



MORTGAGE BANKERS ASSOCIATION

June 17, 2022

Gary Gensler, Chairman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: MBA comments on proposed regulations on climate-related disclosures

Dear Chairman Gensler:

The Mortgage Bankers Association (MBA) respectfully submits these comments in response to the Securities and Exchange Commission's notice of proposed rulemaking on climate-related disclosures.¹

MBA is the national association representing the real estate finance industry, with a membership of more than 2,000 companies that includes all elements of real estate finance: independent mortgage banks, mortgage brokers, commercial banks, thrifts, real estate investment trusts (REITs), Wall Street conduits, life insurance companies, credit unions, and others in the mortgage lending field. From that perspective, our comment focuses on the application of the proposed rule to reporting companies that hold mortgages, residential mortgage-backed securities (RMBS), or commercial mortgage-backed securities (CMBS) on their balance sheets.

MBA is also a proactive participant in policy and market developments on climate-related issues. We have been actively helping our members respond to the risks and benefits arising from extreme weather and other natural events, and to increasing market appetites for Environmental, Social, and Governance (ESG) investing,² including the following:

- MBA formed a Green Lending Roundtable where commercial and multifamily MBA members work together to gather and share information on emerging investor expectations and appetites on climate risk and ESG, and to identify policy and other trends and conditions in climate and ESG investing.
- MBA has responded to climate-change risk issuances by the Office of the Comptroller of the Currency (OCC), Federal Deposit Insurance Corporation (FDIC), Federal Housing

¹ 87 Fed. Reg. 21334 (April 11, 2022); available at <https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf>

² Environmental, Social, Governance (ESG), sometimes referred to as "sustainability," refers to non-financial criteria some investors consider when making investment decisions, and some company leaders consider, when determining how to manage their businesses.

Finance Agency (FHFA), the Federal Insurance Office (FIO), the New York Department of Financial Services (NY DFS), and the SEC. MBA continues to host ESG and climate-change-focused webinar events for members, including events covering an overview of net zero in commercial real estate (CRE), ESG terms and definitions, and challenges and opportunities related to implementing ESG into CRE business.

- MBA is working with the Mortgage Industry Standards Maintenance Organization (MISMO), the real estate finance industry's standards organization, to facilitate the development of green lending and ESG standards, including, but not limited to, data, terms, and definitions to support the flow of consistent information throughout the mortgage finance ecosystem.³

We hope the Commission finds our comments below to be helpful and constructive.

I. OVERVIEW

The stated purpose of the proposed rule is to require companies to disclose “decision-useful information to investors to enable them to make informed judgments about the impact of climate-related risks on current and potential investments.”⁴

MBA shares the Commission’s objective of ensuring investors are provided with decision-useful information about climate-related financial risks. This extensive rulemaking, however, does not appear to be entirely necessary to achieve that objective. Public companies already are required to disclose material information relevant to their financial condition and results of operations, which would include information regarding a company’s material climate-related financial risks.⁵ It appears, therefore, that the objective of ensuring companies disclose material information could be addressed under current rules.

If the Commission nevertheless determines to issue new rules, we believe those rules should be tailored to focus on disclosure of *material* information about *material* risks. The Commission has long recognized that disclosure of immaterial information does not serve investors’ interests,⁶ and mandatory disclosure of immaterial information may mislead investors into believing the

³ For additional information, see the MISMO website at www.MISMO.org

⁴ 87 Fed. Reg. at 21335.

⁵ See, e.g., 17 C.F.R. § 229.303 (Item 303), *Management's discussion and analysis of financial condition and results of operations* (“The objective of the discussion and analysis is to provide material information relevant to an assessment of the financial condition and results of operations of the registrant”).

⁶ See *Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, Securities and Exchange Commission, § I.B, 17 CFR Parts 211, 231 and 241, [Release Nos. 33-8350; 34-48960; FR-72] (Dec. 18, 2003) (“in deciding on the content of MD&A, companies should focus on material information and *eliminate immaterial information* that does not promote understanding of companies' financial condition, liquidity and capital resources, changes in financial condition and results of operations (both in the context of profit and loss and cash flows.” (emphasis added)).

information is more important than it really is. A key theme of our comments below, accordingly, is materiality.

In addition, for purposes of this comment we note that the objective of the proposed rule is to provide investors with information relevant to a reporting company's climate-related financial risks, and that any efforts to require companies to disclose climate-related information for other purposes – for example, to provide information related to a company's impacts on the environment – would therefore be the subject of a different rulemaking under different legal authority.⁷

II. EXECUTIVE SUMMARY OF MBA COMMENTS

We summarize immediately below our comments on Scope 3 emissions disclosures, qualitative disclosures (Regulation S-K), notes to financial statements (Regulation S-X), implementation, and a question on disclosure and asset-backed securities. Our comments in Sections III-VII below discuss each of these areas in greater detail.

A. Scope 3 emissions disclosure

Proposed § 229.1504(c) provides in part as follows:

Disclose the registrant's total Scope 3 emissions if material. A registrant must also disclose its Scope 3 emissions if it has set a GHG emissions reduction target or goal that includes its Scope 3 emissions. ...

Proposed § 229.1504(f) provides a Scope 3 safe harbor. The following bullets summarize our comments on these Scope 3-related provisions.

