their Scope 3 reports, to be furnished to, rather than filed with, the SEC. Filed disclosures impose a higher degree of legal liability with respect to material misstatements, which may arise given the uncertain and evolving nature of Scope 3 data collection, estimation, and verification. Allowing Scope 3 emissions disclosures to be included in a statement furnished to the SEC would provide an additional layer of liability protection as companies work to comply with this novel and far-reaching provision.

⁵⁴ *Id.* at 21391.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ See *Kowal v. MCI Communications Corp.*, 16 F.3d 1271 (D.C. Cir. 1994) (plaintiffs’ contention that defendants’ statements lacked a “reasonable basis” were properly dismissed where plaintiffs failed to plead fraud with particularity); see also *Sierra v. Hayden*, 254 F. Supp. 3d 230, 242 (bad faith must be pled with particularity) and *Cristwell v. Veneman*, 224 F. Supp. 2d 54, 60 (D.D.C. 2002).

vii. Compliance Dates

The proposed rule would grant large accelerated filers just a single year to come into compliance with the Scope 3 emissions disclosure requirement. If the SEC promulgates a final rule in late 2022, for example, Scope 3 emissions disclosures would be required in FY 2024 filings for large accelerated filers. A one-year transition period further underscores the impracticality of the proposed Scope 3 disclosure requirement given the significant uncertainty associated with Scope 3 emissions reporting and the many time-consuming and detailed new processes that companies will be forced to establish to comply with the provision.

The NAM has suggested that the compliance dates for Scope 1 and Scope 2 emissions disclosures be delayed until the third fiscal year following the promulgation of any final rule. The complexity and novelty of the Scope 3 reporting requirement necessitates additional time for businesses to transition into compliance if the SEC insists on including Scope 3 GHG emissions disclosures in any final rule. If Scope 3 reporting is required (which the NAM continues to oppose), the NAM respectfully encourages the SEC to also extend the compliance dates for the Scope 3 disclosure requirement. Specifically, the SEC should leave intact the additional one-year phase-in period for Scope 3 beyond the compliance dates for Scope 1 and Scope 2, thus requiring large accelerated filers to comply with any Scope 3 reporting requirement as of the fourth fiscal year following the rule's finalization and accelerated filers as of the fifth fiscal year. The NAM continues to believe that the SEC should not mandate Scope 3 disclosure, but at the very least a Scope 3 disclosure requirement that requires compliance by large accelerated filers for FY 2026 and by accelerated filers for FY 2027 would grant companies more time than currently proposed to come into compliance with such a difficult and burdensome requirement.

As discussed, the SEC should also clarify that public companies would be under no obligation to provide Scope 3 data for historical fiscal years prior to the compliance date of the proposed Scope 3 requirement. Assuming a delay in the provision's compliance date until the fourth fiscal year following the promulgation of any final rule, as the NAM has suggested (in the absence of a full rescission), large accelerated filers' FY 2026 reports would include Scope 3 data only from FY 2026; FY 2027 reports could include a one-year lookback, FY 2028 reports could include two historical years, and so forth. This approach would ensure that companies are not subject to retroactive disclosure requirements for historical fiscal years.

viii. Suggested Improvements

As discussed, the proposed requirement that most public companies include Scope 3 emissions disclosures in their Form 10-K each year would impose significant costs and liability on a wide range of issuers. The breadth and depth of the requirement will ensure that these burdens will fall on companies up and down the supply chain, including small and privately held companies. Further, the data collection, estimation, and verification processes for Scope 3 reporting are constantly evolving, calling into question the utility and reliability of Scope 3 disclosures for investors. The NAM does not believe that the SEC's proposed materiality threshold and safe harbor are sufficient to protect manufacturers and their shareholders from these significant risks, despite manufacturers' ongoing efforts to understand the GHG emissions associated with their diverse and dynamic value chains. Moreover, the SEC's authority to compel information reporting from private companies is questionable.

As such, the NAM respectfully encourages the SEC to rescind its proposed Scope 3 reporting requirement. The NAM believes that Scope 1 and Scope 2 emissions disclosures, in combination with the proposed Regulation S-K risk disclosures, are sufficient to inform investors of public companies' exposure to climate-related risks. Manufacturers will continue to lead in improving their understanding of their Scope 3 emissions and evolving the methodologies necessary to track and

report this data. Some companies may choose to report their Scope 3 emissions alongside Scope 1 and Scope 2 even in the absence of an SEC mandate—but the NAM does not believe a Scope 3 disclosure requirement is necessary or appropriate for the protection of investors.

To the extent a final rule mandates Scope 3 emissions disclosure, several improvements could make the provision somewhat more workable—though, again, the NAM urges the SEC to avoid mandatory disclosure of Scope 3 emissions.

- If the SEC continues to believe that Scope 3 data is necessary for investors to understand issuers' climate-related transition risks, a final rule could specify that descriptions of any transition risks disclosed pursuant to Item 1502 of Regulation S-K could include, if material, a narrative description of the impact that Scope 3 emissions might have on the issuer's exposure to that risk. Such a requirement could replace the quantitative reporting regime envisaged by the proposed Item 1504(c).
- If the SEC mandates quantitative Scope 3 reporting, it should reinforce the traditional materiality standard and only require disclosure of Scope 3 emissions to the extent they would be material to a reasonable investor's understanding of a company's financial condition and risk exposure. The SEC should also remove references to any bright-line or ratio-based materiality tests from any adopting release.
- Under any Scope 3 disclosure requirement, the SEC should make clear that companies would be allowed to conduct materiality analyses with respect to individual categories and sources of Scope 3 emissions—and to forgo reporting on immaterial categories and sources based on those assessments.
- The SEC should enhance the liability protections associated with Scope 3 compliance by strengthening the proposed Scope 3 safe harbor, requiring allegations of fraud with respect to Scope 3 to be made with "particularity," and allowing Scope 3 emissions data (as well as Scope 1 and Scope 2 data) to be furnished to the SEC outside of Form 10-K.
- With respect to the proposed requirement that companies report Scope 3 data if they have adopted an emissions reduction target that includes Scope 3 emissions, the SEC should allow for disclosure under Item 1506 rather than Item 1504(c), require disclosure of emissions data only from those categories of Scope 3 emissions necessary to understand the target, and clarify that reporting would only be required following the public announcement of a material, company-specific goal.
- The SEC should exempt a wider range of small, newly public, mid-size, and recently acquired companies from any Scope 3 reporting requirement. In addition to SRCs (as proposed), the SEC should exempt EGCs, other newly public companies prior to their first annual report, and other companies that meet the EGC size thresholds (i.e., those with annual revenues below \$1.07 billion and public float below \$700 million, irrespective of how long the issuer has been publicly traded). The SEC should also provide a transition period for recently acquired companies by exempting such entities from any Scope 3 reporting requirement for the first two full fiscal years following an acquisition.
- The SEC should revisit the economic analysis underpinning the proposed rule so it can appropriately consider the impact that a Scope 3 reporting requirement would have on privately held businesses. Though the most effective protection for private companies would be for the SEC to rescind its proposed Scope 3 mandate entirely, if Scope 3 reporting is required under any final rule then SEC should take specific, deliberate steps to increase

flexibility and liability protections for public companies in order to reduce their reliance on emissions data from private businesses within their value chains.

- In order to grant companies the time necessary to collect, aggregate, and analyze emissions data from upstream and downstream partners throughout their value chains, the SEC should allow companies' Scope 3 emissions disclosures (as well as their Scope 1 and Scope 2 disclosures) to be reported via a new midyear "Form GHG" rather than in Form 10-K.
- Finally, the SEC should delay the compliance date of any Scope 3 reporting requirement so that compliance is required no earlier than the fourth fiscal year (for large accelerated filers) or fifth fiscal year (for accelerated filers) following the promulgation of a final rule. The SEC should also clarify that companies would not be expected to provide Scope 3 data for any historical fiscal years before their Scope 3 compliance date.

Manufacturers appreciate that the SEC is continuing to consider how companies can best inform their investors about any potentially material impacts that GHG emissions may have on their operations and financial condition. However, the NAM opposes the proposed Scope 3 disclosure requirement, and we respectfully encourage the Commission to rescind this provision. At a minimum, the SEC should more appropriately balance the significant costs and minimal benefits associated with Scope 3 emissions reporting given the current state of the information infrastructure across manufacturers' diverse and dynamic global supply chains.

II. Regulation S-X Financial Statement Metrics

The proposed rule would amend Regulation S-X to require public companies to analyze the impact of climate-related risks, weather events, and transition activities on each of the line items in their consolidated financial statements. If the aggregate impact of these risks, events, and activities exceeds 1% of the value of a given line item, companies would be required to provide a note in the financial statements describing the disaggregated quantitative impacts, both positive and negative, of climate-related events and climate-related transition activities on the line item. Separately, companies would be required to provide similar analysis and disclosure with respect to aggregate amounts of expenditure expensed and capitalized costs incurred. As part of an issuer's consolidated financial statements, these disclosures would be subject to an external integrated audit of a company's financial statements and internal controls over financial reporting ("ICFR"). The quantitative financial impact metrics and expenditure metrics would be accompanied by contextual information describing, for example, specific climate-related events and activities and any methodological choices an issuer made in preparing the required quantitative disclosures.

The NAM strongly opposes the proposed amendments to Regulation S-X, which would impose unworkable, highly burdensome requirements on all public companies and would result in immaterial and confusing disclosures for investors. We respectfully encourage the SEC to remove this costly and complex provision from any final rule.

