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<u>*Submitted electronically via SEC.gov*</u>

The Honorable Chair Gary Gensler
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: File No. S7-10-22; Public Comment, The Enhancement and Standardization of Climate-Related Disclosures for Investors

Dear Chair Gensler:

Endeavor Energy Resources, L.P. ("EER") appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's (the "SEC" or the "Commission") proposed rule on The Enhancement and Standardization of Climate-Related Disclosures for Investors (the "Proposed Rule").

EER is a privately held exploration and production company. We are one of the largest private operators in the United States, with approximately 370,000 net acres across the Martin, Howard, Midland, Glasscock, Upton, and Reagan Counties of the Midland Basin, Texas. EER was the first privately held company to serve as a member of the Permian Strategic Partnership, a coalition of seventeen oil and gas companies dedicated to supporting projects that positively impact education, healthcare, housing, roads, and workforce development.

Although the Proposed Rule applies to reporting companies, EER provides the following comments from the perspective of a non-reporting company. Fundamentally, we believe that the Proposed Rule will discourage capital formation and adversely affect the competitiveness of the U.S. capital markets by undercutting the optionality that private companies currently have in raising capital. This concern is premised primarily on the Commission's implementation timeline, the costs of building the requisite internal controls and processes for compliance, the impact of the disclosures being filed rather than furnished, and the chilling effect upon voluntary actions such as climate scenario analysis. Specifically, and for the reasons discussed below, EER believes the final version of the Proposed Rule should:

1. Eliminate Scope 3 greenhouse gas ("GHG") emissions reporting requirements or, alternatively, expand the safe harbor to accommodate private companies that do not collect or report GHG emissions by recognizing that such data are not reasonably available to those companies and therefore do not need to be disclosed;
2. Defer the implementation timeline to fiscal year 2025 or 2026;
3. Incorporate an extended phase-in period applicable to newly public companies, providing temporary relief from full disclosures and compliance; and

4. Remove the granular requirements associated with the disclosure of voluntary actions such as climate-scenario analysis.

1. Eliminate Scope 3 Disclosure Requirement or Expand Safe Harbor

Proposed Item 1504 would require public companies to disclose their Scope 3 GHG emissions "if material" or included as part of a GHG emissions reduction commitment. The Proposed Rule defines Scope 3 GHG emissions as "all indirect GHG emissions not otherwise included in a registrant's Scope 2 emissions, which occur in the upstream and downstream activities of a registrant's value chain."[1] The definition identifies fifteen potential categories of activities that could give rise to Scope 3 GHG emissions, further split into upstream (*e.g.*, a registrant's purchased goods or transportation and distribution of the same) and downstream (*e.g.*, end-of-life treatment by a third party of the registrant's sold products or investments by the registrant).[2] This definition effectively requires public companies to obtain information on the Scope 1 and 2 GHG emissions of every entity in their supply chain, regardless of whether these suppliers or customers are public companies that would also be subject to the Proposed Rule, and appears to presuppose that entities within a registrant's value chain are currently tracking, or even capable of tracking, GHG emissions data. EER, like most private companies, does not currently maintain a GHG emissions inventory as contemplated under the Proposed Rule,[3] and such an obligation on private companies would be expensive and administratively burdensome to implement.

In recognition of the difficulties of reporting Scope 3 GHG emissions, such as obtaining the necessary data or verifying the accuracy of that information, the Commission proposes a limited safe harbor from liability. Applicable only to Scope 3 GHG emissions, the safe harbor provides that a registrant's disclosure will not be deemed a fraudulent statement "unless is it shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith."[4] Notwithstanding this safe harbor, substantially all disclosures under the Proposed Rule—to include Scope 3 GHG emissions—will be treated as "filed" rather than "furnished" and thus subject to potential liability under Exchange Act Section 18. If such disclosures are included in a registration statement, Sections 11 and 12 of the Securities Act of 1933 would also become applicable.[5]