- **Make Scope 3 emissions disclosures voluntary rather than mandatory.** We recommend that the Commission make Scope 3 disclosure voluntary, subject as appropriate to anti-greenwashing authority. Voluntary disclosure of Scope 3 emissions is appropriate because Scope 3 disclosure is an evolving concept: Scope 3 carbon accounting guidance is incomplete, applying the concept of materiality to Scope 3 emissions is novel, and the burden of reporting Scope 3 will be very high. Voluntary Scope 3 disclosure is additionally

⁷ For example, on May 22, 2022, the Commission released two rulemaking proposals on ESG-related issues: (1) Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, and (2) Investment Company Names. We note also that the Environmental Protection Agency (EPA) has a Greenhouse Gas Reporting Program (GHGRP) (codified at 40 C.F.R. Part 98), which requires large GHG emission sources, fuel and industrial gas suppliers, and CO₂ injection sites in the United States to report GHG data and other relevant information. As described by the EPA, the GHGRP collects GHG emissions data that can be used by businesses and others to track and compare facilities' greenhouse gas emissions, identify opportunities to cut pollution, minimize wasted energy, and save money. States, cities, and other communities can use EPA's greenhouse gas data to find high-emitting facilities in their area, compare emissions between similar facilities, and develop common-sense climate policies. For additional information, see the GHGRP landing page at <https://www.epa.gov/ghgreporting/learn-about-greenhouse-gas-reporting-program-ghgrp>

appropriate because Scope 3 emissions are more likely to be of interest to an ESG investor than to an investor focused on understanding a company's climate-related risk exposure.

- **Limit mandatory disclosure of Scope 3 emissions to companies that have set Scope 3 greenhouse gas (GHG) emissions reduction targets or goals.** We recommend that any mandatory disclosure be limited to companies that have set public Scope 3 targets or goals. To minimize disincentives to making commitments to reduce GHG emissions, we also recommend that any mandatory disclosure apply only to Scope 3 emissions the company identified in a goal or target, and also recommend that Scope 3 emissions reporting should be outside of companies' 10-Ks and 10-Qs.
- **If disclosure of Scope 3 emission "if material" is mandatory:**
 - **Clarify that Scope 3 materiality means decision-critical, not merely decision-useful.** If the Commission retains any requirement to report Scope 3 emissions if material, we recommend clarifying that, consistent with the U.S. Supreme Court materiality cases the Commission cites, a company should conclude that Scope 3 emissions are material only if the company determines that a reasonable investor would be substantially likely to view the act of including or omitting that information as significantly altering the total mix of available information. The standard of materiality in connection with federal securities laws and regulations is and always has been a very high standard. In effect, "material" means *decision-critical* rather than merely *decision-useful*.
 - **Clarify that large percentages of Scope 3 emissions alone do not equal material emissions.** We recommend clarifying that a company should not conclude that its Scope 3 emissions are material solely because Scope 3 emissions make up a large proportion of the company's total emissions, to counteract any confusion that has resulted from certain statements in the proposal that suggest otherwise.
 - **Remove the reference to total Scope 3 emissions.** We recommend deleting the reference to "total" Scope 3 emissions to limit reporting to subsets of a company's total Scope 3 emissions that are material. This narrowing of focus is appropriate because Scope 3 emissions include indirect emissions attributable to 15 categories of a company's upstream and downstream elements of its value chain, and value chains involve millions of assets and heterogeneous roles across countless actors. As a result, it is a practical impossibility to confidently account for a company's *total* Scope 3 emissions, and emissions from subsets of a company's total Scope 3 emissions are more likely to be of interest to an investor.
 - **Highlight that, where Scope 3 emissions are not specifically and reliably related to a company's risk, they cannot be material.** We recommend highlighting that a company's Scope 3 emissions cannot be material if there is not, at a minimum, a specific and reliable relationship between the company's Scope 3 emissions and its levels of a climate-related risk. This concept is important to MBA

members because this is likely to be the case for Scope 3 emissions and climate-related risk on mortgage portfolios.

- **Scope 3 emissions information on mortgages or securities backed by mortgages may not be “reasonably available.”** We recommend that the Commission continue to recognize that some requirements to disclose Scope 3 emissions may be conditionally inapplicable where the information is not “reasonably available,” either because obtaining the information would involve unreasonable effort or expense, or because the information rests peculiarly within the knowledge of another person not affiliated with the registrant.⁸ This concept is important to MBA members because it may apply to holdings of mortgages or securities backed by mortgages, where it may be impossible to obtain and report the necessary information, and where estimates would not be reasonable substitutes for data. In addition, we recommend that Scope 3 emissions be reported outside of companies’ 10-Ks and 10-Qs to accommodate how difficult or impossible it would be to timely disclose Scope 3 emissions within those filings.
- **Scope 3 safe harbor.** To better accommodate the uncertainty around the reporting of Scope 3 emissions, we recommend that the Scope 3 safe harbor be deep, wide, and perpetual (no sunset), and that it apply explicitly to a company’s determination not to report Scope 3 emissions because the information was not material. The Commission also should clarify that any “statement” for purposes of the Scope 3 safe harbor includes the quantitative disclosures themselves.

B. Qualitative disclosures (Regulation S-K)

Proposed §§ 229.1501, 229.1502, and 229.1503 would require a reporting company to make qualitative disclosures related to climate-related risk, including disclosure of the company’s governance of climate-related risks and opportunities; the company’s strategy, business model, and outlook; and how the company integrates climate-related risk and transition plans into its risk management systems and processes.

- **Comment summary.** We recommend that the proposed mandatory disclosure be limited to *material* information about *material* climate-related risks to prevent the rule from requiring information that is immaterial and is not necessary to provide investors with decision-useful information about a company’s climate-related risks. We also recommend clarifying that each of the specified elements of disclosure is only an illustrative example and is not required, so that the rule cannot be read to implicitly require company to adopt certain preferred best practices.

⁸ See 87 Fed. Reg. at 21391.

C. Notes to financial statements (Regulation S-X)

Proposed §§ 210.14001 and 210.14-02 would require companies to make quantitative disclosures of climate-related impacts on financial reporting, including impacts of severe weather events on financial statement line items, impacts of severe weather events on expenditures, and impacts of severe weather events or climate-related assumptions on financial statements.