A. Difficulties Associated with the Proposed Financial Statement Metrics

From a practical standpoint, the processes and procedures necessary to conduct the financial statement analysis that would be required under the proposed rule simply do not exist. The breadth of the Regulation S-X amendments would effectively require detailed tagging of financial impacts at the invoice level, a mammoth undertaking for any public company. Companies would be required to count every single financial impact that could plausibly be attributable to climate risks, weather events, or transition activities, somehow determine the degree of climate causation associated with each, and then aggregate these impacts to determine if they meet the proposed 1% threshold—for *each* line item in the consolidated financial statements. Companies' existing systems do not currently

track data at such a granular level. They also do not generally aggregate positive and negative costs rather than netting them against each other (as would be required by the proposed rule). The extreme burden of building new processes and systems to track quantitative climate impacts, with no materiality threshold or even a *de minimis* exception for minor events or immaterial impacts, would impose colossal costs and strain resources at all public companies.

Compliance with the proposed requirements could ultimately necessitate a separate set of books just to track the myriad minor impacts that climate and weather events and activities might have on the individual line items within a company's financial statements. The proposing release describes the required aggregation, analysis, and disclosure in simple terms, but in reality the proposed Regulation S-X amendments are simply not feasible. The proposed degree of quantitative analysis is far beyond the practices of even those companies with the most thorough and complete understanding of climate risks and impacts. The NAM acknowledges that companies may need to understand the potential material impacts of climate-related risks on their business and operations, including their financial statements, but assigning exact dollar amounts on a line-by-line basis is not feasible and would not provide useful information to investors.

The magnitude of this burden is further enhanced by the uncertainty and complexity associated with the required impact determinations. Assigning quantitative, line-by-line financial impacts to subjective climate-related risks requires a degree of guesswork that would be inappropriate for a disclosure designed to inform investors of material information—and especially for audited financial statements. The SEC's proposed approach would also diverge from existing accounting standards for estimating and disclosing risks. Presenting arbitrary and ambiguous estimates as quantifiable and thus reliable would be misleading to investors, undermining the very objectives the rule purports to serve (and that the SEC is obligated to carry out). Even if a company appropriately discloses that it is subject to, for example, regulatory or reputational transition-related risks, how should it decide on a specific degree of climate causation? What is the exact dollar amount to associate with those risks? How should a company attempt to surgically isolate potential impacts of these risks from general market trends? How could a company assign a specific financial impact to evolving physical risks like weather, sea level rise, and global temperature increases, which are inherently difficult to understand and predict even with the most sophisticated scientific modeling? These may be legitimate and important risks for companies to understand and take steps to mitigate. But the proposed quantitative analysis, which would require companies to assign exact dollar values to these risks on a line-item basis, is not the best way to evaluate their impact nor is it reflective of existing accounting standards. In the absence of actual costs, the required financial statement notes would be driven almost entirely by subjective estimates and assumptions, in an environment where no accounting guidance exists to help companies make such estimates and assumptions. As a result, the required disclosures likely would not be comparable among companies nor useful for investors.

Attempting to quantify the impact of weather events, seemingly less amorphous than other risk factors, illustrates the difficulty of complying with the proposed Regulation S-X changes. Is a tornado in Kansas attributable to climate change or just a risk of doing business in the Great Plains? If a company rebuilds a damaged facility following the tornado, is the entire rebuild attributable to climate change or should the financial impact analysis exclude any modifications to improve the facility beyond the harm caused by the storm? What if the modifications make the facility more energy efficient—would those costs be assigned to “climate-related events” (the tornado) or “climate-related transition activities” (improving the company's energy efficiency)? Would the full cost of installing energy efficient technology count, or should the company just track the difference between the cost of the efficiency improvements and the available less-efficient alternatives? In addition to the costs of the modifications themselves, should the company also track the ongoing differences in its electric bill? Or does building an energy efficient facility even count as a transition activity if the installed technologies are industry standards? Just this one simple example highlights multiple choices a

company must make in attempting to assign, quantify, track, control, and report financial statement impacts pursuant to the proposed rule. The actual degree of uncertainty would increase by several orders of magnitude in the real world given that companies, many of which are operating hundreds or thousands of facilities on an international basis, face far more, and far more complex, decisions every single day. If each company is making different reporting decisions based on their own ever-changing and uncertain understanding of climate causation and impact, how could the proposed financial statement disclosures possibly facilitate consistency and comparability for investors?

In addition to being practically impossible to implement, the required financial statement metrics would also be extremely difficult to audit reliably, especially from a completeness perspective.⁵⁸ The complexity of providing traditional assurance on the proposed financial statement metrics and undertaking an ICFR assessment with respect to companies' procedures in preparing said metrics will result in significant compliance costs. Further, there is not currently a PCAOB standard against which auditors can compare companies' processes, choices, and assumptions in complying with the proposed amendments to Regulation S-X, nor is there Financial Accounting Standards Board ("FASB") or International Financial Reporting Standards ("IFRS") guidance for how companies should account for such a wide range of subjective risks within the financial statements. Given the subjectivity inherent in assigning the required quantitative financial impacts, it is unclear how auditors will evaluate and subsequently provide assurance with respect to these decisions and the associated disclosures.

Despite the overwhelming complexity and burden associated with the proposed amendments to Regulation S-X, the proposing release estimates that issuers' audit costs would increase by just \$15,000 as a result of the provision. This entirely novel and extremely complex requirement most likely will increase audit costs several orders of magnitude in excess of \$15,000 (to say nothing of the extraordinary internal costs the requirement will impose). The proposed financial statement metrics would require external auditors to audit at a lower level of precision than is required for most of the audit (which is based on the traditional concept of financial materiality). As discussed in more detail below, the SEC's proposed 1% threshold falls well below any current understanding of materiality, and as such the rule would necessitate significant incremental procedures for an auditor to validate a company's processes around identifying, tagging, accumulating, and disclosing data at that level—dramatically increasing the time and cost of the integrated audit. The NAM urges the SEC to reconsider its unreasonably low cost estimate for this provision in light of these significant complexities and to rescind the proposed Regulation S-X amendments.

B. Materiality of the Proposed Financial Statement Metrics

The NAM is concerned that the proposed financial statement requirements would discard the time-tested concept of materiality and impose an overbroad and costly mandate that does not provide useful information for investors.

First, the proposed rule would set a bright-line test that would require disclosure if the aggregate impact of all climate-related risks, events, and activities is equal to at least an arbitrary value (1%) of a given line item within a company's consolidated financial statements. By imposing a top-down threshold that substitutes the SEC's judgement for the issuer's, a bright-line test would effectively prevent companies from conducting the appropriate analysis to determine the importance of a given climate event to their business and financial statements. The NAM does not believe it is lawful or appropriate for the SEC to set a bright-line test that would mandate reporting on risks and events that may or may not be material for a given business. Given that the impact of climate-related risks, events, and activities will vary across companies and across individual companies' financial

⁵⁸ For example, it is not clear how an auditor could validate that a complete list of transactions was considered and appropriately aggregated.

statement line items, it makes little sense for the SEC to assign a one-size-fits-all threshold that would apply to all issuers and all line items equally. This is especially true because, under the proposed rule, companies would have to track and quantify every individual potential climate impact in order to determine whether the aggregate impact equals or exceeds the SEC-mandated threshold, imposing a significant compliance burden for all climate-related factors irrespective of their materiality. The proposed bright-line test would undermine companies' ability and obligation to determine materiality on a case-by-case basis and provide appropriate disclosures for the benefit of their investors.

Second, the proposed 1% threshold is far too low to substitute for a true materiality assessment. Instead, it functions more as a *de minimis* exception, allowing companies to exclude some minor climate impacts from their financial statements but otherwise defining all other financial impacts as material. This extremely low threshold falls below any reasonable understanding of financial materiality and would ultimately necessitate disclosure with respect to virtually every climate-related risk, event, or activity and for virtually every financial statement line item.⁵⁹ Further, companies would still be required to track *all* potential impacts in order to calculate the 1% test—even if some *de minimis* activities were excepted from disclosure by the 1% threshold, they would not be excepted from the underlying requirement to estimate and aggregate any climate-related impacts. The 1% threshold is thus hardly an exception at all, and it would not decrease the cost or burden associated with the proposed Regulation S-X amendments. Ultimately, it simply does not follow that an unrelated series of risks, events, and activities aggregating to 1% of the value of a financial statement line item necessarily means that the impact of those risks, events, and activities would be material to investors.⁶⁰ In fact, a 1% impact on a single line item attributable to an unrelated series of positive and negative events, each with an impact below 1% of that line item, is far more likely to be *immaterial* in the vast majority of situations. The NAM opposes the imposition of a bright-line threshold, which would undermine the settled and well-understood concept of financial materiality. However, if the SEC includes a quantitative test in any final rule, it would need to significantly exceed 1% in order to approximate materiality in the context of climate impacts on companies' financial statements.

Third, the financial statement metrics provision would require impact analysis with respect to any material physical and transition risks identified pursuant to the proposed amendments to Regulation S-K—as well as other *immaterial* weather events, natural conditions, and transition activities. The proposed definitions of material physical risks and material transition risks under Item 1502(a) of Regulation S-K specifically include severe weather events, natural conditions, and transition activities to the extent material to a business. As such, if a weather event, natural condition, or transition activity were material then it would already be incorporated into the financial impact analysis as part of an identified physical or transition risk. By specifically mentioning weather events, natural conditions, and transition activities outside of these identified material risks, the proposed rule would require companies to analyze *all* weather events, natural conditions, and transition activities, even if they had been specifically determined to be immaterial. Such a requirement would further weaken the materiality standard, undermine companies' risk factor identification pursuant to Regulation S-K, and impose a significant compliance burden to track and analyze these immaterial factors.

