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June 17, 2022

VIA ELECTRONIC SUBMISSION: rule-comments@sec.gov

Vanessa Countryman
Secretary
File No. S7-10-22
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

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

Dear Ms. Countryman,

This letter is submitted by Nareit in response to the Securities and Exchange Commission's (SEC or Commission) proposing release titled The Enhancement and Standardization of Climate-Related Disclosures for Investors (Proposal or Proposed Rule).[1] Nareit and its members welcome this opportunity to participate in the SEC's rulemaking process focused on addressing climate-related disclosures, and commend the SEC's commitment to this important subject. Nareit and its members have long understood the critical importance of communicating accurate and material business and financial information to investors, and Nareit has previously submitted several comments to the SEC on the topic of climate-related and sustainability disclosure, including our letter in response to the SEC's Request for Comment on Climate Change Disclosure on March 15, 2021 and in our letter in response to the SEC's Concept Release on Business and Financial Disclosure Required by Regulation S-K.[2]

Nareit serves as the worldwide representative voice for real estate investment trust (REITs) and non-REIT public companies that own, operate, and finance income-producing real estate, as well as those firms and individuals who advise, study, and service those businesses.[3]

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[1] See, SEC Release No. 33-111042, The Enhancement and Standardization of Climate-Related Disclosures for Investors (March 21, 2022).
[2] See, Nareit comment letter on SEC Request for Comment on Climate Change Disclosure (June 11, 2021) available at https://www.sec.gov/comments/climate-disclosure/cll12-8911339-244295.pdf; and Nareit comment letter on SEC Concept Release on Business and Financial Disclosure Required by Regulation S-K; 17 CFR Parts 210, 229, 230, 232, 239, 240 and 249; Release Nos. 33-10064, 34-77599; File No. S7-06-16; RIN 3235-AL78 (July 21, 2016) available at https://www.sec.gov/comments/s7-06-16/s70616-268.pdf.
[3] References in this letter to REITs also include non-REIT public companies that own and operate income-producing real estate properties. Through the properties they own, finance and operate, REITs help provide the essential real estate we need to live, work, and play. U.S. REITs own approximately $3.5 trillion in gross assets, with public U.S. REITs accounting for nearly $2.5 trillion in gross assets. Stock-exchange listed REITs had an equity market capitalization of over $1.5 trillion as of May 31, 2022. In addition, approximately 145 million Americans live in households that benefit from ownership of REIT stocks through their individual shareholdings, their 401(k) retirement plans and other investment funds (https://www.reit.com/data-research/data/reits-numbers).

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Leadership in Sustainability

Nareit and its members recognize the importance of sustainability and climate change concerns. Many REITs have long records of documented leadership roles on sustainability matters.[4] Several listed REITs were among the Fortune 100 pioneers in releasing comprehensive sustainability data and information to the public in the form of annual sustainability reports, or by periodic website updates.[5] Nareit estimates that all of the 100 largest U.S. equity REITs (by market cap) now publicly report ESG data in some form.[6] In a recent Nareit survey, 82% of responding REITs reported that they currently integrate identified ESG risks and opportunities into their business strategy and financial planning.[7] REITs are also in the forefront of promoting sustainable building models and technology. Today, nearly 2,700 REIT-owned buildings (covering approximately 712 million square feet) have been LEED or ENERGY STAR certified, or have qualified under other commercial real estate "green" rating programs.[8] REIT-owned properties are often at the forefront of sustainable building innovations.[9]

While REITs have demonstrated significant leadership in publicly reporting on sustainability and climate-related matters, Nareit and its members recognize that climate-related disclosures in the context of SEC reports present a range of complications and considerations that are important to understand when formulating rules requiring such disclosure. As a result, Nareit believes that it is important for the Commission to consider the perspectives of REITs when formulating the final rules.

Nareit's Recommendations

As Nareit indicated in its response to the SEC's March 2021 request for comment, Nareit strongly believes that materiality, as evaluated through the eyes of a "reasonable investor" under the prevailing legal standard,[10] should govern the climate-change related disclosure required of REITs and other registrants. For this reason, Nareit believes that the Commission should reconsider the approach that it has set forth in the Proposal to

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[4] See, Nareit, Leader in the Light Awards available at https://www.reit.com/nareit/industry-awards/leader-light-award.
[5] Gia Vosilla, Jon Behrendt and Melissa Hanson, State of the Industry: Sustainability Reporting in the REIT Sector – 2016 Update (2016) available at https://www.usgbc.org/resources/state-industry-sustainability-reporting-reit-sector-%E2%80%93-2016-update.
[6] See, Nareit, REIT ESG Dashboard available at https://www.reit.com/investing/reits-sustainability/reit-esg-dashboard.
[7] See, Nareit, REIT ESG Dashboard, supra note 6.
[8] See, Nareit, REIT ESG Dashboard, supra note 6; other green certifications include Energy Star and BREEAM USA.
[9] See, e.g., Salesforce Tower in San Francisco, which is owned by Boston Properties, a publicly traded REIT, is LEED Platinum certified and won first place in the Sustainable Building category for the 2018 International Edition of the CEMEX Building Awards. See, https://www.businesswire.com/news/home/20181023005277/en/Boston-Properties-Earns-Top-ESG-Rating-and-Executes-Sustainable-Development-Strategy-at-Salesforce-Tower; and the Empire State Building, owned by a publicly traded REIT, Empire State Realty Trust, which is the largest commercial real estate user of fully renewable energy and was awarded the highest awards for sustainability performance by GRESB and Green Star in 2021. See, Sarah Kaplan, The Washington Post, Climate Solutions, The Empire State Building and its Related Buildings are Now Powered by Wind (Feb. 3, 2021) available at https://www.washingtonpost.com/climate-solutions/2021/02/03/climate-empire-state-wind/ and PR Newswire, The Empire State Building to Celebrate 90 Years (Apr. 29, 2021) available at https://www.prnewswire.com/news-releases/the-empire-state-building-to-celebrate-90-years-301280789.html.
[10] TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

focus on disclosure of climate-related information that is material to investors under established standards of materiality, while seeking disclosure of accurate and reliable material information through principles-based disclosure requirements that can be applied more effectively across different industries and registrants. With that said, the balance of this comment letter will focus on specific aspects of the Proposal that are of most interest to Nareit and its members, which are grouped as follows:

- Background on REITs;
- The proposal's departure from a principles-based disclosure approach grounded in materiality to a highly prescriptive "one size-fits all" approach is not warranted;
- A forward-looking statement safe harbor for climate-related disclosure should be adopted and should expressly apply to climate-related risk disclosures and scenario analysis; the proposed safe harbor for Scope 3 GHG emissions should remain available;
- The proposed financial impact reporting requirements are confusing and should not be required; however, if required, the reporting requirements should be based on current materiality standards for financial statement purposes;
- Scope 3 GHG disclosures should be voluntary: *REITs should only be required to report GHG emissions arising from operations they directly control and tenants*[11] *should be responsible for reporting GHG emissions arising from their own business operations*;
- The materiality threshold for disclosure of Scope 3 GHG emissions, as described and proposed, likely would operate as a mandate for most REITs and should be reconsidered;
- The attestation report should only be required at the limited assurance level and the SEC should defer the requirement that registrants retain a "GHG emission attestation provider";
- Registrants should have flexibility to designate organizational boundaries for reporting on joint ventures and similar investments;
- The SEC should coordinate with other Federal agencies and provide a safe harbor for GHG emissions calculated pursuant to Federal agency tools;
- The reporting timeline should align with the availability of GHG emissions and climate data; additional modifications and clarifications are necessary;
- The compliance date for the proposed disclosures in annual reports should be extended by at least one year for all registrants and should not require historical disclosure at the compliance date;

[11] We refer to the relationship between REITs and tenants for ease of description; however, the comments raised in this letter apply also to mortgage REITs and their borrowers.

- Requiring climate disclosure to be filed, rather than furnished, is not justified; and,
- An alternative reporting provision should be available to all registrants, including REITs.

Background on REITs

While REITs share many features with other SEC registrants, they also exhibit important differences, some of which are very important to the disclosure of material climate change information. We preface our comments on the Proposal with a brief overview of certain important features of REITs before addressing those questions posed in the Proposal that Nareit believes are most relevant to REITs. Additionally, because the legal framework governing U.S. REITs, which requires that REITs operate their real estate businesses independently of the businesses of their tenants, is particularly relevant to climate change reporting, we include a summary of this framework in Appendix A.