- **Comment summary.** We recommend that the proposed separate Regulation S-X financial statement notes be eliminated in favor of applying current requirements as to qualitative disclosures under Regulation S-K, relying on existing notes to financial statements, or referring the matter to the Financial Accounting Standards Board (FASB) for possible accounting guidance. The reporting processes that would otherwise be required under this provision would be difficult or impossible to implement, and the resulting reporting would not meaningfully increase investors' understanding of a company's climate-related financial risks. At a minimum, the Commission should remove the one percent thresholds in favor of conditioning disclosure on a company's determination of materiality.

D. Implementation

The Fact Sheet accompanying the proposal projects a final rule with a December 2022 effective date, and implementation as early as January 1, 2023, for some registrants.⁹

- **Comment summary.** We recommend extending the projected implementation schedule by a minimum of two full calendar years to accommodate the substantial changes that would be required to implement the proposed rule. In addition, any required reporting should be prospective only because requiring reporting on prior periods would effectively eliminate the benefit of delayed implementation.

E. Question on asset-backed securities

The proposal asks for feedback on whether the Commission should require asset-backed security issuers to provide some or all of the disclosures that would be required under proposed Subpart 1500 of Regulation S-K.

- **Comment summary.** In our view, it would be premature at best to consider requiring specific climate-related disclosures in connection with the issuance of asset-backed securities. There is insufficient infrastructure in place to support such disclosure and it is not clear what, if any, additional information would be material to investors.

We address each of these points in greater detail below.

⁹ See SEC, *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosures*, p. 3 (March 21, 2022); available at <https://www.sec.gov/files/33-11042-fact-sheet.pdf>

III. COMMENT ON SCOPE 3 REPORTING REQUIREMENTS

Proposed § 229.1504(c) provides in part as follows:

Disclose the registrant's total Scope 3 emissions if material. A registrant must also disclose its Scope 3 emissions if it has set a GHG emissions reduction target or goal that includes its Scope 3 emissions. ...

Proposed § 229.1504(f) provides a Scope 3 safe harbor. Our comments below relate to these provisions.

A. Make Scope 3 emissions disclosures voluntary rather than mandatory.

There are many reasons Scope 3 emissions should be voluntary, not mandatory. The disclosure of Scope 3 is an evolving concept, Scope 3 carbon accounting guidance is incomplete, and applying the concept of materiality to Scope 3 emissions is novel.

In addition, Scope 3 emissions information is likely to have little to no value in providing decision-useful information about a company's climate-related risk. Rather, companies generally disclose Scope 3 emissions only as part of a company's voluntary efforts to appeal to ESG investors rather than to inform investors as to the company's level of climate risk. As a result, a rule on disclosures of climate-related financial risks may be the wrong tool for the job. The better tool for the job would be voluntary disclosure together with the Commission's anti-greenwashing authority or ESG-related rulemakings as appropriate.¹⁰

Recommendation: We recommend making Scope 3 disclosure voluntary, subject as appropriate to anti-greenwashing authority.

B. Limit mandatory Scope 3 disclosures to companies that set Scope 3 targets or goals.

For the reasons described immediately above, it may be premature, at best, to require mandatory disclosure of total Scope 3 emissions. If the Commission determines, however, to include mandatory Scope 3 disclosure in the final rule, that requirement should be limited to companies that set Scope 3 targets or goals.

When a company makes a public commitment to reduce GHG emissions-that includes a Scope 3 emissions goal or target , that company effectively has told investors that the company believes that those Scope 3 emissions are important. A company that has voluntarily made such a commitment presumably has conducted its own cost-benefit analysis as to whether the value of the new information outweighs the cost of providing that information. Accordingly, it may be

¹⁰ See, e.g., recent SEC enforcement actions to address allegations of greenwashing and the Commission's two recent proposals on ESG-related issues: Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social; and Governance Investment Practices, and Investment Company Names, both released May 22, 2022.

appropriate to expect that company to subsequently and consistently report on its progress against the goals or targets that it has set.

The investor purpose of a voluntary GHG emissions-reduction commitment, however, is to provide investors with information that may be relevant to ESG factors and not to provide information about financial risk. As a result, it may be more appropriate for the Commission to address such disclosures through an ESG-related rulemaking or the Commission's anti-greenwashing authorities.

Recommendation 1: We recommend that any mandatory disclosure of Scope 3 emissions be limited to companies that have set a GHG emissions reduction target or goal that includes Scope 3 emissions.

Recommendation 2: We recommend clarifying that any mandatory Scope 3 disclosures arising from such a commitment are limited to the specific Scope 3 targets or goals that the company has specified, to reduce disincentives for companies to make GHG emissions reduction commitments.

C. If disclosure of Scope 3, if material, is mandatory

The following recommendations and observations apply to any requirement to disclose total Scope 3 emissions if material.

1. Clarify that Scope 3 materiality means decision-critical, not merely decision-useful.

Materiality has never been applied to Scope 3 emissions until this rulemaking.¹¹ The GHG Protocol that the Commission used as a model for the Scope 3 disclosures, for example, does not include the concept of materiality.¹² On the other hand, materiality in the context of public disclosures under federal securities law is not a new concept, and its meaning does not change in the context of a requirement to disclose Scope 3 emissions if material.

In the proposal's discussion of Scope 3 emissions and materiality, the Commission summarizes the long-standing standard of materiality as follows:

As defined by the Commission and consistent with Supreme Court precedent, a matter is material if there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote,¹³

This description is helpful but falls short of helping companies operationalize Scope 3 materiality – *how* important is important enough to be material? The U.S. Supreme Court cases the

¹¹ See 87 Fed. Reg. at 21381 (“We acknowledge that a registrant’s material Scope 3 emissions is a relatively new type of metric, based largely on third-party data, that we have not previously required.”).

¹² See *id.* at 21345.

¹³ *Id.* at 21381.

