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June 17, 2022

Via E-mail: rule-comments@sec.gov

Ms. Vanessa Countryman, Secretary

U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: **Comments on The Enhancement and Standardization of Climate-Related Disclosures for Investors Proposal—File No. S7-10-22**

Dear Ms. Countryman,

The Retail Industry Leaders Association (RILA), on behalf of its members, appreciates the opportunity to submit this letter in response to the U.S. Securities and Exchange Commission's (SEC or Commission) proposal on *The Enhancement and Standardization of Climate-Related Disclosures for Investors* (the "proposed rules").[1] By way of background, RILA is the trade association for America's largest and most innovative retailers. RILA members include more than 200 retailers, product manufacturers, and service suppliers with more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad and which together account for more than $1.5 trillion in annual sales. As the nation's largest private sector employer, retail supports more than 52 million American jobs through the retail ecosystem. Retail workers represent all types of people, in all types of roles, experience, education, and skills, in all phases of their lives.[2]

RILA and its members firmly believe that, in order to protect communities and economies around the world from the most disruptive impacts of climate change, effective and pragmatic public policy by the appropriate branches of U.S. government and regulatory agencies is necessary. Therefore, RILA and its members are ready and eager to partner with all relevant U.S. policymakers and government officials, including the SEC, as they look to take proactive actions consistent with their scope of authority in the important fight against climate change.

Additionally, the retail industry, which is not among the largest contributors to greenhouse gas (GHG) emissions, is already working diligently to address and reduce its climate change impact.[3]

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[1] *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Release Nos. 33-11042; 34-94478; File No. S7-10-22 (Mar. 11, 2022) (the "Proposing Release").

[2] RILA, *Representing the Leading Brands in Retail*, https://rilastagemedia.blob.core.windows.net/rila-web/rila.web/media/media/pdfs/rila%20membership/rila-represents8.pdf.

[3] For additional information regarding the efforts of RILA and its members to lower GHG emissions in retail operations, *see* RILA Sustainability Committee, https://www.rila.org/committees/sustainability-committee; Retail

Among other efforts, RILA members are building and retrofitting facilities and stores to increase energy efficiency and use of renewable energy, transitioning to new refrigerants with less global warming impact, reducing waste and excess packaging, and streamlining and improving supply chain, transportation, and distribution systems to decrease GHG emissions.

In 2022, RILA members continue to focus on climate-related corporate disclosure and governance as one of the top-five impact areas within RILA's Retail Climate Priorities and have also developed a new supplemental resource, RILA's Retail Climate Action Blueprint, to help retailers at different points on their journeys towards sustainability understand the nuanced steps in emissions data collection and action and share learnings to allow for faster and more effective execution of climate transition initiatives.[4] In line with these priorities, RILA and its members fully support the SEC's goals of providing investors with "consistent, comparable, and reliable—and therefore decision-useful—information" about the actual and potential impacts of climate change on an issuer's business and the U.S. and global environment in which it operates when such information is material to an issuer, or to an investor's investment or voting decisions.

RILA and its members would like to offer constructive suggestions to address serious concerns about the prescriptive approach taken by the SEC in the proposed rules, which deviates from the SEC's long-standing materiality-based approach in ways that would not further the SEC's stated investor benefit goals while imposing significant compliance challenges and costs on issuers. Requiring issuers to provide comprehensive, "one-size-fits-all" disclosures of climate-related information regardless of materiality and without the existence of well-established frameworks for measuring and reporting climate-related information will lead to "disclosure overload" and disclosures that are inconsistent, incomparable, and unreliable and therefore *not* "decision-useful." Such disclosures will be unhelpful to the vast majority of RILA members' investors, who, even among those most interested in climate-related information, have consistently indicated that they want material climate-related information and to understand a particular retailer's climate risks, as well as its directional efforts to build climate resiliency, rather than granular details. These investors have not requested and, in most instances, do not possess the resources to accurately interpret and process the vast amount of non-material, granular climate-related information contemplated by the proposed rules.

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Sustainability Model, https://www.rila.org/retail-compliance-center/retail-sustainability-management; Energy Network, https://www rila.org/committees/retail-energy-management-program; Retail Energy Model, https://www rila.org/retail-compliance-center/retail-energy-management; DOE cooperative agreement project, https://www rila.org/focus-areas/sustainability-environment/financial-management; Zero Waste Network, https://www rila.org/retail-compliance-center/zero-waste-network; Environmental Compliance Network, https://www rila.org/retail-compliance-center/environmental-compliance-network; and Retail Compliance Center, https://www rila.org/retail-compliance-center.

[4] *See* RILA Retail Climate Priorities (Apr. 2021), https://www rila.org/retail-climate-priorities; RILA Retail Climate Action Blueprint (Feb. 2022), https://www.rila.org/focus-areas/sustainability-environment/rila-climate-action-blueprint.

**Summary of Comments**

This letter outlines five major areas of concern regarding the proposed rules expressed by RILA members and identifies other areas where clarification, modification or deletion may be appropriate. RILA's goal in submitting these comments is to: (i) use real-world examples from companies that already report some climate information to provide the SEC with insight into the practical implementation challenges and burdens the retail industry, among others, will face in implementing the proposed rules and (ii) provide the SEC with initial constructive feedback on how to address our members' main concerns in ways that enable issuers to focus their efforts and resources on providing climate-related disclosures that are likely to be useful to their investors when making an investment or voting decision. A brief description of each of these points is below with additional detail provided in the body of the comments.

**First**, many aspects of the proposed rules are not qualified by materiality while other aspects are qualified by a materiality standard that deviates from the long-standing definition of materiality established by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc*. Examples of specific proposed requirements that currently have no materiality qualification include requirements to disclose physical climate risks by zip code, GHG emissions by constituent gas and any actual or potential impacts of climate-related risks. Other proposed disclosure requirements appear to apply thresholds that are inconsistent with the long-standing definition of materiality (*e.g.*, the disclosure triggers for Scope 3 GHG emissions and the 1% disaggregated line-item threshold for financial statement disclosures).

Without a uniform materiality threshold aligned with the Supreme Court's definition, issuers will be required to prepare uneven disclosures that bury material information among information that is not material to investors' investment or voting decisions and may instead confuse investors. The lack of such a materiality threshold will create substantial disclosure compliance costs and burdens (including potential disclosure of competitive and business sensitive information) for issuers that are not commensurate with their benefit to investors. Therefore, RILA and its members recommend that the SEC apply the long-standing definition of materiality established by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc*. to all the climate-disclosure requirements under the proposed rules.

