Tyson

June 17, 2022

Ms. Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090
rule-comments@sec.gov

Re: Proposed Rule for Climate-Related Disclosures (File No. S7-10-22)

Dear Ms. Countryman:

On behalf of Tyson Foods, Inc. ("Tyson Foods"), we appreciate the opportunity to comment on the proposed rule on The Enhancement and Standardization of Climate-Related Disclosures for Investors (the "Proposed Rule") from the Securities and Exchange Commission (the "Commission"). As a global food company, Tyson Foods is supportive of consistent, comparable, and reliable science-based metrics and standards by which a company can evaluate and disclose its climate-related risks particular to its business. This is consistent with our June 2021 comments on climate change disclosures to the Commission, where we supported the creation of workable standards, considering current practices, that provide a level of certainty for public companies when speaking on the topic of climate change; allowing for flexibility and modification as the science develops; and adopting innovative approaches as they become available.

Tyson Foods supports visibility of and access to material and reliable climate-related information. However, the implementation and enforcement of the Proposed Rule, as currently written, will prove challenging practically for public companies and the many businesses in their supply chains. Therefore, we encourage the Commission to create more flexibility in the Proposed Rule to accommodate the distinct differences among industries, expand safe harbor protection for required disclosures, extend compliance timetables, and recognize the potential chilling effect of the Proposed Rule on innovation and the desire to provide transparent information to combat climate change.

<u>Flexibility in Identification, Monitoring, and Management of Climate-Related Risk and Opportunities; Higher Threshold for Disclosure of Financial Impact Metrics; Timing Implications</u>

Similar to the Task Force on Climate-Related Disclosures ("TCFD") framework, the Proposed Rule contemplates climate-related risks with corresponding disclosures based on how a specific climate-related risk is characterized. The Proposed Rule views a climate-related risk as being ***<u>either</u>*** a "physical risk" (*i.e.,* a risk related to physical impacts of climate change, such as hurricanes, wildfires, floods) ***<u>or</u>*** "transition risk" (*i.e.*, a risk related to steps to transition to a lower-carbon economy) and seeks information on corresponding impacts to business operations, products and services, suppliers, and other parties in its value chains, as well as responsive actions by the filer. The Proposed Rule is, however, inflexible as compared to TCFD and other disclosure frameworks because it imposes strict categorization of risks as either "physical risk" ***or*** "transition risk." In doing so, the Proposed Rule assumes that risks can be readily classified into a specific category, however such categorization may be far more complex and nuanced, depending on particular facts and circumstances, than the Proposed Rule contemplates. The Proposed Rule's rigidity in how climate-related risks are categorized has significant potential for unintended consequences, including potential failures to properly identify, manage, or communicate truly material climate-related risks and opportunities.

To illustrate, within the agricultural sector, transition risks can include shifting land and water use policies, whereas physical risks can consist of drought, wildfires, and floods. Under the Proposed Rule the risk of drought, wildfires and floods in a set geography would be solely a "physical risk" with corresponding financial impact. Yet, this same geography may have land and water use policies and requirements in response to the severe weather concerns, which have a potential to pose a significant, and in some cases, larger "transition risk" for food systems. Another example, policies encouraging production of certain agricultural grain products for use as alternative and bio-fuel sources could severely limit availability of raw material inputs for food production and lead to greater physical disruptions in the food system following a loss of grain from weather related events.

The Commission should address these unintended consequences by revising the Proposed Rule to provide companies with more flexibility around identification, management, and disclosure of climate related risks and require disclosures for those risks that are truly material to a company. Without the flexibility to identify, view, manage, and disclose climate-related risks on a spectrum of transition and physical risks as well as treat the risks as having interconnectivity, the Proposed Rule may lead to incomplete or confusing information about a company's overall risks.