There are two types of REITs, generally referred to as equity REITs and mortgage REITs (mREITs), though a few REITs use the investment strategies of both equity REITs and mREITs. Equity REITs own “brick and mortar” real estate, such as apartments, cell towers, data centers, office buildings, shopping malls, and other properties. mREITs are companies that finance residential and commercial real estate through a variety of financial activities, including originating or directly financing mortgage loans; purchasing or otherwise acquiring mortgage loans in the secondary market; creating, purchasing interests in and managing mortgage-related securitization vehicles; and acquiring and holding residential and commercial mortgage-backed securities.

While the majority of public REITs are listed on either the NYSE or NASDAQ, public non-listed REITs (PNLRs), which are largely equity REITs, are public reporting companies that conduct offerings registered with the SEC but do not have a class of securities listed for trading on any major securities exchange. Nareit’s comments below address many issues related to climate change disclosures relevant to both equity and mREITs, whether listed or non-listed, but the discussion of issues relating to REITs as owners of tenant-occupied buildings pertains only to equity REITs.

The proposal’s departure from a principles-based disclosure approach grounded in materiality to a highly prescriptive “one size-fits all” approach is not warranted

Nareit and its members have long understood the critical importance of communicating accurate and material business and financial information to REIT investors. For this reason, Nareit has long favored and strongly supported the SEC’s tradition of principles-based disclosure rules, which we believe are best suited to address information needs of the constantly evolving business environment in which REITs and other businesses operate. Principles-based disclosure rules also accommodate the reality that “one size does not fit all,” especially within the REIT industry, which encompasses a range of business models. REITs have consistently

applied the principles-based disclosure rules that are grounded in materiality. For example, we believe that most REITs have significant, non-boilerplate, risk factor disclosure that is tailored towards the specific circumstances of the registrant, which results in material and useful information being provided to investors. We believe that the Commission's long-standing commitment to a principles-based, registrant-specific approach to disclosure, which has enabled registrants to tailor disclosure to their particular circumstances, has resulted in more accurate, meaningful disclosure for investors.

Nareit believes that the Supreme Court's traditional materiality standard should remain the foundation of the SEC's disclosure regime, including its rulemaking with respect to climate change disclosure. Our members are concerned that the highly prescriptive, "one-size-fits all" nature of many provisions of the Proposal, which in many circumstances would require disclosures that may not be material to a particular registrant, would not provide relevant information to investors and would erode investor confidence in the SEC's disclosure regime. As we wrote in our June 2021 comment to the SEC, differences across geographies and industries in the registrant community, as well as differences within the commercial real estate sector, demand flexibility in the disclosure requirements to permit registrants to focus on the information that is most relevant to their businesses and to adapt their disclosures as circumstances change over time.

One example our members point to are the highly prescriptive requirements set forth in the amendments to Regulation S-X, discussed in greater detail below, which would require registrants to report climate "impacts," (which we believe are not well defined in the Proposal) greater than 1% regardless of their materiality. Although we believe that the financial impact reporting requirements should not be required, if the SEC adopts these requirements, we believe that investors would be far better served by the traditional SEC approach to disclosure, i.e., a rule requiring management to evaluate climate change information relevant to its company's operations through a traditional materiality lens and to disclose to investors the material impacts of climate change on the company's consolidated financial statements.

There are also troubling, highly prescriptive, requirements set forth in the amendments to Regulation S-K. Of particular concern to REITs and others in the commercial real estate sector is the requirement that registrants describe the "location and nature of the properties, processes, or operations subject to the physical risk," defining "location" as ZIP code.[12] This would be an incredibly blunt instrument that would not provide context about the particular property/structure (method of construction, mitigating factors, etc.) and it would result in significant burdens for REITs without corresponding benefit to the investors.

Our members have also expressed concern that the "one size-fits all" disclosure requirements, while highly prescriptive as to the required disclosures, are also overly broad in application and lacking specific definitions, which would lead to varying disclosure within the REIT industry and, as a result, could cause confusion among investors. As an example, the Proposal defines climate-related risks as "the actual or potential negative impacts of climate-related conditions and events on a registrant's consolidated financial statements, business

[12] See, supra note 1, at 21,350.

operations, or value chains, as a whole."[13] Climate-related risks are further classified as physical and transition risks. Furthermore, if an identified climate-related risk is a physical risk, it would be required to be classified as an acute or chronic risk. Nareit believes that requiring registrants to disclose each of these broadly defined types of risks would inevitably result in registrants disclosing information that may or may not be climate-related, and may not be material to all registrants. For example, how would a registrant determine whether a storm or other weather event is related specifically to climate change? As a result, Nareit believes that the proposed disclosure requirements would lead to inconsistent disclosure that would ultimately cause investor confusion and lack of comparability.

In our June 2021 comment to the SEC responding to its earlier information collection on climate change, we noted that "prescriptive disclosure requirements are not readily adaptable to changing circumstances and may quickly become outdated or immaterial to registrants that are required to disclose them. Registrants – and ultimately their investors – bear the cost of generating and maintaining such disclosures, regardless of whether investors find the information useful."[14] We continue to believe that this is true. We also suggested that, if the Commission concludes that these objectives justify a departure from principles-based rules, any such exceptions should be limited. We believe that the current Proposal represents a significant departure from principles-based rules that cannot be justified.

A forward-looking statement safe harbor for climate-related disclosure should be adopted and should expressly apply to climate-related risk disclosures and scenario analysis; the proposed safe harbor for Scope 3 GHG emissions should remain available

The Proposal poses questions about whether the Private Securities Litigation Reform Act's (PSLRA) forward-looking statement safe harbors provide adequate protection for climate-related disclosures. Because the existing PSLRA safe harbors exclude forward-looking statements that are "made in connection with an offering by, or relating to the operations of, a partnership, limited liability company, or a direct participation investment program," Nareit recommends that the SEC adopt a forward-looking statement safe harbor for climate-related disclosure that would apply to all registrants that are required to disclose the climate-related information required by the Commission, including partnerships,[15] limited liability companies and direct participation investment programs. There is precedent for the Commission to follow in adopting a general forward-looking statement safe harbor for certain information – in Securities Act Rule 175, the Commission adopted a limited safe harbor that provides certain forward-looking statements will not be deemed a "fraudulent statement" for purposes of relevant anti-fraud provisions of the Federal securities laws. At the very least, the SEC should

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[13] See, supra note 1, at 56.
[14] See, supra note 2.
[15] More than half of U.S. listed equity REITs use the UPREIT structure under which virtually all of the operations are conducted through an Operating Partnership (OP) for which the REIT is the majority general partner. OPs issue securities to the public and therefore need the same liability protections for climate disclosures as REITs.

specify that partnerships that make consolidated securities filings with REITs should fall under the forward-looking safe harbor protections as their parent REITs.[16]

Members have expressed concern that the PSLRA would not provide sufficient protection for forward-looking statements required by the Proposal. Specifically, members point to the forward-looking disclosure that would be required by proposed Item 1503 of Regulation S-K. As discussed above, registrants would be required to disclose physical and transition risks and include forward-looking disclosure regarding these risks over the short, medium and long term. Of equal concern to Nareit members is the application of the PSLRA to disclosures in a scenario analysis. The Proposal would require disclosure of scenario analysis, if used by the registrant.[17] However, the PSLRA may not apply to the entirety of the disclosures regarding the scenario analysis. The SEC appears to acknowledge this concern, ". . . we believe that the PSLRA forward-looking safe harbors would apply to much of the disclosure concerning scenario analysis provided the other statutory conditions for application of the safe harbor are met."[18] As proposed, registrants that disclose a scenario analysis would be in a worse situation than those registrants that do not disclose a scenario analysis.

For these reasons, Nareit believes that the SEC should adopt a forward-looking statement safe harbor for all climate-related disclosures that specifically includes climate-related risk disclosure and any scenario analysis. The forward-looking statement safe harbor should be available for all registrants that are required to disclose the climate-related information required by the Commission, including partnerships,[19] limited liability companies and direct participation investment programs.

Nareit supports the proposed safe harbor for Scope 3 GHG emissions disclosures. Recognizing the challenges that registrants may have in disclosing Scope 3 GHG emissions, the Commission has proposed a safe harbor for Scope 3 GHG emissions disclosure from certain forms of liability under the Federal securities laws. In particular, the proposed safe harbor would provide that disclosure of Scope 3 GHG emissions by or on behalf of the registrant 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.