⁵⁹ In addition to making compliance with the proposed Regulation S-X amendments extraordinarily difficult, defining a 1% impact as material could also set precedent for courts or regulators in the future to apply a similarly low standard to other materiality-based disclosure obligations—potentially resulting in a dramatic overhaul of how companies determine materiality. (To be clear, the NAM does not believe that a 1% threshold set by the SEC in the context of its proposed climate rule *should* carry such precedential weight, but we are concerned by the potential for such a novel and unworkable standard to be applied in other contexts.)

⁶⁰ This is especially true given that the proposed rule would require companies to aggregate positive and negative impacts rather than netting them against each other.

Finally, the proposed financial statement requirements effectively define climate-related risks, events, and activities as *more* material than other risks, events, and activities a company might experience. A wide range of risks, events, and activities might account for 1% of a given line item, especially if aggregated with other risks, events, and activities. Climate change may be a relevant risk to many companies, but the proposing release does not justify why climate impacts—as opposed to, for example, macroeconomic, geopolitical, technological, or competitive impacts, just to name a few—are the only items necessitating amendments to Regulation S-X. Risks, events, and activities (including those related to climate) may well necessitate incorporation into the financial statements on a case-by-case basis if their impact is material to an issuer’s financial condition, but the proposed rule would subject *only* climate-related factors to its line-item reporting requirement. This is a significant departure from the well-understood obligation for companies to identify and appropriately disclose material risks to their investors.

C. Compliance Dates and Retroactive Disclosure Requirements

i. Compliance Dates

As discussed, the proposed rule’s financial statement requirements are extraordinarily novel and difficult. Yet the SEC has not proposed any delay in the provision’s compliance date. The mandate to track and analyze, on a line-item basis, any and all climate-related impacts on a company’s consolidated financial statements is arguably the most complex condition in the proposed rule, yet compliance with this novel and burdensome provision would be required at the same time as most of the rest of the rule: as of fiscal year 2023 for large accelerated filers, fiscal year 2024 for accelerated filers, and fiscal year 2025 for SRCs. The proposed rule also does not include any additional flexibility for small companies beyond this delayed compliance date.

By way of comparison, the FASB provided approximately four years for the implementation of its recent revenue standard (ASC 606)⁶¹ and three years for its leasing standard (ASC 842).⁶² The new processes and controls required to comply with the proposed financial statement metrics will likely significantly exceed those associated with these recent FASB standards. The NAM respectfully encourages the SEC to adjust the compliance dates for the proposed rule’s Regulation S-X amendments accordingly (if the financial statement requirements are not rescinded, as we have suggested).

As discussed, the NAM believes that each of the proposed rule’s compliance dates should be delayed by at least two years as compared to the SEC’s proposed implementation timeline, with compliance beginning for large accelerated filers during the third fiscal year after the rule’s finalization. But the sheer magnitude and difficulty of the financial statement metrics provision necessitates further delay if the provision is maintained in any form in a final rule. Whatever the exact structure of any final requirement with respect to issuers’ financial statements, the NAM respectfully encourages the SEC to allow for, at a minimum, three years of delay for companies to come into compliance with the requirement—which is to say that compliance with any amendments to Regulation S-X should not be required for large accelerated filers until the fourth fiscal year following the rule’s finalization. For each class of issuer, this would represent an additional one-year phase-in beyond our proposed two-year delay of the rule. For example, under a rule finalized by the SEC in 2022, large accelerated filers would be required to comply with most of the rule in their FY 2025 filings and the financial statement requirements in their FY 2026 filings. Correspondingly,

⁶¹ See *Accounting Standards Update No. 2015-14: Revenue from Contracts with Customers (Topic 606)*. Financial Accounting Standards Board (August 2015). Available at <https://fasb.org/Page/ShowPdf?path=ASU+2015-14.pdf>.

⁶² See *Accounting Standards Update No. 2016-02: Leases (Topic 842)*. Financial Accounting Standards Board (February 2016). Available at https://www.fasb.org/Page/ShowPdf?path=ASU+2016-02_Section+A.pdf.

accelerated filers would face compliance obligations as of FY 2026 (for most of the rule) and FY 2027 (for the financial statement requirements). To be clear, the NAM opposes the inclusion of any amendments to Regulation S-X in the final rule; a delayed compliance date would simply give companies more time to adjust to what is a fundamentally unworkable provision.

If financial statement requirements are included in any final rule, a more effective protection for smaller companies than a delayed compliance date would be an exemption from any Regulation S-X amendments. As noted, the financial statement analysis requirements are arguably the most complex in the entire rule, and the NAM believes it would not be reasonable to subject small, newly public, mid-size, and recently acquired companies to these burdens. The NAM strongly encourages the SEC to exempt SRCs, EGCs, other newly public companies prior to their first annual report, and other companies that meet the EGC size thresholds (i.e., those with annual revenues below \$1.07 billion and public float below \$700 million, irrespective of how long the issuer has been publicly traded) from any final rule's amendments to Regulation S-X. The SEC should also exempt recently acquired companies from the proposed financial statement requirements for the first two full fiscal years following an acquisition; additionally, any historical financial information provided about these entities should not be required to include climate-related impact analysis.

ii. Historical Financial Statements

The NAM is disappointed that the proposed rule does not include a specific exemption for historical data in the early years after the financial statement provisions' compliance date. Generally, companies are required to include two or three historical years of consolidated financial statements in their annual Form 10-K so investors can compare their year-over-year performance. If the consolidated financial statements include climate-related impacts pursuant to the proposed rule, companies' historical financial statements would be required to do so as well.

For future years, this requirement will not create additional burdens. If a company is successful in completing the required analysis in FY 2029 and FY 2030, it will not be difficult to include those years in the FY 2031 Form 10-K. But for the first several years of the provision's effectiveness, historical data simply will not exist. Assuming a compliance date of FY 2023, as proposed, how could companies be expected to provide historical climate-related financial impact metrics for FY 2022 and FY 2021, let alone metrics that have been subject to the rigor of disclosure controls and procedures (as well as ICFR) that have yet to be implemented? The proposing release notes that issuers "may" be able to rely on Rule 409 or Rule 12b-21,⁶³ which provide accommodations for historical information that "is not reasonably available to the registrant without unreasonable effort or expense"⁶⁴—but *no* issuers will have access to pre-compliance-date historical information given the novelty of the proposed financial statement requirements. The SEC therefore should provide a specific exemption from any requirements to provide historical climate information associated with any fiscal years before the compliance date of the financial statement provisions of any final rule.

D. Suggested Improvements

The NAM opposes the SEC's proposed amendments to Regulation S-X. As described above, it would be extremely complex and confusing to assign causation and then estimate quantitative financial impacts for the myriad climate-related risks, weather events, natural conditions, and transition activities a business may experience. It would be challenging and costly to track these impacts across the company at the granular level necessary to aggregate their effects and apply the proposed 1% materiality threshold. And the bright-line 1% test would undermine the materiality

⁶³ Proposed Rule, *supra* note 1, at 21364.

⁶⁴ See 17 CFR 230.409 and 17 CFR 240.12b-21.

standard and require disclosure of minor and ultimately irrelevant climate-related factors. All told, the proposed financial statement provisions are unworkable, inappropriate, and costly—and would lead to non-comparable data of minimal, if any, use to investors. The NAM respectfully urges the SEC to rescind the proposed amendments to Regulation S-X that would require companies to analyze the impact of climate-related risks, weather events, and transition activities on each of the line items in their consolidated financial statements.

If the SEC is determined to require companies to attempt to predict the potential impact of climate-related risks on their financial statements, the appropriate home for those amendments would be Regulation S-K, not Regulation S-X. In fact, the proposed Item 1502(d) of Regulation S-K would already require an issuer to provide “a narrative discussion of whether and how any of its identified climate-related risks...have affected or are reasonably likely to affect [its] consolidated financial statements.”⁶⁵ This requirement would allow a narrative description rather than a quantitative analysis and would be more closely linked to the climate-related risks a company has determined to be material to its operations. The NAM believes that the proposed Item 1502(d) requirement is sufficient to enable investors to understand the impact of climate change on companies’ financial statements and operations.

To the extent the SEC persists in incorporating a costly, burdensome, and unreliable climate-related risk reporting requirement into Regulation S-X and issuers’ consolidated financial statements, several reforms could make compliance slightly less onerous—though no changes can entirely mitigate the impact of this unworkable provision.

- First, a narrative description of the impact that climate-related risks have or potentially may have on a company’s consolidated financial statements would be sufficient to inform and protect investors. The SEC should abandon its proposed line-item analysis, but could still require a high-level narrative description of climate-related impacts on issuers’ consolidated financial statements under Regulation S-K rather than Regulation S-X.
- If the SEC requires line-item reporting, the NAM respectfully urges the Commission to remove the proposed bright-line test and instead allow companies to disclose only those climate impacts that would be material to their business and operations. The wide range of climate-related risks, events, and activities that companies experience will have disparate and unpredictable effects on different issuers and different financial statement line items, so the SEC should not mandate a top-down threshold that undermines companies’ materiality assessments.
- If the SEC insists upon a bright-line test, the NAM would suggest replacing the proposed 1% threshold with a 10% test. A higher 10% threshold would be more likely to capture the impacts of climate-related events that are actually material to a business and thus relevant to investors’ understanding of climate-related impacts on its financial statements and operations.
- Irrespective of whether a final rule allows companies to set their own materiality threshold or mandates a bright-line test, the SEC should only require analysis of the impacts associated with material physical and transition risks detailed on an issuer’s Form 10-K. Requiring tracking and analysis of events and transition activities specifically determined to be immaterial under the analysis framework outlined in Item 1502 of Regulation S-K would represent a significant and unnecessary resource diversion and would not provide any useful information for investors.

⁶⁵ Proposed Rule, *supra* note 1, at 21354.