Commission cites, however, provide further explanation of how important is important enough to be material that may provide companies with additional guidance.¹⁴

Specifically, the U.S. Supreme Court expanded on that general description, in a case deciding whether an omitted fact was material, adding the following further explanation:

What the standard [of materiality] does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.¹⁵

Here that means that Scope 3 emissions information is material only if the omission of that information would alter the total mix of available information on a company’s climate-related risk. In effect, the U.S. Supreme Court language indicates that, for information to be material, it must be *decision-critical* rather than merely *decision-useful*.

Recommendation: If the final rule includes a requirement to disclose “material” Scope 3 emissions, we recommend clarifying that a company should determine its Scope 3 emissions to be material only if it determines that including or omitting that information would be substantially likely to significantly alter the total mix of available information – i.e., that the information is *decision-critical* rather than merely *decision-useful*.

2. Clarify that large percentages of Scope 3 emissions alone do not make them material.

We appreciate that the Commission clearly states that a quantitative threshold alone cannot be used to determine whether a company’s Scope 3 emissions are material, for example, as follows:

Consistent with the concept of materiality in the securities laws, this determination would ultimately need to take into account the total mix of information available to investors, including an assessment of qualitative factors.¹⁶

* * *

¹⁴ In a supporting footnote to the Commission’s description of materiality, the Commission cites two seminal materiality cases, *Basic Inc. v. Levinson*, 485 U.S. 224, 231, 232, and 240 (1988) and *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S. 438 (1976). The *Basic Inc.* case involved alleged violations of § 10 and Rule 10-b-5 arising from omissions of certain information. To decide whether the omissions in that case were “material” for purposes of § 10 and Rule 10-b-5, the Basic Inc. Court adopted the materiality standard applied in the *TSC Industries* case to determine whether omissions from proxies were material for purposes of § 14(a) of the Securities Exchange Act of 1934.

¹⁵ *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. at 449.

¹⁶ 87 Fed. Reg. at 21379.

We ... have not proposed a bright-line quantitative threshold for the materiality determination as suggested by some commenters because whether Scope 3 emissions are material would depend on the particular facts and circumstances, making it difficult to establish a “one size fits all” standard.¹⁷

We are concerned, however, that certain other statements, including the following, needlessly confuse the issue:

When assessing the materiality of Scope 3 emissions, registrants should consider whether Scope 3 emissions make up a relatively significant portion of their overall GHG emissions.¹⁸

* * *

“[S]ome companies rely on, or support reliance on, a quantitative threshold such as 40 percent when assessing the materiality of Scope 3 emissions.¹⁹

The proposal’s Request for Comment 98 also creates confusion by asking questions that suggest that a quantitative threshold for materiality may be appropriate:

Should we use a quantitative threshold, such as a percentage of total GHG emissions (*e.g.*, 25%, 40%, 50%) to require the disclosure of Scope 3 emissions?
If so, is there any data supporting the use of a particular percentage threshold?
Should we require registrants in particular industries, for which Scope 3 emissions are a high percentage of total GHG emissions, to disclose Scope 3 emissions?²⁰

While those statements do not explicitly state that Scope 3 emissions are “material” for purposes of the rule solely because they make up a large proportion of the company’s total emissions, they give that impression.

That impression is clearly mistaken. Any company’s determination of materiality depends on the particular facts and circumstances, including both *qualitative* and quantitative factors – as they relate to the company’s climate-related risks. As a result, a company should not conclude that its Scope 3 emissions are material to the company’s climate-related risk solely because they make up a large proportion of a company’s total emissions.

Recommendation: We recommend clarifying that a company should not conclude that its Scope 3 emissions are material to the company’s climate-related risk solely because its Scope 3 emissions make up a large proportion of the company’s total emissions. It is critical for the Commission to draw a clear boundary between the factors a company may consider when voluntarily making a GHG emissions-reduction commitment and the factors a company must consider when

¹⁷ Id. at 21381 (footnote omitted).

¹⁸ Id. at 21379.

¹⁹ Id. at 21381.

²⁰ Id.

determining whether information is subject to mandatory disclosure because it is material to a company's climate-related financial risks.

3. Clarify that information on Scope 3 emissions cannot be material if there is no relationship between a company's levels of Scope 3 emissions and levels of the company's climate-related risk.

The assumption underlying the mandatory disclosure of material Scope 3 emissions is that information on the level of a company's Scope 3 emissions may be informative about the level of the company's exposure to transition risk or other climate-related risk.²¹

A company's Scope 3 emissions, therefore, cannot be material unless, at a minimum, its carbon accounting levels of Scope 3 emissions are specifically and reliably related to the levels of a company's climate-related financial risk. If a company's Scope 3 emissions can increase or decrease independent of its levels of climate-related risk, for example, there would be no specific

²¹ See, e.g., discussion at 87 Fed. Reg. at 21377-21378 (emphasis added).

When recommending that the Commission require the disclosure of Scope 3 emissions, some commenters indicated that Scope 3 emissions represent the relatively large source of overall GHG emissions for many companies. Given their relative magnitude, we agree that, for many registrants, Scope 3 emissions **may be material to help investors assess the registrants' exposure to climate-related risks, particularly transition risks**, and whether they have developed a strategy to reduce their carbon footprint in the face of regulatory, policy, and market constraints...

Scope 3 emissions information may be material in a number of situations to help investors gain a more complete picture of the **transition risks** to which a registrant may be exposed. In certain industries, ... a **transition** to lower emission products or processes may already be underway, triggered by existing laws or regulations, changes in weather, policy initiatives, a shift in consumer preferences, technological changes, or other market forces, such that **financial risks are reasonably foreseeable for registrants in those industries based on the emissions in their value chain**. For example, some registrants may need to allocate capital to invest in lower emissions equipment. Investors thus need and use information about the full GHG emissions footprint and intensity of a registrant to determine and compare how exposed a registrant is to the **financial risks associated with any transition** to lower emission products.

