June 16, 2022

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

Via Email: rule-comments@sec.gov

Re: File No. S7-10-22 – The Enhancement and Standardization of Climate-Related Disclosures for Investors

Dear Ms. Countryman:

We are a group of commentators with diverse experience in securities and corporation law, business management, accounting, and corporate governance generally. Combined, we bring to bear well over a century's work in areas bearing on these important issues, and although we have diverse experiences and viewpoints on many issues, we have a shared interest in helping the Securities and Exchange Commission (the "Commission" or the "SEC") grapple with, and propose a cost-effective approach to, the urgent issue of providing American investors with important information on the effect climate change has on the companies in which they invest.[1]

It is in that spirit that we express our gratitude for the opportunity to comment on the Commission's proposal to require public disclosure to investors of meaningful information about the substantial risks that climate change poses for the issuers of publicly traded securities. These important disclosures will protect investors in those securities and help promote efficiency, competition, and capital formation.

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[1] We speak solely in our individual capacities, but do set forth present and past affiliations so that our collective experiences can be understood. Nothing we say should be interpreted as the position of any organization of any kind with which we have a present, past or future affiliation. We speak only for ourselves. We also wish to acknowledge the research and drafting assistance of Cody Westphal, Esquire and Nicole Hovatter, and the critical support provided by Peggy Pfeiffer.

To frame our comments, we wish to underscore our starting position. If the only choice were to have the rule adopted as proposed, or to not have the rule, we would support adoption of the rule "as is." Our reasoning is simple. The rule as proposed will help provide investors with uniform, more comprehensive disclosures and greatly enhance the availability of comparable, reliable data and information regarding climate change and its risks. A more than sufficient number of investors of all types have credibly claimed and demonstrated that these disclosures will allow them to make more informed and better decisions regarding risks facing and valuation of the companies making these disclosures, and are therefore material to them and appropriate for their protection.

In our view, the proposed rule is a core exercise of the SEC's well-established authority to require disclosure necessary and appropriate to protect the integrity of our nation's securities markets and the investors in those markets. Indeed, to conclude otherwise would upend settled understandings of securities law, and deny investors of all classes access to quality disclosures to make prudent investing and voting decisions on issues that affect the future of American companies and the American economy.

It is in that supportive spirit that we advance the following comments, recognizing that the choice presented to us and the Commission is not between this rule and no rule, but also includes what we believe is a better rule. We are therefore taking up the Commission's invitation to provide recommendations that will make the substantial benefits of the proposed rule even greater, while also reducing the implementation costs the proposed rule will impose on registrants. Put simply, our view is that a rule of this kind will have substantial value for investors, and that if the suggestions we advance are adopted, the value of this rulemaking to investors will substantially increase, and be achieved at a much lower cost, and the Commission's important investor-protection objectives will be better served.

I. The SEC's Statutory Authority to Require Climate Disclosure Important to Investors Is Well-Established and Should Continue to Be Respected by the Judiciary

The SEC's statutory authority to require disclosure about the effect of climate change on issuers and the climate impact of issuers is firmly rooted in the statutory text. A fundamental power of the SEC since 1934 has been its authority to authorize the Commission to promulgate rules for registrant disclosure "as necessary or appropriate in the public interest or for the protection of investors."[2] That grant of authority was intentionally broad and designed to give the SEC, which regulates dynamic aspects of a market economy, the power and "flexibility" to address "the complicated nature of the problems" that Congress aimed to resolve, including inadequate disclosure.[3] For that reason, in keeping with Congressional intent, and without further explicit Congressional direction, the SEC has used its authority over the near-century since its creation to require disclosures on topics that have emerged as salient to the integrity of markets and prudent investing, such as the: interests of affiliates in material transactions involving an issuer; performance and background of management; management discussion and analysis ("MD&A"); indemnification arrangements for officers and directors; executive

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[2] *See, e.g.*, 15 U.S.C. §§ 77g, 77j, 77s(a), 78c, 78i, 78j, 78l, 78m(a), 78n(a), 78o(d), and 78w(a); *see also* 15 U.S.C. § 78n(a) (proxy solicitation), Sections 7, 10, 19(a) and 28 of the Securities Act of 1933, as amended (the "Securities Act") and Sections 3(b), 12, 13, 15, 23(a) and 36 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). In 1996, Congress added Section 2(b) to the Securities Act and Section 23(a)(2) to the Exchange Act, providing: "Whenever pursuant to this subchapter the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." *See* 15 U.S.C. § 77(b).

[3] *See* H.R. REP. NO. 73-1383, at 6-7 (1934); *see also* Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1045 (D.C. Cir. 1979) (concluding that Congress "opted to rely on the discretion and expertise of the SEC for a determination of what types of additional disclosure would be desirable").

compensation; mergers and acquisitions; disclosure controls and procedures; selective market disclosures; compensation discussion and analysis; board oversight of risk management; mining properties; human capital management; and most recently, form and content of financial statements.[4] As noted above, some of these topics and disclosures were or have become among the most salient to investors, and it has never been seriously suggested that the SEC's otherwise unquestioned broad disclosure authority should stop at the water's edge of the most important disclosure subjects. That would be perverse and undermine the clear intent of the statutory scheme.

Consistently, and importantly, the Commission has for nearly a half century properly used its authority to require disclosure regarding environmental and climate-related issues of importance to investors.[5] During the early 1970s, the Commission first required specific disclosure by public companies of information about the environment. The Commission has

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[4] *See, e.g.*, Item 32 of Form S-1, Adopted in Miscellaneous Amendments, 14 Fed. Reg. 91, 92 (Dec. 31, 1948) (interests of affiliates in material transactions); Uniform and Integrated Reporting Requirements: Directors and Executive Officers, Management Remuneration, Legal Proceedings, Principal Security Holders and Security Holdings of Management, 43 Fed. Reg. 34,402 (July 28, 1978) (performance and background of management); Amendments to Annual Report Form, Related Forms, Rules, Regulations, and Guides; Integration of Securities Acts Disclosure Systems, 45 Fed. Reg. 63-630 (Sept. 2, 1980) (to be codified at 17 C.F.R. pts. 229, 231, 239 et al.) (MD&A); Adoption of Integrated Disclosure System, 47 Fed. Reg. 11,380 (Mar. 3, 1982) (indemnification arrangements for officers and directors); Executive Compensation Disclosure, 57 Fed. Reg. 29,582 (June 23, 1992) (to be codified at 17 C.F.R. pts. 229, 240); Mergers and Acquisitions, 34 Fed. Reg. 61,408, 61,443 (Oct. 22, 1999) (to be codified at 17 C.F.R. pts. 229.1000 through 229.1016); Disclosure Controls and Procedures, 68 Fed. Reg. 36,636, 36,663 (June 5, 2003) (to be codified at C.F.R. pt. 229.307); Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,715 (Aug. 15, 2000) (to be codified at 17 C.F.R. pts. 240, 243, 249); Compensation and Discussion Analysis, 71 Fed. Reg. 53,158, 53,163 (Aug. 29, 2006) (to be codified at 17 C.F.R. pt. 229.402(b)(1)); Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334 (Dec. 16, 2009) (to be codified at 17 C.F.R. pts. 229, 239, 240, 249, 274) (board oversight of risk management); Modernization of Property Disclosures for Mining Registrants, 83 Fed. Reg. 66,344 (Oct. 31, 2018) (to be codified at 17 C.F.R. 229, pts. 230, 239, 249); Human Capital Disclosure, 85 Fed. Reg. 63,726, 63,737 (Aug. 26, 2020) (to be codified at 17 C.F.R. pts. 229, 239, 240) (human capital management); Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2,080 (Jan. 1, 2021) (to be codified at 17 C.F.R. pts. 210, 229 et al.) (modernizing, simplifying, and enhancing financial disclosure requirements).

[5] *See* Disclosures Pertaining to Matters Involving the Environment and Civil Rights, Release Nos. 33-5170, 34-9252, 36 Fed. Reg. 13,989, 13,989 (July 19, 1971). The Commission has continued to require environmental disclosures and to refine those requirements over time. *See* Adoption of Integrated Disclosure System, Release No. 33-6383 (47 Fed. Reg. 11,380) (Mar. 3, 1982) (codified at 17 C.F.R. pts. 200, 201, 229 et al.).

continued to require environmental disclosures and to further refine those requirements over time.[6] More recently, in 2010 the Commission issued guidance that made clear that issuers should consider more carefully whether matters relating to climate change fall within the categories of information required to be disclosed in public filings under existing disclosure requirements.[7]

In the mid-1970s, the Commission, after extensive consideration including public hearings, determined that investor protection interests would not at that time be further served by extensive additional disclosure requirements regarding environmental matters, and also concluded that the National Environmental Protection Act did not require adoption of such rules.[8] Relevant to the current rulemaking proposal, the Commission stated that its reasons not to engage in the requested extensive rulemaking included, first, the almost total lack of investor interest in the requested extensive additional information, attributable in part to the absence at that time of an appropriate uniform method for disclosure of environmental effects on issuers, and second, the excessive cost and administrative burdens. At the same time the Commission made clear that its broad discretion to require disclosure, including in the environmental area, would provide a statutory basis for expanding or contracting disclosure rules if warranted to

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6 *See* Disclosure with Respect to Compliance with Environmental Requirements and Other Matters, Release Nos. 33-5386, 34-10116, 38 Fed. Reg. 12,100 (Apr. 20, 1973) (citing NEPA, 42 U.S.C. §§ 4321 through 4333); *see also* Adoption of Integrated Disclosure System, Release No. 33-6383 (47 Fed. Reg. 11,380) (Mar. 3, 1982) (codified at 17 C.F.R. pts. 200, 201, 229 et al.).

7 Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106, 34-61469, 75 Fed. Reg. 6,290 (Feb. 2, 2010).

8 Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, Release No. 5627, (Oct. 14, 1975); Notice of Commission Conclusions and Final Action on the Rulemaking Proposals Announced in Securities Act Release No. 5627 Related to Environmental Disclosure, Release No. 5704 (May 6, 1976). The Commission's decision was affirmed. *Nat. Res. Def. Council*, 606 F.2d at 1051 (Congress has given the SEC "complete discretion" "to require in corporate reports" "such information as it deems necessary" "to protect investors").

address changes in the relevant business dynamic in which American public companies conduct their business.[9]

Times change, especially so in the fast-moving arena of commerce. To that point, we underscore that in making the current proposal, the Commission has concluded that there are currently the sorts of uniform methods that can frame disclosure mandates covering climate-related matters and that there is current broad support for disclosure of climate-related matters from investors of all types. Although some commentators have disparaged as irrelevant the views of institutional investors, we do not, nor do the financial markets. In our experience, institutional investors are fierce competitors, unlikely to take a monolithic view, and, even more important, investors like mutual funds and private equity funds are not known to, because in reality they do not, focus on issues unrelated to profit for themselves and their investors.[10] When leading investors have focused on climate recently, they have therefore done so within the context of focusing on sustainable returns for their investors, which they believe are threatened by the adverse effects of climate change.[11]

Many institutional investors are also the managers of large pension funds and have multi-decade investment mandates that require them to consider and mitigate risks that could impair

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9 *Id.*

10 *See, e.g.*, John C. Coates IV & R. Glenn Hubbard, *Competition in the Mutual Fund Industry: Evidence and Implications for Policy*, 33 J. CORP. L. 151 (2007) (documenting fierce competition in the mutual fund industry); Justin Baer, *Fidelity Eliminates Fees on Two New Index Funds*, WALL ST. J. (Aug. 1, 2018, 5:20 PM), https://www.wsj.com/articles/fidelity-index-fund-fees-tumble-to-zero-1533141096 (noting that the "race to zero" had "finally reached bottom" as Fidelity eliminated fees on certain of its index funds to put "pressure" on "rivals" such as Vanguard and Charles Schwab); Jeff Sommer, *A Price War Has Driven Fund Fees to Zero. They May Be Set to Drop Further*, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/05/business/price-war-fund-fees-zero-negative html.

11 *See, e.g.*, Larry Fink, CEO of BlackRock, *2020 Letter to CEOs: A Fundamental Reshaping of Finance*, https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter (stating that climate risk is investment risk, and that "[c]limate change has become a defining factor in companies' long-term prospects"); Cyrus Taraporevala, CEO of State Street Global Advisors, *CEO's Letter on Our 2022 Proxy Voting Agenda*, https://www.ssga.com/us/en/intermediary/ic/insights/ceo-letter-2022-proxy-voting-agenda ("[C]limate change poses systemic risk to all investors.").

their ability to deliver sustainable long-term returns necessary to ensure payment of their beneficiaries' pensions.[12] To that point, climate change is also recognized by scientists, economists and actuaries as a systemic economic, not just social and human and environmental, problem.[13]

Every class of investor has expressed support for better climate disclosure,[14] and the growing interest of individual investors in funds that take climate change into account evidences that ordinary American investors understand the economic importance of this issue.[15] In our

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12 *See, e.g.*, Statement of Investment Policy for the Teacher Retirement System of Texas Pension Fund (Sept. 2021), https://www.trs.texas.gov/TRS%20Documents/investment_policy_statement.pdf ("In making investment decisions, the [pension] will consider ESG factors that are material to long-term returns and levels of risk."); MARYLAND STATE RETIREMENT AND PENSION SYSTEM, MARYLAND PENSION RISK MITIGATION ACT (2022), https://sra.maryland.gov/sites/main/files/file-attachments/maryland_pension_risk_mitigation_act_risk_assessment_january_2022___vf.pdf?1643730002 (the Board of Trustees of the Maryland State Retirement and Pension System estimates the impact of climate change on long-term risk and return forecasts across financial markets, consistent with its long-term strategic asset allocation policy).