- Absent a focus on just material physical and transition risks identified pursuant to Item 1502 of Regulation S-K, the SEC should at least limit the financial statement impacts requirement to only events that are predominately caused directly by climate change. Such a change would prevent companies from being forced to estimate proportional climate-related impacts of events attributable to multiple factors.
- The SEC should provide a specific exemption from any requirements to provide historical data from years prior to the compliance date of the Regulation S-X amendments. It is not reasonable to expect companies to retrospectively provide detailed, line-item-specific analysis for fiscal years during which compliance with the financial statement requirements was not required and processes and systems did not exist to track this information. As such, any financial statement requirements should only apply on a prospective basis in the early years following the compliance date of the provisions.
- The SEC should delay the compliance date of any financial statement-related provisions by a minimum of three years, only requiring compliance by large accelerated filers as of the fourth fiscal year following the promulgation of any final rule. The NAM supports delaying compliance with the entire rule until the third fiscal year after its finalization, but an extra year to comply with its financial statement provisions is necessary given the novelty and complexity of the proposed requirements.
- The SEC should exempt small, newly public, mid-size, and recently acquired companies from any financial statement-related provisions. The NAM believes that these issuers should be exempt from the entire rule, but regardless of the application of the broader rule it would be reasonable and appropriate to provide targeted exceptions for SRCs, EGCs, other newly public companies prior to their first annual report, and other companies that meet the EGC size thresholds (i.e., those with annual revenues below \$1.07 billion and public float below \$700 million, irrespective of how long the issuer has been publicly traded) from its most complicated provision. The SEC should also exempt recently acquired companies from the proposed financial statement requirements for the first two full fiscal years following an acquisition; additionally, any historical financial information provided about these entities should not be required to include climate-related impact analysis.
- Finally, any requirement to report financial statement impact metrics should be accompanied by a robust safe harbor and an exemption from the traditional audit requirements associated with Regulation S-X. If the SEC persists in mandating financial statement analysis then companies will of course make good faith efforts to aggregate and provide the required data; however, much of the proposed analysis framework relies on assumptions, estimates, and choices with no right or wrong answer. Applying traditional liability and audit standards to this framework could expose companies to significant legal risk and substantial costs. Accordingly, the NAM recommends removing any climate-related financial statement analysis from Regulation S-X and providing any financial statement disclosures with robust legal safe harbor protection.

These changes would make the proposed financial statement requirements somewhat less costly and more feasible, but at their core the Regulation S-X amendments remain unworkable. The NAM respectfully encourages the SEC to abandon its attempt to incorporate climate-related factors into Regulation S-X and issuers' financial statements and instead to focus its efforts on right-sizing the other aspects of the proposed rule.

III. Regulation S-K Climate-Related Risk Disclosures

A. Material Risks, Opportunity Disclosures, and Liability Protections

The NAM welcomes the SEC's efforts to enhance and standardize disclosures with respect to public companies' climate-related risks. In general, we support the proposed approach to climate risk disclosures, which would require issuers to identify material risks as either "physical risks" or "transition risks" and provide additional narrative descriptions on the nature of these risks, their actual or potential impact on the company's operations, and steps the company is taking to mitigate them. We also appreciate that the SEC's proposed approach is based on the TCFD framework, with which many manufacturers are already familiar. Climate change may pose a material risk to public companies, and the NAM agrees with the SEC that appropriate disclosure of any material climate-related risks can enable investors to make informed investing and voting decisions.

The NAM specifically appreciates that the proposed disclosure framework is based on issuers' material risks. As we have previously said, "[c]onveying decision-useful information that issuers determine to be financially material to shareholders under the Supreme Court's *TSC Industries* standard should be the mission of any disclosure regime."⁶⁶ Public companies are familiar with this standard in the context of risk disclosures given that the Risk Factors and Management's Discussion and Analysis ("MD&A") sections of Form 10-K are designed to provide a discussion of the material factors that could make an investment in the company or offering speculative or risky. The NAM appreciates that the proposing release clarifies that companies' materiality determinations with respect to potential climate-related risks should mirror existing practices for determining material risks.⁶⁷ Retaining this approach would ensure the disclosure of material risk factors—without distracting or confusing shareholders with immaterial information.

The NAM also appreciates that the proposed amendments to Regulation S-K would grant manufacturers a forum to disclose their climate-related opportunities. As we have discussed, manufacturers are leading the way in responding to climate change, and the technologies developed by manufacturers across the country—including clean energy, carbon capture, batteries, microgrids, advanced vehicles, and more—are critical to America's and the world's efforts to combat this generational challenge. These advancements provide manufacturers with significant business opportunities to show leadership, increase market share, and guard against both physical and transition risks. As such, it may be beneficial for companies to report information about these opportunities to their investors via the proposed Item 1502. However, we appreciate that the proposed rule clarifies that any such reporting would be optional given the potential risks associated with publicly disclosing such competitive and sensitive information.

The NAM also supports the SEC's clarification that any forward-looking statements included in an issuer's climate risk disclosures would benefit from the traditional safe harbor under the Private Securities Litigation Reform Act ("PSLRA"). The NAM has previously said that "[r]educing the liability on public companies will ultimately ensure that any reporting framework is more useful to investors by granting companies the flexibility to fulsomely describe their climate...risks and opportunities."⁶⁸ The NAM appreciates that the SEC has included specific PSLRA safe harbor protections for issuers' forward-looking statements under the proposed amendments to Regulation S-K.

⁶⁶ NAM Comments on SEC Climate Disclosures RFI, *supra* note 9, at 2.

⁶⁷ See Proposed Rule, *supra* note 1, at 21352 ("The materiality determination that a registrant would be required to make regarding climate-related risks under the proposed rules is similar to what is required when preparing the MD&A section in a registration statement or annual report.").

⁶⁸ NAM Comments on SEC Climate Disclosure RFI, *supra* note 9, at 10.

B. Difficulties Associated with the Proposed Risk Disclosures

Though the NAM largely supports the SEC's efforts to enhance the disclosure of issuers' climate-related risks, there are some areas of concern with the rule's proposed approach. Most notably, the NAM believes that the proposed risk descriptions are unnecessarily prescriptive. Overly prescriptive disclosure requirements create significant costs for issuers and could lead to competitive harm and stifle innovation by publicly exposing sensitive and strategic information. The level of disclosure required by the proposed rule is not necessary to fulsomely inform investors about issuers' climate-related risks.

While the NAM supports identifying climate-related risks as either physical risks or transition risks, the additional information required about these risks once they are disclosed is extensive and overwhelming—both for companies and investors. For example, disclosing a physical risk would require a company to identify at the ZIP code level the exact location of any operations that might be subject to that risk. While some information about the location of a risk may provide useful information to investors, there is no need for granular ZIP-code-level data.⁶⁹ The same goes for the proposed rule's specific requirements for water-related risks, which would obligate issuers to disclose the square footage of their facilities located in a flood hazard area and the share of their assets located in high water stress regions. These granular location-specific disclosures also could expose competitive information, present security risks, or implicate national security. As we have said, manufacturers support the SEC's focus on materiality in the context of climate-related risk disclosures; however, the granular details required by the proposed rule would ultimately require companies to invest significant resources to compile and report immaterial information that would not help investors understand these risks.

Additionally, it is worth noting that many companies utilize third-party frameworks like TCFD (on which the SEC's risk disclosure framework is based) to *guide* their climate-related risk disclosures. Incorporating a TCFD-like approach into Regulation S-K will convert the framework from a guide into a regulatory mandate, obliterating any ability for companies to adjust to, customize, or phase in their reporting obligations. The aggressive timeline with which the SEC has proposed to implement its climate disclosures rule (the new risk disclosures would be required in the first fiscal year following the rule's finalization) could make it difficult for some companies to fully come into compliance with the new requirements in time. After all, according to the proposing release, just 17% of Russell 1000 companies have indicated that they are currently in alignment with TCFD, while another 13% mention TCFD in their filings.⁷⁰ And on a going forward basis, the lack of flexibility inherent in an SEC mandate stands in stark contrast to the flexibility of a voluntary framework.

The NAM respectfully encourages the SEC to take steps to ease compliance with the rule by rescinding the more prescriptive provisions of its proposed climate risk disclosure framework. Companies can and should provide thorough narrative disclosures about identified material physical and transition risks. However, there is no need for the level of granularity envisaged by the proposed rule. The SEC should encourage issuers to provide sufficient information to inform investors about a given risk, but the Commission should not attempt to dictate the exact disclosures that companies

⁶⁹ In addition to being unnecessary, ZIP-code-level information will also be impractical for many companies and their investors. Diffuse physical risks like weather patterns may impact a wide swath of a company's operations, and it would be of limited utility to list all the ZIP codes in which a company operates that might be impacted by those weather patterns. Also, some companies may have physical operations that are not easily definable by ZIP code—like shipping services, or a railroad, or a pipeline. It would make little sense to force ZIP-code-level disclosure for any physical risks associated with these operations when higher-level descriptions would be sufficient for investors to understand the nature of the risk. The SEC should allow companies to provide relevant, decision-useful information about any material climate-related risks they identify, not seek to micromanage the exact content of issuers' risk disclosures.

⁷⁰ See Proposed Rule, *supra* note 1, at 21423 n.775.

make. The SEC should also, as the NAM has suggested, delay the compliance dates of any final rule such that the earliest risk disclosures would not be required until the third fiscal year following the rule's finalization.

C. Short-, Medium-, and Long-Term Materiality Assessments

The NAM appreciates that the proposed rule would allow companies to evaluate and disclose the impacts of any material climate-related risks in the near term and further in the future. However, the NAM is concerned that the lack of clarity associated with the proposed rule's short-, medium-, and long-term time horizons could increase the difficulty of compliance. The proposing release solicits comment on this question, asking whether the SEC should dictate specific definitions for short-, medium-, and long-term (e.g., 1-5 years, 5-10 years, and 10-20 years, respectively).⁷¹ The NAM would not support such a prescriptive approach given that companies' climate-related risks will manifest over different time horizons depending on their industry and business model.