**Second,** the proposed rules would require disclosure of Scope 1, Scope 2 and (for many companies) Scope 3 GHG emissions, as well attestations of Scopes 1 and 2 GHG emissions disclosures for accelerated filers and large accelerated filers despite the significant data collection challenges for issuers and lack of standardized methodologies for emissions calculation and assurance. Retailers rely on tens of thousands of third parties in their value chain and must collect emissions data or data estimates from all such third parties in a consistent and reliable manner. Retailers face additional challenges in calculating downstream emissions, such as emissions from sold products and end of life treatment of sold products. RILA members have begun to use emerging tools to estimate a limited subset of Scope 3 GHG emissions, but there still are no comprehensive tools available to estimate this information consistently for the millions of products that RILA members sell annually.

Until a universally accepted, well-established data collection and GHG emissions calculations methodology or framework is adopted (*e.g.*, analogous to U.S. Generally Accepted Accounting

Principles (GAAP) or International Financial Reporting Standards (IFRS) for financial reporting) and tools and systems for collecting and reporting such information are developed (*e.g.*, comparable to an enterprise resource planning (ERP) system), RILA and its members recommend that the SEC make Scope 3 GHG emissions disclosures and attestations for Scopes 1 and 2 GHG emissions fully voluntary rather than bringing such disclosures into a reporting regime that is subject to significant liability under the federal securities laws.

**Third**, the financial statement disclosure requirements proposed under Regulation S-X are not well suited to meeting investors' need for accurate and reliable financial information. Instead, the proposed rules would require issuers to draw arbitrary lines between climate-related activity and general business activity, as well as require a level of granularity and introduce highly subjective judgements and estimates into financial statements included in SEC filings that will decrease the accuracy and reliability of the financial statements for investors. Also, the proposed 1% disaggregated line-item quantitative threshold would not only be indecipherable but would create a misleading impression for investors as to the accuracy of the information disclosed, which is not capable of being estimated with such a degree of precision.

Therefore, RILA and its members urge the SEC to eliminate the proposed financial statements disclosure requirements from its final rules. At a minimum, the proposed 1% threshold should be eliminated in favor of the SAB 99 standard[5] and any additional rules related to financial statements disclosures should be developed by the SEC in conjunction with the Financial Accounting Standards Board (FASB). Any new pronouncement or standard should be subject to an iterative process among key stakeholders as part of the rulemaking process, consistent with FASB's practices today.

**Fourth**, the truly historic nature and vast scope of the proposed rules calls for the SEC to take a flexible approach related to the final SEC rules' effective compliance date, reporting format and timing, and appropriate liability exposure. The proposed rules will require issuers to disclose a large amount of information that most issuers have not previously disclosed in SEC filings starting as early as 2024 for periods as early as 2021. As a result, large accelerated filers will have to implement the necessary data reporting processes and related internal controls immediately despite the absence of final SEC rules to meet the initial compliance deadlines proposed by the SEC, and potentially on a retroactive basis in order to include the historical period information that would need to be included in SEC filings unless such information is not available without unreasonable effort or expense.[6] It is also important to note that although all large accelerated filers have adapted to short reporting deadlines for periodic reports and are subject to disclosure and other controls intended to meet them, it is not accurate to assume that they all have equally mature GHG-emissions-related processes.

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[5] SEC Staff Accounting Bulletin No. 99-Materiality, 64 Fed. Reg. 45150 (Aug. 12, 1999), codified at 17 CFR 211, *available at* http://www.sec.gov/interps/account/sab99 htm.

[6] *See* Proposing Release at 113; Securities Act of 1933 ("Securities Act") Rule 409; Securities Exchange Act of 1934 ("Exchange Act") Rule 12b-21. The SEC precedent of setting a very high bar for what is considered "not available without unreasonable effort of expense" has amplified concerns that retailers will be required to meet the proposed compliance dates despite all the concerns detailed in Section V below.

Additionally, given the nature of retail operations, the industry's heavy reliance on third parties for GHG emissions-related information and retailers' challenges in collecting data in a timely manner, providing the required information on an annual reporting cycle timeline as proposed, *i.e*., within a short time after fiscal year-end, is impracticable and unworkable. The currently proposed safe harbors, which are limited to Scope 3 emissions disclosures and forward-looking statements,[7] are not sufficient to protect issuers from meritless litigation associated with the disclosure of information that is inherently more subjective and difficult to produce accurately, given the current state of the climate disclosure landscape.

To address these considerations, RILA and its members recommend that the SEC delay the initial implementation of the proposed rules at least two years and phase in the requirement to disclose historical period information. Also, the SEC should allow issuers to "furnish" (rather than "file") any new climate-related disclosures. These required disclosures, as well as any other information related to climate risks issuers choose to voluntarily disclose, should be allowed to be furnished in a report or form at least 240 days after fiscal year-end. With respect to any information that is required to be filed, such information should benefit from the protection of an appropriately robust safe harbor.

**Fifth**, RILA and its members believe that the SEC has significantly underestimated the real-world costs and administrative burdens that will be imposed by the proposed rules on issuers. Based on feedback from RILA members, many of which have extensive experience and are intimately familiar with the challenges associated with collecting and reporting GHG emissions data and other climate-transition planning activities, the true initial set up and ongoing compliance costs for a typical retailer will be more than 35 times the amount that the SEC has estimated. Retailers are also concerned about certain unintended negative consequences of the proposed rules. These include potential chilling effects on the wide adoption of measures that could advance climate and other ESG-related goals of the SEC, which RILA and its members broadly support, such as implementation of investor and industry diversity, equity and inclusion goals, as well as development of relationships with small (often private) U.S. businesses and farmers. The recommendations in this letter will address, in part, the high costs and potential chilling effects of issuers' compliance with the proposed rules.

**Lastly**, RILA and its members encourage the SEC to consider the issues, challenges and improvement recommendations detailed in this letter as it moves forward in the rulemaking process. The proposed rules, which are vast in scope and will have broad impact on issuers and investors alike, have generated significant interest among a wide range of stakeholders as evidenced by the thousands of comments submitted to date. RILA and its members strongly recommend that the SEC not move directly to a final rule. Instead, the Commission should take the time to "get it right" and carefully consider the large number of recommendations received to ensure that it adequately considers and balances the benefits and costs of disclosure and appropriately tailors the rules accordingly. The Commission then should issue a re-proposal of its rule reflecting initial stakeholder input, which will provide interested parties additional opportunities to comment and provide feedback. A final rule would follow the SEC's

[7] Proposed Item 1504(f) of Regulation S-K (proposing safe harbor for Scope 3 GHG emissions disclosures); Pub. Law 104-67, 109 Stat. 737 (presenting existing safe harbor for forward-looking statements under Private Securities Litigation Reform Act).

consideration of stakeholder feedback on the re-proposed rule. Taking this recommended thoughtful approach during the rulemaking process will allow the SEC to achieve its goal of providing investors material climate-related risk information and reduce the chilling effects and undue burdens and costs associated with the proposed rules.