13 *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2022 REPORT: MITIGATION OF CLIMATE CHANGE (2022), https://report.ipcc.ch/ar6wg3/pdf/IPCC_AR6_WGIII_FinalDraft_FullReport.pdf (assessing the "scientific, technological, environmental, economic, and social aspects" of climate change); *see also* NASA, *Scientific Consensus: Earth's Climate Is Warming*, https://climate.nasa.gov/scientific-consensus/ (last visited May 25, 2022) (describing scientific consensus on climate change); Climate Change Working Party of the Institute and Faculty of Actuaries, *Climate Change for Actuaries: An Introduction*, https://www.actuaries.org.uk/system/files/field/document/Climate-change-report-29072020.pdf (revised July 2020) ("The reality of human-induced climate change and the nature of the risks it poses is now accepted by almost all governments and policy-makers worldwide."); Governor Lael Brainard, *Financial Stability Implications of Climate Change* (Mar. 23, 2021), https://www.federalreserve.gov/newsevents/speech/brainard20210323a htm.

14 *See* U.S. Sec. & Exch. Comm'n, Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure (May 14, 2020), https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-of-the-investor-as-owner-subcommittee-on-esg-disclosure.pdf; *see also* Emirhan Ilhan, Climate Risk Disclosure and Institutional Investors, *Swiss Fin. Inst. Research Paper Series* (Working Paper No. 661/2020, last revised Oct. 2021), https://ssrn.com/abstract=3437178 (noting that a survey of 439 large institutional investors shows that seventy-nine percent of respondents believe that climate risk reporting is as important as traditional financial reporting, and almost one-third consider it to be more important); MACQUAIRE ASSET MANAGEMENT 2021 ESG SURVEY REPORT (2021), https://www.mirafunds.com/assets/mira/our-approach/sustainability/mam-esg-survey/mam-2021-esg-surveyreport.pdf (noting that in a survey of 180 global institutional real assets investors, including asset managers, banks, consultants and investment advisors, foundations, endowments, insurance companies, and pension funds, who combined represent more than $21 trillion of assets under management, more than half of responding investors selected climate change as their primary ESG concern).

15 *See* MORGAN STANLEY INSTITUTE FOR SUSTAINABLE INVESTING, SUSTAINABLE SIGNALS: INDIVIDUAL INVESTORS AND THE COVID-19 PANDEMIC (4th ed. 2021) (survey of 800 U.S. individual investors age eighteen or older with minimum investable assets of $100,000 conducted on behalf of the Morgan Stanley Institute for Sustainable Investing in which seventy-four percent of investors expressed interest in climate-themed investments); Ray Sin & Samantha Lamas, *Are Your Clients ESG Investors?*, MORNINGSTAR (Apr. 22, 2019), https://www.morningstar.com/insights/2019/04/22/esg-investors (Morningstar report showing seventy-two percent of the U.S.

collective view, when institutional investors of all diverse kinds—from public[16] and private[17] pension funds, to charitable funds,[18] to private equity funds,[19] to actively traded mutual fund

population expressed at least a moderate interest in sustainable investing, defined as "balanced," "sustainability-minded," or "sustainability-driven"); David Webber et al., *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CA. L. REV. 1250, 1302-04 (2020) (discussing the "importance" of the climate change "phenomenon" in millennials' investment decisions and stating that "investors [who] are committed to ESG investing" constitute nearly twenty-five percent of modern day investors).

16 *See, e.g.*, Gregory Zuckerman, *Big Investors Reconsider Oil and Gas Upside as Supplies Remain Tight*, WALL ST. J. (May 12, 2022, 5:30 AM), https://www.wsj.com/articles/big-investors-reconsider-oil-and-gas-upside-as-supplies-remain-tight-11652330144?mod=Searchresults_pos1&page=1 ("For more than five years, endowments, pension funds, and other so-called institutional investors shunned the oil-and-gas industry because of . . . concerns about climate change."); Statement of Investment Policy for the Teacher Retirement System of Texas Pension Fund (Sept. 2021), https://www.trs.texas.gov/TRS%20Documents/investment_policy_statement.pdf (noting that the pension fund considers ESG factors such as climate change in making investment decisions); MARYLAND STATE RETIREMENT AND PENSION SYS., MARYLAND PENSION RISK MITIGATION ACT (2022), https://sra.maryland.gov/sites/main/files/file-attachments/maryland_pension_risk_mitigation_act_risk_assessment_january_2022___vf.pdf?1643730002 (describing the Maryland state pension funds' adoption of Task Force on Climate-Related Disclosure (TCFD) standards).

17 *See, e.g.*, Statement of Investment Principles for the General Motors (VML) Pension Plan (Sept. 2021), https://pensioninformation.aon.com/generalmotors/fileviewer.aspx?FileID=12879&FileName=vml_sip.pdf ("The Trustee expects [General Motors Investment Management Corporation] and its investment managers to take account of financially material considerations including climate change and other ESG considerations."); Statement of Investment Principles for the Coca-Cola Enterprises Pension Scheme (Feb. 2022), https://pensioninformation.aon.com/cocacola/fileviewer.aspx?FileID=12916&FileName=feb_2022_sip_update.pdf (listing as a key investment belief "climate change is a financially material systemic issue that presents risks and opportunities for the Scheme over the short, medium and long term," and stating expectations that investment managers take into account climate change as a financially material factor); Statement of Investment Principles for the Caterpillar DC Pension Plan (Sept. 2021), https://www mycatpension.co.uk/Uploads/Documents/00/00/01/07/DocumentDocument_FILE/Caterpiller-DC-Plan-SIP-September-2021.pdf (stating that the pension trustee has selected climate change and carbon emissions as among its key areas for voting focus); Statement of Funding and Investment Principles for the ExxonMobil Pension Plan (Dec. 2020), https://www.exxonmobilofp.nl/meer-informatie/belangrijke-documenten/beleid/beleggingsbeginselen-sip/ (stating that the pension plan considered environmental, social, and governance considerations, including but not limited to climate change); Annual Statements for the IBM Pension Plan (Dec. 2020), https://www mypension.com/media/2379/ibm-pension-plan-2020.pdf ("The Trustee believes that ESG factors, including climate change, can impact the performance of the Plan's investments . . . over the medium to long-term."); Statement of Investment Principles for the Raytheon Systems Limited Pension Scheme (Aug. 2020), https://www.raytheon.com/sites/default/files/2020-10/RSL-UK%20Pension%20Statement%20of%20Investment%20Principles%20002.pdf ("The Trustees also recognise that long-term sustainability issues, particularly climate change, present risks and opportunities that increasingly require explicit consideration.").

18 *See, e.g.*, WALTON FAMILY FOUNDATION, WATER & CLIMATE: THE OPPORTUNITY BEFORE US (2021), https://www.waltonfamilyfoundation.org/learning/water-climate-the-opportunity-before-us ("The material impacts of climate change on critical industries is clear in a wide variety of ways."); Duke University Board of Trustees, Statement on Climate Change and Investment (May 8, 2020) (acknowledging the "grave challenges posed by climate change" and directing management of Duke's endowment to take climate change into account).

19 *See, e.g.*, CLIMATE-RELATED CORPORATE STRATEGY, NEUBERGER BERMAN 6 (2022) ("We . . . urge[] governments to step up their ambition to achieve the goals of the Paris Agreement, support investment in the low-carbon transition and improve climate-related financial disclosures."); Dawn Lim, *Carlyle Sets Its Portfolio Companies a 2050 Net Zero Target*, BLOOMBERG (Feb. 1, 2022, 1:50 PM), https://www.bloomberg.com/news/articles/2022-02-01/carlyle-sets-its-portfolio-companies-a-2050-net-zero-target ("Carlyle . . . is taking several actions to bring the businesses it owns more in line with the Paris Climate Agreement."); SILVER LAKE,

complexes,[20] to index funds[21]—consider consistent, comparable, and reliable information about climate-related risks important, that buttresses the SEC's determination that climate-related disclosures are appropriate to protect investors and thus within its core statutory authority to mandate.

The SEC is authorized to be responsive when there is broad demand in the investor community for information on an important topic relevant to the viability and prospects of public

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https://www.silverlake.com/purpose/ (last visited May 21, 2022) ("We aim to . . . evaluate material ESG considerations across our portfolio—we believe sustainable, inclusive growth generates stronger stakeholder returns."); BLACKSTONE, AN INTEGRATED APPROACH TO ESG 11, 20 (Nov. 2021) (stating that Blackstone has partnered with the TCFD to help build a "more resilient" financial system, as quality disclosure affects the "long-term resilience and growth" of companies and assets); Institutional Ltd. Partners Ass'n, ESG Data Convergence Project, https://ilpa.org/ilpa_esg_roadmap/esg_data_convergence_project/ (last visited May 23, 2022) (describing a project to streamline the private investment industry's historically fragmented approach to collecting and reporting ESG data to create a critical mass of meaningful, performance-based, comparable ESG data from private companies, with a global group of over 100 general partners and limited partners representing $8.7 trillion in assets under management and 1,400 portfolio companies).

[20] *See, e.g.*, FIDELITY ASSET MANAGEMENT ESG INVESTING TEAM, REPORT ON INVESTMENT SUSTAINABILITY AND IMPACT (2021), https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/mutual-funds/Stewardship-report.pdf ("Our expectations for the companies we invest in are evolving as we encourage a greater focus on, and disclosure of, issues related to ESG risks and opportunities."); News Release, T. Rowe Price, T. Rowe Price Releases 2020 Sustainability Report (July 8, 2021), https://troweprice.gcs-web.com/news-releases/news-release-details/t-rowe-price-releases-2020-sustainability-report ("Utilizing both the SASB and TCFD frameworks provides our clients and stakeholders . . . and, as an asset manager, is consistent with the recommendation we make to our investee companies for how they can enhance their own ESG disclosures."); Anne Simpson, *Why the SEC is Right to Make Climate Risk Disclosure Mandatory*, FIN. TIMES (Mar. 30, 2022), https://www ft.com/content/b6cc17f0-c0c3-476a-bb77-1e7c1e9e946a (presenting argument from the Global Head of Sustainability at Franklin Templeton Investments as to the necessity for consistent climate disclosure requirements); FRANKLIN TEMPLETON MARTIN CURRIE FUND, STEWARDSHIP ANNUAL REPORT 2022 at 7, 15 (2022) (stating that "as investors," the fund uses "activity and dialogue with investee companies" to broaden "engagement activity at [the] portfolio level" and "encourage greater detail around climate transition risk").

[21] *See, e.g.*, *2020 Letter to Clients: Sustainability as BlackRock's New Standard for Investing*, BLACKROCK, https://www.blackrock.com/corporate/investor-relations/2020-blackrock-client-letter (last visited May 19, 2022) (discussing BlackRock's desire for clear, consistent ESG disclosure standards, and founding involvement in the TCFD); STATE STREET GLOBAL ADVISORS, GUIDANCE ON CLIMATE-RELATED DISCLOSURES (Jan. 2022), https://www.ssga.com/library-content/pdfs/asset-stewardship/guidance-on-climate-related-disclosures.pdf (encouraging all public companies in State Street portfolios to offer public disclosures in accordance with the four pillars of the TCFD and advocating for increased transparency in key areas of climate transition disclosure); Cyrus Taraporevala, *The Other Climate Risk Investors Need to Talk About*, FIN. TIMES (May 14, 2021), https://www.ft.com/content/c586e4cd-9fb7-47a3-8b43-3839e668fe3a (urging the SEC to consider the need for uniform requirements for both public companies and private companies); VANGUARD, VANGUARD INVESTMENT STEWARDSHIP INSIGHTS: CLIMATE RISK GOVERNANCE 3-4 (2020), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/perspectives-and-commentary/ISCLRG_062020.pdf (arguing that effective and quality climate disclosure is essential to investors and supporting a consistent and universal disclosure framework).

companies.[22] Although it is of course the right of anyone to oppose the merits of an SEC-proposed rule, it would, in our view, be inconsistent with settled law, and an exercise in unprincipled judicial adventurism, to conclude that the SEC's broad authority to require disclosures "necessary or appropriate in the public interest or for the protection of investors"[23] does not include the power to require disclosures on a topic universally considered important by investors themselves.