Rather, the NAM believes that the SEC should eliminate the requirement that companies disclose medium-term risks, and instead bifurcate the time horizon requirement between short-term risks and long-term risks. Short-term risks are well-understood by both issuers and investors, as evaluations of near-term impacts like quarterly and annual results are part of virtually all business and investing decisions. We expect that most companies would define "short-term" in this context to mean the next 18 to 24 months. "Long-term," on the other hand, would cover all other material risks. For some companies, long-term risks could include material risks manifesting two or three years in the future; for others "long-term" might mean 20 or 30 years depending on their industry sector and economic pressures. Ultimately, a materiality assessment involving the nature of the risk and the time horizons relevant to the business would determine whether and how a business should disclose a long-term risk—not an arbitrary government-mandated framework.

The NAM's recommendation would not eliminate the disclosure of medium-term risks—it would simply re-categorize them to avoid the confusion inherent in determining whether, for example, seven years counts as medium- or long-term. Instead, risk disclosures would be divided into short-term risks and everything else (i.e., long-term risks), thus providing the same information to investors without creating unnecessary compliance difficulties.

D. Governance and Risk Management

The proposed rule would require a range of disclosures related to issuers' governance and risk management processes with respect to climate-related risks. In general, these requirements are likely to be workable for most companies. However, the NAM is concerned that the broad and prescriptive nature of these disclosures could give investors an inaccurate perspective on the relative importance of the underlying risks and thus undermine the objectives of the proposed rule. Additionally, the new processes to identify, assess, and manage climate-related risks needed to comply with the proposed rule's governance provisions could take time to create and implement.

The NAM does not dispute that issuers should maintain robust board oversight, management oversight, and risk management procedures—with respect to *all* material risks the company faces. However, the proposed rule would require issuers to prepare and investors to review dozens of new governance and risk management disclosure requirements specific to climate change. The NAM believes that this overemphasis could mislead investors as to the magnitude of the impact of climate-related risks a given company may face relative to that of other material risks. Some of the proposed disclosures could also prove difficult to comply with—for instance, given the broad definition of climate-related risks included in the proposed rule, how are companies expected to

⁷¹ See *id.* at 21352.

ascertain which board discussions are officially “consider[ing] such risks”⁷² so they can disclose the frequency of such discussions under Item 1501(a)(iii)?

The NAM supports appropriate governance and risk management disclosures, and manufacturers are leaders in responding to evolving risks, including the material risks posed by climate change. However, we respectfully encourage the SEC to reconsider whether such a broad and prescriptive disclosure framework is necessary—or if climate-related reporting could be better incorporated into companies’ existing governance and risk management disclosures. Additionally, the SEC should allow any new governance and risk management disclosures to be included in a company’s proxy statement rather than its Form 10-K, as is current practice for many similar disclosures.

Additionally, the NAM is specifically concerned by the proposed requirements that issuers detail which specific members of the board of directors and individuals in management positions have expertise in climate-related risks. These provisions are less detailed than similar requirements from the SEC’s recent rule proposal on cybersecurity risk disclosures, which would have required disclosure against a specific set of technical certifications and expertise.⁷³ Nevertheless, as we said in our response to the SEC’s cybersecurity proposal, the NAM does not believe it is appropriate for the SEC to mandate issue-specific criteria for candidates for public company boards of directors or management positions.⁷⁴ Company boards are charged with broad strategy, governance, and risk management duties, and issuers and their shareholders are free to nominate and elect directors with a mix of diverse experience and expertise in order to meet these challenges—and the areas of expertise necessary often differ between companies and industries. The board, in turn, has the obligation to hire a management team that has appropriate skill and expertise (which, again, differ between companies and industries) to manage these challenges and keep the board appropriately informed. As with any material risk, managing climate-related risk requires an enterprise-wide focus on the issue and appropriate risk prioritization by the board—which of course falls under the purview of the *entire* board and management team, not just one officer or director.

Finally, the NAM is concerned that the proposed rule does not include a safe harbor for any board members identified as having climate expertise pursuant to the proposed disclosure requirement. Audit committee financial experts are protected by the safe harbor in Item 407(d)(5)(iv) of Regulation S-K, and board members with cybersecurity expertise would be similarly protected by the SEC’s proposed Item 407(j)(2). If the final climate disclosures rule maintains a requirement that companies identify any individuals with climate expertise on the board of directors, the SEC should provide any such directors with specific safe harbor protections mirroring those available to financial and cybersecurity experts.

IV. Internal Carbon Price, Scenario Analysis, Transition Plans, and Climate-Related Targets and Goals

The proposed rule would require an issuer to disclose information about any internal carbon prices it maintains, any scenario analyses it uses, and any transition plans it adopts. The NAM is concerned that these reporting requirements could expose competitive information to the marketplace and potentially undermine manufacturers’ efforts to understand the impact of climate-related risks on their business and plan and innovate accordingly. Further, these tools are designed for internal

⁷² *Id.* at 21359.

⁷³ *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, 87 Fed. Reg. 16590 (23 March 2022). Release Nos. 33-11038, 34-94382, IC-34529; available at <https://www.govinfo.gov/content/pkg/FR-2022-03-23/pdf/2022-05480.pdf>.

⁷⁴ NAM Comments on File No. S7-09-22 (9 May 2022). Available at https://documents.nam.org/tax/nam_comments_sec_cybersecurity_rule.pdf.

estimates and planning purposes—they do not necessarily have the rigor or data integrity necessary for a public filing. The mere existence of one of these internal evaluation metrics, irrespective of its materiality or its impact on a company’s strategy, is not sufficient to mandate its public disclosure. The SEC should exercise caution given that making disclosures about these tools could expose proprietary or strategically sensitive information and could ultimately disincentivize companies from utilizing evolving practices to understand climate risks and impacts.

In addition to potentially exposing internal and competitively sensitive information, these disclosure requirements could discourage companies from utilizing new methods and metrics to evaluate climate-related impacts and risks in pursuit of more ambitious climate goals. The NAM supports manufacturers’ efforts to combat climate change, and we are concerned that burdensome disclosure obligations triggered by the utilization of an internal carbon price, scenario analyses, and transition plans could have the unintended consequence of discouraging this important work by exposing companies to regulatory, reputational, and legal risks. The NAM respectfully encourages the SEC to rescind these proposed requirements.

The proposed rule also would require the disclosure of information about companies’ targets or goals related to the reduction of GHG emissions, or any other climate-related target or goal. The NAM supports the objective of this requirement, which is designed to provide investors with the information necessary to understand emissions reductions targets and other climate-related goals announced by public companies. However, overly prescriptive disclosures could discourage issuers from adopting these targets and disincentivize aggressive climate action by public companies. As with the proposed disclosure obligations related to internal carbon pricing, scenario analyses, and transition plans, the legal liability and compliance burden associated with the proposed targets and goals reporting would fall only on companies who have set these goals—and the regulatory, reputational, and legal risks would increase for companies with more ambitious goals. The NAM does not want an SEC reporting requirement to discourage or impede companies’ efforts to address climate change, so we are hopeful that the SEC will make several changes to tailor and improve its proposed targets and goals requirement. The NAM respectfully encourages the SEC to limit the requirement to only material targets and goals, focus the requirement largely on GHG emissions targets, take steps to protect competitively sensitive information, protect companies from the risks associated with litigation and shareholder activism, and clarify that the proposed reporting requirement would only apply to publicly announced targets and goals.

A. Internal Carbon Price and Scenario Analysis

If used, internal carbon prices and scenario analyses can provide companies with rough guidance about the current and potential future impacts of climate change on their business. However, these metrics and analyses are usually customized and specifically designed to highlight an issuer’s strengths and weaknesses with respect to climate. They also can take significant time and resources to develop and maintain. Publicly disclosing the specifics of an internal carbon price or a scenario analysis methodology, as well as any factors that drove the development and adoption of these frameworks and the results of any related analysis, could expose a tremendous amount of information to the public—including a company’s competitors. Such disclosure would obviate much of the competitive benefit associated with adopting internal carbon price planning or conducting scenario analyses, ultimately disincentivizing the use of such strategies.

In the NAM’s view, the proposing release does not provide sufficient justification for these requirements, and it is not clear why investors would need information with this degree of specificity. The proposed rule already requires disclosure of a wide range of information to enable shareholders to understand companies’ exposure to and management of climate-related risk. There is simply no need for these additional requirements, which could serve as an impediment to manufacturers’ efforts to understand and respond to climate-related risks given that the scrutiny and liability

associated with such disclosures could discourage companies from utilizing an internal carbon price or conducting scenario analysis. As such, the NAM opposes the proposed internal carbon price and scenario analysis disclosure requirements.

In addition to the proposed disclosure requirements, the proposing release also solicits comment on whether the SEC should “require all registrants to disclose an internal carbon price and prescribe a methodology for determining that price”⁷⁵ or “require all registrants to provide scenario analysis disclosure.”⁷⁶ The NAM would strongly oppose any such prescriptive, policy-driven requirements. The SEC’s authority to promulgate a rule related to climate hinges on its ability to set disclosure requirements designed to provide investors with material information—in this case, information about material climate risks and companies’ material actions to respond to these risks. The SEC lacks the authority to mandate specific steps that companies should take with respect to climate risks. As such, the SEC should not, and cannot, mandate that companies adopt an internal carbon price or utilize any specific methodology to determine such a price. Similarly, the SEC should not, and cannot, mandate that companies conduct scenario analyses or analyze the impact of any specific scenarios. The NAM appreciates that these substantive policy requirements are not included in the proposed rule, and we respectfully caution the SEC against taking such steps in any final rule.