RILA acknowledges the SEC's stakeholder engagement efforts to date and appreciates the opportunity to be part of those efforts. The creation of a climate-related disclosure regime that promotes consistency, comparability, reliability, and decision-usefulness will require the SEC to have further in-depth discussions with market participants to understand how climate-related issues affect issuers in different industries, as well as the type of climate-related information that is likely to be material to the business operations of issuers in different industries. RILA and its members would welcome the opportunity to discuss these issues further with the SEC.

## I. RILA and Its Members Believe that Disclosure of Material Climate Risk Management, Strategy, Governance, Goals, and Targets Will Result in Decision-Useful Information for Investors

RILA members broadly support disclosure of material climate-related risks and GHG emissions information, which can assist investors in assessing an issuer's carbon footprint and efforts to lower GHG emissions. Consistent with the SEC's 2010 Guidance on Climate Risks Disclosure[8] those RILA members subject to the relevant reporting requirements already disclose their material climate-related risks within the applicable section(s) of their annual filings.[9] Further, a large number of RILA members voluntarily provide additional information about their companies' efforts to tackle climate change, including those GHG emissions categories most significant to their businesses, through company sustainability or corporate social responsibility reports or through filings with one of several voluntary reporting frameworks.

As the SEC noted in the proposed rules, disclosures required under the federal securities laws are subject to the materiality framework outlined by the Supreme Court in *TSC Industries, Inc. v. Northway, Inc*.[10] and *Basic Inc. v. Levinson*.[11] This materiality framework is well suited for balancing investors' need for clear disclosures (where information material to their investment and voting decisions are easily identifiable) against issuers' need for a certain degree of flexibility to manage the disclosure process in an efficient and non-wasteful manner. RILA

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[8] See Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 2, 2010), codified at 75 FR 6290 (Feb. 8, 2010); SEC Climate Change Disclosure-Sample Letter, *available at* https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures.

[9] Reporting retailers most frequently disclose climate-related risk in the Risk Factors section of their annual filings as that is the most appropriate section to discuss the various risks facing retailers. To date, retail companies rarely discuss climate-related information in the Management Discussion and Analysis (MD&A) section of the annual filing because the impact of climate-related matters has not had a material effect on the company, its financial condition or results of operations. This, of course, could change over time if climate-related risk and opportunities become more material to retailers.

[10] *TSC Indus., Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976) ("[A]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.").

[11] *Basic Inc.* v. *Levinson*, 485 U.S. 224, 240 (1988) ("[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information.").

members are deeply concerned that many of the proposed rules' requirements are not based on the SEC's long-standing definition of materiality, and will instead force issuers to disclose immaterial, competitively sensitive, and potentially misleading information that ultimately will not be useful and could be confusing to investors. Some areas where the lack of a materiality qualifier will likely disproportionately impact issuers in the retail industry and their investors include (1) disclosure of material physical risks by zip code, even if operations in a particular location are not material to an issuer's business,[12] (2) disclosure of Scope 3 GHG emissions if an issuer has set a Scope 3 emissions reduction goal,[13] as many retailers have, even if such emissions are not material to investors' investment or voting decisions and (3) the 1% disaggregated line-item quantitative threshold for disclosures in the notes to the financial statements,[14] even if the underlying line item is not material. Each of these issues is further discussed in Sections I.B, Section II, and Section III.B respectively below.

For the vast majority of RILA members' investors, especially retail investors, such an approach will decrease the usefulness and reliability of issuers' disclosures. Given the differences between issuers across industries with respect to climate-related risks and activities, the proposed rules' granular, "one-size-fits-all" approach will yield uneven disclosures where issuers will be required to provide detailed information that is immaterial to their investors' investment or voting decisions despite the fact that the issuer does not have certain climate-related risks or activities that are material.

In other instances, the proposed rules would require issuers to assess materiality in a manner that is inconsistent with the SEC's traditional materiality framework. For example, the proposed rules would require the disclosure of material medium- and long-term climate risks.[15] While the SEC already has a framework for issuers to assess and disclose the forward-looking impacts of material risks, this framework is traditionally focused on short-term future impacts where the effects on the issuer, its business, and its financial statements are more likely to be predicted with a higher degree of certainty. The requirement to assess the materiality of medium- and long-term risks would force issuers to attempt to gaze into a crystal ball to discern the future and attempt to predict whether events that may or may not occur will have a material impact on their business and financial statements—a highly speculative exercise. This departure from the SEC's traditional approach to the disclosure of material risks would require issuers to make a choice between, on the one hand, disclosing potential outcomes without regard to probability and with a significant potential liability risk once those disclosures are viewed in hindsight, and on the other hand, facing liability risks for being more selective about the outcomes they disclose and for

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[12] *See* Proposed Item 1502(a)(1) of Regulation S-K (requiring a registrant to include in description of physical risk the location of properties, processes, or operations subject to physical risk); *id.* at 459, Proposed Item 1500(k) (defining "Location" as "a ZIP Code" or "similar subnational postal zone or geographic location.").

[13] *See* Proposed Item 1504(c)(1) of Regulation S-K.

[14] *See* Proposed Item 14-02(b) of Regulation S-X.

[15] *See* Proposed Item 1502(a)(2) of Regulation S-K ("Describe how the registrant defines short-, medium-, and long-term time horizons, including how it takes into account or reassesses the expected useful life of the registrant's assets and the time horizons for the registrant's climate-related planning processes and goals.").

failing to accurately predict the rapidly evolving risks arising from issues on which the science is still developing.

Therefore, RILA and its members respectfully recommend that the Commission adopt a uniform materiality threshold aligned with the Supreme Court's long-standing definition to all new climate disclosures proposed under Regulation S-K, which would bring the entire proposal in line with Chair Gensler's statement that the proposed rules are "guided by the concept of materiality."[16] RILA and its members believe that by requiring issuers to disclose only material information in their SEC filings, both issuers and investors will be able to focus on significant climate-related risks and impacts. This adjustment will further the SEC's goals of providing disclosures that benefit investors, as well as ease the compliance burden for issuers by eliminating the requirement to disclose immaterial, competitively sensitive, and misleading information.