In addition, the Proposed Rule uses the term "metrics" to refer to quantitative disclosures and requires disclosure of two kinds of metrics ("financial impact" metrics and "expenditure" metrics) for "physical risks" and "transition risks." Each of the financial impact metrics must be presented "on an aggregated line-by-line basis in the notes to a company's financial statements for all negative impacts and, separately, on an aggregated line-by-line basis in the notes to a company's financial statements for all positive impacts." If the impact on a given line item is less than 1%, the impact may be omitted. As explained in the proposing release for the Proposed Rule:

- Financial impacts must be determined for each line item of the financial statements. The examples in the proposing release refer to items in the income statement or the balance sheet, but the text of the Proposed Rule text would appear to capture the cash flow statement as well.
- For each line item, the financial impacts must be measured against a threshold equal to 1% of that line item. For this purpose, a company must use absolute values, not net values, and if the sum of the absolute values of all impacts is less than 1% of the line item, no disclosure is required.
- For each line item, positive impacts must be presented separately from negative impacts, but positive impacts and negative impacts may each be aggregated.

While arguably this "bright-line standard" is expected to promote comparability and consistency over time and reduce the risk of underreporting, 1% is a particularly low threshold which will exacerbate the challenges of implementation, require substantial work and further the complexity of disclosure. Although a company may think it does not have to quantitatively track climate-related impacts on its existing financial statement lines because it will be below the threshold, this is not necessarily the case. As a result, on the one hand, a company will have to track climate-related impacts to make this determination while on the other hand, much of the work that is performed in connection with such tracking may not result in any disclosure because it identifies a large number of negligible amounts.

In addition, the Commission's decision to propose that this information be included in a note to the audited financial statements has important consequences. Auditors will need to be closely involved, and their standards and expectations (and those of their regulator, the PCAOB[1]) will influence how companies approach the requirements. While the proposing release states that this will enhance reliability, it

[1] Public Company Accounting Oversight Board

adds complexity and costs to an already rigorous process for financial statement disclosures as well as additional coordination, more resources and sufficient mechanisms to ensure smooth implementation. The expanded scope may also present a challenge for internal and external auditors given the novelty of the metrics, which could have timing implications for both companies and their auditors.

Expansion of Safe Harbor Protections for Required Disclosures

The Proposed Rule contemplates a safe harbor for disclosures related to a company's Scope 3 Emissions, acknowledging "it may be difficult to obtain activity data from suppliers and other third parties in a registrant's value chain, or to verify the accuracy of that information" and it may "be necessary to rely heavily on estimates and assumptions to generate Scope 3 emissions data." The Proposed Rule recognizes that "the task of calculating Scope 3 emissions could be challenging" for large and complex companies and that "some of these challenges may recede over time." As such, the safe harbor should provide broad protection to statements made with a "reasonable basis" and disclosed in "good faith" thereby limiting liability to only knowing misstatements made with an intent to deceive.

The Proposed Rule, however, must provide companies with clarity as to what constitutes a "reasonable basis" to obtain the protection of the safe harbor, particularly given the multiplicity of challenges to verify third-party data as recognized by the Proposed Rule. Until there is a clear definition of what constitutes a "reasonable basis" and resources available to companies to reliably measure this data, the safe harbor should be available to companies who make these disclosures in "good faith." At a minimum, the safe harbor provisions should contemplate a designated period of time for companies to build the required governance structure, resources, and data to support their Scope 3 Emissions disclosures.

The safe harbor should provide protection and expressly preempt lawsuits filed under state law that target a company's Scope 3 Emissions disclosures. Allowing states to impose conflicting disclosure requirements will undermine one of the primary goals of the Proposed Rule of encouraging consistent and comparable disclosures.

Finally, the safe harbor should provide protection against frivolous claims of antitrust violations based on allegations of coordination or collusion. The Proposed Rule aims to require companies to disclose how climate-related risks are impacting business operations and identify the activities they are undertaking to mitigate and adapt to climate-related risks. Companies within an industry could utilize the same third parties because of their knowledge and capabilities of that industry to address and measure climate-related risks, and customers will sometimes require similarly situated suppliers to meet certain minimum or uniform standards related to climate. Accordingly, it is likely that companies operating in the same or adjacent industries may report parallel climate-related goals or initiatives. Companies should not be subject to costly litigation when such disclosures are required by regulation.