II. Universal Disclosure by All Public Companies of Scope 1 and 2 Emissions Is Transformational and the Proposal Underestimates Its Benefits— Especially If the Commission Addresses Outsourcing of Core Economic Functions and Requires Apples-to-Apples Reporting on Scope 1 and 2

The SEC's requirement that all public companies disclose Scope 1 and 2 greenhouse gas ("GHG") emissions in substantial alignment with the well-recognized GHG Protocol promulgated by the World Resources Institute and the World Business Council for Sustainable Development [24] and provide assurance for such disclosures will be incredibly valuable to investors.[25] Some observers, and the Commission itself, appear to underestimate how

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22 *See Nat. Res. Def. Council, Inc.* v. *SEC*, 606 F.2d 1031, 1051 (D.C. Cir. 1979) (Congress has given the SEC "complete discretion" "to require in corporate reports" "such information as it deems necessary" "to protect investors"); Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013) ("Investor interest in certain information has often prompted the SEC to consider whether changes to disclosure rules are needed—and, in particular, whether disclosure of additional information should be required.").

23 *See* 15 U.S.C. § 77b(b) (providing that, for every rulemaking, the SEC "is required to consider or determine whether an action is necessary or appropriate in the public interest, . . . [and] shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation").

24 *See* WORLD RESOURCES INSTITUTE & WORLD BUSINESS COUNCIL FOR SUSTAINABLE DEVELOPMENT, GREENHOUSE GAS PROTOCOL: A CORPORATE ACCOUNTING AND REPORTING STANDARD (2021), https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf.

25 For details on the GHG Protocol, see GREENHOUSE GAS PROTOCOL, *supra* note 24 (providing an overview of the GHG Protocol scopes and emissions across the value chain, as well as methods to calculate and report emissions). See also WORLD RESOURCES INSTITUTE & WORLD BUSINESS COUNCIL FOR SUSTAINABLE DEVELOPMENT, GREENHOUSE GAS PROTOCOL: SCOPE 2 GUIDANCE (2021), https://ghgprotocol.org/sites/default/files/standards/Scope%202%20Guidance_Final_Sept26.pdf for details on the GHG Protocol specific to Scope 1 and Scope 2 disclosures. For further information on EPA requirements, see Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56,259 (Oct. 30, 2009) (to be codified at 40 C.F.R. pts. 86, 87, 89 et al.) (requiring reporting of certain GHG data in the United States). *See also* EPA, DIRECT EMISSIONS FROM STATIONARY COMBUSTION SOURCES (Dec. 2020), https://www.epa.gov/sites/default/files/2020-12/documents/stationaryemissions.pdf (identifying and estimating GHG emissions and reporting standards from stationary combustion of fossil fuels); EPA, DIRECT

meaningful this portion of the proposed rule is. For example, some observers seem to assume that all companies already disclose their Scope 1 and 2 GHG emissions. That is not close to true. It is far from universal for public companies to disclose their Scope 1 and 2 emissions; not all that disclose do so in accordance with the GHG Protocol, and it is even rarer for companies to provide assurance or verification for such metrics.[26] Admittedly, one valuable study[27] of a random sample of one-fifth of the biggest public companies—i.e., the S&P 500—found that eighty percent were reporting some measure of Scope 1 and 2 GHG emissions, but one of the study's main conclusions was that this reporting was done under a wide variety of different criteria, which diminished the ability to determine its accuracy and comparably rank similarly situated companies.

The transformative value of Scope 1 and 2 disclosure has been underestimated in the proposal for another reason. Quality disclosure of Scope 1 and 2 emissions will work in concert with standards in other nations and markets—for example, the European Union and International Sustainability Standards Board (the "ISSB") which takes as a starting point for its future standard setting activities the standards of the Sustainability Accounting Standards Board (the "SASB") to

EMISSIONS FROM MOBILE COMBUSTION SOURCES (Dec. 2020), https://www.epa.gov/sites/default/files/2020-12/documents/mobileemissions.pdf (same, for emissions from mobile combustion of fossil fuels); EPA, INDIRECT EMISSIONS FROM PURCHASED ELECTRICITY (Dec. 2020), https://www.epa.gov/sites/default/files/2020-12/documents/electricityemissions.pdf (same, for indirect GHG emissions); EPA, DIRECT FUGITIVE EMISSIONS FROM REFRIGERATION, AIR CONDITIONING, FIRE SUPPRESSION, AND INDUSTRIAL GASES (Dec. 2020), https://www.epa.gov/sites/default/files/2020-12/documents/fugitiveemissions.pdf (same, for sources of industrial gases).

[26] *See* Laura Thornton & Shane Khan, *The SEC Is Close to Requiring Emissions Disclosure – Here's Where Companies Stand*, JUST CAPITAL (Mar. 21, 2022), https://justcapital.com/news/where-companies-stand-after-sec-proposed-rule-for-requiring-greenhouse-gas-emissions-disclosure (presenting an analysis of Russell 1000 companies showing that only fifty-seven percent of those companies disclose Scope 1 and 2 emissions as of 2022); Chris Cote & Kenji Watanabe, *Companies May Not Be Ready for SEC Climate-Disclosure Rules*, MSCI (Mar. 29, 2022), https://www.msci.com/www/blog-posts/companies-may-not-be-ready-for/03092675115 (presenting an analysis of MSCI USA Investable Market Index showing that twenty-eight percent of companies disclose Scope 1 and 2 emissions); CITI, TASKFORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES REPORT 2021 18 (2021) (stating that only thirty percent of Citi's Power and Energy clients reported Scope 1 and 2 emissions).

[27] Lynn M. LoPucki, *Corporate Greenhouse Gas Disclosures*, 56 U.C. DAVIS L. REV. (forthcoming Nov. 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4051948.

enable investors and regulators to hold issuers accountable for accurate and prudent narrative disclosure about their climate impact. Internationally, Scope 1 and 2 disclosure is becoming more standardized and will also be spurred if the European Union's proposed Carbon Border Adjustment Mechanism ("CBAM") regulation is adopted. Thus, the proposal builds and is designed to cohere with emerging private sector and international frameworks, in particular the Task Force on Climate-related Financial Disclosure ("TCFD"), the GHG Protocol, and the ISSB. This approach is beneficial to investors and registrants alike. Demand by U.S. global investors is for global comparability of climate-related disclosures. Multi-national registrants, likewise, will appropriately demand one set of reporting requirements, not several, and substantial work has already been done to embed emerging best practices. In addition, the approach of sector-specific reporting—pioneered by SASB and adopted by ISSB—is very much in line with the informational and organizational structure of capital markets.

Thus, the proposed rule's encouragement for all public companies to use the GHG Protocol, or something close to it—by basing many of the GHG emission definitions and concepts in the proposal on those of the GHG Protocol—will substantially improve the data available to investors compared to the current situation, where many companies do not report this data at all and those who do use a cacophony of incomparable reporting standards.[28]

The proposed rule, however, does not mandate that the GHG Protocol be followed, and that is something we think should be reconsidered. In an admitted departure from our general dislike of prescriptive approaches, in this case we believe the proposed rule would be even more beneficial if it hewed closer to the GHG Protocol and provided for its use in determining organizational boundaries, with as few variations as possible. The Commission's proposal in

[28] *See* proposed 17 C.F.R. § 229.1504 (requiring disclosure of GHG emissions metrics and related attestations).

effect calls for a more prescriptive approach to setting organizational boundaries. The GHG Protocol permits an issuer to use either the "equity share" approach (under which an issuer is required to include in its emissions its proportional share of the emissions of an entity, based on its equity ownership interest therein) or the "control" approach (under which an issuer is required to report all of the emissions of an entity which it controls).[29] The Commission requires an issuer to use the same concepts in setting its organizational boundaries as it uses in the accounting principles that it uses to prepare its financial statements. Under U.S. GAAP, an issuer would generally be required to report all of the emissions of an entity that it majority-owned or controlled (and thus also consolidated in full into its financial statements), as well as its proportionate percentage share of entities as to which it reported under the equity method.[30]

We understand the reasoning behind the proposed departures from the GHG Protocol to require issuers to incorporate current GAAP consolidation concepts in their methodology and to allow investors to make comparability determinations on the same basis. But the uncertain benefits that would result from requiring departures from the GHG Protocol to accommodate accounting rules do not justify divergences in critical disclosures from what would otherwise be a single uniform global framework.

We also appreciate that the Commission must make a choice where there is not a perfect solution or even an obvious first-best option for reconciling existing GAAP reporting principles and the GHG Protocol. But all solutions will lead to some non-comparability, including that

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29 *See* GREENHOUSE GAS PROTOCOL, *supra* note 24, at Chapter 3; *see also* Proposed Rule Release at 187 n.92. In addition, the GHG Protocol permits an issuer to determine control in either financial or operational terms. *See* GREENHOUSE GAS PROTOCOL, *supra* note 24, at Chapter 3.

30 Foreign private issuers that report under IFRS as adopted by the IASB would use IFRS to determine their organizational boundaries and report GHG emissions, whereas foreign private issuers using other accounting principles (for example, home country GAAP) and reconciling their financial statements to U.S. GAAP would be required to use U.S. GAAP principles in setting their organizational boundaries and reporting GHG emissions. *See* Proposed Rule Release at 187 n.494, proposed 17 C.F.R. § 229.1504(e)(2).

which can result from the approach of the GHG Protocol and that which can result from differences in accounting principles. But mitigating this concern is the reality that there has not been a large amount of comment from investors that any non-comparability resulting from this aspect of the GHG Protocol outweighs the GHG Protocol's advantages.

Similarly, there is no solution to reconciling differences between the GHG Protocol and GAAP that will not involve additional work for issuers. There may be some advantage to the Commission's approach for some issuers of starting with their existing accounting records, but this will be mostly true of issuers not currently engaged in making climate disclosures. And issuers for which climate disclosure is brand new will face implementation costs in any event, whatever approach is taken. But for those issuers that have already embarked on efforts to provide their investors with climate information, the costs of deviating from the GHG Protocol may be more substantial than any benefit from attempting to conform climate reporting to U.S. GAAP. The reason for that is that many, and more likely most, of the issuers currently doing some form of climate disclosure are basing their efforts on the GHG Protocol and thus the Commission's deviations from it will force them to make changes that will impose additional costs on them.

We acknowledge that it is difficult to predict with confidence which approach is least burdensome. But in the face of this uncertainty and the lack of a perfect approach, we believe that there is an important guiding principle that the Commission should keep in mind: there is a huge advantage for investors, preparers, and markets from using a single high-quality global framework to address the critical business risks climate change poses. The Commission has laudably proceeded from recognizing that TCFD and the GHG Protocol represent such frameworks. We respectfully ask that the Commission consider extending the same advantage in adopting organizational boundaries in the rule, and then using its leadership in key international forums to help improve and better standardize those frameworks so that consensus over time on an ultimate best approach emerges.

At the very least, if the final rule does not go further to adopt the GHG Protocol, we would urge that the Commission adopt an additional requirement that issuers identify and explain any differences between their methodology and the GHG Protocol. The final rule should both effectively further encourage use of the GHG Protocol and provide better appreciation for comparability, if not comparability itself, to investors by including in the requirement to disclose methodology a specific requirement to disclose departures from the GHG Protocol. The additional complexity and messiness of such a requirement is itself an argument for adopting the GHG Protocol as the standard.

Having argued that the Commission should follow the GHG Protocol, we nonetheless strongly support a departure from it in one critical respect. The Commission has proposed an anti-evasion provision tied to Scope 3 involving future outsourcing.[31] The Commission should follow a rationale based not on anti-circumvention, but on a general approach to outsourcing that would level the disclosure playing field for similar businesses, with climate considerations that are also similar, and accordingly adopt a provision requiring reporting of emissions of core outsourced activities. To the extent this apples-to-apples approach itself varies with the GHG Protocol, we believe the benefits of the more coherent disclosure of these risks is worth any additional cost, and that the Commission's exercise of leadership in coming to grips with this key issue and moving the international debate forward in a positive way to address it would be valuable to investors. In the long run, it is inefficient and unwise to have companies' reported

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[31] *See* Proposed Rule Release at 200, proposed 17 C.F.R. § 229.1504(e)(8).

Scope 1 and 2 emissions vary, not by virtue of whether their performance of a substantive economic function has more or less carbon impact but whether the company chooses to do that function directly or have it outsourced and performed by a contractor.