### A. The Lack of a Materiality Threshold May Require Companies to Disclose Confidential and Competitively Sensitive Information

The retail industry is hyper-competitive as retailers compete against each other for customers and market share. The proposed rules' expansive disclosure requirements would require companies to publicly disclose confidential business information to competitors, undermining companies' business strategies and ability to compete in the marketplace. For example, the proposed rules would require public companies to share their "secret sauce" behind confidential sourcing and supplier strategies and details of companies' efforts and plans to increase operational efficiencies and resiliency with competitors. Detailed below are several specific examples of how the proposed rules could require the disclosure of confidential or competitively sensitive information in the absence of a materiality threshold.

Also, the proposed rules would give private companies a competitive advantage since they would not be subject to similar disclosure requirements. Ultimately, requiring public companies to disclose confidential and competitively sensitive information will harm public company investors' ability to realize the full value of their investments.

To avoid these unintended harmful consequences, RILA members' overarching recommendation is that the SEC should allow issuers to omit immaterial information, and to instead make disclosures at a sufficiently high level so that they can avoid revealing information that is more likely to harm the issuer (and ultimately its shareholders), while still providing decision-useful information to investors. Specifically, RILA and its members urge the SEC to limit disclosures regarding an issuer's transition plans, climate-related targets and goals, scenario analysis and internal carbon pricing to high-level information that is material to an issuer and to its investors' investment and voting decisions.

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[16] *See* Statement of Chair Gary Gensler on Proposed Mandatory Climate Risk Disclosures (Mar. 21, 2022), *available at* https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321.

### i. Climate Transition Plans[17]

The proposed rules would require disclosure of transition plans, defined as "a registrant's strategy and implementation plan to reduce climate-related risks, which may include a plan to reduce its GHG emissions in line with its own commitments or commitments of jurisdictions within which it has significant operations,"[18] if such a plan is adopted by a company. RILA is concerned that the lack of a materiality qualifier with respect to this proposed requirement, combined with the broad definition of a "transition plan," will force retailers to make premature disclosures that include sensitive business information, since many retailers' plans related to business efficiency or future business planning may have some impact on GHG emissions and arguably could count as a climate transition plan requiring disclosure. Below are several examples:

> **Example 1**: Retailer A, for operational efficiency and cost reduction reasons, has decided to transition to more electric delivery vehicles and automation, which will also have a positive impact on its Scopes 2 and 3 GHG emissions and support the retailer's overall climate goals. The retailer develops a detailed five-year plan to implement these business goals. Under the proposed rules, the retailer's actions would seem to constitute adoption of a climate transition plan. In such case, the retailer would be required to provide detailed public disclosures on its plans, timing, and rationale, which may be harmful to Retailer A from a commercial and competitive standpoint, without providing any clear benefits for the retailer's investors.
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> **Example 2**: Over the past two years, the COVID-19 pandemic and related country lockdowns have had a dramatic negative impact on retail supply chains resulting in shipment delays and product shortages. As part of its supply chain resiliency assessment, Retailer B has decided to diversify its supply chain to include U.S., Central and South American suppliers in addition to its current largely Asian and Southeast Asian supplier portfolio. The retailer's goal is to make its supply chain more resilient and eliminate shipment delays and product shortages. But the retailer also considered that these plans could also impact the retailer's Scope 3 GHG emissions related to both Category 1 (emissions connected with Purchased Goods) and Category 4 (Upstream Transportation and Distribution), so arguably, Retailer B's business plan could be considered to be a climate transition plan requiring disclosure.
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> **Example 3**: Similarly, to strengthen its logistics and distribution operations, Retailer C is looking to increase its use of intermodal operations moving more shipments toward rail operations and lessen its reliance on long-haul truck delivery operations. As part of this effort, the company is looking to establish new warehouse facilities near major rail junctions and other key points to streamline logistics operations and create more efficient last mile delivery options. The retailer also considered that these business plans could potentially lessen the retailer's overall Scope 3 Categories 4 (Upstream Transportation and Distribution) and 9 (Downstream Transportation and Distribution) emissions, and

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[17] *See* Proposed Item 1503(c) of Regulation S-K (proposing disclosure requirements related to various details of a registrant's transition plan).

[18] Proposed Item 1500(s) of Regulation S-K.

therefore could be considered to be climate transition plans. Premature disclosure of these business plans under the proposed impact disclosure requirement could reveal strategic business information about new warehouse plans at a time when competition for warehouse space is fierce within the retail industry.

In addition, while the SEC has made it clear that it is not requiring transition plans, some RILA members will potentially be required to implement such plans under the proposed Directive of the European Parliament and of the Council on Corporate Sustainability and Due Diligence released in February 2022 (the "EU Directive").[19] Under the proposed rules, all companies who have to implement transition plans under the EU Directive would then be required to report these plans in their "filed" Annual Report on Form 10-K. These expansive plans will be highly speculative in nature and should not be subject to the heighted scrutiny of a "filed" Annual Report on Form 10-K.

To avoid premature disclosures of confidential business information, unnecessary uncertainty, and the reporting of highly speculative information, RILA and its members recommend the SEC clarify that a climate transition plan is limited to plans specifically directed for a climate-related purpose, and material information regarding such a transition plan should only be required to be disclosed if the plan would materially affect a company's business, financial condition, or results of operations. If, as an ancillary benefit, certain business activity has a climate-related impact and may somehow affect a company's value chain GHG emissions, it should not be required to be disclosed if the primary intention of the business activity was not principally directed at addressing a climate-related risk.

**ii. Scenario Analysis[20]**

The proposed rules would require detailed disclosure of any climate-risk scenario analysis conducted by an issuer, as well as disclosure of the results of the analysis and the underlying assumptions and inputs. Such detailed disclosures could require companies to reveal confidential and competitively sensitive information. For example, the SEC references a third-party as having provided cost estimates for preparing disclosures aligned with the recommendations of the Task Force on Climate-related Financial Disclosures (TCFD).[21][22] However, this same third-party requires that companies provide long-term revenue growth rates to 2025 and beyond in order to calculate a TCFD Transition Risk – Carbon Costing scenario. This rate is often kept confidential by companies. It is also usually a speculative estimate only, typically lower than near- or medium-term growth rates, and will likely deviate significantly from the growth rate the company actually experiences in the long term.

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[19] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.

[20] *See* Proposed Item 1502(f) of Regulation S-K (requiring disclosures related to specific scenarios considered, including parameters, assumptions, analytical choices and projected financial impacts).