Public companies subject to the Proposed Rule face a number of challenges in navigating and complying with the prescriptive requirements for calculating and reporting their Scope 3 GHG emissions, all while attempting to ensure they are not unnecessarily exposed to legal liability. To claim the protections of the limited safe harbor applicable to Scope 3 GHG emissions, public companies will inevitably insist that private companies in their supply chain prepare and supply

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[1] Proposed 17 C.F.R. § 229.1500(r).
[2] *Id.*
[3] EER reports its direct GHG emissions consistent with Subpart W of the U.S. Environmental Protection Agency's ("EPA") Greenhouse Gas Reporting Program. EER does not collect data related to its Scope 2 emissions.
[4] *Id.* § 229.1504(f)(1).
[5] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,411 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, and 249).

GHG emissions data to them. The indirect effects of the Proposed Rule, therefore, impose significant burdens relating to the collection, calculation, and verification of data on companies that are not currently—and may never become—subject to the scope of the Commission's authority.

As a result of the above, we expect that private companies, to the extent they transact with public reporting companies, will be increasingly subject to rigorous contractual obligations regarding the preparation and provision of climate-related data to assist third parties with their compliance obligations. As an example, EER interacts with many public companies in the upstream, midstream, and downstream segments of the oil and gas industry (including public suppliers of goods and services related to EER's exploration and production business), lenders to EER under its credit facility, purchasers of EER's private debt instruments, and counterparties to EER's hedging transactions. EER expects that the Scope 3 GHG emissions reporting requirements of the Proposed Rule will force these public companies to demand significant GHG emissions data from EER; however, EER lacks the necessary systems and personnel to collect such data.

Further, as public companies attempt to navigate the Proposed Rule, they will seek to ensure that they have a legal recourse in the event that the climate-related data is not provided by their private counterparties on a timely basis or at all, or is provided but ultimately turns out to be incorrect. This will be especially true for Scope 3 GHG emissions data where public companies will seek to fall within the limited safe harbor and establish either the "reasonable basis" or "good faith" required. Thus, again, the indirect effects of the Proposed Rule foists the burdens of compliance upon private companies not within the parameters of the Commission's authority by obligating such companies to report and track their own GHG emissions data and certify such data to their publicly traded business partners. Furthermore, given that public companies will likely demand stronger contractual indemnities from private entities within their value chain related to their collection of GHG emissions data to protect against risks related to the narrow safe harbor, the Proposed Rule will unnecessarily expose such private entities to heightened risk of liability as their public company partners seek to mitigate their own exposure to the legal risks arising from the Proposed Rule. The Proposed Rule goes far beyond the mandate of securities laws without express Congressional authorization.

Accordingly, EER encourages the Commission to consider the following recommendations when finalizing the Proposed Rule:

i. Eliminate the disclosure requirement for Scope 3 GHG emissions altogether. Alternatively, if the Commission chooses to retain the Scope 3 GHG emissions reporting requirement, it should expand the safe harbor to account for the indirect effects upon private companies. For example, the safe harbor should accommodate private companies who do not engage in collection and reporting of their GHG emissions and provide a "reasonably available" protection for public companies with respect to liability.

ii. Provide that emissions data is furnished rather than filed for all scopes of emissions.

2. Defer Implementation

Under the Proposed Rule, large accelerated filers will be required to disclose all climate-related qualitative and quantitative data, including those surrounding Scope 1 and Scope 2 GHG emissions, except Scope 3 GHG emissions and the associated intensity metric for fiscal year 2023.[6] Accelerated filers and non-accelerated filers will be required to disclose such information for fiscal year 2024 and smaller reporting companies ("SRCs") for fiscal year 2025.[7] This implementation timeline applies to both annual reports and registration statements.[8] Accelerated filers and large accelerated filers would also be required to file an attestation report covering the disclosure of their Scope 1 and Scope 2 GHG emissions.[9] In order to attest to the Scope 1 and Scope 2 GHG emissions disclosure, the attestation provider would need to include in its evaluation relevant contextual information, including presentation requirements, the calculation instructions, and certain methodology, organizational boundary and operational boundary information.[10]