This proposal would enhance the value of the proposed Scope 1 and Scope 2 disclosures by adding a separate element of comparability, and would lessen the need for the more general, and more difficult and expensive, Scope 3 disclosures that the Commission proposes at this stage. Our proposal would maintain an issuer's Scope 1 reporting requirement, but would also require an issuer to disclose the Scope 1 GHG emissions of other entities for their conduct in conducting material aspects of the issuer's core operations. The Commission already uses the concept of outsourcing in its anti-circumvention provision.[32] The outsourced operations that would be captured under our proposal would be core and material to the issuer's business. Among the factors that the Commission could use to cabin the requirement are whether the operations contracted out cover a material amount of goods or services comprising the issuer's business and whether they are obtained under contractual or similar arrangements that are long-term and contain individually negotiated terms regarding the specifications of the goods and services, their provision or delivery or the personnel who fulfill the contractual or other arrangements, as opposed to contracts where the issuer is essentially trading in off-the-shelf or commoditized goods or services. Activities that would be expected to be captured by this provision include manufacturing of a material amount of products an issuer sells under its brand name, franchising out by an issuer of the operations of restaurants, hotels, or other consumer outlets that operate under its name and standards and where ownership of the precise outlet is not distinct to consumers, or core functions such as customer service or data operations of an issuer

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[32] *See* Proposed Rule Release at 200, proposed 17 C.F.R. § 229.1504(e)(8).

that are material and where customers are directed to buy or address concerns with the company's services or products. This proposed requirement could operate either upstream or downstream in an issuer's value chain. For investors, the Scope 1 and 2 impact of different hotel companies should vary because of their different climate impact, not because one chain directly operates all its hotels, and another franchises out a substantial number of them (downstream). The same is true of manufacturing firms. The fact that one company manufactures its own branded products, such as shoes, and another contracts out the manufacturing does not meaningfully distinguish its exposure to climate risk (upstream). Much of the argument regarding the importance of requiring Scope 3 relates to this issue, and if the rule were to require that the core functions of registrants be reported under Scope 1 and 2 regardless of whether registrants choose to perform those functions directly or by outsourcing, it would improve the comparability of disclosure while reducing the need to impose the more tangential requirements of Scope 3 reporting on registrants.

By this means, a level playing field would be established in reporting, and investors could make more reliable comparisons of the Scope 1 and 2 impact of companies in an industry and across industries. Our suggestion would provide comparability between companies that conduct their core functions internally and those that choose, for whatever reason, to contract them out. Among the advantages of this rule would be its anti-circumvention effect that would prevent a company from understating the effect of climate on its operations by contracting out certain functions (and thus removing any unintentional perverse incentive to outsource that the proposed disclosures would create).

As noted above, we recognize that our suggestion regarding outsourcing is inconsistent with our position that the Commission should closely hew to the GHG Protocol. But in our view, this is a crucial issue that must be grappled with for two reasons. The first is that from an investor climate risk standpoint, it does not matter whether a product manufacturer—such as a sneaker company—makes its own products directly, makes some of them directly and contracts some of their manufacture, or contracts all of them, in terms of reporting their GHG emissions. The same is true for hospitality companies like hotels and restaurant chains, many of which use a combination of these techniques. To move toward truly comparable climate-related impact information to aid investors in assessing risks, the method by which a company carries out a core function should not drive its obligation to report. The second reason this issue is crucial is that it addresses the important reality that some companies contract out core functions whose climate impact would otherwise be reportable under Scope 1 and Scope 2, without imposing the burdensome and more attenuated aspects of Scope 3 on all companies. To the extent that companies must report the impact of core functions like making their products, running a call center, or operating hotels and restaurants under their brand—regardless of whether they perform those functions directly or by prescriptive contracts—the need to require Scope 3 at this stage goes way down, and investors benefit because like impacts of like industry conduct are reported all in one Scope, regardless of the business technique to accomplish them.

We do not pretend that there are not difficulties in coming to grips with this important issue. But we think that the effort to address it forthrightly, if necessarily imperfectly, in the proposed rule is both important and worthy of mandating. The reality is that the GHG Protocol has not wrestled with this issue, and thus has comparably situated companies in the same industries reporting comparable economic functions on different scopes. There are lines to be drawn in any reporting regime; that is inescapable. And no lines will be perfect. But, if truly comparable reporting is to be required of the ways in which companies are exposed to climate risk that are material to investors, the focus of the approach should not be on the "why" (it does not matter if you did it before the rule or what reason you do a core function by outsourcing, especially as we know most of the reason is to lower costs) or the "how" (directly or by contracting or a combination) of a core economic function, but on the "what"—is it a core function without which the business could not operate and which is central to the way the company makes money? In our view, those functions include functions such as those we have mentioned (*e.g.*, the manufacturing of the company's products, the operation of their consumer outlets, their interaction with their consumers), and the climate impact of those functions should be reported by all companies on Scope 1 or 2.

Much of the breadth of Scope 3, with its *fifteen diffuse components* (or as the Commission refers to them, fifteen non-exclusive categories), is not because of distinct functions captured by Scope 3. Scope 3, for certain, does capture issues such as worker commuting that are distinct from Scope 1 and 2 and never have to be reported on Scope 1 and 2 by any company. To be candid, these distinct categories are less important to investors in distinguishing between companies and tend to involve social conditions and information not within the company's legitimate control, and reporting on them requires more speculative exercises, often about conduct or factors beyond the company's influence.[33] But Scope 3 also acts as an imperfect

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[33] For example, in the high-profile auto industry, we think it is already quite easy for investors to determine the types of vehicles the major players sell each year, what percentage is electric, and their average miles per gallon. We doubt it adds anything to that robust mix for these companies to make these manufacturers try to further estimate the carbon impact of their product's usage. As to individual consumers, that is impossible, because a gas-driven SUV that goes out for an occasional spin may use less carbon than a fully electric vehicle driven every day that is powered by home electricity coming from a coal-fueled power plant. And if other public companies buy vehicles and operate them as part of their business, their climate effect must be reported by them on Scope 1. We likewise question whether it will be helpful to investors if they receive a Scope 3 impact estimate that lumps together the distinct contribution of different inputs (*e.g.*, downstream use by customers of products and upstream outsourced manufacturing costs and the other thirteen components of Scope 3). And if the fifteen inputs to the Scope 3 calculus have to be broken down to allow for investor understanding, that supports our suggestion that impacts that must be reported on Scope 1 or 2 if done directly, should be reported by all companies under those Scopes, even if the technique used is contractual.

seine net to capture the climate impact and risks of companies—what would otherwise be reportable under Scope 1 and 2—solely because they choose to use a contractual, rather than direct, technique of performance. A main reason we do not focus on circumvention as our watchword is that the use of contracting out is already common and driven by motivations, such as cost, that have nothing to do with the proposed rule. For investors in the U.S. and internationally, ensuring that companies in similar industries report on the climate impact and risks of their core economic functions in a comparable way is critical, and should be a focus of those who promulgate use of frameworks like the GHG Protocol and TCFD for purposes of disclosure to investors. The Commission has earned great credibility with international standards-setters and should exercise its leadership here to encourage improvement of the GHG Protocol to address this central issue. Notably, this problem is not one that is confined to climate, and respected scholars have noted that similar problems confront investors in understanding other important issues, because companies are able to escape reporting on the full impact and risks of core functions solely because they use contractual, rather than direct

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Likewise, we admit that we want companies to create quality jobs in the U.S. so that our children, grandchildren, and all Americans can hope for economic security and a better chance for prosperity. Commuting impact is a societal issue to address, unless we wish to discourage companies from having employees travel to work. The climate risk of companies for investors is unlikely to vary on this dimension, as it involves the capture of information from employees that is expensive and intrusive or the reliance on estimates that are of little utility to investors but must be paid for if reporting is obligatory, and to be blunt, in the U.S., the reality is that many employees have to drive to work regardless of whether they live in the North, South, East, or West. It may well be good policy to expand public transportation in our nation not just because of climate change, but for other reasons. But companies have to operate in the nation and, indeed, world, as it exists, and investors understand that, and aspects of Scope 3 that do not involve the disclosure of information that meaningfully distinguishes among comparably situated companies, but simply underscores obvious realities such that there are sizable carbon impacts to millions of Americans moving from one place to another to work, are not valuable to them and involve excessive cost. We also note that this issue is a good example of some tangential problems that just cannot be addressed through the lens of disclosure policy, because if employees work from home, or companies move facilities that already exist to somewhere else, those changes also involve carbon usage that would have to be measured. The focus of the Commission is rightly on the value of disclosures to investors, and it should be chary about imposing inefficient reporting by companies that tend not to distinguish them from each other and that require them to disclose homogenized estimates, provided by advisors they must pay. Our emphasis on core economic functions being reported on Scope 1 and 2 by all public companies regardless of method, by contrast, gives investors meaningful information to better assess the genuine climate risks of different companies and industries.

methods, such as direct ownership and management, to carry out those functions.[34] For an issue like climate, the risks of a function that is necessary for a company to be profitable are not minimized by the method of accomplishment. If a shoe must be made, or a hotel must be open, for the company's strategy to be implemented, how that happens is not relevant to the climate risk that function presents to the company. In our view, this approach is more consequential and will bring more substantial benefits for investors than the departures from the GHG Protocol discussed above.

Even in its original articulation, the Commission's proposal to have all public companies disclose the level of their Scope 1 and 2 emissions in a substantially uniform manner and provide assurance for such disclosures will seismically improve the availability and quality of material information available to investors, and importantly provide the information that will allow them, and the SEC itself, the ability to better evaluate and challenge as appropriate narrative disclosure about climate and company claims about their climate-relevant conduct—such as claims of moving toward net-zero carbon emissions. The informational base that Scope 1 and 2 disclosures provide, taken together with the narrative disclosure called for by the proposed rule and our suggestions below, helps focus attention on the key direct sources of GHG emissions in the economy that are most important to investors and has the additional benefit in our view of limiting the extent to which more burdensome narrative and Scope 3 disclosures need be mandated in the near term, thereby providing additional time to further refine current guidance

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[34] *See* Shivaram Rajgopal, *Hotels in Name Only: The Strange Case of Lodging REITs*, FORBES (May 3, 2022, 6:52 PM), https://www.forbes.com/sites/shivaramrajgopal/2022/05/03/hotels-in-name-only-the-strange-case-of-lodging-reits/ (discussing how the issue of franchising affects the comparability and completeness of reporting on key workforce issues); *see also* Shivaram Rajgopal, *Asset-Lite Companies Rely on Labor-Based Arbitrage. Here's the Investor and ESG Case for Disclosing Their Labor Practices*, FORBES (May 20, 2022, 3:54 PM), https://www.forbes.com/sites/shivaramrajgopal/2022/03/20/asset-lite-companies-rely-on-labor-based-arbitrage-heres-the-investor-and-esg-case-for-disclosing-their-labor-practices/ (same).

on Scope 3 disclosures to address ongoing concerns such as double counting of emissions, improving the methods for identifying and measuring Scope 3 emissions and delineating appropriate organizational boundaries for Scope 3 reporting.

Scope 1 and 2 disclosures, when disclosed in substantial accordance with the GHG Protocol, will help yield high-quality, concrete, auditable data that will be critical for investors' assessments of climate-related risks, and when disclosed over time, will also provide a basis for measuring progress and ensuring accountability as to transition plans and climate risk mitigation strategies. Scope 1 and 2 disclosures can serve as the basis for future market-led developments to improve narrative disclosure and foster more comprehensive corporate-investor dialogue. And new software technology that is rapidly being developed by well-funded startups[35] and large incumbent[36] software firms will likely drive down the costs of reporting, especially as the scale of reporting increases.[37]

When all issuers in all industries make uniform Scope 1 and 2 disclosures, the ability of an issuer to mislead investors or get a greenwashed leg up on competitors will be curtailed. Because it will be possible for investors, analysts, the media, and the Commission to see where particular companies stand in comparison to others about their most verifiable and direct climate impact, using narrative to falsely portray company impact will be much harder. Furthermore,

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35 *See, e.g.*, PERSEFONI, https://persefoni.com/ (last visited May 23, 2022) (a climate management and accounting platform for enterprises and financial institutions, which raised $101 million in its Series B financing in 2021); WATERSHED, https://watershed.com/ (last visited May 23, 2022) (carbon data engine analyzing emissions for all business line items, which raised $70 million in its Series B financing in February 2022).

36 *See, e.g.*, *IBM Environmental Intelligence Suite: Carbon Performance Engine*, IBM, https://www.ibm.com /products/environmental-intelligence-suite/carbon-performance-engine (last visited May 23, 2022) (carbon accounting APIs to track emission outputs); *Net Zero Cloud Overview*, SALESFORCE, https://www.salesforce.com/ products/net-zero-cloud/overview/ (last visited May 23, 2022) (investor-grade data for emissions tracking).

37 Robert G. Eccles, *The Benefits and Costs of Climate-Related Disclosure Activities for Companies and Investors*, FORBES (May 18, 2022), https://www forbes.com/sites/bobeccles/2022/05/18/the-benefits-and-costs-of-climate-related-disclosure-activities-for-companies-and-investors/ (observing that demand for this new software category could drive cost down).

investors will be able to use all the information provided by the new disclosures, as well as other available information, as a check on company narrative disclosure. For example, the product mix of industries like the automobile industry is already the subject of a great deal of public information that can and will be used by investors in that industry alongside the Scope 1 and 2 data as they consider an issuer's accompanying narrative disclosure about climate.