While Nareit believes that disclosure of Scope 3 GHG emissions by REITs should be voluntary as described below, if the SEC were to require disclosure of Scope 3 GHG emissions as set forth in the Proposal, it is appropriate that the Scope 3 GHG emissions disclosure be afforded at least limited protection from certain forms of liability under the Federal securities laws.

[16] See Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated (available March 14, 2016) (where the SEC allowed the holding period for shares of a REIT's common stock to commence upon the acquisition of OP Units.) available at https://www.sec.gov/divisions/corpfin/cf-noaction/2016/bankofamerica-merrilllynch-pfs-031416-144.htm. In addition, 2011 SEC guidance permits a majority-owned operating partnership of a REIT that qualifies as a well-known seasoned issuer (WKSI) to use Form S-3 for offerings of non-convertible debt securities under the Securities Act of 1933. See Securities Act Rules Compliance and Disclosure Interpretation 612.16 at https://www.sec.gov/corpfin/securities-act-rules.
[17] See, supra note 1, at 83.
[18] See, Id. at 87.
[19] See, supra note 15.

The proposed financial impact reporting requirements are confusing and should not be required; however, if required, the reporting requirements should be based on current materiality standards for financial statement purposes

Under the proposed rules, registrants would be required to address several climate-related financial metrics in a footnote to their financial statements, including: i) financial impacts of severe weather events and other natural conditions; ii) financial impacts related to transition activities; iii) expenditures to mitigate risks of severe weather events and other natural conditions; iv) expenditures related to transition activities; v) financial estimates and assumptions impacted by severe weather events and other natural conditions; vi) financial estimates and assumptions impacted by transition activities; and, vii) the impact of identified climate-related risks.

The Proposal specifies that the financial impact metric disclosure requirements in proposed Rules 14-02(c), (d), and (i) of Regulation S-X would require a registrant to disclose the financial impacts of severe weather events, natural conditions, transition activities, and identified climate-related risks on the consolidated financial statements included in the relevant filing unless the aggregated impact of the severe weather events, other natural conditions, transition activities, and identified climate-related risks is less than 1% of the total line item for the relevant fiscal year.

Our members are concerned and confused by these provisions of the Proposal, which would be novel, extensive, and demand a level of precision that may not be possible for most registrants. Most of our members have no experience developing information to disclose the climate-related metrics at the 1% level, nor control systems capable of operating at a 1% level of precision across financial statement line-items. We also note that there are currently no generally accepted accounting principles for reporting financial impacts associated with climate change matters as required by the Proposal. As recently noted by the SEC's Acting Chief Accountant,[20] although the Financial Accounting Standards Board (FASB) recently added a project to its research agenda to explore accounting for and disclosure of certain financial instruments with climate-linked features,[21] neither the FASB, nor any other body, has addressed financial statement disclosure requirements associated with impacts arising from climate change risks and uncertainties. In the absence of accounting

[20] Paul Munter, SEC Acting Chief Accountant, Statement on the FASB's Agenda Consultation: Engagement with Investors and Other Stakeholders Vital to Development of High Quality Accounting Standards (Feb. 22, 2022) available at https://www.sec.gov/news/statement/munter-statement-fasb-agenda-consultation-02222022.

[21] See FASB's "Objectives of Research Projects" webpage, available at https://www.fasb.org/cs/ContentServer?c=FASBContent_C&cid=1176169433424&d=&pagename=FASB%2FFASBContent_C%2FProjectUpdatePage.

guidance or standards, it seems inevitable that registrants would not interpret these reporting requirements consistently and they would not result in consistent, comparable and reliable reporting for investors.

Our members have identified many potential difficulties for REITs and other registrants in implementing these rules, which would require registrants to quantify financial impacts on a line-item by line-item basis arising from a broad range of poorly defined climate risks, as further discussed above. Our members are concerned that many impacts arising from these kinds of risks cannot even be precisely identified, let alone quantified or verified, for purposes of financial statement disclosure. For example, our members point out that the requirement to report financial impacts of severe weather events is confusing, because not all severe weather events are caused by climate change and the Proposal does not define a severe weather event, although the release cites "flooding, drought, wildfires, extreme temperatures, and sea level rise" as examples.[22] Regardless, our members remain confused by this, because it is not clear if *all* flooding and wildfires and other weather events on this list must be presumed to be climate related, or if a subset should be presumed to be and, if so, how this subset is determined. It is also not clear if this list is exhaustive, or suggestive. Further, REITs and other registrants may engage in any number of activities, with corresponding expenditures, that might, intentionally or not, be responsive to a severe weather event to some degree, or appear to be. As owners of real estate, REITs continuously undertake expenditures to maintain their properties. Many such expenditures might be linked, or appear to be linked, in varying degrees, to protecting buildings against effects of weather or making repairs or replacements that resulted from a weather impact, but also for other purposes. Are all such expenditures required to be categorized as climate impacts under the Proposal?

The Proposal asks for comment as to whether it is "clear which climate-related events would be covered by 'severe weather events and other natural conditions'?"[23] For the reasons set forth above, our members believe that the Proposal is not clear about this. To the contrary, our members believe that there is ambiguity in this mandate and that investors are likely to be confused by the reporting resulting from this requirement. We believe that while additional guidance could be helpful, such guidance may not resolve the fundamental problem that many expenditures undertaken by REITs and other commercial real estate owners are undertaken for more than one purpose, and to categorize all such expenditures as climate-related may misinform investors in many circumstances.

Similarly, our members further note that there is also little to no guidance available on how a REIT would quantify financial statement impacts resulting from climate risk to supply chains. For example, how much of a supply chain disruption that is linked, in part, to a weather event should be attributed to climate change, and how much to other factors? Our members are also confused about the requirement that they track direct and indirect impacts of climate transition risks, which are broadly defined, including, but not limited to, "legal liability,

[22] See, supra note 1, at 117.
[23] See, supra note 1, at 130.

litigation, or reputational risks."[24] REITs, and likely other registrants, are not set up to identify and track these kinds of costs, which would require significant changes in enterprise-level reporting rules and controls.

For the reasons discussed above, Nareit believes that the financial impact reporting requirements should not be required. However, if the SEC adopts financial impact reporting requirements, we believe that the Commission's objectives in seeking information about climate-related financial metrics would be best served by having such information disclosed in accordance with generally accepted accounting principles, whereby the FASB (or another applicable accounting standard setter) could address the accounting and disclosure implications of climate change in a comprehensive manner that is in accordance with the typical approach for formulating accounting and disclosure requirements applicable to a registrant's financial statements.

The Proposal also requests input on whether the proposed 1% threshold is appropriate for the financial impact metrics. The Proposal explains that this departure from a principles-based materiality standard "should reduce the risk of underreporting such information [and] . . . could also promote comparability and consistency among a registrant's filings over time... ."[25] As noted above, Nareit believes that the financial impact reporting requirements should not be required, but if the SEC adopts financial impact reporting requirements, a principles-based rule requiring registrants to report climate change impacts that are material to their companies would better serve registrants, investors and stakeholders alike. However, if the SEC departs from a principles-based materiality standard for reporting financial impacts with what it calls "a bright-line standard for registrants,"[26] then we suggest that the quantitative threshold be increased to at least 10%.

Increasing the threshold to at least 10% would better ensure that material information about climate-related impacts is provided to investors and is consistent with other Regulation S-X requirements.[27] Therefore, Nareit recommends that that if the SEC retains this requirement, it should increase the threshold for the financial impact metrics to at least 10%, which we believe would focus the required disclosures on circumstances when there is a substantial likelihood that a reasonable investor would consider the information important when making an investment or voting decision.

Scope 3 GHG disclosures should be voluntary: *REITs should only be required to report GHG emissions arising from operations they directly control and tenants should be responsible for reporting GHG emissions arising from their own business operations*

A key element of the Proposal would be the requirement to disclose a registrant's GHG emissions data for the most recent fiscal year and the historical periods included in its consolidated financial statements. The

[24] Id.
[25] Id. at 121.
[26] Id.
[27] For example, FASB ASC 280-10-50-42 requires information about the reliance on major customers when revenues from transactions with a single external customer amount to 10 percent or more of a registrant's revenues.