This implementation timeline presents a number of difficulties and, we believe, will significantly deter private companies from accessing the public markets, thereby restricting investment opportunities for public investors. Private companies generally "go public" through one of various traditional transaction structures, including underwritten initial public offerings ("IPOs"), mergers with special purpose acquisition companies ("SPACs"), or business combination transactions with existing public operating companies ("M&A"). The Proposed Rule would require private companies desiring to undertake, *e.g.*, an IPO, to incorporate the required climate-related data and disclosures in the registration statement for the same number of years as financial statements are presented (*i.e.*, generally two to three years). These requirements will be difficult to comply with given their complexity, and represent a significant cost, burden, and barrier to entry on the public markets. While private entities may have limited ability to gather some historical Scope 1 GHG emissions data if they are subject to the EPA's Greenhouse Gas Reporting Program, the burdens involved in reconstructing two to three years of historical Scope 3 inventory to go public represents a monumental task which, when coupled with the liability exposure the entity would face because of the lack of a robust safe harbor in the Proposed Rule, will ultimately discourage capital formation.

More significantly, the Proposed Rule in its current form will apply to private companies seeking to go public *before* if applies to public companies of the same size. The Proposed Rule explicitly notes that the climate-related disclosures and data must be included in registration statements but, per the implementation timeline, provides a delayed compliance date for registrants other than large accelerated filers. A smaller private company contemplating an IPO that would, if already public, qualify as an accelerated filer or non-accelerated filer, would be required to comply with the Proposed Rule's disclosure requirements before an existing accelerated filer or non-accelerated filer, thereby increasing the burden on new entrants to the public markets. Likewise, the Proposed Rule's amendments to Form S-4 would require a private target company

[6] *Id.* at 21,412.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 21,436.
[10] *Id.* at 21,392 n.561.

to present all the disclosures required by the Proposed Rule in a Registration Statement on Form S-4 registering the equity securities of the acquiror to be issued in an M&A transaction. For a non-reporting company that has not maintained such records (and which may have been indifferent as to whether its potential acquiror was a reporting company), such a disclosure requirement presents a significant potential barrier to being acquired in an M&A transaction or a SPAC merger. Moreover, the relevance of such information (*i.e.*, the historical climate data of a company being merged out of existence) to the shareholders of the acquiror that are voting on the transaction is of dubious significance and its disclosure could be required before a similarly sized existing public company is required to provide it under the transition requirements.

This is in sharp contrast to the approach taken by the Commission in the context of Section 404 of the Sarbanes-Oxley Act of 2002. Section 404 requires public companies' annual reports to include the registrant's assessment of its internal controls over financial reporting and an auditor's attestation. The Commission's rules, however, provide some relief to newly public companies: they have until the second annual report form to comply and include the requirements of Section 404. To put this in perspective, the Commission has judged that a company may go public absent any assessment of or attestation regarding its internal controls, which goes to the very heart of the accuracy of financial statements and public reporting. However, under the Proposed Rule, the Commission will not permit a company to go public without first disclosing multiple years of climate-related data. This is inconsistent with capital formation, only furthering the current trend of decreasing numbers of public companies.

As a result, smaller private companies—the very same companies that often do not have the resources available to comply with the requirements of the Proposed Rule and within the implementation timeline—will likely bear a disproportionate burden under the Proposed Rule.

Accordingly, EER recommends that:

i. The Commission defer its implementation timeline to fiscal year 2025 or 2026 (*i.e.*, filed in 2026 or 2027) to allow sufficient time for the significant efforts of all companies (both private and public) to implement the necessary internal controls, frameworks, and reporting processes to ensure compliance; and
ii. The Commission eliminate the acquired company disclosure requirement in Form S-4 and implement a phase-in period applicable to newly public companies in the IPO context. For example, drawing upon the Commission's prior approach elsewhere, new public companies should be allowed at least a full fiscal year before including and complying with all the requirements of any final rule in their respective securities filings.