In this regard, the Proposed Rule Release highlights that the new Scope 1 and 2 information of other companies will help the companies that choose to report Scope 3, providing that "as more companies make their Scope 1 and 2 emissions data publicly available, these data can serve as the input for other companies' Scope 3 calculations."[38] The transformational Scope 1 and 2 requirements proposed by the Commission provide significant flexibility in the event that the Commission considers our proposed approach to outsourcing and the truly distinct issues covered by Scope 3. Under either the Commission's proposal or our suggested approach, there will be Scope 3 reporting, including under our proposal some that is voluntary. But the more effective and comprehensive Scope 1 and 2 reporting we propose will make the truly distinct aspects of Scope 3 reporting better, more meaningful to investors because reported distinctly, and easier to accomplish. By doing what we propose, the climate impact of core economic functions will be reported as a mandatory requirement on Scope 1 and 2 by all companies, allowing for better comparability. When these fundamental functions are reported in a comparable way, the Commission will be in a better position to make decisions regarding whether, to what extent, and how to mandate the truly distinct requirements of Scope 3 and, for example, whether to be industry-specific in its determinations, after the impact on investors, markets and valuation analysis of universal uniform Scope 1 and 2 reporting is understood.

[38] *See* Proposed Rule Release at 209.

Importantly, this information and experiential basis will lower the cost of any Scope 3 disclosures that may then be required as important to investors.

Under our approach, Scope 1 and 2 issuer disclosures of this kind will have another value. This approach will also enable the SEC to more fully realize its stated goal of syncing with private-sector guidance like the TCFD recommended framework and the ISSB by adopting their more streamlined and less burdensome approach to narrative disclosure. This direction builds on a traditional and effective SEC approach, exemplified by MD&A.[39] Within the context of this vibrant Scope 1 and 2 reporting regime, narrative disclosure within a materiality-driven section of the company MD&A on climate, in close sync with emerging frameworks like TCFD, will be more helpful to investors and less burdensome to issuers to prepare than the overly prescriptive approach of the proposed rule.[40]

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39 17 C.F.R. § 229.303 (Item 303 of Regulation S-K).

40 One of the most powerful values of the new rule is that it requires all issuers that engage in registered offerings under the Securities Act or that are registered and reporting under the Exchange Act to disclose their Scope 1 and 2 emissions. But in doing so, the rule exacerbates an important and growing risk to American investors and markets.

For a variety of historical reasons, the securities laws are not well tailored to addressing the sizable private securities markets we now have, and their effect on ordinary American investors. There are complex reasons why that is so, which include: the facilitation of private markets to fuel the emergence of more large private companies and thus their growing importance to investors; the failure to anticipate and address the prevalence of institutional investors who invest on behalf of individuals, such as pensioners and mutual fund investors, and expose them to private market risk; and the rise of debt security financing as a primary tool for financing companies and the attendant consequences for investors.

American investors are now exposed to the risks of these private markets in several important ways, including as: 1) retirement- and college-saving investors in mutual funds that hold the debt of private companies; 2) pensioners whose pensions depend on the performance of private companies owned by investment funds in which their pension funds exist; and 3) taxpayers and community members who subsidize and depend upon the continued vitality of charities and foundations that perform critical functions like health care, education, and social service and that invest in these private markets. Their exposure to these markets has been facilitated by a series of congressionally authorized, SEC-granted exemptions, that enable private companies to access capital from mutual funds, pension funds, and charities that are important to ordinary Americans. *See, e.g.*, Section 4(a)(2) of the Securities Act (15 U.S.C. § 77d(a)(2)); Rule 144A under the Securities Act (17 C.F.R. § 230.144(a)); Section 504, 506(b), and 506(c) of Regulation D under the Securities Act. The risks that these private markets pose for American investors have grown exponentially, as these large private markets have become enormous and continue to grow. *See* Gary Gensler, Chair, SEC, Testimony at Hearing before the Subcommittee on Financial Services and General Government U.S. House Appropriations Committee (May 17, 2022), https://www.sec.gov/news/testimony/gensler-testimony-fsgg-subcommittee (noting fifty percent growth (from $67 trillion to $100 trillion) in combined assets under management in registered investment companies, private funds, and separately managed accounts, representing the life savings of more than 106 million American investors); Patrick Henry, Frank Fumai & Tania

III. The Proposal Can Better Encourage Useful Innovation by Not Requiring (or by Postponing) the Disclosure of Scope 3 Emissions, and by Encouraging Voluntary Disclosure by Way of a Safe Harbor for Issuers That Choose to Make Voluntary Disclosure. The Same Is True of Disclosure of Other Innovative Techniques Such as Internal Carbon Pricing

The Commission's proposed rule requires companies to undertake serious new responsibilities, as will also be the case if our suggestions are adopted. These will involve substantial efforts by company employees and require companies to expend resources for outside advisors for help. To the extent the new requirements involve reporting Scope 1 and 2 emissions, companies may benefit from well-developed existing standards, models like the GHG

Lynn Taylor, *The Growing Private Equity Market*, DELOITTE (Nov. 5, 2020), https://www2.deloitte.com/us/en/insights/industry/financial-services/private-equity-industry-forecast html ("In 2020, 66 percent of institutional investors invested in PE, up from 57 percent in 2016.").

We take no position on whether this has been a good or bad thing overall; we just underscore the objective reality and its implications for American investors and markets. In particular, we highlight that it will be difficult for the Commission to fulfill its worthy intention of requiring disclosure of valuable information about climate risk and impact for investors without addressing the reality that there are private companies that are larger in scale and pose more climate-related investor risk than many public companies. We also believe it is important to consider the consequences to markets and investors if the costs of listing shares are excessive in comparison to those faced by companies that do not list shares, but can raise capital using Commission-granted exemptions from the securities laws. In other words, if widening the disclosure window solely on public companies contributes to more large companies with high investor impact to go private, investors and our economy will not be well-served.

The Commission has authority to amend its rules-based exemptions, particularly those embodied in Rule 144A and Rule 506 of Regulation D, to condition offerings under such rules on certain disclosures. We believe that the Commission should consider doing so. *See* 15 U.S.C. § 77z-3 (empowering the SEC, "by rule or regulation . . . [to] *conditionally* or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities or transactions from any provision or provisions of [the Securities Act or any rule or regulation issued thereunder], to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.") (emphasis added); *see also* 15 U.S.C. §§ 80a-6(c), 80b-6a.

The Commission could, for example, modify those exemptive rules in connections with offerings that exceed a certain size or are undertaken by issuers exceeding a certain size, when the investor impact is comparable to that of typical public companies. What is ultimately most important to investors, in both the public and private markets (and many are active in both), is to require companies that have a similar impact on American investors to make comparable disclosures, regardless of whether they have a public offering or their equity securities happen to be listed on a stock exchange. The time when American investors (including individuals) were primarily subject to the investment risk of public companies is past, and that reality should be addressed as a matter of investor protection and market rationality.

Protocol and the GHG reporting requirements of the Environmental Protection Agency,[41] and thus be able to make the new and valuable disclosures with more reliability and less burden.

The same is not true of Scope 3, for reasons we have previewed. Although the GHG Protocol reflects important progress in respect of Scope 3 and has significant detail (for example, it proceeds from fifteen defined components, or categories, both upstream and downstream), the process for developing Scope 3 reporting within those components remains more of a work in progress and in greater flux than that for Scope 1 and Scope 2 reporting. Scope 3 reporting also requires companies to obtain information from and place much greater reliance on third parties over which they often have limited or no control or even influence,[42] or from statistical, economic, public, and other general studies that may well have nothing to do with their particular personnel or business circumstances.[43]

We appreciate and respect the Commission's well-meaning attempt to provide investors information that the Commission believes is important to them for investor protection purposes.[44] If we thought that the proposed mandatory Scope 3 requirements were the best way to serve investor protection interests in this area, we would nonetheless and despite our

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41 *See* EPA Greenhouse Gas Reporting Program, 40 C.F.R. § 98 (2009). To the extent feasible, we encourage cooperation between the SEC, EPA, and other regulators to work with the private sector to increase the efficiency of reporting key climate metrics, and to facilitate the ability of companies to obtain high-quality advice and attestation services at affordable cost from many possible providers, and not just a small set of accounting firms.

42 As we have explained, we do not view franchisees who must operate under strict brand standards, contract manufacturing firms that operate under tight contractual specifications, or contractors who run company call centers to address consumer inquiries and to process orders, as being of this kind. Contractors who perform what would otherwise be core, necessary business functions can be expected to provide information necessary for reporting under Scope 1 and 2, just as they are expected to perform to standard in other very exacting ways by the companies that employ them.

43 This information, as we also mention, is likely to come from outside advisors at issuer expense and is likely to be homogenized and not likely to meaningfully distinguish between companies, because it measures factors that involve more general societal factors rather than issues within their control.

44 We observe, though it is not the core of our concern here, that the permissible use of such sources can open the door to abuse, including by facilitating greenwashing.

misgiving prefer the approach. But, we believe there is a better way that in the long run will better serve the Commission and investors.

Let us be clear. We support efforts by companies, investors, and others to improve the efficacy of Scope 3 emissions measurement and reporting. We also believe that if under current law an issuer otherwise deems its Scope 3 emissions must be disclosed, the changes we suggest be made to the proposal would not result in an exemption from required disclosure that would otherwise be the case.[45] So, for example, if disclosure by an issuer of Scope 3 matters would be required to avoid disclosure otherwise being misleading, disclosure should be required, as under current law. The same would be the case with forward-looking Scope 3 information that is reasonably likely to have a material impact on an issuer's results of operations or financial condition.

We also support the Commission's proposal to require companies to make accompanying Scope 3 disclosure in their SEC filings if they choose to voluntarily set *public* GHG emissions reductions or targets that include one or more Scope 3 categories and to voluntarily provide *public* reports about progress toward those goals that include one or more Scope 3 categories,[46] so long as those filings are accorded the safe harbor protection the proposal contemplates and our recommendations to strengthen that protection and to further limit excessive litigation cost risk are accepted.

But, as to other aspects of Scope 3 reporting, the Commission is operating in a very challenging area. The Commission is properly trying to protect investors and markets by calling

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[45] *See* Commission Guidance Regarding Disclosure Related to Climate Change, *supra* note 7 (providing guidance to public companies regarding the Commission's existing disclosure requirements as they apply to climate change matters).

[46] Proposed Rule Release at 480, proposed 17 C.F.R. § 229.1506(a)(1). As discussed later, we believe that the Commission, to the extent it calls for Scope 3 reporting, should limit its focus to categories that are material or significant to an issuer.

for disclosure in a critically important area, but one that is also characterized by more uncertainty, more flux, less hard data and less consensus as to what serves investor interests. We strongly believe that the Commission is in a position where not acting is not a responsible option. The Commission thus has to make difficult decisions in an uncertain landscape. In doing so, we believe the Commission must of course put investors first, but should not disregard the substantial commentary, including from those who support the Commission's objective,[47] to the effect that Scope 3 information is not currently sufficiently robust or reliable in many cases to be a proper subject today for broad Commission-mandated line item disclosure, even conditioned on materiality, with its normal attendant rigor, controls and procedures. Indeed, it is difficult to read the Commission's proposed rule regarding Scope 3 disclosure, which would permit use of unverified (and in at least some cases unverifiable) third-party information, data derived from economic studies, published databases or government statistics, and even industry averages, and not see an agency stretching to the outer limits of, and beyond, its normal emphasis on exactitude, the high confidence levels in reliability and desire for verification of disclosed information.

As a matter of reality, we also recognize that for many companies in many industries, especially smaller companies with fewer resources and less market power or other ability to obtain information from third parties, determining Scope 3 emissions is burdensome and

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[47] *See, e.g.*, T. Rowe Price, Comment Letter on Proposed Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8906961-244220.pdf (arguing that Scope 1 and 2 emissions should be mandatory, but Scope 3 emissions data should be phased in once data is reported consistently and accurately); American Bankers Association, Comment Letter on Proposed Climate Change Disclosures (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8906876-244192.pdf (stating that the SEC should not mandate disclosure of Scope 3 emissions until shortcomings related to the current lack of methodological consensus and data, as well as the quality of such data, are resolved); Securities Industry and Financial Markets Association, Comment Letter on Proposed Climate Change Disclosures (June 10, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8902525-243346.pdf (arguing that mandatory Scope 3 emissions would impose substantial burdens on, and be beyond the capacity of some, registrants).

uncertain, and not something that they choose to do even as an internal exercise, much less use as a basis for public communication, especially in a Commission filing. At this stage in the development of climate measurement and reporting frameworks, we therefore think it preferable for the Commission to take an encouraging, not mandatory approach, to Scope 3, and to rely more on qualitative disclosures included elsewhere in the proposal or under current law. Even with a materiality trigger for Scope 3 reporting, if an issuer has one or two elements of Scope 3 emissions which rise to a level of materiality, that issuer is required to report all of its Scope 3 emissions across all fifteen components, with questionable benefits for investors. An encouraging voluntary mode and reliance on narrative disclosure is a preferable way for the Commission to start its Scope 3 journey.

A voluntary approach is also advisable because investors and companies themselves in industries with a high climate-salience are likely to drive innovation and convergence on good practices. That outcome should be more desirable for both investors and the Commission. It will happen more efficiently and with less regulatory friction if companies are not otherwise penalized for being willing to take what the Commission itself recognizes are uncertain and challenging steps with greater and uncertain reporting requirements and liability risk.