[21] Task Force on Climate-related Financial Disclosures (TCFD), https://www.fsb-tcfd.org/.

[22] *See* Proposing Release at 373 fn 913.

Requiring companies to disclose this confidential information, which potentially may not align with other forward-looking information disclosed by the company, will confuse investors, create unnecessary "noise" in the marketplace, and increase companies' potential liability exposure. Concerns about liability risks will discourage companies from engaging in scenario analysis, a useful climate-risk mitigation tool. In fact, this is already occurring. To avoid potential harmful consequences, several RILA members are placing plans to conduct scenario analysis on hold, waiting to decide whether to proceed until after the SEC finalizes its climate-related disclosure rules.

To ensure that the climate-risk scenario analysis disclosure requirements would not mandate disclosure of confidential or competitively sensitive information, which ultimately harms investors, the SEC should revise its rule to require high-level and material information with respect to climate-risk scenario analysis only if and to the extent that scenario analysis is material to the issuer and its investors' investment or voting decisions. Companies' underlying assumptions should not be part of any required disclosure.

### B. Untethered to the Traditional Materiality Standard, the Volume of Granular, Detailed Information Required to Be Disclosed under the Proposed Rules Will Overwhelm and Confuse Investors

RILA and its members are concerned that the volume of detailed information required to be disclosed under the proposed rules, which are not qualified by materiality in many respects, will make it considerably more difficult for investors to identify an issuer's material climate change risks and track its management of those risks.

For example, the proposed rules require disclosure of physical risks by zip code, even if operations in a particular location are not material to an issuer's business.[23] While disclosing physical risks by zip code may allow issuers in some industries to effectively communicate their climate exposure to investors, such disclosures would impose a significant and disproportionate burden on issuers in the retail industry given their large physical footprints. RILA members operate on a nation-wide or regional basis, and many have international operations as well. It is not atypical for these retailers to have stores, factories, warehouses, distribution facilities, and corporate offices across tens of thousands of zip codes in the U.S. alone. Zip code assessments for retail operations would be impractical, extremely expensive and would generate more information than most investors, especially retail investors, can readily digest. Further, retailers may have multiple locations within one zip code, not all of which face identical physical risks. Requiring disclosure of physical risks by zip code would be misleading to investors as it would incorrectly imply that all of the retailer's operations within that zip code face identical physical risks. [24]

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[23] *See* Proposed Item 1502(a)(1) of Regulation S-K (requiring a registrant to include in description of physical risk the location of properties, processes, or operations subject to physical risk); *id.* at 459, Proposed Item 1500(k) (defining "Location" as "a ZIP Code" or "similar subnational postal zone or geographic location.").

[24] RILA members have also expressed concern that the SEC's zip code disclosure requirements would not present a true and accurate picture of the potential physical risks posed by climate change to company property and could be misinterpreted by companies' insurers to substantially increase premiums.

Also, requiring individualized disclosures of specific climate risks for each of these zip codes is a departure (in format and scope) from the risk disclosure requirements otherwise found in Regulation S-K, particularly when the risks that would be disclosed are both speculative and global in impact. Rather than requiring companies to disclose a veritable phone book of data that is difficult to compile (including because it relies on granular forward-looking information and evolving climate emissions science), investors would be better served by a more traditional risk disclosure approach (which many RILA members already include in their current risk factor disclosures), where an issuer can highlight in a more general manner the locations most likely to be impacted by such risks.

Further, RILA recommends that the SEC limit disclosure of the actual and potential impacts of any risks identified to those that are likely to be material under the Supreme Court's traditional definition. Predicting the actual and potential impacts of climate risks requires issuers to rely heavily on evolving climate science and novel, rapidly developing and potentially bespoke methodologies and frameworks. Therefore, the SEC should allow issuers to remain focused on providing well contextualized disclosures based on traditional materiality standards that are familiar to both investors and issuers, to ensure that investors are not misled or distracted by speculative or remote climate-related impacts.[25]

## II. The Proposed Requirements Regarding GHG Emissions Disclosures (Especially Scope 3) and Attestation Would Create Serious Compliance Challenges and Burdens Without Providing Commensurate Investor Benefits

As the SEC noted in the proposing release, issuers face significant challenges collecting data related to GHG emissions.[26] This is especially true for the retail industry, which is uniquely reliant on third parties, the majority of which do not have the infrastructure to provide the level of detail needed in an auditable disclosure. Additionally, currently, there are no established standardized calculation and assurance methodologies that are universally applicable to all Scope 3 categories or products and emissions data collection and reporting tools are still in a nascent stage of development. For all of these reasons, we urge the SEC to recast the disclosure of Scope 3 GHG emissions[27] and the third-party attestation requirement with respect to Scopes 1 and 2 GHG emissions[28] as fully voluntary.

### A. Scope 3 GHG Emissions Disclosures Should be Voluntary

The proposed rules would require all public companies to disclose Scopes 1 and 2 GHG emissions data. Issuers would also need to disclose their Scope 3 emissions if such emissions are material or if the reduction of Scope 3 GHG emissions is part of their climate-related targets or

[25] Other examples of where the proposed rules would require issuers to gather, analyze and report information that is not material along with RILA's reasonable recommendations on how to address the information are discussed in Section II.A.iii (discussion of disaggregated gas reporting) and Section III.B (discussion of 1% threshold for financial statement disclosure) below.

[26] *See* Proposing Release at 160.

[27] *See* Proposed Item 1504(c) of Regulation S-K.

[28] *See* Proposed Item 1505(a) of Regulation S-K.

goals,[29] although it is not clear whether issuers are required to estimate emissions across all 15 categories of Scope 3 emissions if only certain categories are material or included in an issuer's climate targets/goals.

These requirements will undoubtedly present challenges for issuers in many industries, but these challenges will be particularly acute for RILA members and other retailers. Unlike other industries where the majority of their related GHG emissions fall under Scopes 1 or 2, retailers typically have lower Scopes 1 and 2 GHG emissions with a large portion of their estimated value chain-related GHG emissions likely falling under one or more Scope 3 emissions categories, including Purchased Goods and Services (GHG Protocol Category 1), Use of Sold Products (Category 11), and up and downstream operations such as Transportation and Distribution (Category 9). Other potentially relevant categories include End of Life Treatment of Sold Products (Category 12) and Leased Assets (Category 13).[30] It should be noted that because of data collection challenges, the majority of retailers are not currently tracking, and will not have any information regarding at least some, if not all, of the 15 Scope 3 categories.