This **transition** [to reduce tailpipe emissions through the adoption of stricter fuel efficiency regulations] raises **financial risks** for automobile manufacturers, which can be gauged, in part, by their Scope 3 emissions. ...

Financial institutions and investors may focus on Scopes 1 and 2 emissions for companies in some industries, particularly for industries in which Scopes 1 and 2 represent the majority of companies' total GHG emissions footprint. For other industries, however, Scope 3 emissions represent a relatively significant portion of companies' total GHG footprint, and therefore may reflect a more complete picture of companies' exposure to **transition risks** than Scopes 1 and 2 emissions alone.

reliable relationship between the company's Scope 3 emissions, and its Scope 3 emissions could definitively not be material to those climate-related risks.

This self-evident principle is important to MBA members because it may be applicable across many or most mortgage portfolios (or holdings of securities backed by mortgages). Transition risk as to mortgages is property-specific (location, location, location) and is specific to the financial instrument. Transition risk associated with local emissions standards will depend on the emissions of each building and how they relate to current or future governmental standards in the building's location, and to the specific terms of each mortgage loan and the expected remaining duration of the loan, among other factors.

Transition risks associated with changes in market preferences depend on the specific locations and property characteristics of each property, together with local market conditions and dynamics for each. Carbon accounting measures of the Scope 3 emissions attributable to a portfolio of mortgages in metric tons of CO₂ equivalents (discounted to reflect loan-to-value ratios) would reflect none of these factors and so would provide no information on levels of transition risk.

Because of this lack of relationship between Scope 3 emissions and transition risk, Scope 3 emissions attributable to a mortgage portfolio could *increase* at the same time transition risk *decreases*, for example, if a company increases its investments in mortgages financing affordable multifamily housing.

Affordable multifamily housing may have relatively higher Scope 3 emissions than other properties because affordable housing often consists of relatively older housing stock. It also has relatively low transition risk because affordability may be more important to renters and policymakers than greenness; there may be subsidies or programs available to reduce GHG emissions; or there may be affordability exemptions to local emissions restrictions.²² On the other hand, that affordable housing also could be newer housing stock, with relatively lower emissions, while still also having low transition risk. Clearly, the level of Scope 3 emissions attributed to a company's mortgage portfolio would provide no useful insights into the risks of holding those mortgages.

Recommendation: We recommend that the Commission highlight that, for a company's Scope 3 emissions to be material, there must be, at a minimum, a specific and reliable relationship between levels of a company's Scope 3 emissions and levels of that company's climate-related risk.

4. Remove the requirement to disclose "total" Scope 3 emissions.

The proposal would require accelerated filers or large accelerated filers to disclose the registrant's *total* Scope 3 emissions if material. On the other hand, language in the proposal suggests that the

²² As a result of what could be an inverse relationship between emissions and affordable housing (i.e., relatively higher emissions attributable to affordable housing), an undue focus on urging lenders to reduce the emissions attributable to the mortgages they hold on their balance sheets could result in a reduction in the sources of debt capital available to finance or refinance affordable housing (environmental redlining), which would not be a desirable public policy outcome.

Commission may have intended this requirement to apply only to subsets of a company's total Scope 3 emissions that may be material:

[I]f a registrant determines that certain categories of Scope 3 emissions are material, registrants should consider disclosing why other categories are not material.²³

* * *

Although we have not proposed to exclude specific upstream or downstream activities from the scope of the proposed Scope 3 disclosure requirement, *we have limited the proposed disclosure requirement to those value chain emissions that overall are material.*²⁴

We believe the better approach is to focus on disaggregated subsets of a company's total Scope 3 emissions if material. First, a focus on aggregated "total" Scope 3 emissions would be unworkable because the proposed rule defines Scope 3 emissions to include indirect emissions attributable to 15 categories of a company's upstream and downstream elements of its value chain,²⁵ and value chains involve millions of assets and heterogeneous roles across countless actors. As a result, it would be a practical impossibility to confidently account for a company's "total" Scope 3 emissions, and efforts to do so would quickly reach a state of diminishing returns.

Second, a focus on aggregated *total* Scope 3 emissions does not serve the objective of providing decision-useful (much less *decision-critical*) information to investors on climate-related risks. Disclosure of selected disaggregated subsets of a company's total Scope 3 emissions, such as Scope 3 emissions attributable to activities involving the energy sector, rather than total Scope 3 emissions seem more likely to result in decision-useful information to investors on climate-related risks.

Recommendation: We recommend revising the proposed rule to require reporting on disaggregated "components of" Scope 3 emissions if material. Again, we note that this may have implicitly been the Commission's intention. We also recommend the term "components" rather than "categories" because the 15 items identified in a company's Scope 3 value chain are commonly referred to as categories.²⁶

²³ 87 Fed. Reg. at 32379.

²⁴ *Id.* at 21381 (emphasis added); see also the related question contained in Request for Comment 102, 87 Fed. Reg. at 21381 ("Should we require a registrant to disclose its Scope 3 emissions for each separate significant category of upstream and downstream emissions as well as a total amount of Scope 3 emissions for the fiscal year, as proposed? Should we only require the disclosure of the total amount of Scope 3 emissions for the fiscal year? Should we require the separate disclosure of Scope 3 emissions only for certain categories of emissions and, if so, for which categories?").

²⁵ Proposed § 229.1500(r) (defining Scope 3 emissions).

²⁶ See, e.g., PCAF's *Global GHG Accounting & Reporting Standard for the Financial Industry*.

5. Continue to recognize that some Scope 3 emissions may not be “reasonably available.”

We appreciate the Commission’s recognition that Scope 3 emissions information may be conditionally omitted if that information it is not “reasonably available,” either because obtaining the information would involve unreasonable effort or expense, or because the information rests peculiarly within the knowledge of another person not affiliated with the registrant.²⁷

The concept of excluding information that is not “reasonably available” is important to MBA members because it may be relevant to the reporting of Scope 3 emissions on mortgages or securities backed by mortgages.²⁸ Even if that information were material, the unreasonable effort and expense of generating the data necessary to report Scope 3 emissions would place substantial burdens on the reporting companies as well as on millions of entities that are not covered by the rule.