We are also concerned by the unintended disincentive the proposed rule creates for companies that are undertaking difficult, discretionary efforts to assess their climate impact, such as through internal efforts to price carbon use, and engage in scenario analyses and transition planning.[48] We therefore do not support the provision of the proposed rule imposing greater reporting obligations on registrants that seek to be ahead of the curve, and encouraging those

[48] *See* Proposed Rule Release at 79-83, proposed 17 C.F.R. § 229.1500(j) (carbon pricing disclosure); *id.* at 83-88, proposed 17 C.F.R. § 229.1502(f) (scenario analyses); *id.* at 102-06, proposed 17 C.F.R. § 229.1503(b) (transition plans).

behind the curve to stay there. Nor do we support the proposal to make companies that have "any" climate-related goals or targets, regardless of whether they are public, provide detailed, forward-looking multi-year disclosure about the company's plans to meet those goals (unless disclosure would otherwise be required under existing rules regarding forward-looking information).[49]

As with our view that Scope 3 should not be a general mandate at this stage, we believe the market itself will be able to encourage good practices and police disclosures using the powerful tool the new Scope 1 and Scope 2 disclosure gives them.[50] The market will be well-positioned to police companies that attempt to use climate goals as a branding exercise rather than a good-faith tool to reduce business risk. If the Commission wants to encourage more disclosure, we believe it should extend to issuers that choose voluntarily to make disclosures about their scenario planning or efforts to hit carbon reduction goals and price carbon internally or their scenario planning, the same safe harbor protection the Commission has proposed to give for Scope 3 disclosures.

Discouraging innovation on this important topic by subjecting those companies making the most serious effort to address the impact of climate change on their business to greater legal burden and risk should be avoided. It is not in the best interests of investors or the markets.

If the Commission decides to proceed with mandatory Scope 3 disclosures, we believe that it should only consider a more targeted approach that would be preferable for both investors and issuers. As we have discussed, if Scope 3 disclosures are to be useful to investors, they

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[49] Proposed Rule Release at 479-81, proposed 17 C.F.R. § 229.1506.

[50] Not only will a requirement for universal public company disclosure of Scope 1 and 2 emissions police narrative and other disclosures, so do existing aspects of the reporting regime for public companies. For example, if a climate-related factor is materially associated with recognition in the financial statements, then this factor should be discussed in that context. *See* Commission Guidance Regarding Disclosure Related to Climate Change, *supra* note 7.

cannot be made in an undifferentiated lump covering fifteen, or more, undifferentiated categories, but must distinguish between the contribution of different categories that are covered. The Commission in its proposal in fact recognizes this reality. Although the proposal calls for reporting of Scope 3 emissions as a whole if they are material, it also calls on issuers to identify which categories of Scope 3 emissions are significant and to disclose emissions from such categories separately.[51]

On this logic, if categories must be isolated in Scope 3 reporting to provide investor-useful information—as we agree should be the case[52]—then our outsourcing proposal makes even more sense. But, in addition, imposing reporting by an issuer only in respect of categories that are significant or material would focus on investor-useful information and would lessen the burden on issuers. Such disclosure would also tie more directly into the other parts of the Commission's proposal addressing material aspects of risk identification, risk management and the like. By contrast, requiring reporting of total Scope 3 emissions, as the Commission's proposal requires, resulting in undifferentiated disclosure of a single number covering fifteen (or more) non-exclusive[53] distinct functions with no or incomplete ability to discern the inputs, much less to compare the inputs to similarly situated industries players, would be an inferior policy decision both from the perspective of helping investors and limiting burdens on issuers.

At the very least, if the Commission is going to require Scope 3 reporting, it should phase in those requirements, starting with the largest public companies, with billions of dollars of market cap and attendant resources. We would suggest that a line at smaller reporting companies

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51 *See* Proposed Rule Release at 470, proposed 17 C.F.R. § 229.1504(c)(1).

52 To the extent that Scope 1 and 2 emissions are also comprised of important functional categories, we also believe that similar reasoning should apply so that investors can understand the material categories driving company emissions, and be able to compare companies in similar industries along these functional lines.

53 *See* Proposed Rule Release at 171.

falls well below what should be considered. This approach would focus the implementation costs in the early stages on companies with the largest impact on investors and best able to absorb those costs. And, as we underscore later, companies that are required to disclose or voluntarily choose to do so should receive the protection of a meaningful regulatory safe harbor when facing government enforcement, and should not face the prospect, as we also underscore later, of enforcement by a private right of action.

For that reason, we concentrate at this point on the topic of safe harbors in proceedings initiated by the Commission itself. If the Commission adopts any version of Scope 3 disclosure, it is also essential that it adopt a genuine and not an illusory safe harbor. It gives us no pleasure to observe that the safe harbor proposed falls into the latter category;[54] it is largely if not entirely illusory. Our reasoning is simple. The "fraudulent statement" definition from which the Commission proceeds appears to require scienter.

Our first question is whether the safe harbor has any applicability to other statements and civil liability provisions, particularly Section 11, Section 12 and Section 17 of the Securities Act. Because liability under these sections attaches without regard to whether there is a "fraudulent statement," the safe harbor is of limited utility where those provisions are in play.

Our second question is whether the Commission intends to seek to interpret the "fraudulent statement" definition as requiring only some form of negligence, as traditional concepts of fraud have eroded in some jurisdictions to encompass negligent misstatements, not just ones made with the wrongful state of mind historically associated with the concept of fraud. If a negligence-based standard is intended and the safe harbor simply involves some modest benefit for due diligence, the Commission should say so, in which case issuers will in our view

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[54] *See* Proposed Rule Release at 210, proposed 17 C.F.R. § 229.1504(c)(3).

face undue risk in implementing these important new requirements, which involve the application of new and still evolving standards. If scienter is the standard, as we believe should be the case, then the safe harbor should require the government to prove a knowing or intentional misstatement, so that concepts of negligence or the intermediate state of mind of recklessness are not adequate in proving liability for complying with the new rule.

Our final and related question has to do with the notion of "reasonable basis" in the context of the Scope 3 proposal. For many aspects of Scope 3 reporting, issuers will have to rely on information provided by some third parties over which they exercise no control or market power. The Commission concedes this crucial fact. An issuer can seek verification, assurance, and any sort of comfort or support from these parties. Whether the third party, presumably informed by advice of counsel, will permit any such step is unclear. Many issuers may effectively be on their own to make judgments about reliability. The reasonable basis standard of the safe harbor is of little utility under these circumstances.

We would therefore propose that any safe harbor that the Commission proposes that will actually be useful in producing disclosure in this area require knowing or intentional fraud in the sense that the issuer have actual knowledge that the third-party information it is utilizing is unreliable. Otherwise, issuers will have an unproductive incentive to rely on published sources that provide essentially no additional decision-useful information to investors.

To the extent the Commission believes it needs the authority to require corrective disclosures, the production of certain books and records, or other similar remedial measures against companies, then it could exempt those remedial measures from the safe harbor. But to the extent that the Commission wishes to proceed against an individual or to seek penalties or damages from a company, we believe that a safe harbor requiring proof of knowing or intentional misconduct should apply.

Moreover, this entire discussion is strong evidence supporting our position that a new rules-based requirement of the Commission for disclosure of Scope 3 information is unwise and at the least premature, and our later recommendation that education and facilitation of robust disclosure be the Commission's key focus and that any enforcement of the new rule be entrusted solely to the government.

IV. Make Narrative Requirements, Including Those Proposed in Financial Statement Notes, Sync Better With Emerging Private Sector and International Reporting Regimes, and With Principles-Based Disclosure, Such as That Found in MD&A

We applaud the Commission for recognizing the value of syncing U.S. disclosure practice with high-quality private sector and international standards, including the TCFD framework and the GHG Protocol.[55] But, as we have previewed, the proposed rule will also be markedly improved if there is substantial simplification and closer adherence to the more streamlined approach of those standards. As important, the proposed rule could achieve its intended purpose at less cost and with more real value to investors by basing narrative disclosure more on existing principles-based disclosure practices used by companies in the MD&A sections of their annual reports. To move in that direction, by way of non-exclusive example, proposed Items 1501-1503 should be consolidated into a single more concise item that is less prescriptive, less redundant and more focused on materiality, and that item should be reportable as a section

[55] Proposed Rule Release at 128 (noting a similar disaggregation of disclosure with IFRS), and at 34 ("Our proposed climate-related disclosure framework is modeled in part on the TCFD's recommendations."); Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46 ("The proposed disclosures are similar to those that many companies already provide based on broadly accepted disclosure frameworks, such as the Task Force on Climate-Related Financial Disclosures and the Greenhouse Gas Protocol.").

of the MD&A of the company's 10-K (or equivalent on a company's 20-F). An example of an item that effectively addresses the subject matter of the proposed items as suggested is attached as Exhibit 1.

The proposal falls short of its own stated goals by requiring companies to make narrative and certain quantitative disclosures in accordance with strict prescriptive line item quantitative standards and without the consideration, which the Commission is capable of and often gives, of whether the information prescribed to be disclosed is material. For example, the proposed rule includes in numerous places terms like "any" and "all" that are at odds with traditional narrative disclosure requirements and practices that recognize that it is generally best to give companies discretion to assess the significance of information and not force them with overly prescriptive rules to report information of trivial significance.[56]

The proposed rule also requires that certain issuers report additional quantitative information outside Scope 1 and 2 as a part of the new required narrative disclosure. Some of this information is not the subject of developed, understood standards. And the proposed rule also requires the reporting of this information without regard to a traditional materiality threshold.[57] We do not support requirements for quantitative or qualitative disclosures that are unrealistic, unduly burdensome, or that will result in a surfeit of insignificant chaff rather than focused material information. If metrics are not well defined, they cannot support concrete,

[56] *See, e.g.*, Proposed Rule Release at 454, proposed 17 C.F.R. § 210.14-02(d); *id.* at 463, proposed 17 C.F.R. § 229.1502(a); *id.* at 466, proposed 17 C.F.R. § 229.1502I(2); *id.* at 466, proposed 17 C.F.R. § 229.1502(f); *id.* at 466-67, proposed 17 C.F.R. § 229.1503(a).

[57] By contrast, see Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2,080, 2,089 (Feb. 10, 2021) (to be codified at 17 C.F.R. pts. 210, 229, 230, 239, 240) (noting that the development of MD&A disclosures is based on a "materiality-focused and principles-based approach").

comparable reporting. These include, *inter alia*: the identification of "all."[58] By way of further example, the requirements for financial statement footnotes in the proposed rule call for the reporting of the financial impact on a line item in financial statements if it amounts to one percent of the total line item for the relevant fiscal year.[59] It does so by telling companies that if something is lower than one percent, it need not be disclosed.[60] The logical corollary is that if anything has at least a one percent impact, it must be disclosed. But although, as discussed below, there is precedent for accounting disclosure requirements with a one percent threshold, for this proposed rule, we do not believe that a one percent threshold would represent a level that is sensible or easily reconcilable with accepted standards applicable to the sort of broad and complex financial reporting being considered here. We would also observe that the sort of financial statement note disclosure that the Commission seeks here is in some significant respects analogous to materiality-driven MD&A type disclosure, and that the proposed one percent threshold would in way too many cases go well beyond what the Commission is likely seeking to achieve in terms of useful reporting.

That said, we understand the Commission's legitimate concern that some issuers have not been sufficiently rigorous in determining their existing reporting obligations under the Commission's 2010 guidance to disclose climate- related information required under current rules,[61] and that a quantitative trigger or backstop is helpful in ensuring provision of information important to investors. We also recognize that a one percent trigger has been used in other

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[58] *See* proposed 17 C.F.R. §§ 229.1502 (Item 1502) and 229.1503 (Item 1503), climate-related impacts across each of business operations, products or services, suppliers, adaptation and mitigation activities, and R&D expenditures.

[59] Proposed Rule Release at 452-53, proposed 17 C.F.R. § 210.14-02(b).

[60] *Id.*

[61] *See* Commission Guidance Regarding Disclosure Related to Climate Change, *supra* note 7, at 6,293-97.

specific areas.[62] Given the transformational value of the required Scope 1 and 2 reporting the proposed rule mandates, and the intense interest investors will take in evaluating (and in some cases policing) issuers' accompanying narrative disclosures around climate, we suggest that a more balanced approach might be, if the Commission believes a quantitative trigger is necessary to prevent non-compliance, to set a basic threshold based on materiality and backstop the materiality standard with a numerical level at five percent in the short- and medium-term or ten percent in the long-term. This would limit the ability of issuers to avoid disclosure of meaningful information, while not setting an unreasonably low threshold that will lead not only to a risk but also to a certainty of provision of a massive amount of immaterial information to investors and thus more cost than benefit.