Based on RILA members' currently available information and best estimates, Scope 3 emissions will likely represent a significant portion of many retailers' overall value chain GHG emissions, which under the SEC's suggested quantitative materiality threshold could trigger required disclosure.[31] Given the volume of products and properties and the amount of third parties involved in their value chains, retailers will face unique and complex data collection challenges not applicable to some other industries. Contributing to these challenges are a general lack of sophistication and data collection and reporting technologies across companies' value chains, and the absence of uniformly accepted standardized methodologies.

Thus, RILA and its members recommend that the SEC permit issuers to voluntarily report their Scope 3 GHG emissions, and not require such reporting until data collection tools and methodologies are sufficiently mature. If issuers are required to report Scope 3 emissions, any required disclosures should be limited to the Scope 3 GHG emissions categories that are material to the issuer, and only if these categories are capable of being measured on a sufficiently reliable basis, with other recommendations detailed below.

**i. The SEC's approach to the materiality trigger for Scope 3 GHG emissions disclosures is impracticable and inconsistent with the Commission's traditional materiality standard**

One of the triggers for Scope 3 disclosures under the proposed rules is the materiality of Scope 3 emissions. The specific language in the proposed rules regarding the disclosure trigger seems to be consistent with the Commission's traditional materiality standard and would provide issuers

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[29] *See* Proposed Item 1504(c)(1).

[30] *See* GHG Protocol, *Technical Guidance for Calculating Scope 3 Emissions* (2013), *available at* https://ghgprotocol.org/scope-3-technical-calculation-guidance.

[31] *See* Proposing Release at 176 (asking whether Scope 3 GHG emissions should be subject to quantitative threshold, such as 25%, 40% or 50% of total GHG emissions).

with flexibility in making this materiality determination.[32] Nevertheless, in the Proposing Release, the SEC seems to contemplate a different materiality standard for purposes of the materiality-based Scope 3 GHG disclosure trigger and the type of information that would be required to be disclosed, instead referencing a quantitative threshold of 40% of overall GHG emissions and urging issuers to consider disclosing why certain categories of Scope 3 emissions are not material.[33]

RILA members are concerned that the SEC's interpretation of materiality could require companies to report on all categories of Scope 3 emissions even when Scope 3 emissions or certain categories thereof are not material to the issuer, or to an investor's investment or voting decision with respect to that issuer. If so, the resulting disclosure will be overly detailed, uneven, and unlikely to provide investors with comparable or decision-useful information, while creating insurmountable challenges for issuers that will struggle to produce such disclosures on a reliable and timely basis.

RILA members have overwhelmingly noted that gathering detailed, comparable, and high-quality quantitative information for even a limited number of Scope 3 GHG emissions categories will be challenging and that collecting that quality of data for *all* Scope 3 categories is, in fact, impossible. In fact, many voluntary reporting frameworks recognize these data collection challenges and contain, a "de minimis" exception for immaterial subsets of categories of GHG emissions.[34] Requiring estimates and potentially reporting on all Scope 3 GHG categories will mean, at best, information for many Scope 3 GHG emissions categories will be highly speculative and based on estimates that vary across each third-party data provider. Moreover, the cost of collecting more detailed quantitative data across all Scope 3 categories will yield diminishing returns in investor usefulness.

As noted above, the Proposing Release seems to require issuers to assess materiality using a 40% quantitative standard based on the proportion of the total Scope 3 GHG emissions as a percentage of all GHG emissions.[35] Under this formulation, issuers would need to collect and analyze data for all GHG emissions, and then assess the proportion of such emissions represented by emissions in all 15 enumerated, non-exhaustive Scope 3 categories, even if an issuer knows that the emissions in particular categories are unlikely to be material. Issuers that

[32] Proposed Item 1504(c) of Regulation S-K ("Disclose the registrant's total Scope 3 emissions if material.").

[33] *See* Proposing Release at 165-166 (noting that some companies rely on a quantitative threshold of 40% when assessing materiality of Scope 3 emissions).

[34] *See* The GHG Protocol, A Corporate Accounting and Reporting Standard (Revised Edition) at 70, *available* at https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf. The GHG Protocol identifies de minimis emissions as "a permissible quantity of emissions that a company can leave out of its inventory." These immaterial amounts create significant additional burden to collect, without providing information of value to investors, the ultimate end users. Furthermore, acceptance of this exception among professionals collecting this data, both internal to companies and outside service providers, is so widespread that RILA members have reported significant challenges in obtaining their understanding of the need for or their cooperation in collecting such information. As another example, SBTi, does not require perfection of GHG emissions data. In recognition that data points enabling the calculation of the entire Scope 1 and 2 emissions global footprint of operations are often not available, SBTi allows up to 5% to be excluded.

[35] *See* Proposing Release at 165.

currently voluntarily disclose Scope 3 GHG emissions typically assess and disclose on only a limited number of the 15 Scope 3 emissions categories, which are chosen based on the companies' ability to measure and influence. However, the SEC's suggestion that issuers also explain why certain categories were deemed immaterial and how a company has made such a determination could ultimately require issuers to disclose (or at least assess), on an ongoing basis, all 15 categories of Scope 3 GHG emissions, especially since the disclosure safe harbor for Scope 3[36] is not clear on what an issuer needs to do in order to satisfy the "good faith" and "reasonable basis" standards required for the applicability of the safe harbor.

Therefore, if the final rules include any Scope 3 disclosures requirements, RILA and its members urge the SEC to require the disclosure only of those Scope 3 categories that issuers are capable of measuring and that are material based on the SEC's traditional definition of materiality. Also, issuers should not be required to disclose the rationale for their non-materiality determinations. Further, the SEC should clarify that the Scope 3 disclosure safe harbor applies to issuers' materiality determinations and would not require issuers to conduct a burdensome amount of due diligence on those Scope 3 categories that are unlikely to be material.

**ii. The SEC should clarify that the climate-related "targets" and "goals" that trigger disclosure requirements are limited to publicly disclosed targets and goals related to GHG emissions**

RILA requests that the SEC provide additional clarity as to the targets and goal setting that would trigger disclosure requirements, as well as the activities that could trigger the requirements under proposed Item 1506, with respect to targets and goals, and proposed Item 1503(c), with respect to transition plans. A lack of clarity around the disclosure triggers, as well as the definitions of "target," "goal," and "transition plan," is likely to lead to inconsistent application of the proposed rules among issuers that reduce consistency and comparability for investors. For example, the proposed rules do not clearly define what constitutes "setting" a target or goal that includes Scope 3 emissions (*e.g.*, would a public announcement of a future intention to set a future goal constitute "setting" a goal?).