If Scope 3 emissions on single-family mortgages were material, for example, that information could be reported by companies that hold the mortgages only if 50 million US homeowner borrowers could be persuaded to timely send copies of their utility bills to their servicers to be passed on to the companies holding the mortgages. Similarly, if Scope 3 emissions on commercial mortgages were material, a company could report Scope 3 emissions on a mortgage portfolio only if every borrower-owner of every apartment building, office building, or other commercial property would timely obtain copies of utilities bills for every tenant of every building and provide them to the mortgage holder. In either case, the undertaking could be a practical impossibility.

Collecting utility usage information for all borrowers and tenants also may be a legal impossibility. Most or all mortgage holders would lack the legal right to require borrowers to report that data, and many or most borrowers would not have the legal right to require utilities bill data from their tenants. As a result, the information would rest peculiarly within the knowledge of another person not affiliated with the registrant.

These obstacles cannot be overcome by substituting estimates for data. The lack of accuracy inherent in an estimate distorts any reliable relationship that might otherwise exist between Scope 3 emissions and a climate-related risk. Estimates based on industry averages or national averages,

²⁷ See 87 Fed. Reg. at 21391 (“[W]e note that Securities Act Rule 409 and Exchange Act Rule 12b–21, which provide accommodations for information that is unknown and not reasonably available, would be available for the proposed Scope 3 emissions disclosures. These rules allow for the conditional omission of required information when such information is unknown and not reasonably available to the registrant, either because obtaining the information would involve unreasonable effort or expense, or because the information rests peculiarly within the knowledge of another person not affiliated with the registrant.” (footnote omitted)).

²⁸ As we discuss above, we believe Scope 3 emissions would not be material to the transition or other climate-related risks of holding these investments.

for example, may not have the level of sensitivity or accuracy to provide decision-critical insights into the relevant risks.²⁹

Also, in the absence of actual data, companies would have no way to verify whether estimates were materially accurate, again, undermining the decision-usefulness to investors. The caveats and disclaimers that would need to accompany any disclosure of estimated Scope 3 emissions would further erode any reliance an investor might place on the disclosure.

In addition, the process of developing estimates would not be cost-free. Most companies would lack the expertise necessary to produce such estimates, so producing estimates may also involve “unreasonable cost or effort,” including the burden of hiring experts and engaging consultants with the appropriate knowledge and dedicating internal resources to calculate and track such estimates.

Recommendation 1: We recommend that the Commission continue to recognize that Scope 3 emissions information may be omitted, even if it might be material, if it is not “reasonably available” either because obtaining the information would involve unreasonable effort or expense, or because the information rests peculiarly within the knowledge of another person not affiliated with the registrant.

Recommendation 2: Because reporting of any components of Scope 3 emissions is likely to be challenging and time consuming, even where it is “reasonably available,” we recommend that any Scope 3 emissions be reported outside of companies’ 10-K and 10-Q filings and timelines that apply to those reports.

B. The Scope 3 safe harbor should be deep, wide, and perpetual, and it should apply to determinations of non-materiality.

Any accounting for and reporting of a company’s Scope 3 emissions would likely be subject to a high degree of uncertainty. We appreciate, therefore, that the Commission has provided a safe harbor under which “any statement regarding Scope 3 emissions” pursuant to the proposed rule and made in a document filed with the SEC would be deemed not to be a “fraudulent statement” unless “it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.”³⁰ Establishing a safe harbor encourages companies to take steps in the direction of Scope 3 disclosures by reducing the risk that could result from a good faith miscalculation of the carbon accounting of these emissions.

²⁹ We note that, even where a lender could obtain actual energy usage, the resulting measure of GHG emissions attributable to that energy usage still will only be an estimate. It may be impossible to allocate GHG emissions per kilowatt hour for the utility company billing each respective purchaser of that electricity, particularly considering that many utilities utilize electricity generated across multiple sources, some greener than others. As a result, companies would generally need to use published “emission factors” based, for example, on national estimate of GHG emissions per kilowatt hour of electricity generated. See 87 Fed. Reg at 21380. The product of an actual value multiplied by an estimated value is an estimated value, not matter how accurate the actual value might be.

³⁰ Proposed § 229.1504(f)(1).

Recommendation 1: We recommend retaining the safe harbor indefinitely. Any scheduled sunset of the safe harbor would undermine the purpose of encouraging companies to take steps in the direction of Scope 3 disclosures.

Recommendation 2: We recommend clarifying that the safe harbor applies to a company's decision not to disclose Scope 3 emissions because that information is not material.³¹ As the extensive discussion of Scope 3 materiality in the proposal suggests, a good faith determination of whether Scope 3 emissions are or are not material easily can be second-guessed. The Commission also should clarify that any "statement" for purposes of the Scope 3 safe harbor also includes the quantitative disclosures themselves.

IV. COMMENT ON QUALITATIVE DISCLOSURES (REGULATION S-K)

The proposed rules at § 229.1501 (Item 1501), Strategy, business model, and outlook; § 229.1502 (Item 1502), Governance; and § 229.1503 (Item 1503) Risk management would all benefit from being explicitly conditioned on materiality. We discuss our specific comments on each of these sections below.

A. Required governance disclosure should be limited to material information regarding climate-related risks.

The disclosure requirements of § 229.1501 appear to apply without regard for materiality. While the threshold of materiality may be implicit, the text of § 229.1501 could be read to require disclosure of a company's board oversight of climate-related risks and management's role in assessing and managing all aspects of climate-related risks, without regard to the extent to which those climate-related risks are material to that company. This provision would, therefore, require companies to report substantial amounts of immaterial information, which would not serve the interests of investors³² and which could mislead investors by drawing more attention to climate risk than is warranted by the company's actual risk profile.