3. Phase-In Period for Newly Public Companies

The Proposed Rule requires extensive climate-related disclosures, compliance with which will be costly. In the preamble, the Commission sets forth the anticipated direct and indirect costs, noting that the former "could potentially be significant."[11] Direct costs could include the gathering

[11] *Id.* at 21,439.

of the information required to be disclosed under the Proposed Rule, the reallocation or hiring of personnel (*e.g.*, in-house, third-party consultants), conducting climate-related risk assessments, collection of data, and the measuring of emissions. For non-SRCs, the Commission anticipates that the first year of compliance will cost an estimated $640,000 with subsequent annual costs estimated to be $530,000.[12] For SRCs, the Commission anticipates that the first year of compliance will cost an estimated $490,000 with subsequent annual costs estimated to be $420,000.[13]

The Proposed Rule's climate-related disclosures cannot be addressed at the last minute. Accordingly, companies—both private and public alike—face significant expenditures, as the Commission itself anticipates, to build the internal controls and processes as required by the Proposed Rule, to include board, management, risk, and strategy. These time-intensive, resource-heavy measures will impair the abilities of private companies to pursue their business plans and grow through private capital. Increased costs will create significant burdens even if such private companies ultimately never seek to access the public market. Relatedly, as compliance with the Proposed Rule will require significant forethought, planning, and expense well in advance of any access to the public markets, the current form of the Proposed Rule would have the effect of imposing significant costs on private businesses due to the absence of applicable phase-in periods or similar exemptions. Newly public companies, or companies selling to public companies as part of a transaction that would require comparable disclosures, would hugely benefit from applicable protections comparable to those provided to SRCs under the Proposed Rule.

EER recommends, and as noted previously, that the Commission implement a phase-in period applicable to newly public companies. Such a phase-in period will help mitigate the dwindling numbers of public companies—private companies may be more willing to undertake an IPO with the knowledge that they have time to implement the systems required for compliance.

4. Remove Requirement for Disclosure of Voluntary Climate-Scenario Analysis

The Proposed Rule requires disclosure of the resilience of a public company's business in light of potential future changes in climate-related risks. Pursuant to Proposed Item 1502, companies that have voluntarily undertaken climate-scenario analysis (or other analytical tools) to assess the resiliency of their business must make a number of additional disclosures.[14] Public companies will have to disclose the scenarios considered (*e.g.*, an increase of not greater than 3 °C, 2 °C, or 1.5 °C above pre-industrial levels), "including parameters, assumptions, and analytical choices, and the projected principal financial impacts" on the company's business and integrate both qualitative and quantitative information.[15]

EER agrees that climate-scenario analysis is an important tool for companies to utilize to understand the resiliency of their business. However, as the Proposed Rule will immediately apply to private companies wanting to go public (*see* Section 2 above), the additional and burdensome disclosure requirements associated with climate-scenario analysis will likely result in some

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[12] *Id.*
[13] *Id.*
[14] Proposed 17 C.F.R. § 229.1502(f).
[15] *Id.*

hesitancy to conduct such actions. Consequently, such companies may choose to avoid any further reporting requirements resulting from voluntary actions, such as climate-scenario analysis, by avoiding the undertaking of those actions in the first place. This directly inverts any potential benefits, discouraging and disincentivizing companies from engaging with such analytical tools and depriving investors of useful information. The Proposed Rule's disclosure requirements are especially difficult for private companies to navigate given they are not subject to the same external market forces that public companies are, such as shareholders or external third parties encouraging the undertaking of climate-scenario analysis. Private companies wishing to go public will already have to change much of their securities reporting and, in light of the disclosure requirements, much of their internal business, strategy, and outlook. The lack of certainty as to disclosure of voluntary actions only compounds the burdens of transition.

The Commission should remove the granular, potentially confidential and proprietary disclosures associated with the undertaking of climate-scenario analysis and other analytical tools. This will mitigate the discouragement of conducting such voluntary actions and help alleviate some concerns of private companies as they go public.

EER appreciates the opportunity to comment on the Proposed Rule and provide the perspective of a private, non-reporting company. We thank the Commission for its consideration and look forward to continued dialogue.

Respectfully submitted,

Endeavor Energy Resources, L.P.