B. Transition Plans

The NAM agrees that it can be important to understand how companies are responding to climate-related risks. As we have said, we generally support the SEC’s proposed approach to climate risk disclosures, which would require issuers to describe any “activities to mitigate or adapt to climate-related risks,” how climate risks and impacts “are considered as part of the registrant’s business strategy, financial planning, and capital allocation,” and “how any resources are being used to mitigate climate-related risks.”⁷⁷

Given that these requirements would provide investors with sufficient information about companies’ responses to and strategies regarding both physical and transition risks, the NAM respectfully encourages the SEC to rescind its proposed transition plan disclosure requirement. The proposed requirement to report information on an issuer’s transition plans would require detailed disclosures that could expose competitively sensitive information to the market. As with the proposed rule’s internal carbon price and scenario analysis requirements, prescriptive transition plan disclosures could reduce the competitive advantage of adopting aggressive plans to respond to climate change. Specifically, the NAM is concerned by the potential for both the high-level “strategy and implementation” disclosures and the more-specific “metrics and targets” disclosures to expose competitively sensitive information. We are also concerned that exposing companies’ transition plans to public scrutiny and legal liability could disincentivize issuers from adopting ambitious plans and ultimately hamper manufacturers’ efforts to combat climate change. Manufacturers believe strongly in taking appropriate steps to effectively respond to climate-related risks, but requiring overly detailed disclosure about these plans could do more harm than good.

If the SEC is determined to require transition plan disclosures, at a minimum any final rule should clarify that the reporting requirement would only be triggered by the *public* adoption of a transition plan. Limiting the requirement to only publicly announced plans would reduce to some extent the amount of competitively sensitive information companies would be required to disclose. However, the NAM continues to believe that the proposed rule’s risk disclosures would provide investors with

⁷⁵ Proposed Rule, *supra* note 1, at 21358.

⁷⁶ *Ibid.*

⁷⁷ *Id.* at 21467.

sufficient information about companies' transition activities and thus obviate the need for a separate transition plan disclosure requirement.

C. Targets and Goals

The NAM generally supports the SEC's efforts to enhance disclosures about public companies' climate-related targets and goals. Many manufacturers have publicly adopted plans to reduce their GHG emissions and taken significant steps to reduce their GHG footprint. Under the proposed rule, companies would be required to disclose the activities or emissions included in a target, the baselines for measurement and evaluation, the time horizon for meeting the target, and any interim targets adopted, among other data points.

The NAM generally believes that a level of disclosure about significant company targets and goals would be appropriate to inform investors. However, as with the proposed transition plan disclosures, there is a risk that the requirements that an issuer "discuss how it intends to meet its climate-related targets or goals" and "disclose relevant data to indicate whether it is making progress toward achieving the target or goal and how such progress has been achieved"⁷⁸ could expose competitively sensitive information. The SEC should take steps to mitigate these risks by making the reporting requirement more flexible and emphasizing that companies would not be under any obligation to report detailed, competitively sensitive data as part of their descriptions of any targets or goals.

The SEC should also limit the disclosure requirement to material goals. Such a clarification would prevent issuers from being forced to report on minor targets that are not relevant to investors; this would reduce the burden associated with tracking and reporting on targets and goals pursuant to the requirement.

Similarly, the SEC should narrow the scope of the requirement to just GHG emissions-related goals. Emissions reductions targets are the most common iteration of climate goals, and we understand that the SEC wants greater disclosure about these targets. But companies may adopt a wide range of goals related to environmental stewardship, product development, water usage, biodiversity, circularity, waste management, and more that could potentially be categorized as climate-related. These goals may or may not be suitable for a disclosure requirement designed primarily for emissions reduction targets. The SEC could ease compliance with its proposed targets and goals requirement—while still achieving its primary mission of enhancing disclosure about emissions reduction targets—by allowing reporting about other climate-related goals on a voluntary basis.

Additionally, the SEC should remain mindful of the possibility that companies might face litigation or shareholder activism after disclosing aspirational targets, which might not always be met. These risks are heightened under Staff Legal Bulletin ("SLB") 14L, which effectively prohibits public companies from excluding climate-related shareholder proposals from their annual proxy ballot⁷⁹—a standard the NAM said "would put a thumb on the scale in favor of shareholder proposals related to [ESG] topics, irrespective of their relevance to any individual company."⁸⁰ The NAM is concerned that the proposed targets and goals requirement, combined with the effects of SLB 14L, will invite activist shareholder proposals at companies doing their best to understand their climate impact and address climate change. The NAM supports manufacturers' efforts to set ambitious climate-related

⁷⁸ *Id.* at 21406.

⁷⁹ *Staff Legal Bulletin No. 14L* (3 November 2021). Available at <https://www.sec.gov/corpfin/staff-legal-bulletin-14shareholder-proposals>.

⁸⁰ NAM Comments on SLB 14L (30 November 2021). Available at https://documents.nam.org/tax/nam_comments_slb_14l.pdf.

goals, and we would not want an SEC reporting mandate to disincentivize aggressive climate action by subjecting companies to litigation or shareholder activism. We strongly encourage the SEC to continue to emphasize that “[a] registrant’s disclosure of its climate-related targets or goals should not be construed to be promises or guarantees”⁸¹ and, further, to maintain robust safe harbor protections under the PSLRA for any disclosures made pursuant to the targets and goals requirement. The NAM also recommends that the SEC rescind SLB 14L.

Finally, the SEC should clarify that disclosure would only be required if a target or goal is publicly announced. The same should be true of any interim targets associated with a longer-term goal. Our understanding of the targets and goals proposal is that the SEC wants to ensure that companies that “announce plans to be ‘net zero’” take steps to disclose “information that stands behind that claim.”⁸² The Commission’s support for the proposed reporting requirement is clearly driven by the perceived need for enhanced disclosure following the *announcement* of such a goal—and the NAM supports the public disclosure of material information about public emissions goals. It would make little sense, however, to require public disclosure of an internal objective for which an issuer has sought no publicity. Businesses frequently set internal metrics on a wide range of topics, from sales numbers to workplace satisfaction to emissions reductions. These objectives align staff around a common goal and may well be important to a company’s success. They are not, however, public pronouncements deserving of the scrutiny associated with a public filing, and the SEC lacks any authority to mandate their disclosure. As such, the NAM respectfully encourages the SEC to make clear that the proposed reporting requirement would only apply to targets and goals (including interim targets or goals) publicly announced by an issuer. Similarly, the SEC should clarify that the disclosure requirement would only apply to the extent that a company publicly adopts an emissions target for itself (as opposed to goals set by, for example, industry groups).

V. Location of Climate-Related Disclosures

The proposed rule would amend Regulation S-K and Regulation S-X to require the disclosure of climate-related information within a domestic issuer’s annual report in Form 10-K. Climate disclosures would also be required to be included in an issuer’s registration statements, most commonly Form S-1 for initial public offerings (“IPOs”) and Form S-3 for secondary offerings (often shelf offerings). A foreign private issuer (“FPI”) trading on a U.S. exchange would face similar requirements with respect to its annual report (Form 20-F) and its registration statements (most commonly, Form F-1 and Form F-3).

A. Form 10-K

With respect to domestic issuers’ annual reporting obligations pursuant to Form 10-K, the NAM believes that:

- Narrative descriptions of issuers’ climate-related governance, material risks and impacts, risk management, and targets and goals (i.e., proposed Items 1501, 1502, 1503, and 1506 of Regulation S-K) are appropriate to be included in Form 10-K, though it would be more efficient for these items to be incorporated into existing sections of the Form 10-K alongside other risk, risk management, and governance disclosures rather than siloed into a separate Climate-Related Disclosure section. Companies should also have the flexibility to include governance- and risk management-related disclosures in their proxy statements rather than in Form 10-K, if appropriate for their current reporting practices.

⁸¹ Proposed Rule, *supra* note 1, at 21407.

⁸² *Prepared Remarks Before the Principles for Responsible Investment “Climate and Global Financial Markets” Webinar*. Chair Gary Gensler (28 July 2021). Available at <https://www.sec.gov/news/speech/gensler-pri-2021-07-28>.

- Quantitative disclosures of issuers' Scope 1 and Scope 2 GHG emissions (i.e., proposed Item 1504(b) of Regulation S-K) should be removed from the Form 10-K and furnished to the SEC via a new "Form GHG." Information related to the assurance requirements associated with issuers' Scope 1 and Scope 2 GHG emissions (i.e., proposed Item 1505 of Regulation S-K) should be provided alongside the emissions disclosures themselves in "Form GHG."
- The SEC should rescind its proposed quantitative disclosures of issuers' Scope 3 GHG emissions (i.e., proposed Item 1504(c) of Regulation S-K); if required or provided on a voluntary basis, such disclosures should be removed from the Form 10-K and furnished to the SEC via a new "Form GHG." To the extent that the SEC replaces its proposed quantitative Scope 3 requirement with a narrative description of an issuer's exposure to transition risks as a result of its Scope 3 emissions, these qualitative disclosures should be included in Form 10-K under proposed Item 1502 of Regulation S-K.
- The SEC should rescind its proposed requirement that issuers analyze the impact of climate-related risks, weather events, and transition activities on each of the line items in their consolidated financial statements (i.e., proposed Article 14 of Regulation S-X) and should not require such disclosures in Form 10-K. To the extent that the SEC replaces its proposed Regulation S-X amendments with a narrative description of general climate-related impacts on an issuer's financial statements, these qualitative disclosures should be included in Form 10-K under proposed Item 1502 of Regulation S-K.