Certain RILA members have announced plans to set a goal approved by the Science Based Targets Initiative (SBTi) that include Scope 1, Scope 2 and certain Scope 3 GHG emissions but have not yet formally adopted such a goal. Under the proposed rules, it is not clear whether that announcement of future intention would count as "setting" a goal that would trigger both the targets and goals disclosures under proposed Item 1506 and the Scope 3 GHG emissions disclosures under proposed Item 1504. Also, SBTi currently has an extended timeline for approving a company's proposed goals and targets with approval now occurring approximately nine months from initial submission. The process involves coordination and collaboration between SBTi and the proposing company and as a result the final goals and targets approved by SBTi may differ from the goals and targets as initially proposed by the company. Requiring companies to disclose initially submitted but not yet formally approved goals and targets, which

[36] Proposed Item 1504(f) of Regulation S-K (providing that a Scope 3 disclosure made by or on behalf of an issuer on a statement is 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").

then need to be adjusted to align with final SBTi approved goals and targets, will only add to investor confusion.

Also, as currently drafted the trigger for and scope of required disclosures could be interpreted as including internal targets, goals, and transition plans that are not public. As the SEC noted in the proposing release, managing climate risks, and setting climate goals, targets, and transition plans is an effort that requires decision-making across an organization. Requirements that would trigger premature disclosure could inhibit the robustness of these internal stakeholder discussions. Such disclosures would not be helpful to investors if the targets, goals, or transition plans are disclosed before they have been fully vetted by the issuer. Neither an intention to take a future action nor setting internal, not fully vetted targets, goals, or transition plans, should require formal SEC reporting.

In addition, many retailers have sub-brands that are not their own reporting segments, which may set their own climate-related targets and goals. The current language in the proposed rule would result in an issuer having to disclose goals of these sub-brands that may be completely immaterial to the company as a whole. For instance, one RILA member has a sustainability-focused sub-brand, that represented less than 3.5% of the company's total revenue in 2021. This sustainability-focused sub-brand has brand specific climate-related goals and targets. The inclusion of this sub-brand's targets by the issuer would be completely at odds with the remainder of its Annual Report on Form 10-K, which barely references this sub-brand given its immateriality to the business as a whole. Therefore, RILA suggests that targets, goals, or transition plans set by specific segments or subsidiaries of a public issuer should not trigger the reporting requirement, unless such goals or plans are material to the issuer as a whole.

Further, as discussed in Section I.B below, almost every aspect of an issuer's business operations could have a climate-related impact or connection. In order to differentiate between climate-focused targets, goals, and transition plans, and more general business plans, the SEC should focus its disclosure requirements on those targets, goals, and transition plans that explicitly address an issuer's GHG emissions. Specifically, the SEC should clarify that the target-based trigger for Scope 3 GHG emissions disclosures only applies if a climate-related target, goal or a climate transition plan relates specifically to an issuer's Scope 3 GHG emissions and (1) the issuer has publicly disclosed in its SEC filings (including its proxy statement) or designated sustainability (or similar) report, or (2) the issuer's board has approved, as applicable, a climate transition plan, targets or goals. And for the reasons detailed in Section II.A.i above and Section VIII.C below, any subsequent required reporting should be limited to the specific categories set forth in the company's climate transition plan, goal, or target.

#### iii. The SEC should not require Scopes 1, 2 and 3 GHG emissions disclosures disaggregated by specific gas as this information is immaterial to reasonable investors' voting and investment decisions

Under the proposed rules, companies would be required to report Scopes 1, 2 and, for some companies, 3 GHG emissions on an aggregate CO2e and gas-by-gas basis.[37] The requirement to report GHG emissions on a gas-by-gas basis would apply regardless of the materiality of a

[37] *See* Proposed Items 1504(b), (c) of Regulation S-K.

particular gas to the issuer's business or even to its overall or per-Scope GHG emissions. This proposed requirement will significantly increase the complexity and volume of data collection and reporting and will require companies to change how they currently track emissions, resulting in significant reporting and internal control challenges. Neither the Sustainability and Accounting Standards Board (SASB) Standards nor the TCFD (nor the new proposed International Sustainability Standards Board (ISSB) standards)[38] require such specific emissions disclosures. In addition, there are limited resources available for gas-specific GHG emissions calculations. As a result, few, if any, of RILA's members currently track or report their emissions at this level of detail, even though many currently publish corporate social responsibility or sustainability reports or file voluntary reports under one of the multiple voluntary reporting frameworks that include some GHG emissions data.

Further, based on a preliminary survey of RILA members, none have received requests for such granular information from investors. Instead, feedback from RILA members indicates that their investors remain focused on high-level metrics that can be accurately reported and tracked over time, and that are material to companies' operations. Lastly, RILA members have also raised concerns that the disclosure of GHG emissions broken down by gas would result in publication of competitively sensitive information, as companies may be able to glean insights into their competitors' operational and manufacturing processes from the breakdown of gases composing a company's emissions.

Therefore, RILA and its members recommend that the SEC eliminate the requirement to disclose disaggregated gas-by-gas data in the final rules as it is unnecessarily broad, inconsistent with industry GHG data collection and voluntary reporting practices and would not provide meaningful information for investors.

**iv. The retail industry's unique reliance on a large number of third parties for Scope 3 GHC emissions data poses significant data collection challenges**

A core function of the retail industry is purchasing finished consumer goods from product manufacturers and suppliers for ultimate sale to a retailer's customers. It is unsurprising then that GHG Protocol Scope 3 Category 1 Purchased Goods and Services makes up a good portion of retailers' Scope 3 GHG emissions. Over the last 50 years, the U.S. retail industry has developed complex, global value chains with multiple cascading tiers of suppliers and service providers to bring American consumers the variety and quality of products they want at reasonable prices. These suppliers and service providers include product manufacturers, component and raw material suppliers, transportation, and logistics providers and more.

It is important to emphasize that when attempting to gather data on product-related GHG emissions, a retailer must rely on a long list of third parties. Retailers typically purchase finished consumer products from hundreds of thousands of domestic and foreign manufacturers for resale to their customers. Even those retailers that sell private-brand or private-label products generally do not own the manufacturing facilities that make these goods, and instead contract with third-

[38] *See* IFRS, *IFRS S2 Climate-related Disclosures* (Mar. 2, 2022), *available at* https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-climate-related-disclosures.pdf.

party suppliers to produce them to the quality and cost standards American consumers demand. These tier 1 product manufacturers in turn rely on multiple tiers of component suppliers and their suppliers, ultimately cascading through to the raw material production or extraction.