Compliance Timetable Must be Reasonable

A reasonable compliance timetable is necessary, especially for large accelerated filers, such as Tyson Foods, to create auditable processes with reliable data and associated infrastructure. Moreover, the implementation of such processes to obtain the necessary data and develop the necessary controls will require significant time and cooperation from a multitude of third parties. This is particularly relevant for collection of data, such as Scope 3 emissions, which is not readily available or accessible to Tyson Foods. The current compliance timetable is wholly insufficient and does not afford reasonable time for such filers to thoughtfully implement new procedures, confirm and validate the reliability of internal and external data, and engage and educate specialized independent auditors for the required third-party attestation.

The Proposed Rule is a one-size fits all approach that is prescriptive, inflexible, and unnecessarily granular and adds new requirements for disclosure. The Commission's Proposed Rule is a significant departure from well-established frameworks, such as the TCFD framework and the Greenhouse Gas ("GHG") Protocol, to monitor and communicate respective climate-related risks and opportunities. For example, the Proposed Rule contemplates an attestation report, with strict requirements for attestation providers to state they are experts in GHG emissions by virtue of having "significant experience," and is "independent" from the company and affiliates during the "attestation and professional engagement period." The proposed requirement for the verification of GHG emissions data by an independent third party creates additional pressure on the ability of public companies to meet the proposed compliance dates. Even if companies timely engage a qualified independent expert, the proposed timetable does not afford an opportunity to properly validate controls and audit processes. Providing companies with a reasonable compliance timetable will enhance the rigor of review and the quality and reliability of information disclosed.

Disclosures May Chill Innovation and Lead to Competitive Harm

The Proposed Rule requires detailed and granular disclosure of companies' strategy and action plans to address climate-related risks and their efforts to address climate change more broadly. The required disclosures will include proprietary and sensitive competitive information, including planned pathways for reaching GHG emission reductions, renewable energy purchasing plans, technological innovations, and product developments in detail. Disclosure to this degree will cause significant and unintended consequences of inhibiting competition and innovation and ultimately could delay action plans towards emission reductions.

For example, renewable energy purchasing plans involve extensive research, identification, and analysis of renewable markets. If mandated to disclose granular details of energy purchasing plans under the Proposed Rule, companies will lose a competitive advantage and thus bargaining power and be required to disclose information that is generally treated as commercially sensitive, resulting in competitive harm and, in some cases, inhibiting their ability to move forward successfully in negotiations of renewable energy purchase agreements. Rather than helping, the Proposed Rule forces companies to disclose energy pricing, needs, and market considerations, which would harm investors by driving up the cost of such initiatives.

Similarly, if companies are required to disclose detailed strategies for development of new technologies, manufacturing methods, and product development, companies may, as a result, choose to forgo these innovations to avoid the competitive harm likely to result from corresponding disclosure requirements. The Commission should therefore adjust its disclosure requirements to provide protection and shielding of trade secrets, commercially sensitive information, and information that, if disclosed, would result in competitive harm.

Tyson Foods is doing its part to combat climate change and recognizes the need to work together with regulators and businesses to protect our natural resources. We formalized Board oversight of ESG, and our leadership team is leading the development of an enterprise-wide ESG strategy with time-bound key performance metrics in pursuit of GHG emissions reduction ambitions. We understand the value of using ESG metrics and goals based on materiality, and we continue to believe that success with respect to the crucial task of slowing climate change depends on guidance, rules, and regulations that inspire and enable companies to take bold steps by minimizing the risk and burden of doing so. We appreciate the Commission's attention to our most pressing concerns within the Proposed Rule and look forward to engaging further as the rule is refined. We strongly encourage the Commission to incorporate our feedback and the comments from other stakeholders when shaping its expanded regulatory oversight.

Sincerely,

Amy Tu
Chief Legal Officer and Secretary
Global Governance & Corporate Affairs