Proposal would require disclosure of the methodology, significant inputs and significant assumptions used to calculate GHG emissions. Under the Proposal, registrants would be required to provide the disclosures on a disaggregated basis based on constituent GHGs, as well as in the aggregate. All registrants subject to the Proposal would be required to disclose Scope 1 and Scope 2 GHG emissions, and disclosure of Scope 3 GHG emissions would be required if those emissions are material or if a registrant has set a GHG emissions reduction target or goal that includes Scope 3 GHG emissions.

The Proposal poses a series of questions relating to Scope 3 GHG emissions, including whether disclosure of Scope 3 GHG emissions should only be required for upstream or downstream activities over which the registrant has influence or indirect control, or for which it can quantify emissions with reasonable reliability, whether any categories of upstream or downstream activities should be precluded because of a lack of accepted methodologies or availability of data and whether Scope 3 GHG emissions disclosures should be voluntary.

Nareit strongly believes Scope 3 GHG emissions disclosure by REITs should be voluntary. While there is currently no generally accepted definition of Scope 3 GHG emissions for the real estate sector, Scope 3 GHG emissions may typically, but not invariably, include emissions arising from tenant operations outside the building owner's control (among other unrelated outputs, such as business travel). For the reasons set forth below, Nareit believes that REITs should only be required under the SEC's emerging rule to report climate change information and data arising from operations under their direct and immediate control, and that commercial real estate tenants and supply chain contractors should, in turn, be responsible for disclosures of data arising from their own business operations. Some REITs may choose, for reasons related to their sector, geography or other factors, to report Scope 3 GHG emissions. However, Nareit does not believe that REITs should be required to report Scope 3 GHG emissions at this time.

Equity REITs in particular, which comprise more than 95% of the U.S. REIT sector, are businesses engaged in owning and leasing real estate to third-party tenants, some of which are publicly traded companies in their own right. It is important not to confuse the business operations of REIT building owners with those of their tenants. It is also important to recognize that REITs and other commercial landlords generally have very little ability to control or direct tenant business activities, including tenant activities related to resource consumption and GHG emissions.

The laws in most U.S. jurisdictions affirm the independence of REITs and other commercial landlords from their tenants' businesses, reflecting the reality that the relationship between a commercial landlord and a commercial tenant is not one of a principal and agent, but rather of independent business counterparties. Additionally, as described above and in Appendix A, the tax rules applicable to REITs effectively prohibit REITs from engaging in business activities distinct from real estate, including those of their tenants. Certain of these tax rules, including rules applicable to lodging facilities and certain healthcare-related facilities, impose specific

limitations requiring a demonstration that the tenant operations are managed by “eligible independent contractors” or under similar arms-length arrangements.[28]

We believe it is important that the SEC take notice of long-standing real property leasing practices in the U.S. Today, types of U.S. commercial leases vary widely, ranging from a simple net lease, which generally requires a tenant to pay a limited amount of the operating expenses associated with its tenancy, to a triple-net lease, which requires the tenant to pay all of the operating expenses associated with its tenancy.[29] A significant number of REITs have some triple net-leased properties in their portfolios, and roughly 25 REITs hold only triple net-leased properties. Notably, almost all REIT commercial leases require tenants to pay utilities, tax, and insurance expenses.[30] For these reasons, commercial real estate property owners generally have very limited visibility into their tenants' GHG emissions and resource use otherwise and certainly no current basis to make reasonable assumptions.

U.S. commercial real property leasing practices have been in place for many decades and over that period have been affirmed by judicial opinions far and wide. Consequently, under most real property leases in place today, commercial real estate landlords[31] generally have no legal right to receive relevant emissions and resource consumption or use data arising from a tenant's business or other operations at the leased property.[32] Additionally, landlord-tenant related laws in most jurisdictions preclude Multifamily REITs and other multifamily owners from requesting tenant energy and water consumption data. Should a given lease require a tenant to provide data to a commercial real estate landlord, there are very practical difficulties with enforcing such a requirement to ensure timely delivery of accurate data. In such circumstances, judicial redress is likely to be expensive, unlikely to be quick, and could damage landlord-tenant relationships.

Due to obstacles in obtaining third-party data, Nareit's members believe that owners of income-producing real estate should only be required to report on data arising from operations under their direct and immediate control. The independent relationship between commercial landlords and tenants limits the landlord's access to reliable tenant GHG emission data. In fact, the Proposal recognizes the difficulties of obtaining this third-party data.[33] Due to a lack of tenant data, REITs would be required to estimate a tenant's GHG emissions based on third-party data, if available, which is less likely when the tenant is not an SEC registrant. Moreover, Nareit's

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[28] See, 26 U.S.C. 856(d)(9), infra note 40.
[29] See, Mary Hall, Single vs. Double vs. Triple Net Leases: What's the Difference?, Investopedia (Jan. 1, 2021) available at https://www.investopedia.com/ask/answers/040115/what-are-differences-between-single-double-and-triplenet-leases.asp.
[30] The Fundamental Income Net Lease Real Estate Index, includes 25 REITs, owning more than 26,300 properties across all 50 states leased to tenants operating in a variety of industries available at https://netleaseetf.com/about.
[31] References herein to commercial landlords include REIT owners of multifamily buildings. Multifamily building owners similarly do not generally have visibility into and/or control over tenant resource use, although lease provisions vary among multifamily properties. Moreover, privacy and other local laws in most jurisdictions limit multifamily owners' ability to obtain resource use data from residential tenants.
[32] See, e.g., Corriere v. Lucky Stores, Inc., No. D036543, 2002 WL 844818 (Cal. Ct. App. May 3, 2002); Saada v. King of Prussia, Assocs., 888 F.2d 1382 (3d Cir. 1989).
[33] See, supra note 1, at 291 (“We also recognize that obtaining the data necessary to calculate a registrant's Scope 3 emissions might prove challenging since much of the data is likely to be under the control of third parties.”).

members are concerned that estimating tenant GHG data derived from third-party models predicated on a range of estimates is not useful and may be confusing to investors. While REIT tenants can be among the largest public companies (such as Amazon), they also can be individuals or families in apartment buildings or smaller mom and pop tenants in shopping centers. Even when a lease requires tenants to provide landlords with relevant Scope 3 data, it is far from clear that all tenants would be able to submit such information in a timely manner, and/or that such information would be accurate or sufficient. In such cases, a REIT's recourse as a landlord would be limited. The SEC acknowledged concerns of the Scope 3 GHG emissions disclosure in the Proposal, stating "[w]e acknowledge that a registrant's material Scope 3 GHG emissions is a relatively new type of metric, based largely on third-party data, that we have not previously required."[34] Given the nature of the real estate industry, longstanding commercial leasing practices and legal impediments, we do not believe it is appropriate to require commercial landlords to report information to the SEC arising from the activities of its tenants.

We note that some have suggested that so-called "green leases," which are commercial leases modified in certain ways to align tenant and landlord interests for energy-efficient and green building improvements, might alter this calculus. Although not appropriate to all circumstances, green leases can facilitate constructive collaborative relationships between landlords and tenants and, depending on their terms, they may facilitate landlord-tenant cost-sharing for energy-efficient building modifications, such as LED lighting upgrades and renewable energy installations.[35] Some green leases require tenants to report certain energy and resource use to landlords, though this varies considerably among property owners, diverse tenants and the requirements of local jurisdictions. Many Nareit member REITs have entered into green leases with certain tenants and are justifiably proud of their green lease tenant collaborations. Several Nareit member REITs have been recognized for their green leasing by the Institute for Market Transformation (IMT), the U.S. Department of Energy's (DOE) Better Buildings Alliance, and others for these practices.[36] However, many tenants are not willing to enter into such leases.

Notwithstanding the very limited existence of green leases today, the fundamental fact is that commercial real estate tenants remain responsible for conducting their own businesses, including their stewardship of scarce resources and GHG emissions; and tenants should remain responsible for reporting on relevant data arising from their business operations, including data arising from their use of the real estate which they lease. We also note that because commercial real estate leases are, for most REIT sectors, of long duration (typically ranging from five to 40 years, depending on sector), it is not generally feasible to quickly transition a typical commercial property portfolio to green leasing, even if the landlord is committed to doing so.