B. Form S-1 and Form S-3

The NAM opposes the inclusion of climate-related information in domestic issuers' registration statements associated with an IPO (i.e., Form S-1). The proposing release reminds companies that PSLRA liability protections are not available for "forward-looking statements made in connection with an initial public offering."⁸³ Given the uncertain and forward-looking nature of climate-related risks as well as the evolving methodologies used to report those risks and any associated quantitative metrics, the NAM does not believe it would be appropriate to require companies to provide climate risk disclosures without PSLRA protection. Further, requiring a private company considering an IPO to undertake costly and extensive GHG emissions reporting and financial statement metric analysis would impose significant costs and compliance burdens that could ultimately discourage small businesses from going public. In light of these significant concerns, the SEC should not require any climate-related reporting on Form S-1.⁸⁴

Generally, Form S-3 allows incorporation by reference of information included in other documents filed with the SEC (e.g., Form 10-K). As such, the NAM generally believes that issuers should be able to incorporate climate-related information into any Form S-3 filings by referring to Form 10-K. We would not support any requirement that issuers disclose new climate-related information at the time of filing a Form S-3, however.

⁸³ Proposed Rule, *supra* note 1, at 21352.

⁸⁴ In order to further limit the proposed rule's potential barriers to public capital formation, the NAM believes that small and mid-size newly public companies should be fully exempt from the proposed rule for five years (i.e., for the duration of their EGC status). We also support a phase-in period for all newly public issuers, which would allow non-EGCs to delay compliance until after they have filed their first annual report.

C. Foreign Private Issuers

The proposing release solicits comment on whether the SEC should adopt an “alternative reporting provision” that would allow FPIs to satisfy the disclosure requirements described in proposed Subpart 1500 of Regulation S-K (i.e., the proposed rule’s climate risk, governance, and GHG emissions disclosures) and Article 14 of Regulation S-X (i.e., the proposed rule’s financial statement metrics) by reporting pursuant to an “alternative reporting regime” that is “substantially similar” to the proposed requirements.⁸⁵ The NAM would support such an accommodation.

Many foreign companies face reporting requirements in their home country similar to those included in the SEC’s proposed rule. It makes little sense to require these issuers to re-format and re-report information that is already available to investors and subject to scrutiny by a foreign securities regulator. Such duplicative reporting would not benefit investors but would impose significant costs on these businesses and sow confusion. Provided that a foreign jurisdiction’s climate-related reporting obligations largely align with any requirements included in a final SEC rule, the NAM supports allowing FPIs to satisfy the requirements of the SEC rule by complying with the relevant provisions in the foreign jurisdiction’s reporting regime. We also believe that compliance with any global sustainability standards, such as any issued by the recently created International Sustainability Standards Board (“ISSB”), should be sufficient for compliance with the SEC’s rule.

VI. Impact on Small, Newly Public, Mid-Size, and Recently Acquired Companies

The proposed rule would impose significant burdens on small, newly public, mid-size, and recently acquired public companies. The SEC has acknowledged the unique difficulties of complying with such a broad and complex reporting regime by exempting SRCs from the Scope 3 reporting requirement and delaying the compliance date of the proposed rule by one year for accelerated filers and by two years for SRCs. However, more must be done to protect small, newly public, mid-size, and recently acquired companies from the cost, resource diversion, and uncertainty associated with the proposed rule.

The SEC should fully exempt SRCs, EGCs, and issuers that meet the EGC size thresholds (i.e., those with annual revenues below \$1.07 billion and public float below \$700 million, irrespective of how long the issuer has been publicly traded) from the proposed rule. The SEC should also provide all newly public companies with an exemption from the rule until after they have filed their first annual report, which would mirror the compliance dates associated with SOX Section 404. The SEC should allow a similar transition period for recently acquired companies by not requiring compliance for the first two full fiscal years following an acquisition.

These issuers are small and growing companies with limited resources to undertake the significant compliance burden associated with the proposed rule. Any entity that qualifies for an exemption should of course be permitted to provide some or all of the disclosures described in the proposed rule, but the NAM strongly believes that mandating compliance by these small, newly public, mid-size, and recently acquired companies would hamper their growth and disincentivize public capital formation.

If the SEC is unwilling to provide a full exemption for SRCs, EGCs, other newly public companies, other companies that meet the EGC size thresholds, and recently acquired companies, these issuers should at least qualify for an exemption from the proposed rule’s most complicated quantitative reporting requirements: the financial statement impact and Scope 3 emissions reporting requirements (if these provisions are not rescinded, as the NAM has suggested). The SEC has already provided an exemption from the Scope 3 requirement for SRCs, but this exemption should

⁸⁵ Proposed Rule, *supra* note 1, at 21409.

be expanded to their EGC, newly public, EGC-sized, and recently acquired peers. The SEC should also exempt these small, newly public, and recently acquired companies from the proposed amendments to Regulation S-X, which represent arguably the most complicated provision in the entire rule. Providing these targeted exemptions will preserve resources at growing businesses across the country while still requiring companies that represent the vast majority of investor equity holdings in the U.S. to comply with the rule as proposed.

VII. Compliance Dates

For large accelerated filers, most of the proposed rule's provisions would have a compliance date of the fiscal year following the promulgation of a final rule. If the SEC finalizes a rule in 2022, large accelerated filers will be required to comply with most of its provisions in their FY 2023 filings. The proposed rule would phase in compliance obligations for accelerated filers and SRCs beginning in FY 2024 and FY 2025, respectively. Certain provisions also have delayed compliance dates: Scope 3 reporting begins in FY 2024 for large accelerated filers and in FY 2025 for accelerated filers, while the assurance requirements for Scope 1 and Scope 2 emissions phase in beginning in FY 2024. The NAM appreciates these minor allowances, but more must be done to allow companies to prepare for the significant and novel compliance burden associated with the proposed rule.

First, the SEC should delay the earliest compliance dates within the rule by two years as compared to its proposal, so that the earliest disclosure obligations for large accelerated filers would be associated with the third fiscal year following the promulgation of a final rule (as opposed to the first fiscal year after finalization, as proposed). This would allow companies more time to implement new disclosure controls and processes, including those around any new systems that are required to comply with the rule. In delaying the earliest compliance dates, the SEC should maintain its proposed phase-in approach for accelerated filers and, if not exempted from the rule, SRCs. Assuming finalization in 2022, this would mean that large accelerated filers would begin complying in their FY 2025 filings, followed by accelerated filers in FY 2026 and SRCs in FY 2027. Other compliance dates would need to be adjusted accordingly; for example, beginning Scope 1 and Scope 2 reporting in FY 2025 would mean that assurance for these emissions reports would phase in beginning in FY 2026.

The SEC should also provide additional time for companies to come into compliance with the rule's most complicated quantitative reporting requirements: the financial statement metrics and Scope 3 emissions reporting requirements (assuming these provisions are not rescinded, as the NAM has urged). The SEC should delay the compliance dates associated with these requirements until, at the earliest, the fourth fiscal year after the rule's finalization. This would mean that large accelerated filers would be required to comply with these quantitative disclosures beginning in their FY 2026 filings, followed by accelerated filers in FY 2027.

Assuming the SEC finalizes a climate disclosures rule by the end of 2022, the NAM would suggest compliance dates associated with the following fiscal years' SEC filings for the key provisions in the rule:

	Regulation S-K Risk Disclosures and Scope 1 and Scope 2 GHG Emissions Disclosures	Scope 3 GHG Emissions Disclosures	Regulation S-X Financial Statement Metrics	Limited Assurance of Scope 1 and Scope 2 GHG Emissions Disclosures	Reasonable Assurance of Scope 1 and Scope 2 GHG Emissions Disclosures
Large Accelerated Filers	FY 2025 ⁸⁶	Rescind	Rescind	FY 2026	Rescind
		<i>If requirement is not rescinded:</i> FY 2026	<i>If requirement is not rescinded:</i> FY 2026		<i>If requirement is not rescinded:</i> FY 2028
Accelerated Filers	FY 2026	Rescind	Rescind	FY 2027	Rescind
		<i>If requirement is not rescinded:</i> FY 2027	<i>If requirement is not rescinded:</i> FY 2027		<i>If requirement is not rescinded:</i> FY 2029
SRCs	Exempt	Already exempt under the proposed rule	Rescind	Already exempt under the proposed rule	Already exempt under the proposed rule
	<i>If SRCs are not exempt:</i> FY 2027		<i>If requirement is not rescinded:</i> Exempt		

The NAM recognizes that the SEC would like to expedite compliance with the proposed rule. However, rushing the compliance process, especially for the rule’s more difficult provisions, could result in even more dramatic cost increases and reporting difficulties. Further, requiring compliance shortly after adoption could result in less reliable disclosures for investors. The NAM appreciates the SEC’s work to enhance and standardize climate disclosures, but if the compliance dates for the proposed rule’s myriad provisions are not tailored then it will significantly increase burdens on issuers and undercut the comparability of the required disclosures.

VIII. The SEC’s Legal Authority

The NAM appreciates the SEC’s ongoing consideration of how best to ensure that investors have access to material information about public companies’ material climate risks. To the extent that a final rule allows for the disclosure of financially material information in a standardized and comparable format, the NAM believes it can help investors appropriately understand the impacts of climate change and business’s critical efforts to respond to this generational challenge. However, the NAM is concerned that several provisions within the proposed rule go beyond simply informing investors about issuers’ material climate-related risks.

⁸⁶ To clarify, our suggested compliance dates here are the fiscal years to which the data would apply; in all cases, the required reports would be due during the following year. For example, the NAM supports large accelerated filers coming into compliance with the Regulation S-K risk disclosures and Scope 1 and Scope 2 GHG emissions disclosures in their FY 2025 filings, due in early (Form 10-K) or mid (“Form GHG”) 2026.