We urge similar caution about the proposed disclosure requirements regarding offsets and renewable energy credits or certificates ("RECs").[63] This is a level of detail appropriately determined not by a regulator but by a standard-setter (such as ISSB or the FASB).[64] We again underscore that markets, quality certifications, data systems, and other relevant factors critical to climate reporting are still in their infancy, while also developing rapidly. We note also that the proposals, taken literally without a general qualifier making certain that only material issues need to be discussed—for example, "the source of the offsets or RECs, the nature and location of the

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62 *See, e.g.*, 17 C.F.R. § 210.12-13 (disclose open option contracts using a one percent of net asset value threshold, based on the notional amounts of the contracts); 17 C.F.R. § 229.404(d) (disclose transactions between a smaller reporting company and related persons in which the amount involved exceeds one percent of average total assets); 17 C.F.R. § 229.103 (disclose governmental proceedings if they reasonably will result in monetary sanctions larger than the lesser of $1 million or one percent of the current assets).

63 *See* Proposed Rule Release at 271, Question 173.

64 We note, consistent with the concern we raised in note 40 about the growing imbalance between public and private company disclosure and its negative effect on investors, that if the FASB acted to address this salient issue with more alacrity, then its action would likely have an important impact on both public and large private companies. This would be of value to investors and in promoting useful convergence in accepted accounting principles.

underlying projects …"[65]—are too prescriptive and risk overly detailed, expensive disclosure of information that is not of decision-making utility to investors and may force issuers to disclose competitively sensitive information.

Similarly, although ZIP code reporting might be relevant to substantive environmental regulators, environmental advocates, or state and local governments, geographic reporting requirements of that kind and at that level of detail seem alien to the singular purpose of the proposed rule—market and investor protection—and involve more cost than benefit.[66] We thus believe the Commission (again as a matter of a better policy choice rather than as a matter of authority) should not require location information, at least in the absence of a geographical concentration of risk or loss that would result in a strong likelihood that such information is material. More relevant to investors are business line risks, which are already a well-recognized basis for required disclosure.

Requiring unduly detailed information of these kinds is not just unduly expensive; it harms investors because the overwhelming bulk of disclosure required can obscure the most important information. Importantly, climate information, although undeniably important, is not the only information important to investors. An overly fulsome—a word we use advisedly—approach to prescriptive climate disclosure also might result both in causing companies to treat climate disclosure as a compliance exercise, rather than a more meaningful exercise of greater utility to investors and in denying companies the opportunity, through sheer resource limitations, to provide equally meaningful disclosure on other important topics to investors.[67]

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[65] *Id.*

[66] Proposed Rule Release at 59-63.

[67] The reality is that the average size of a public company annual report has grown substantially. From 2006 to 2020, 10-K filings for Russell 3000 companies grew from approximately 46,000 words to 62,000 words (a thirty-four percent increase). *See* Zack Yang & Temi Oyeniyi, *Hiding in Plain Sight—Risks That Are Overlooked*, S&P GLOBAL MKT. INTELLIGENCE QUANTAMENTAL RESEARCH 2 (Mar. 2021). This reflects a longer trend—from 1996

As to this subject, we also applaud the Commission for its adherence to its precise statutory role of providing disclosure relevant to investors, and not straying into substantive environmental policy that is the responsibility of other agencies of the federal government. We underscore the Commission's admirable recognition of this in the release discussing the proposed rule, which states "the objective of this disclosure is not to drive targets, goals, plans, or conduct, but to provide investors with the tools to assess the implications of any targets, goals, or plans on the registrant in making investment or voting decisions."[68] Our proposals to make the proposed rule conform more closely to emerging private sector guidance such as ISSB's proposed framework on climate-related disclosures[69] and to the SEC's own model for MD&A disclosure bring the proposed rule into tighter conformity with that objective and will assure that this message is made more prominent. Rather, companies should disclose their objective impact (Scope 1 and 2) and then have flexibility to do a materiality-driven narrative tailored to their industry and company (for which frameworks like ISSB and the MD&A principles of the Commission itself provide a foundation).

V. **Focus Required Attestation of Scope 1 and 2 Emissions on an Even Larger Size of Public Companies in the First Phase and Phase in Attestation Requirements as to Other Specified Companies When the Market of Providers Is Broader, Practices Are Better Established, and Implementation Costs Will Be Lower**

We support the Commission's desire to make sure that all public companies report their Scope 1 and 2 emissions in a comparable, reliable manner. That is best achieved by having

to 2013, the median length of 10-Ks more than doubled. *See* Travis Dyer et al., *The Ever-Expanding 10-K: Why Are 10-Ks Getting So Much Longer (and Does It Matter)?*, THE CLS BLUE SKY BLOG (May 5, 2016), https://clsbluesky.law.columbia.edu/2016/05/05/the-ever-expanding-10-k-why-are-10-ks-getting-so-much-longer-and-does-it-matter/. By thoughtful concision, the proposed rule would allow companies to address all material matters relevant to their investors more cost-effectively.

68 Proposed Rule Release at 169.

69 *See* IFRS Foundation, *Exposure Draft: Climate-Related Disclosures* (Mar. 2022), https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-climate-related-disclosures.pdf.

reporting that is backed by attestation from qualified advisors expert in measuring climate impact. But the Commission's approach of requiring immediate attestation by accelerated filers and large accelerated filers, strikes us as too costly and as ignoring certain important realities.

The size and market power of American public companies, even at the level of large accelerated filers and accelerated filers, from largest to smallest, varies considerably. So too does their impact on investors. If the Commission takes this into better account, it can improve the benefit to cost ratio of the rule in terms of its approach to attestation. By phasing in attestation starting with the companies that have the largest market capitalization, the Commission will ensure that the first wave involves those companies with the greatest effect on investors. As important, it will focus the first wave costs on the companies that are best able to bear those costs.

We think the proposed rule, with its overly prescriptive attestation and narrative disclosure requirements, risks subjecting both too many issuers and the few advising firms with competence in the area to stresses and imbalances that are bad for the market and hence for investors. We are concerned that the Commission will unintentionally impose professional, independence, and standards stresses on a relatively small set of advising firms, including large accounting firms, that do not have the resources in place to meet the demands the rule will create. Likewise, the requirement for the specified companies to obtain attestation will be most burdensome on mid- and small-cap companies with fewer resources in the early stages of the rule's implementation. These mutual difficulties for providers and companies will make cost control and timely performance challenging, because a limited array of providers will have to work with diverse companies in a mutual exercise in which both the company and provider must work together to develop a reliable base of empirical data and make difficult materiality and compliance judgments.

We believe that the Commission should think in broad terms regarding participants in the attestation process, and that it is advisable to encourage the participation of environmental advisory firms as an additional source of reliable and independent attestation services, as well as traditional accounting firms.[70] In the early stages, the limited number of firms—including the large public accounting firms, for which we have the highest respect—that certify public filings of public companies will be in high demand, and be under stress themselves to help clients comply with the new rule. In the absence of a more pronounced phase-in than the Commission proposes, this will be especially hard on smaller companies with less market power, and that also may be more likely than larger companies to be measuring their climate impact for the first time.

By contrast, following a phase-in approach, the market can adjust and the Commission can help facilitate the creation of a broader group of reliable attestation firms. As important, the experience gained in the first phase should allow attestation firms to improve their processes and to provide needed services in a more affordable fashion. Likewise, for the rule to be most cost-effective, it is important to recognize that there are other safeguards that temper any risk of a phase-in approach. For example, to the extent companies are already subject to another governmental reporting regime for Scope 1 and 2 GHG emissions, such as that of the EPA,[71] their compliance with that government-enforced regime and the results they report under

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70 *See* Proposed Rule Release at 250 (question implying that an accounting standards body should oversee attestation); *compare* Proposed Rule Release at 238 ("If not limited to registered public accounting firms, who should be permitted to provide assurance of GHG emissions disclosure?"), *with id.* at 318 (noting that a majority of firms getting third-party assurances for sustainability reports get them from engineering firms and only fourteen percent get them from accounting firms).

71 Mandatory Reporting of Greenhouse Gases, 47 Fed. Reg. 56,259, 56,260 (Oct. 30, 2009) (to be codified at 40 C.F.R. pts. 87, 89 et al.) (requiring reporting of GHG data and other relevant information from large GHG emission sources, fuel and industrial gas suppliers, and CO_2 injection sites in the United States).

requirements of law will be reflected in their reporting of Scope 1 and 2 emissions under the proposed rule. Moreover, encouraging good but expensive practices like attestations by smaller companies during the phase-in by giving safe harbor effect for their use, rather than mandating universal use of those practices, seems likely to have more benefit at less cost to investors.

For these reasons, we advocate that the Commission require attestation of Scope 1 and 2 emissions for the first three years of implementation only of large cap companies with a market capitalization of over $25 billion. This would cover approximately 300 of the largest public companies.[72] We would then require attestation of the remaining large-capitalization public companies with market capitalization above $10 billion, covering approximately 275 additional companies, and only after this initial five year period, require attestation by the mid-cap and small-cap public companies specified by the Commission.[73] In the phase-in period, any company not required to use attestation that chooses to employ that safeguard, should receive the benefit of a regulatory safe harbor of the kind we have described in enforcement proceedings.

VI. Emphasize Education and Facilitation as First Priorities, and Limit Enforcement to the Government Itself, Not by Private Right of Action

Precisely because measuring and reporting on climate impact will be a novel task for many companies, and involves the applications of standards and norms that are still evolving, compliance with the rule will be challenging in the early years. Most management teams, like most Americans, take very seriously their duty to comply with the law. They will thus strive to

72 *See* Federal Reserve Bank, Wilshire 5000 Total Market Full Cap Index, https://fred.stlouisfed.org/series/WILL5000INDFC; *see also* FORBES, THE GLOBAL 2000 (May 12, 2022, 6:30 AM), https://www.forbes.com/lists/global2000/?sh=2f6da64c5ac0.

73 Because market capitalization can fluctuate, we would propose that once a company meets the criteria of large capitalization in a particular year, it must disclose the next year, and that reductions in market capitalization would not alleviate the requirement to continue to disclose. That is, once a company is required to disclose in one year, its obligations to report continue thereafter so long as it is a public company subject to required reporting under the securities laws.

provide investors with reliable, non-misleading disclosure in this new area. And investors themselves will scrutinize disclosures closely and provide perhaps the strongest form of accountability. Moreover, investors have made clear that climate matters to them, and companies will have to be responsive to them. And of course, the SEC and the Department of Justice have enormous authority to enforce the law.[74]

Given these realities, we believe that the benefits of the proposed rule will markedly increase, and the costs diminish, if the Commission emphasizes that its focus in the early years will be on education and facilitation, and that enforcement will be a second-best and less-preferred alternative, at least in the absence of egregious conduct. Importantly, we also strongly believe that enforcement of the new requirements should be left solely to the government, with the stronger safe harbors for companies that we advocate. Thus, the proposed rule should explicitly provide that it cannot be the subject of a private right of action. This is within the SEC's recognized authority,[75] and the Commission has used that authority in the recent past when undertaking innovative new regulation.[76] This proposal would be strengthened, too, if the

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[74] In combination, the SEC and DOJ have widespread authority to enforce the securities laws by way of civil fines, administrative sanctions and injunctions, and by criminal prosecution. *See* 15 U.S.C. § 78u(a), (c) (power to investigate potential violations of securities laws, and power to invoke the aid of federal courts to enforce the investigative power); *id.* § 78u(d)(1) (power to bring an action in U.S. district court, and power to seek temporary and permanent injunctions); *id.* § 78u(d)(2) (power to seek bar orders); *id.* § 78u(d)(3)(A)(i) (power to impose civil penalties); *id.* § 77h-1 (cease and desist power); *id.* § 78u(d)(7) (power to seek disgorgement); *id.* § 78ff(a) (subjecting to criminal prosecution "willful" violations of securities laws); *id.* § 78u–2 (civil remedies in administrative proceedings); 17 C.F.R. § 202.5 (describing the process by which the SEC investigates and refers matters to the DOJ for criminal prosecution).

[75] *See* Joseph A. Grundfest, *Disimplying Private Rights of Action Under Federal Securities Laws: The Commission's Authority*, 107 HARV. L. REV. 963, 976-97 (1994) (concluding that the SEC has the "broadest possible" authority to "disimply" a private right of action, consistent with the language and history of statutes and rules, the scope of the Commission's discretion, and judicial precedent creating the private right of action).

[76] *See* 17 C.F.R. § 205.7 (2003) (noting that "nothing" in the final rule establishing the standards of professional conduct for attorneys under the Sarbanes-Oxley Act of 2002 "create[s] a private right of action against any attorney, law firm, or issuer" but rather that "[a]uthority to enforce compliance with this part is vested exclusively in the Commission"); *see also* 17 C.F.R. § 243.102 (2000) (providing that under Regulation FD, failure to make a public disclosure is not a violation of Rule 10b-5 under the Securities Exchange Act, and thus there is no private right of action for violations of Regulation FD).