[34] See, Id. at 173.
[35] See, The Building Owners and Managers Association (BOMA), Green Lease Guide (2018) available at https://www.boma.org/GreenLeaseGuide.
[36] 10 REITs attained Gold status as Green Lease Leaders in the national program sponsored by the U.S. Department of Energy's Better Buildings Alliance and the Institute for Market Transformation. The Green Lease Leaders is a national program which sets standards for what constitutes a green lease and recognizes cross-sector landlords and tenants for creating and implementing those leases. See, Green Lease Leaders available at https://www.greenleaseleaders.com/recipients-2020/.

Furthermore, the lack of a uniform method for determining Scope 3 GHG emissions supports Nareit's position that Scope 3 GHG emissions disclosures should be voluntary. For example, some REITs only include tenant emissions in their Scope 3 reporting, while other REITs include tenant emissions, business travel, employee commutes, other energy and fuel-related activities in their Scope 3 reporting. As noted in a report published by one federal regulator, this lack of uniformity is not unique to REITs, as at least one federal regulator has noted that the measurement of Scope 3 GHG emissions is still evolving for most industry sectors.[37] For this reason, few investors are currently asking registrants to report Scope 3 GHG emissions.[38] The lack of a generally accepted definition of Scope 3 GHG emissions in the real estate sector has the potential to make the disclosures confusing and not comparable between REITs and other real estate companies.

mREIT members of Nareit have also expressed concerns that the Proposal does not address the fact that there is no agreed upon methodology for determining Scope 3 GHG emissions arising from residential mortgage-backed securities or commercial mortgage-backed securities. The Proposal cites to the PCAF, Global GHG Accounting & Reporting Standard for the Financial Industry (2020) and suggests that it sets forth a methodology relevant to many financial assets. However, the PCAF has deferred setting standards for measuring and reporting on Scope 3 GHG emissions from securitized products to a later time and neither PCAF nor other frameworks set forth a methodology for Agency securities. At present, neither Fannie Mae nor Freddie Mac publish relevant GHG data related to the securities they have issued, except for designated Green Bonds, which are new and represent a small slice of the market.[39] We also note that asset-backed issuers are exempt from the Proposal, suggesting that the SEC recognizes some of these reporting difficulties. For these reasons, we suggest that any requirement for registrants to disclose Scope 3 GHG emissions attributable to investments in RMBS and CMBS be deferred until meaningful information is available and standards for such disclosure are developed by the PCAF or others that would allow such disclosure of accurate and useful information. Such a deferral would align to the proposed treatment of asset backed issuers, which are proposed to be exempt from climate disclosure, and would allow standards to develop that provide guidance of how to calculate Scope 3 GHG emissions of assets within securitized pools.

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[37] U.S. Commodity Futures Trading Commission, Managing Climate Risk in the U.S. Financial System (Sept. 9, 2020) at 62 ("There is no agreed standard for financed emissions and little consistency or comparability to date, but a wide range of methodologies are being developed.") available at https://www.cftc.gov/PressRoom/PressReleases/8234-20.
[38] See, e.g., Blackrock, BlackRock Investment Stewardship Proxy voting guidelines for U.S. securities Effective as of January 2022 at 17 ("In determining how to vote, we will continue to assess whether a company's disclosures are aligned with the TCFD and provide short-, medium-, and long-term reduction targets for Scope 1 and 2 emissions.") available at https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf; State Street Global Advisors, Summary of Material Changes to State Street Global Advisors' 2022 Proxy Voting and Engagement Guidelines (March 2022) at 2 ("we may vote against the independent board leader at companies in the S&P 500, S&P/TSX Composite, FTSE 350, STOXX 600 and ASX 100 if companies fail to provide sufficient disclosure in accordance with the TCFD framework, including…Total Scope 1 and Scope 2 greenhouse gas emissions…") available at https://www.ssga.com/library-content/pdfs/ic/proxy-voting-and-engagement-summary-of-material-changes.pdf; and Institutional Investor Services (ISS), Americas Proxy Voting Guidelines Updates for 2022 (December 7, 2021), ISS also does not currently incorporate an assessment of registrant Scope 3 emissions in its 2022 voting policies, available at https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf.
[39] See generally, Freddie Mac's Green Bond Program Expands with Single-Family Green Bond Framework and Second Party Opinion (Jan. 3, 2022) available at https://freddiemac.gcs-web.com/news-releases/news-release-details/freddie-macs-green-bond-program-expands-single-family-green-bond.

For the reasons discussed above, Nareit strongly believes disclosure of Scope 3 GHG emissions should be voluntary and that REITs should only be required to report climate change information and data arising from operations under their direct and immediate control as it would be difficult at best for REITs to quantify Scope 3 GHG emissions with reasonable reliability and the upstream and downstream activities lack accepted methodologies and availability of data.

The materiality threshold for disclosure of Scope 3 GHG emissions, as described and proposed, likely would operate as a mandate for most REITs and should be reconsidered

The Proposal would require disclosure of Scope 3 GHG emissions if those emissions are material or if a registrant has set a GHG emissions reduction target or goal that includes Scope 3 GHG emissions. In the Proposal, the Commission has indicated that the standard for materiality in this context is whether "there is a substantial likelihood that a reasonable investor would consider them important when making an investment or voting decision." However, in discussing the materiality determination with respect to Scope 3 GHG emissions in the Proposal, the Commission states: "[w]hen assessing the materiality of Scope 3 GHG emissions, registrants should consider whether Scope 3 GHG emissions make up a relatively significant portion of their overall GHG emissions. While we are not proposing a quantitative threshold for determining materiality, we note that some companies rely on, or support reliance on, a quantitative threshold such as 40% when assessing the materiality of Scope 3 GHG emissions."

Nareit believes that this formulation for determining whether Scope 3 GHG emissions are material would effectively operate as a mandate for Scope 3 GHG emissions disclosure by most REITs and for many other registrants. Under the Proposal, in assessing materiality, registrants would be urged to consider whether Scope 3 GHG emissions make up a relatively significant portion of their overall GHG emissions. While the Proposed Rule does not include a quantitative threshold, the consideration of a 40% threshold when assessing the materiality of Scope 3 GHG emissions, as the Commission suggests in the Proposal,[40] would necessarily require most REITs to report Scope 3 GHG emissions, because a significant portion of a REIT's operations are conducted through ownership of income-producing properties that are leased to tenants. For most REITs, tenant emissions would be considered Scope 3 GHG emissions under the GHG Protocol, because they arise from the activities and operations of a third party. Nareit believes that, for most REITs, a significant portion of their overall GHG emissions would be comprised of tenant, i.e., Scope 3 GHG emissions. Further, REITs that lease their properties to third parties, with perhaps little to no involvement in operating the properties (triple net leases, for example) and therefore small corporate footprints, could de facto find that Scope 3 GHG emissions would almost certainly be material under the proposed 40% materiality threshold, while unlikely to be determined to be material under existing law. Therefore, although the Scope 3 GHG emissions disclosure

[40] See, supra note 1.

requirement specified in the Proposal includes a materiality qualifier, in the context of a REIT's operations, this disclosure requirement effectively would be a mandate for Scope 3 GHG emissions disclosure, significantly increasing the costs and burdens associated with the Proposal across the REIT and publicly traded real estate industry. As described above, disclosure of Scope 3 GHG emissions should remain voluntary.

The attestation report should only be required at the limited assurance level and the SEC should defer the requirement that registrants retain a "GHG emission attestation provider"

The Proposed Rule would require accelerated filers and large accelerated filers to include an attestation report with respect to Scope 1 and Scope 2 emissions disclosures. During the transition period, registrants would be required to obtain an attestation report at a "limited assurance" level. Following the transition period, the attestation report would be provided at the "reasonable assurance" level, the same assurance level required with respect to the annual audited financial statements.

At present, many REITs provide assurance for their GHG Scopes 1 and 2 reporting, most at the "limited assurance" level and fully disclose this in their published reports. Nareit members are particularly concerned that the Proposal's requirement that registrants provide an attestation at the "reasonable assurance" level after the transition period would add significant cost and burden for REITs and other registrants without commensurate benefit to investors and stakeholders. Our members note that they are unaware of investors who have expressed concerns about their current attestation approach, which often provides limited assurance for the GHG reporting. As one member commented, "Never has an investor said they wished our ESG report had third party assurance at the reasonable assurance level as opposed to the limited assurance level."