We also note that the elements of disclosure of governance under § 229.1502 could be read to prescribe that reporting companies must adopt certain preferred governance best practices rather than directing companies to describe their actual processes. The role of qualitative disclosure is to *reflect* company practices, not to *direct* them.

Recommendation. We recommend explicitly conditioning the requirements of § 229.1501 on a company's determination that the information is material and specifying that registrants may "consider" disclosing enumerated types of information, consistent with the verb used in the

³¹ See 87 Fed. Reg. at 21379 (Indicating that disclosure of a decision not to report Scope 3 emissions that are not material is not required, as follows: "If a registrant determines that its Scope 3 emissions are not material, and therefore not subject to disclosure, it may be useful to investors to understand the basis for that determination.").

³² See *Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, Securities and Exchange Commission, § I.B, 17 CFR Parts 211, 231 and 241.

recommendations of the Task Force on Climate-related Financial Disclosures (TCFD),³³ as follows:

(a)(1) Describe the board of director’s oversight of material climate-related risks. The registrant may consider including ~~Include~~ the following, as applicable: ...

* * *

(b)(1) Describe management’s role in assessing and managing material climate-related risks. The registrant may consider including ~~Include~~ the following, as applicable: ...

B. Required disclosure of impacts of climate-related risks on strategy, business model, and outlook should be limited to material impacts.

Section 229.1502(a) provides in relevant part as follows:

(a) Describe any climate-related risks reasonably likely to have a material impact on the registrant, including on its business or consolidated financial statements, which may manifest over the short, medium, and long term. ...

While we appreciate an effort to condition this requirement on a determination of materiality, the use of the language “reasonably likely to have a material impact” conflicts with the definition of materiality that the SEC has adopted, which uses the standard of “substantially likely.”³⁴ As a result, this provision would require a company to describe any climate-related risks that are *reasonably likely to be substantially likely to be* considered by a reasonable investor to be important when determining whether to buy or sell securities or how to vote. This is unnecessarily confusing.

The use of a “reasonably likely to have a material impact” threshold here also is inconsistent with the use of materiality in other parts of the proposed rule, including subsection (d) of this provision, all of which use “material” or “materiality.”³⁵ If “reasonably likely to have a material impact” is intended to mean the same thing as “material,” the rule should use the term “material” to avoid confusion.

Recommendation. We recommend revising § 229.1502 to delete “reasonably likely to have a material impact” in subsection (a) and add “if material,” as shown below, and to specify that

³³ See Task Force on Climate-related Financial Disclosures, *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures*, p. 17 (Oct. 2021); available at https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf

³⁴ See 87 Fed. Reg. at 21381 (“As defined by the Commission and consistent with Supreme Court precedent, a matter is material if there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote.”).

³⁵ See also § 229.1503(a)(1)(iv) (“materiality”); § 229.1504(c)(1) (“if material”), (e)(4)(i), (e)(5), (6), (7), (8) (all “material”); (f)(3) (“material”).

registrants may “consider” disclosing enumerated types of information, consistent with the verb used in the recommendations of the TCFD:³⁶

(a) Describe any climate-related risks ~~to reasonably likely to have a material impact on~~ the registrant, including on its business or consolidated financial statements, if material, which may manifest over the short, medium, and long term. ...

We further recommend that the Commission clarify that the specific elements of disclosure under this provision are illustrative rather than mandatory.

C. Required disclosures of risk management of climate-related risks should be limited to material risks.

The requirements of § 229.1503 appear to apply without regard to materiality. Also, the enumerated elements listed in subsections (a) and (b) could be read to suggest that the SEC is requiring reporting companies to adopt certain preferred risk management best practices. Finally, subsection (c) would require disclosure of a company’s transition plan without regard for whether transition risks addressed in such a plan were material.

Recommendation: We recommend adding explicit references to materiality and specifying that registrants may “consider” disclosing enumerated types of information, consistent with the verb used in the comparable TCFD recommendation,³⁷ for example, as follows:

(a) Describe any processes the registrant has for identifying, assessing, and managing material climate-related risks. If applicable, a registrant may also describe any processes for identifying, assessing, and managing climate-related opportunities when responding to any of the provisions in this section.

(1) When describing any processes for identifying and assessing material climate-related risks, the registrant may consider disclose~~ing~~, as applicable, how the registrant: ...

(2) When describing any processes for managing climate-related risks, the registrant may consider disclose~~ing~~, as applicable, how the registrant: ...

(b) Disclose whether and how any processes described in response to paragraph (a) of this section are integrated into the registrant’s overall risk management system or processes. If a separate board or management committee is responsible for assessing and managing climate-related risks, a registrant may should consider disclose~~ing~~ how that committee interacts with the registrant’s board or management committee governing risks.

³⁶ See TCFD, *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures*, at pp. 18-19.

³⁷ See *id.* at pp. 20-21.

(c)(1) If the registrant has adopted a ~~transition~~ plan to address material transition risk as part of its climate-related risk management strategy, describe the plan, and consider including the relevant metrics and targets used to identify and manage any physical and transition risks. To allow for an understanding of the registrant’s progress to meet the plan’s targets or goals over time, a registrant that discloses a transition plan under this subsection must update its disclosure about the transition plan each fiscal year by describing the actions taken during the year to achieve the plan’s targets or goals.

(2) If the registrant has adopted a transition plan, the registrant may consider discussing, as applicable: ...

V. COMMENT ON QUANTITATIVE DISCLOSURES IN NOTES TO FINANCIAL STATEMENTS (REGULATION S-X).

Proposed § 210.14-02 would require disclosure in notes to a company’s financial statements of “contextual information” on severe weather events and other natural conditions, transition activities, and climate-related risks and opportunities.