Commission would require only that disclosures beyond Scope 1 and 2 and the more streamlined narrative we have suggested be furnished, not filed, with the Commission.[77]

The benefit of private enforcement of the securities laws is questionable, to begin with,[78] and there is great evidence of rent-seeking in private enforcement of corporate and securities laws at the expense of companies and thus their investors.[79] Our skepticism regarding the

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77 We recognize that the SEC's authority to limit a private right of action if one is embedded specifically in a statute may be more limited. To our mind, that makes it more important that the safe harbor from liability be meaningful, especially because the state of the art in climate disclosure is still rapidly evolving. If the rule required only the furnishing, rather than filing, of any required disclosures beyond Scope 1 and 2 and an MD&A style narrative, that would usefully strengthen the safe harbor.

78 *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740 (1975) ("[I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit."); *see also* H.R. REP. NO. 104-369 at 31 (1995) (explaining the legislative history of the Private Securities Litigation Reform Act ("PSLRA"), writing that "Congress has been prompted by significant evidence of abuse in private securities lawsuits to enact reforms," with abuses including the filing of meritless suits and targeting deep-pocketed defendants without regard to actual culpability); Central Bank of Denver, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 189 (1994) (highlighting the "vexatiousness" of private enforcement); Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2200-03 (2010) (criticizing private enforcement of securities law because "a private enforcer is incentivized to maximize her private welfare, which we can expect to diverge from social welfare in significant ways"); U.S. Chamber Institute for Legal Reform, *Economic Consequences: The Real Costs of U.S. Securities Class Action* (Feb. 28, 2014), https://instituteforlegalreform.com/research/economic-consequences-the-real-costs-of-u-s-securities-class-action-litigation (exposing the "fallacy" that class actions benefit shareholders, evidenced by the fact that even since the passage of the PSLRA, shareholders have lost "at least $701 billion in investment value due to the filing of securities fraud class actions"); Matteo Arena & Brandon Julio, *The Effects of Securities Class Action Litigation on Corporate Liquidity and Investment Policy*, 50 J. OF FIN. AND QUANTITATIVE ANALYSIS 251 (2015) (finding that the risk of securities class action litigation alters corporate savings and investment policy, and firms with greater exposure to securities litigation hold significantly more cash in anticipation of future settlements and other related costs); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 4 (1991) (suggesting regulatory reform "to control agency costs" with sensible rules that "take into account the fact that the plaintiffs' attorney—not the client—controls the litigation"); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 569 (1991) (explaining the finding that settlements of securities class actions do not reflect the merits, and observing that "[i]f private enforcement does not sort claims according to whether violations actually occurred, but instead merely exacts a sort of tax from companies that suffer large market losses, then we are paying for an elaborate, expensive enforcement system without receiving the claimed benefits of that system").

79 *See* Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1856 (2004) (study of merger-related litigation providing evidence of meritless litigation and "a pattern that is far more consistent with the self-interested litigator hypothesis than with the shareholder champion hypothesis"); ROBERT M. DAINES & OLGA KOUMRIAN, RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS (Mar. 2012 Update) (documenting high incidence of meritless claims attacking third-party mergers in which the only tangible benefit was the payment of attorneys' fees to plaintiffs' lawyers, so-called "non-*Revlon*, *Revlon* cases"); Suneela Jain et al., *Examining Data*

benefit to cost utility of private rights of action is even higher where the regulation in question involves novel areas where, in order to obtain optimal results for investors, there will be a premium on issuers bringing creativity and new modes of evaluating and addressing disclosure matters. Subjecting companies to enforcement, not by legitimate government authorities, but by private class action attorneys, is likely to make companies less comfortable undertaking innovative exercises in assessing and discussing climate risk. The Commission's goal of candid, informative disclosures about material climate impact is best achieved by encouraging companies to be forthcoming, and not risking inhibiting forthright and plain talk by creating a new product line for serial-filers of securities litigation.

With the potency of government enforcement, the vigorous input of investors themselves, and the ability of investors to recommend a government investigation if they perceive there may be wrongdoing, there is no need to subject companies to a potential wave of strike suits at a time when they are trying to implement a new and important disclosure regime.

Points in Minority Buy-Outs: A Practitioner's Report, 36 DEL. J. CORP. L. 939 (2011) (examining twenty-seven going-private transactions worth over $50 million between 2006 and 2010, and drawing conclusions consistent with Weiss and White); Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749 (2010) (study revealing that corporate governance settlements have "limited value," which "support[s] the view of scholars and commentators that many derivative suits are strike suits in which the real winners are not corporations or their shareholders, but attorneys"); Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and A Proposal for Reform*, 93 TEX. L. REV. 557 (2015) (finding no statistical evidence that disclosure settlements materially affected shareholder voting on mergers, with the primary result being payments to plaintiffs' attorneys as opposed to benefits to shareholders); Sean J. Griffith, *Innovation in Disclosure-Based Shareholder Suits*, 69 CASE W. RES. L. REV. 927, 934 (2019) (discussing plaintiffs' bar pursuit of fees through strike suits designed to extract "meritless [disclosure] settlements" by way of federal Section 14(a) claims after Delaware law had evolved to prevent these suits being brought as fiduciary duty claims); John C. Coffee, Jr., *Understanding the Plaintiffs' Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677 (1986) (explaining that plaintiffs' attorneys operate under an assumption that only a few of their cases will be successful, so they must file numerous lawsuits in order to maintain their business).

VII. Summary of Proposals to Make the Commission's Proposed Rule Even More Beneficial, and to Make the Costs of Implementation Even Lower

We are grateful for the chance the Commission has given us to comment on its important initiative to give American investors information critical to the future of the companies in which they invest. We support the Commission in its efforts, and propose the following constructive changes to make its excellent proposal even better:

- The Commission should recognize the power and value of high-quality Scope 1 and 2 reporting, and not require Scope 3 reporting or the reporting of innovative, voluntary efforts like internal carbon pricing, scenario analyses or transition planning, unless a company has chosen to set public targets for Scope 3 or Scope 3 emissions are required and reportable under existing disclosure requirements. Instead, voluntary disclosure of Scope 3 emissions or other innovative techniques should be encouraged by way of safe harbor protection;

- To improve the utility and efficiency of the Commission's Scope 1 and 2 reporting requirements, the rule should require reporting in conformity with the GHG Protocol, with as little variation as is necessary to allow for investors to compare issuer emissions on an entity-wide basis;

- To further enhance the effectiveness of Scope 1 and 2 reporting, the proposed rule should have strong provisions requiring issuers that outsource material components of their operations, such as manufacturing or call centers, or through franchises, to report the climate impact of those operations within their Scope 1 and 2 disclosures and also ensure the scope of Scope 1 and 2 emissions reporting fully reflect the economic interests of the issuer;

- To further increase the coherence of narrative requirements with emerging private sector and international standards, such as those from the ISSB and TCFD, and with principles-based SEC reporting like MD&A, the requirements for narrative disclosure should be streamlined, the use of words like "any" and "all" or of *de minimis* quantitative thresholds like one percent should be eliminated or replaced with a more reasonable threshold of five or ten percent, and all narrative and quantitative disclosure beyond Scope 1 and 2 emissions should be subject to a materiality judgment[80] by the issuer about the information's impact on the company's operations

[80] *See* Management's Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 34-26831, 54 Fed. Reg. 22427, 22430 (May 24, 1989), *discussed in* Oran v. Stafford, 226 F.3d 275, 286 n.6 (3d Cir. 2000) (Alito, J.) (SEC guidance on making materiality judgments); *see also* Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release Nos. 33-8350, 34-48960, FR-72, 68 Fed. Reg. 74,829, 75,056-65 (Dec. 29, 2003) (SEC guidance on making materiality judgments, including guidance that "companies should identify and discuss key performance indicators, including

and prospects consistent with that used in the Commission's MD&A reporting standard;

- To move in that direction, by way of non-exclusive example, proposed Items 1501-1503 should be consolidated into one more concise item that is less prescriptive, less redundant and more focused on materiality, and that should be part of the MD&A of the company. An example of such an item is attached as Exhibit 1;

- Attestation of Scope 1 and 2 emissions should be phased in rather than be required immediately by all large accelerated filers and accelerated filers. Under this phase-in approach, for the first three years of implementation attestation should first be required for the largest public companies with market capitalization over $25 billion, and then be required by remaining large cap companies with market value above $10 billion. Only after this initial five-year phase-in period should attestation be required by smaller public companies;

- Likewise, to the extent the Commission insists on requiring the disclosure of Scope 3 emissions, or of other innovative techniques such as internal carbon pricing, transition plans, or other climate-related matters, at the very least those requirements should be phased in on the same basis as we urge for attestation; and

- Enforcement of the rule should be limited to the government itself and there should be no private right of action. Emphasis in the early years of implementation should be on education and facilitation, not enforcement. And, in the context of government enforcement, the stronger safe harbor protections we advocate should apply.

We appreciate this opportunity to submit, and the Commission's consideration of, our comments on the Proposed Rule Release. We ask the Staff to contact us through a simultaneous email to David A. Katz at [redacted] and Robert G. Eccles at [redacted] should it have any questions regarding this submission or related matters.[81]

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non-financial performance indicators, that their management uses to manage the business and that would be material to investors").

81 For the sake of clarity, we reiterate that we sign in our individual capacities and do not purport to speak on behalf of any organization with which we are or have been affiliated.

Very truly yours,

Alan Beller
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Exhibit 1—Proposed Consolidation of Items 1501-1503 into a Single Item

§ 229.1501 (Item 1501) Management Discussion and Analysis of Climate Governance, Risk and Opportunity Identification, and Risk and Opportunity Management.

(a) Describe the processes by which the registrant addresses the identification of material climate risks and opportunities and manages and oversees strategies to address those material risks and opportunities. In doing so, discuss, as applicable:

(i) The role of the board of directors, including any board committees or processes used to set policies regarding and to oversee implementation of policies to address climate risks and opportunities, and including links to relevant committee charters and statements of policy;

(ii) The role of management, including any management committees, specific officers, processes or structures used to address climate risks and opportunities, and including links to relevant operating policies, guidelines and charters as well as relevant industry standards, to the extent used by management; and

(iii) The reporting relationships of these management processes and structures to the board of directors and its committees.

(b) Discuss the registrant's criteria for identifying material short-term, medium-term, and long-term climate risks and opportunities. For purposes of this item, short-term means risks and opportunities that exist within the next three years; medium-term means risks and opportunities eventuating within the next four to ten years; and long-term means any risks or opportunities eventuating after ten years. To the extent that a registrant identifies long-term risks and opportunities, it should identify within five-year increments when the material risks and opportunities are most likely to eventuate. The registrant may also report risks, in addition to reporting using the definitions in this paragraph, using an accepted industry standard for durational risks, so long as the registrant explains that standard and publishes a link to it on the registrant's website.

(c) Identify and discuss any climate-related risks reasonably likely to have a material impact on the registrant, including on its business, operations or consolidated financial statements, which may manifest over the short-, medium-, and long-term, specifying whether they are physical or transition risks and the nature of the risks presented.

(i) For physical risks, describe the nature of the risk, including if it may be categorized as an acute or chronic risk, and the location and nature of the properties, processes, or operations subject to the physical risk.

(ii) For transition risks, describe the nature of the risk, including whether it relates to regulatory, technological, market (including changing consumer, business counterparty, and investor preferences), liability, reputational, or other transition-related factors, and how those factors affect the registrant. A registrant that has significant operations in a jurisdiction that has made a GHG emissions reduction commitment may be exposed to transition risks related to the implementation of the commitment.

(d) Discuss the material effects of any short-term climate-related risks, and the potentially material effects of any medium- or short-term climate-related risks, identified in response to paragraph (c) of this item on the registrant's strategy, operations, business model, and outlook. In conjunction with this discussion of material effects, discuss the corresponding material strategies, tactics, or other processes the registrant is employing to mitigate the effect of these risks.

(1) Include material effects and mitigation efforts on the registrant's:

(i) Business operations, including the types and locations of its operations;

(ii) Products or services;

(iii) Suppliers and other parties in its value chain;

(iv) Activities to mitigate or adapt to climate-related risks, including adoption of new technologies or processes and activities pursued in concert with other industry participants;

(v) Expenditure for research and development; and

(vi) Any other significant changes or impacts.

(2) Identify the time horizon for each described effect (*i.e.*, in the short-, medium-, or long-term, as defined by paragraph (b) of this item).

(e) If applicable, a registrant shall also disclose the actual and potential effect of any material climate-related opportunities on its strategy, operations, business model, and outlook. In doing so, a registrant shall disclose the same information required as if it were addressing a climate-related risk under subsections (c) and (d). Registrants cannot assume the success of unconsummated opportunities to avoid the disclosures of material risks under subsections (c) and (d).

(f) For the avoidance of doubt, a registrant shall disclose, without limiting any other required basis for considering a climate-related risk or opportunity material under Management's Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 34-26831, 54 Fed. Reg. 22427, 22430 (May 24, 1989) or other Commission guidance, any climate-related risk or opportunity to the extent to which it may reasonably affect the registrant's revenues or profits in a negative or positive direction by more than five percent in the short-term or medium-term, or by more than ten percent in the long-term.