As we also noted in our June 2021 comment to the SEC,[41] at present REITs currently engage a variety of professionals to provide third-party assurance or attest to the accuracy of certain data related to climate change, which REITs publish in their standalone sustainability reports, on their websites and, when appropriate, in their SEC filings. REITs, like other registrants, typically identify these assurance providers and describe their methodologies in their published reports. Some REITs currently employ specialized environmental or climate change assurance providers. Others rely on PCAOB-registered auditors. Our members believe that GHG assurance is another area where "one size" does not "fit all."

Our members are accordingly concerned that the Proposal's requirement that registrants retain a "GHG emission attestation provider,"[42] a category of professional for which there exists no standard credentialing, or quality control, would be confusing and likely to mislead investors. Our members worry that the supply of such providers may be insufficient, which would further drive-up costs. As a result, many registrants would conclude

[41] Supra note 2.
[42] See, supra note 1, at 21,470.

that it is “safer” to retain a PCAOB-registered auditor, a more costly alternative. They also worry that this attestation requirement would require REITs and others to divert additional internal resources better deployed for other purposes to comply with this requirement.

For these reasons, Nareit believes that the attestation report should only be required at the “limited assurance” level. Additionally, Nareit requests that the SEC not adopt a requirement for registrants to retain a “GHG emission attestation provider” until appropriate credentials and standards for these providers are developed by the SEC.

Registrants should have flexibility to designate organizational boundaries for reporting on joint ventures and similar investments

The Proposal would require many registrants, including many REITs and other real estate companies, to change the way they have been setting their organizational boundaries for reporting GHG emissions with respect to joint ventures and similar projects that are not consolidated in their financial statements. Currently, many REITs and others follow the “control approach” set forth in the GHG Protocol,[43] which, as the Proposal notes, has become a leading accounting and reporting standard for GHG emissions[44] and offers companies a choice of using either an “equity share approach,” or a “control approach.” With respect to joint ventures, or partnership investments, REITs following the GHG Protocol’s operational control approach[45] typically report 100% of the GHG emissions attributable to entities over which they have operational control and 0% of the GHG emissions from entities over which they do not have operational control.

REITs and other real estate companies frequently hold minority ownership stakes in partnerships and ventures over which they have no operational control. More often than not, these joint ventures or partnerships are entities that are not required to track GHG emissions, and therefore may not routinely do so, or may not do so in a manner that would provide accurate and timely data to enable a minority owner to report on its proportional share of GHG emissions, as required under the Proposal.[46] Moreover, under the terms of the relevant governing agreements, the minority owner may not have the contractual right, or otherwise have the legal ability, to obtain GHG data from the controlling partner.

As the SEC acknowledges, the Proposal would require many registrants to abandon the GHG Protocol’s control approach—which some have utilized for years and embedded in their reporting systems—and to follow

[43] See GHG Protocol, Corporate Accounting and Reporting Standard, Chapter 3 available at https://ghgprotocol.org/corporate-standard,
[44] See, supra note 1, at 34.
[45] Under the GHG Protocol, supra note 2, companies using the control approach can choose between either operational or financial control criteria. The concerns raised here apply to both sets of GHG Protocol control criteria, because neither is consistent with the Proposal’s prescribed method of determining boundaries with respect to joint ventures and partnerships. However, our discussion primarily focuses concerns raised by REITs and other real estate firms currently using the GHG Protocol’s operational control approach.
[46] See, supra note 1, at 189.

the U.S. Generally Accepted Accounting Principles ("GAAP") standards for consolidation.[47] This would require many registrants, including many REITs and real estate companies, to significantly reconfigure their reporting systems, some at great expense. Perhaps for this reason, the Proposal requests comment on whether the SEC should reconsider this proposed change in the treatment of reporting GHG emissions,[48] and also asks if situations "could arise where it is impracticable for a registrant to align the scope of its organizational boundaries for GHG emission data with the scope of the consolidation for the rest of its financial statements."[49] The Proposal additionally poses the question of whether, as an alternative, the SEC should "require registrants to use the organizational boundary approaches recommended by the GHG Protocol… ."[50]

Nareit believes that registrants with holdings in joint ventures and similar partnerships often do pose a situation "…where it is impracticable for a registrant to align the scope of its organizational boundaries for GHG emission data with the scope of the consolidation for the rest of its financial statements."[51] Minority owners in joint ventures and partnerships often have no access to relevant underlying data and controlling owners frequently are not legally required to measure and produce this data. For these reasons, Nareit members worry that requiring minority investors to disclose rough estimates, or otherwise unreliable data, with respect to GHG emissions arising from their proportional shares of joint ventures that they do not control would be more likely to confuse investors than to provide them with comparable, useful information. Our members are also concerned that this proposed change in reporting standards would impose considerable burdens on REITs and others who hold minority interests in joint ventures. Many of these registrants would need to develop entirely new GHG reporting methods, and extensively revise their existing GHG emissions targets and related sustainability performance measures.

Accordingly, Nareit urges the SEC to incorporate flexibility into its final rule by permitting REITs and other registrants to select (and disclose) the appropriate method for setting their organizational boundaries with respect to the reporting of GHG emissions arising from joint assets, such as joint ventures and partnerships, over which a registrant has no operational control and does not consolidate in its financial statements. Under such a flexible approach, some registrants, including some REITs, may elect to continue their current practices of reporting GHG emissions related to joint ventures and partnerships pursuant to the GHG Protocol's control approach. We believe that REITs, other registrants and investors alike would benefit from this change.

The SEC should coordinate with other Federal agencies and provide a safe harbor for GHG emissions calculated pursuant to Federal agency tools

[47] Id. at 188.
[48] See, Id. at 202 (question 116).
[49] See, Id. at 203 (question 118).
[50] Id.
[51] Supra note 6.

In the Proposal, the SEC acknowledges that other federal agencies, including the Environmental Protection Agency (EPA), currently publish standards and/or offer computational tools and databases for the calculation of GHG emissions. Many of our members are familiar with these tools and believe that they offer the potential of standardizing GHG emissions reporting for certain industry sectors, including REITs and other real estate companies. Because we believe that these tools offer benefits and hold even greater potential, we urge the SEC to coordinate with these federal agencies and to provide a safe harbor to registrants who properly use these federally developed factors and tools developed to quantify GHG emissions for Scopes 1 and 2 reporting to the SEC.

These federally developed tools include, but are not limited to, the EPA's ENERGY STAR's Portfolio Manager,[52] which is widely used in the commercial real estate sector to help organizations measure and manage GHG emissions and increasingly used by state and local governments. The Department of Energy's Commercial Building Energy Consumption Survey (CBECS) database[53] is another resource that is often incorporated into models and tools to forecast GHG emissions specific to CRE asset classes (e.g., office, retail, hotels, warehouses, health care).

We urge the SEC to coordinate with other federal agencies in the development of tools to assist registrants to report consistent, comparable and reliable GHG data. Extending safe harbor protections to registrants who properly rely on these tools likely would promote their use and result in higher quality reporting for investors.

The reporting timeline should align with the availability of GHG emissions and climate data; additional modifications and clarifications are necessary

The Proposal poses important questions relating to the timing of GHG emissions disclosures. It is the experience of Nareit's members that actual GHG emissions data are typically available several months after our members file their Annual Report on Form 10-K. As such, the Proposal would effectively require two GHG emissions reports for many registrants; first, in a registrant's Form 10-K based in part on estimated data, and then in a subsequent filing based on actual data.

Nareit believes that it is critical for the reporting timeline to be aligned with the timing of when actual GHG emissions data is available to REITs, which is frequently in the second quarter of the subsequent fiscal year. (As the SEC is aware, all REITs are required to maintain a calendar year fiscal year.) Nareit members have

[52] See US-EPA, ENERGY STAR Facts and Stats, "ENERGY STAR in the Commercial Buildings Market," available at https://www.energystar.gov/buildings/about-us/facts-and-stats.
[53] CBECS tables for Consumption and Expenditures. As of this writing, the most recent, best available CBECS data regarding building energy consumption is from 2012. EIA reports that its newest "preliminary estimates" for building energy "consumption and expenditures" will be released this coming August with the final 2018 CBECS data to be released this coming November. See CBECS Status Update (March 10, 2022).

expressed that it would be difficult to collect, assemble and report the required climate data within the current annual report timelines. Additionally, members expressed concerns about whether estimated GHG emissions data for the fourth fiscal quarter would be reliable, made in a consistent manner, and useful to their investors.