The Commission provides no evidence that material impacts of severe weather events and other natural conditions, transition activities, and climate-related risks and opportunities are not adequately reflected in current financial statements prepared under current disclosure and generally accepted accounting principles (GAAP), or in the MD&A or other disclosures already required. As a result, it is not clear that the proposed new Regulation S-X requirements are necessary or useful for achieving the Commission’s objective of providing investors with decision-useful information about climate-related financial risks.

We also are concerned that information required under this provision may not be operationally feasible for many companies to report. The impact of any single event may be the result of a variety of factors, and the dollar impacts of each of those factors may not reasonably be isolated from other factors. As a result, it may be impossible to fully disaggregate the financial impacts and expenditures that might relate to transition activities from the financial impacts and expenditures that may relate to other concurrent activities. Also, terms such as “transition events” and “severe weather events” are not sufficiently defined to support notes to a company’s financial statements. A company may not, therefore, be able to reliably generate the required data in a manner that could reasonably be audited, nor is it clear that the resulting information in notes to financial statements would be useful to investors.

Another concern is that the proposed one percent thresholds in this provision³⁸ appear to be arbitrary and unrelated to materiality. As the Commission has stated, any consideration of

³⁸ Proposed § 210.14-02 (b) (“*Disclosure thresholds*.” (1) Disclosure of the financial impact on a line item in the registrant’s consolidated financial statements pursuant to paragraphs (c) [*Financial impacts of severe weather events and other natural conditions*] and (d) [*Financial impacts related to transition activities*] of this section (including any impacts included pursuant to paragraphs (i) [*Impact of identified climate-related risks*] and (j) [*Impact of climate-related opportunities*] of this section) is not required if

materiality is “fact specific” and “requires both quantitative and qualitative considerations” and “a quantitative analysis alone would not suffice for purposes of determining” materiality.³⁹ As a result, the one percent thresholds, or any other fixed thresholds, would sometimes require companies to disclose information that is not material and would, at other times, exempt companies from disclosing information that is material. This is inevitable because any effort to establish a bright line as a proxy for the application of a fact-specific, principles-based standard like materiality will be both too narrow and too broad.

Recommendation. We recommend eliminating the proposed new Regulation S-X financial statement notes in favor of relying on current requirements under Regulation S-K, relying on existing standards for notes to financial statements, and/or by referring the matter for the FASB to address via accounting guidance if necessary. At a minimum, the Commission should remove the fixed one percent thresholds in favor of conditioning disclosure on a company’s determination of materiality.

VI. COMMENT ON IMPLEMENTATION PERIOD

In the Fact Sheet accompanying the proposal, the Commission projects issuing a final rule with an effective date in December 2022, and projects large accelerated filers beginning implementation for fiscal year 2023.⁴⁰

This schedule is unrealistic. Even for companies that already are disclosing climate-related information in a matter generally consistent with the TCFD recommendations, implementing this rule, including attestation requirements, will be an enormous undertaking. That enormous effort would be borne by the companies covered by the rule, as well as by individuals and companies that are part of those companies’ value chains.

Recommendation 1. We recommend a minimum of two full calendar years after the effective date of a final rule before large accelerated filers are required to implement the rule, followed by a phase-in schedule structured in a manner similar to the proposed implementation schedule. For

the sum of the absolute values of all the impacts on the line item is less than one percent of the total line item for the relevant fiscal year.

(2) Disclosure of the aggregate amount of expenditure expensed or the aggregate amount of capitalized costs incurred pursuant to paragraphs (e) [*Expenditure to mitigate risks of severe weather events and other natural conditions*] and (f) [*Expenditure related to transition activities*] of this section (including any impacts included pursuant to paragraphs (i) [*Impact of identified climate-related risks*] and (j) [*Impact of climate-related opportunities*] of this section) is not required if such amount is less than one percent of the total expenditure expensed or total capitalized costs incurred, respectively, for the relevant fiscal year.”).

³⁹ 87 Fed. Reg. at 21379.

⁴⁰ See SEC, *Fact Sheet: Enhancement and Standardization of Climate-Related Disclosures*, p. 3 (March 21, 2022); available at <https://www.sec.gov/files/33-11042-fact-sheet.pdf>

Scope 3 disclosures, the implementation timeline should include an additional year to implement vs. other elements of the rule.

Recommendation 2. We recommend that all reporting be prospective only. Any requirement that requires reporting on prior periods would effectively eliminate the benefit of delayed implementation.

VII. RESPONSE TO QUESTION ON SECURITIZATIONS

The proposed rules would not apply to asset-backed security issuers. Request for Comment 182, however, requests input on whether disclosure requirements similar to those in the proposal should apply to such issuers, as follows:

Should we require asset-backed issuers to provide some or all of the disclosures under proposed Subpart 1500 of Regulation S-K? If so, which of the proposed disclosures should apply to asset-backed issuers? Are other types of climate disclosure better suited to asset-backed issuers? How can climate disclosure best be tailored to various asset classes?⁴¹

In our view, it would be premature at best to consider requiring specific climate-related disclosures in connection with the issuance of asset-backed securities. There is insufficient infrastructure in place to support such disclosure and it is not clear what, if any, information would be material to investors.

VIII. CONCLUSION

MBA shares the Commission's objective of ensuring that investors are provided with decision-useful information about climate-related financial risks. Our comments are intended to help the Commission achieve that objective in a way that targets *material* information about *material* climate-related risks within a reporting framework that better balances the potential impacts of information on investor decision making and the certainty of the high burden of reporting that information. We hope that the Commission finds our comments and recommendations to be useful and constructive.

Sincerely,



Robert D. Broeksmit, CMB
President and Chief Executive Officer
Mortgage Bankers Association

⁴¹ Id. at 21409.