For example, the proposed rule's characterization of Scope 3 GHG emissions disclosures as always necessary to understand an issuer's exposure to climate-related risks is undermined by the text and effect of other provisions within the rule—leaving a reporting obligation justified only by policy concerns outside the SEC's purview. The proposing release even discusses these outside justifications, including the Commission's apparent desire to help institutional investors reduce the GHG footprint of their holdings and prevent issuers from outsourcing emissions-generating activities. The Scope 3 reporting requirement would also effectively mandate new data collection processes by private companies outside the SEC's regulatory purview.

Similarly, certain of the proposed Regulation S-K disclosures require more granular information than can be justified by the investor protection standard under which the Commission operates, including the mandate to disclose ZIP-code-level information about climate-related risks and the requirements to disclose competitively sensitive internal evaluation metrics like an internal carbon price or scenario analyses.

The SEC is, of course, legally constrained by the confines of its statutory and regulatory authority.⁸⁷ And that authority is centered on facilitating the provision of material information for the protection of investors. As recently as 2016, the SEC itself made clear that “disclosure relating to environmental and other matters of social concern should not be required of all registrants unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material.”⁸⁸ To the extent that the proposed reporting requirements exceed material disclosures necessary for a reasonable investor to understand the total mix of information available about an issuer and to make a corresponding investing or voting decision, they are unlawful.

In addition to requiring the tracking and disclosure of immaterial information, portions of the proposed rule implicate the SEC's obligation to avoid arbitrary and capricious rulemaking actions. For example, the proposed Regulation S-X amendments would require such a high degree of conjecture that they are intrinsically arbitrary and capricious. Financial statement metrics based on such conjecture will not be useful for investors, and the compliance costs associated with the proposed rule's financial statement provisions far outweigh any potential benefits.⁸⁹ Just as an agency action itself cannot be based on speculation,⁹⁰ an agency cannot permissibly force a regulated entity to speculate on outcomes without adequate justification.

The arbitrary and capricious nature of individual provisions within the rule is further embodied in the proposing release's cost estimates, which the NAM believes dramatically understate the true costs public companies would incur to comply with the rule.⁹¹ The cost estimates also ignore the impact on

⁸⁷ See *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 314–316 (2014) (noting that courts routinely hold unlawful agency action in violation of statutory limits on agencies' authority); see also *Reuters Ltd. v. FCC*, 781 F.2d 946, 95 (D.C. Cir. 1986) (explaining that an agency may not “deviate from its rules in order to achieve what it deems to be justice”).

⁸⁸ *Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23916 (22 April 2016). Release Nos. 33-10064, 34-77599; available at <https://www.govinfo.gov/content/pkg/FR-2016-04-22/pdf/2016-09056.pdf>.

⁸⁹ See *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005) (noting that the Commission “has a separate obligation to determine as best it can the economic implications of [a] rule”); see also *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2012) (SEC must “consider the effect of a new rule upon ‘efficiency, competition, and capital formation’” (quoting 15 U.S.C. §§ 78c(f), 78w(a)(2))).

⁹⁰ See *Sorenson Communications, Inc. v. FCC*, 755 F.3d 702, 708-09 (D.C. Cir. 2014).

⁹¹ See *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (D.C. Circuit will not “tolerate rules based on arbitrary and capricious cost-benefit analyses”); see also *Owner–Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 206 (D.C. Cir. 2007) (vacating regulatory provisions where cost-benefit analysis supporting them was based on unexplained methodology).

privately held businesses that will be impacted if a final rule includes a Scope 3 GHG emissions reporting requirement.⁹²

Additionally, disclosure requirements throughout the proposed rule raise significant questions about the appropriateness of the SEC putting its thumb on the scale with respect to major questions about substantive climate policy. To the extent that the proposed rule's provisions are not narrowly tailored to the SEC's mission but rather seek to institute standards or guide corporate behavior for the purpose of achieving specific environment-, energy-, or climate-related policy outcomes absent a "specific congressional mandate,"⁹³ the proposed rule represents a significant encroachment by the SEC into areas traditionally—and more appropriately—governed by Congress and the EPA.⁹⁴ The Commission's charge is to protect investors, support capital formation, and foster efficient markets; it does not have free rein to implement policy judgments outside that mandate and area of expertise. Relatedly, any SEC rule seeking to implement environmental policy would not be given any deference by a reviewing court.⁹⁵

Though the SEC justifies its proposed rule as necessary for the protection of investors, substantive judgments about climate policy are present throughout the proposal. As Commissioner Peirce has noted, the proposed rule goes well beyond requiring companies to identify risks; rather, the rule affirmatively identifies risks "that managers *should* be considering and even suggests specific ways to mitigate those risks."⁹⁶ Further, the proposing release justifies many of the rule's provisions by citing the support of organizations and entities that have called on the SEC to promulgate a climate reporting framework specifically to achieve policy goals related to climate, energy, and environment issues. To be clear, policy questions related to addressing climate change are critically important, but the SEC does not have the expertise or congressional mandate to address them. That authority lies with Congress and the EPA—the federal agency to which Congress has specifically delegated the relevant regulatory authority.

Finally, requirements that exceed factual disclosures necessary to ensure investor awareness of financial risks or avoid confusion could infringe upon issuers' First Amendment rights. The SEC may require regulated entities to report purely factual, non-ideological information material to investor decision-making, but climate change and the appropriate response to its impact are nuanced topics that carry political overtones. Detailed disclosure requirements related to an issuer's beliefs about climate risks, the likelihood it assigns to those risks, and metrics related to these beliefs could constitute government-compelled speech.⁹⁷

⁹² See *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("[W]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.").

⁹³ 2016 Regulation S-K Concept Release, *supra* note 88, at 23970.

⁹⁴ See *Global Tel*Link v. FCC*, 866 F.3d 397, 412 (D.C. Cir. 2017) (vacating an FCC regulation as "beyond the statutory authority of the Commission" where the agency acted to further a "desirable social policy" while ignoring statutory limits.).

⁹⁵ See, e.g., *King v. Burwell*, 576 U.S. 483, 486 (2015) (declining to defer to an IRS interpretation of the Affordable Care Act, as the IRS "has no expertise in crafting health insurance policy" and had Congress wished to assign interpretive authority to the IRS, "it surely would have done so expressly."); see also *Gonzales v. Oregon*, 546 U.S. 243, 266–267 (2006) (declining to defer to the Attorney General's interpretive rule regulating medical practice because the "authority claimed by the Attorney General [was] both beyond his expertise and incongruous with the statutory purposes and design.").

⁹⁶ *We are Not the Securities and Environment Commission - At Least Not Yet*. Commissioner Hester M. Peirce (21 March 2022). Available at <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>.

⁹⁷ See *Nat'l Ass'n of Manufacturers v. SEC*, 800 F.3d 518, 522, 524 (D.C. Cir. 2015) (rejecting disclosure requirements in regulation "directed at achieving overall social benefits" and which were "not intended to generate measurable, direct economic benefits to investors or issuers").

In these comments, the NAM has suggested critical improvements that would focus the proposed rule on the SEC’s statutory mission: facilitating the provision of material information for the purpose of informing and protecting investors. These tailored solutions would allow the SEC to avoid difficult questions about its authority to require immaterial disclosures, make climate policy, and compel protected speech. We believe that the SEC can fulfill its critical mission to protect investors, facilitate capital formation, and maintain efficient markets by incorporating these improvements into any final rule. The NAM agrees with the SEC that providing material climate-related information to investors can “enable them to make informed judgments about the impact of climate-related risks on current and potential investments”⁹⁸—provided that any reporting requirements are narrowly tailored to achieve this goal. The NAM respectfully encourages the SEC to make the changes necessary to ensure any final rule remains within the limits of the Commission’s statutory authority and substantive expertise.

* * * *

Manufacturers are leaders in America’s fight against climate change, and these innovative companies are working tirelessly to develop new technologies and business strategies in response to this generational challenge. They also are investing in processes that enable them to better understand their own impact on the climate. These efforts are critical to addressing climate-related risks and building a safe, resilient economy for the future.

Publicly traded manufacturers also are taking strides to inform investors about this important work. Many companies currently utilize voluntary disclosure frameworks and corporate sustainability reporting—and these ongoing efforts are critical to ensuring that investors have access to material information about issuers’ climate-related risks.

The NAM appreciates that the SEC is considering whether these existing practices could be enhanced or standardized. In some areas, consistency and comparability can be improved by SEC guidelines that underscore the importance of material climate-related disclosures while still acknowledging the evolving nature of climate-related data and the associated analysis and reporting methodologies. However, we are concerned that the SEC’s proposed rule will prove overly burdensome and unworkable in many respects. The costs imposed by its most complicated provisions, combined with a lack of flexibility and an expedited implementation timeline, could make compliance extremely difficult for public companies. Critically, despite these significant costs, the investor benefit associated with certain of the rule’s provisions is unclear at best—and in some instances the required disclosures likely would *increase* investor confusion or inhibit climate ambition.

The NAM respectfully encourages the SEC to reconsider its proposed approach to climate-related disclosures and to re-propose a rule that is more appropriately tailored to give investors insight into the material climate-related risks that public companies face. At a minimum, we urge the Commission to incorporate our suggested improvements into any final rule. Making targeted changes to the proposal would substantially reduce the cost of compliance for issuers and increase the utility of the required disclosures for investors. Narrowing the scope of the rule also would help ensure that it remains within the bounds of the SEC’s statutory authority.

⁹⁸ Proposed Rule, *supra* note 1, at 21462.

The NAM supports manufacturers' efforts to address any material impacts of climate change and to disclose material climate-related information to their investors. We look forward to working with the SEC to ensure that any final climate disclosures rule supports this critical work.

Sincerely,

A handwritten signature in black ink that reads "Charles P. Crain". The signature is written in a cursive, flowing style.

Charles Crain
Senior Director, Tax and Domestic Economic Policy