Nareit recommends that the SEC consider a climate disclosure reporting regime that requires one climate change disclosure report with a required due date that is consistent with when actual GHG emissions data is available. This approach would align with the timing of when GHG emissions and climate data is available and would prevent registrants from presenting estimates for GHG emissions for the fourth fiscal quarter of each year. Overall, this approach would serve the Commission's overriding goal of providing investors with consistent, comparable, and reliable information about climate-related matters.

There are various ways that the SEC could address this problem that would be preferable to the solution set forth in the Proposal. The SEC could require that the Form 10-K include reporting for a designated "climate reporting year" of July 1 to June 30 (i.e., the Dec. 31, 2025 Form 10-K filed in 2026 would show climate information for July 1, 2024 through June 30, 2025). Alternatively, the SEC could require that climate change disclosures covering the most recent calendar year be filed separately on June 30 of the subsequent year. Either option would be preferable to the solution set forth in the Proposal, which would place undue burdens on REITs and other registrants, possibly exposing them to liability while inevitably confusing investors.

Newly acquired assets pose particular issues with respect to the Proposal's reporting timeline. In the ordinary course of a REIT's business, it may acquire a real estate asset in the fourth quarter of the year. The Proposal would require a REIT to report the GHG data for the acquired asset in the same time frame as the filing deadline of the Form 10-K. As discussed earlier, this data may not be readily available, and if it is, it would have not been prepared historically pursuant to the acquiring REIT's processes and financial reporting controls. Therefore, Nareit respectfully requests that GHG emissions data relevant to newly acquired assets should not be required until the asset has been owned by the acquiring company for one full year and is subject to the acquiring company's processes and financial reporting controls.

The compliance date for the proposed disclosures in annual reports should be extended by at least one year for all registrants and should not require historical disclosure at the compliance date

Based on the potential compliance timeline set forth in the Proposal, the compliance date (other than for Scope 3 GHG emissions) would be fiscal year 2023 for large accelerated filers, fiscal year 2024 for accelerated and non-accelerated filers and fiscal year 2025 for smaller reporting companies. Given the complexities of the Proposal, Nareit requests that the SEC extend the compliance dates for the proposed disclosures by at least one year. While it has earlier been stated that REITs have long taken a keen interest in climate disclosure,[54] as the SEC notes, many issuers—including many REITs—have been undertaking climate reporting pursuant to different frameworks and formats, including the GHG Protocol. Moreover, the amendments to Regulation S-X would require REITs and other registrants to develop new systems, controls and rules to track climate related impacts, in addition to auditing protocols.

As noted above, the SEC acknowledges that an issuer following the GHG Protocol would base its organizational boundaries on either an equity share approach or a control approach, which is distinct from the Proposal's requirement that registrants set the organizational boundaries for its GHG emissions disclosure using the same scope of entity boundaries applicable to its consolidated financial statements. This change would require significant modification to the data collection, analysis and reporting practices for many REITs.

Moreover, providing all registrants, even those with more personnel and economic wherewithal, with the additional time required to establish processes and procedures for the purpose of developing these disclosures would serve the Commission's overriding goal of providing investors with consistent, comparable, and reliable information about climate-related matters. In addition, while the definitions related to market capitalization sizes of registrants (such as large accelerated filers) frequently guide the SEC on phase in periods, registrants with smaller corporate footprints likely would find the ability to comply with the proposed timeline to be both very expensive and require significant additional personnel.

Additionally, the Proposal would require multi-year disclosures of historical GHG emissions data for the periods presented in the consolidated financial statements. Nareit requests the SEC to consider the burden represented by undue cost and effort of including historical GHG emissions data at the compliance date. The disclosure required by the Proposal would be burdensome for registrants that do not currently report on climate issues.[55] Some of Nareit's members, including PNLRs, do not currently report on climate related issues and are particularly concerned with the burden of developing historical GHG emissions data to meet the

[54] See, Nareit, REIT ESG Dashboard, supra note 6.
[55] See, supra note 1, at 302 (According to the Proposal, ". . . 33% of all annual reports contain some disclosure related to climate change . . .. Among large accelerated filers, 49% of filings discussed climate change, while the figures for accelerated filers and non-accelerated filers are 29% and 17%, respectively.").

compliance dates set forth in the Proposal. Nareit believes that the burden would be reduced if the historical reporting of climate disclosure is not required at the initial compliance date.

There is precedent for the SEC not requiring comparative periods in SEC filings in certain circumstances, and we encourage the Commission to take a similar approach with GHG data for historical periods. For example, the SEC's Final Rule – Amendments to Financial Disclosures for Acquired and Disposed Businesses[56] does not require interim comparative periods to be presented when one year of audited financial statements are required by Rule 3-05 of Regulation S-X. As we have noted earlier, many REITs and real estate companies currently follow the operational boundaries set forth in the GHG Protocols and have based GHG emissions goals based on this methodology. If the SEC does not permit registrants to continue to report GHG emissions based on the GHG Protocols, there would be undue cost and effort to recreate GHG data for historical periods that is not readily available utilizing the SEC's boundary approach that is based on U.S. GAAP.

Requiring climate disclosure to be filed, rather than furnished, is not justified

Nareit's June 2021 comment to the SEC on climate change disclosure urged the SEC to permit registrants to furnish, rather than file, climate change disclosure information with the SEC.[57] Many of our members were then, and remain, skeptical that the value of climate change reporting would be improved if such disclosure is required to be filed with the SEC. To the contrary, our members fear that the Proposal's requirement that registrants file, not furnish, climate change disclosure may likely cause registrants to discontinue, or curtail, their current practices of providing expansive climate disclosures and related relevant reports that follow internationally-accepted protocols to investors and stakeholders.

Here we note that at least one REIT is acknowledged[58] to be among the first public companies to voluntarily furnish their annual standalone sustainability reports to the SEC, as an exhibit to Form 8-K Item 7.01.[59] Reports furnished in this manner are subject to the general anti-fraud liability of Exchange Act Section 10(b) and Rule 10b-5 and state anti-fraud laws. We believe the general anti-fraud liability of Exchange Act Section 10(b) and Rule 10b-5 provides the appropriate level of investor protection for this type of information, rather than the heightened liability associated with information that is filed with the SEC.

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[56] See, Release No. 33-10786 Amendments to Financial Disclosures about Acquired and Disposed Businesses (May 20, 2020) at 37 ("This proposed revision would eliminate the need to provide a comparative interim period when only one year of audited Rule 3-05 Financial Statements is required.") available at https://www.sec.gov/rules/final/2020/33-10786.pdf.
[57] Nareit comment letter on SEC Request for Comment on Climate Change Disclosure, supra note 2 at 12.
[58] See, Tom Riesenberg and Alan Beller, Sustainability Accounting Standards Board, on Wednesday, June 5, 2019 ("Vornado's use of the SEC Form 8-K filing process in this context is to our knowledge a first.") available at https://corpgov.law.harvard.edu/2019/06/05/sustainability-accounting-standards-and-sec-filings/.
[59] See, e.g., Vornado Realty Trust, 2020 Environmental, Social, & Governance Report available at https://www.sec.gov/Archives/edgar/data/899689/000089968921000020/esgpressrelease.htm; Vornado Realty Trust, 2019 Environmental, Social, & Governance Report available at https://www.sec.gov/Archives/edgar/data/899689/000089968920000020/vnoesgreport-sec.htm.

Nareit has long supported voluntary sustainability reporting in the real estate industry. Nareit's members believe that there is considerable value in their current voluntary reporting of climate change information to investors and stakeholders, alike. According to a recent survey, 80 of the 100 largest REITs by equity market capitalization published a standalone sustainability report in 2021 and all of the largest 100 U.S. listed REITs by equity market capitalization publicly report on their ESG efforts in one or more media, e.g., annual reports, proxy statements, stand-alone sustainability reports and/or on company websites.[60] Moreover, according to recent Nareit survey data,[61] 70% of all REITs report on Scope 1 and 2 GHG Emissions and many report other ESG and climate change metrics in a variety of formats, though most commonly in the form of standalone reports, or on their corporate websites. This voluntary reporting often includes responses to well-known third-party sustainability disclosure frameworks, which request a range of information and are constantly expanding and evolving.[62]

Nareit members also expressed concerns that the potential cost of the Proposal's requirement that registrants file climate disclosure information, including costs arising from additional liability exposure, would be considerable. Permitting registrants to furnish, rather than file, climate change disclosure would accommodate the SEC's goals with significantly less cost and burden to registrants. Moreover, permitting this disclosure to be furnished would not have the deleterious effect of discouraging registrants from continuing to provide the robust disclosures to investors and stakeholders that they provide voluntarily today.

Accordingly, we suggest that if the SEC pursues a path of requiring registrants to report more expansive climate change disclosure to the SEC, such information should be furnished and not filed. This could be accomplished by permitting registrants to furnish their ESG, or other climate change reports, within four business days of making it generally available to the public through other channels (such as a company website) under item 7.01, under a new Item within Form 8-K, or in a stand-alone report. Additionally, as discussed above, Nareit members have many concerns about the Proposal's requirement that requiring climate change disclosure data to be filed on the same timeline as a registrant's annual report. Nareit believes that it is critical for the reporting timeline to be aligned with the timing of when actual GHG emissions data is available to REITs, which is frequently in the second quarter of the following fiscal year. Permitting registrants to furnish these reports would enable registrants to provide this information when they have a complete set of data.

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[60] See, Nareit, REIT ESG Dashboard available at https://www.reit.com/investing/reits-sustainability/reit-esg-dashboard.
[61] Nareit 2021 member survey, to be published in forthcoming Nareit 2021 ESG Report.
[62] Among participants of the 2021 Nareit ESG Member Survey, 62% of REITs aligned their reporting to TCFD, 59% of REITs aligned their reporting to SASB Standards, and 32% reported in alignment with CDP.

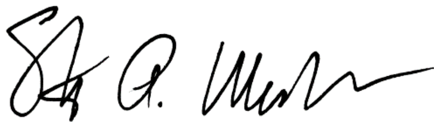
An alternative reporting provision should be available to all registrants, including REITs

In the Proposal, the Commission asks whether it should adopt an alternative reporting provision that would permit a registrant that is a foreign private issuer and subject to the climate-related disclosure requirements of an alternative reporting regime that has been deemed by the Commission to be substantially similar to the requirements of proposed Subpart 1500 of Regulation S-K and Article 14 of Regulation S-X to satisfy its disclosure obligations under those provisions by complying with the reporting requirements of the alternative reporting regime. If the Commission were to adopt an alternative reporting provision, Nareit believes that it would be helpful to encompass the disclosure standards that are being developed by the International Sustainability Standards Board. Further, Nareit believes that the alternative reporting provision could be useful to multi-national REITs and other multi-national registrants, and therefore the Commission should consider allowing domestic registrants to also adopt any alternative reporting provision available to foreign private issuers under the Proposal.

Conclusion

Nareit and its members have a long-standing commitment to responsible stewardship of their real estate assets and to providing investors and other stakeholders with decision-useful, material information about climate change. Nareit appreciates this opportunity to participate in this rulemaking, and would be pleased to discuss our comments, or any questions the SEC or its Staff may have. Please do not hesitate to contact Steve Wechsler at [redacted] Nareit's executive vice president and general counsel, Catherine Barré, at [redacted] or Nareit's senior vice president, regulatory affairs and deputy general counsel, Victoria Rostow, at [redacted] if you would like to discuss these comments, or related issues raised by this complex subject in greater detail.

Respectfully submitted,



Steven A. Wechsler
President & CEO

Appendix A

History of REITs

REITs were established by Congress in 1960 to provide individual investors access to investments in income-producing real estate and mortgages.[63] Today, approximately 145 million Americans live in households that own U.S. REITs directly or indirectly.[64] REITs are invested in every part of the country in every type of real estate and nearly the entire headline real estate sector of the public equity market is comprised of REITs. As a result, REITs own $3.5 trillion in real estate assets, of which $2.5 trillion is owned by public REITs. In 2016, in recognition of the unique attributes of the public real estate sector, Standard & Poor's (S&P) and MSCI created a top-line real estate sector in their Global Industry Classification Standard, known as GICS, of which virtually all sector constituents are REITs.[65]

Legal Framework

Congress' primary objective in authorizing the use of REITs was to provide a means "whereby small investors can secure advantages normally available only to those with larger resources,"[66] in connection with real estate investment. To effectuate this goal, Congress created a legal framework intended to promote longer term real estate investment and ensure that REIT income is distributed annually to shareholders. This operating framework is delineated within the Internal Revenue Code (the Code) by numerous rules, restrictions and limitations under which REITs are required to operate, many of which are designed to ensure that REITs confine their activities to the business of real estate as a landlord or lender. Critically, to qualify as a REIT and to maintain that status for purposes of U.S. corporate income tax, an entity must distribute at least 90% of its ordinary income each year[67] and annually satisfy rigorous asset and income tests that require that:

- at least 75% of the value of a REIT's total assets must be represented by real estate assets, cash and cash items and government securities (so-called "qualifying assets")[68]; and,
- no less than 75% of a REIT's income must be derived from such qualifying assets, essentially from rents from unrelated parties, mortgage interest, or capital gains from the sale of real estate.[69]

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[63] The 1960 law establishing REITs (Internal Revenue Code sections 856, 857 and 858) was enacted as an amendment to the Cigar Excise Tax Extension, section 10(a) of Public Law No. 86-779, 74 Stat. 998, 1003-1008 (Sept. 14, 1960).
[64] See, Nareit, 145 Million Americans Own REIT Stocks available at https://www.reit.com/data-research/research/nareit-research/145-million-americans-own-reit-stocks.
[65] See, Nareit, GICS Classification of Real Estate available at https://www.reit.com/investing/investor-resources/gics-classification-real-estate.
[66] H.R. Rep. No. 2020, 86th Cong., 2d Sess. 3 (1960), reprinted in 1960-2 C.B. 820.
[67] 26 U.S.C. § 857(a).
[68] 26 U.S.C. § 856(c)(4).
[69] 26 U.S.C. § 856(c)(3).

This underlying tax framework[70] ensures that the operations of a REIT are wholly distinct from the operations of their tenants' businesses. For example, if a REIT owns more than 10% of the stock of a tenant, payments from that tenant to the REIT generally do not qualify as "good income" under the REIT tests.[71] Moreover, if a REIT owns more than 10% of the voting shares or value of any non-REIT corporation (including a tenant), it must be held within a "taxable REIT subsidiary," the securities of which may not represent more than 20% of the assets of the REIT.[72]

The structure of the REIT sector today reflects the practical implications of these rules. REITs may lease warehouses to a delivery service such as FedEx, but a REIT's operations may not include more than a small amount of a non-real estate logistics business. An office REIT's lease to a national accounting firm does not mean that the REIT is providing accounting services. And, a data center REIT's lease of space to tenants such as financial institutions, social media companies, and e-commerce companies so that the tenants can house their own computers does not make the data center REIT a banking, social media, or e-commerce business. Further, nursing home and lodging REITs may not operate these facilities; rather, under special provisions of the Code, they must lease them to an "eligible independent contractor" (EIK).[73] REITs that own parking garages typically lease these operations to a third-party operator.[74] REITs owning farmland similarly lease substantially all operations to tenants, typically under master lease agreements.[75] Triple net lease (triple-net) REITs typically lease properties to a single tenant, which assumes the responsibility not only for all operating expenses, but also real estate taxes.

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[70] REITs must also be considered a corporation for tax purposes and have more than 100 shareholders, with no five or fewer individuals owning more than 50% of its stock.
[71] 26 U.S.C. § 856(d)(2)(B).
[72] 26 U.S.C. § 856(c)(4)(B)(iv)(II) and (III); 26 U.S.C. § 856(c)(4)(B)(ii); 26 U.S.C. § 856(i).
[73] 26 U.S.C. 856(d)(9).
[74] PLR 202013006 & PLR 202013007.
[75] See, e.g., Farmland Partners Inc., prospectus supplement filed with the SEC on May 14, 2021 (File No. 333- 254834). ("We have leased, and intend to continue to lease, substantially all of our properties under leases with terms ranging from one to five years. In addition, the terms of the leases with our tenants generally provide that we are responsible for major maintenance, insurance and taxes (which are generally reimbursed to us by our tenants), while our tenants are responsible for minor maintenance, water usage and all of the additional input costs related to the farming operations on the property, such as seed, fertilizer, labor and fuel.") available at https://www.sec.gov/Archives/edgar/data/1591670/000110465921066934/tm2110707-4_s3.htm.