For purposes of illustration, consider the example of a retailer looking to purchase an article of clothing (*e.g.*, jeans) that it knows its customers want to buy. The retailer will contract with one or more tier 1 supplier factories to produce the product. That supplier in turn will buy fabric, thread, and trim (*e.g*., snaps, buttons, or zippers) from component suppliers. The fabric mill, a second-tier supplier, will purchase cotton and other materials (*e.g.*, spandex and dye) from third-tier suppliers to make the fabric. Similarly, the various trim suppliers will purchase the processed metal from their fourth-tier suppliers to make the metal snaps, buttons, and zippers. These fourth-tier suppliers of processed metal will in turn have purchased the raw ore from a fifth-tier supplier.

As demonstrated above, the number of tiers and third parties that could be involved in the making of just one consumer product will vary depending on the complexity of the product and the organization and vertical integration of the third parties involved. Multiplying this process by the millions of finished consumer products sold by retailers each year, the potential number of third parties that could be involved in the collection and reporting of product-related emission data is mind-boggling. The overwhelming majority of these third parties do not have direct contractual relationships with the retailer nor are they typically operating in a region with any legal obligations to quantify their GHG emissions. Indeed, in some regions of the world the governments themselves, parastatal organizations, or government-connected independent operations may control this information. These entities do not have the infrastructure to provide detailed data that would be required in an SEC filing.

Even in the limited instances where a retailer has a direct relationship with a supplier in its supply chain, the retailer may not have the leverage to demand changes in, or visibility with respect to the supplier's data collection or verification process for their GHG emissions data. Additionally, many retailers have smaller, private, or foreign suppliers in their supply chains, and these suppliers may not have sufficiently mature systems or processes in place, or may be calculating GHG emissions using a different methodology than the issuer (including in compliance with home-country jurisdiction rules or norms that may differ from those adopted by the issuer). Retailers are similarly reliant on third parties for Scope 3 emissions information in other situations as well (*e.g.*, company-specific emissions connected to mall-based and foreign operations and upstream and downstream logistics and transportation service and providers).

Retailers' unique reliance on a complex cascading chain of third parties makes the collection of accurate, verifiable Scope 3 GHG emissions extremely challenging and cautions against the SEC imposing a mandatory requirement for disclosure of Scope 3 GHG emissions. At a minimum, as discussed in Section IV.B below, the SEC should include an appropriate safe harbor for any required Scope 3 GHG emissions disclosures.

**v. There are no universally accepted, standardized methodologies for calculating Scope 3 emissions and data collection and reporting tools are still under development**

The current lack of universally accepted, standardized methodologies means that issuers will likely differ in their decisions about what will or will not be included in their Scope 3 calculations, creating non-comparable emissions disclosures across companies, even those that operate in the same sectors. Among other reasons, some of these differences may reflect the difference in companies' operations and business structures while others may reflect different methodologies used. For example, when considering how to draw operational boundaries, two issuers that choose to treat leased facilities differently (*e.g.*, as part of Scope 2 or Scope 3 or a combination of Scopes 2 and 3) could have large variations in their Scopes 2 and 3 emissions reporting results. Understanding this nuance will require a detailed review by investors, many of whom will not have the necessary resources or expertise to reverse engineer the calculations.

While there are some emerging tools to help companies quantify and manage GHG emissions data collection, including Scope 3 emissions data, none of these tools have universal industry acceptance, because there is no consensus on a standard and there is a lack of well-established, detailed methodology. Also, there is no one tool can collect data from all suppliers for all the categories of Scopes 1, 2 and 3 GHG emissions, be leveraged for all types of products, or use or uniformly provide users guidance on methodologies necessary for true comparability by investors.

For example, in the apparel industry, many companies use the Higg Index, a suite of tools developed by the Sustainable Apparel Coalition for the standardized measurement of value chain sustainability, to help verify, among various environmental impacts, emissions in one Scope 3 emissions data category, Category 1 emissions related to Purchased Goods and Services.[39] The Higg Index was developed over the last decade with meaningful input from the apparel industry, ultimately achieving a degree of consensus among large international brands and retailers. However, the Higg Index does not provide guidance on data cleaning, a process where companies scrub and adjust raw data to reflect the allocated GHG emissions specific to their company. As a result, companies using Higg Index data must independently determine the appropriate methodologies to integrate the data into their company's climate reporting and models. Also, the Higg Index Facility Environmental Module does not yet provide the same value to other subsectors (non-textile/apparel) of the retail and consumer product industries. There are emerging efforts to expand the Higg Index more broadly to other types of businesses, but the timeframe for developing such a tool is uncertain and it is still unclear if these efforts will result in a tool that will cover all consumer product categories and garner wide industry acceptance.

Further, the Higg Index is not the only supplier of GHG emissions data collection resource used by RILA members. Other resources include EcoVadis, SupplyShift, and UL360, which use varying methodologies and procedures to collect and process supply chain emissions data.[40] Other companies instead work with third parties that simply use average or spend data to estimate many Scope 3 emissions categories, including Purchased Goods and Services, rather

[39] Sustainable Apparel Coalition, *The Higg Index*, *available at* https://apparelcoalition.org/the-higg-index/#:~:text=The%20Higg%20Index%20is%20a%20suite%20of%20tools,SAC%E2%80%99s%20mission%20to%20transform%20businesses%20for%20exponential%20impact.

[40] *See* Ecovadis, *available at* https://ecovadis.com; Supply Shift, *available at* https://www.supplyshift net; 360 Sustainability Software, *available at* https://www.ul.com/resources/apps/360-sustainability.

than collecting data directly from suppliers. These varying methodological approaches are acknowledged and described as acceptable in the GHG Protocol as supplier-specific, hybrid, average-data, and spend-based methods.[41] It is unclear which (if any) methodology will achieve industry-wide consensus because the "best" methodology for a company's emissions in a specific category is always going to vary by what data is available. Until a widely accepted tool emerges, or tools agree to align on approaches, calculating GHG emissions, especially Scope 3 emissions throughout a retailer's value chain, will implicate inconsistent methodologies, resulting in an expensive process that yields information that is inherently incomparable, imprecise, and highly variable, and therefore unlikely to be useful to investors in making investment or voting decisions.

Retailers face similar challenges in accessing accurate data to measure emissions from the transportation of their products throughout their supply chains (Categories 4 and 9, relating to Upstream and Downstream Transportation and Distribution), and from the Use of Sold Products (Category 1, involving calculation of GHG emissions related to the customer use of specific products) and End of Life Treatment of Sold Products (Category 12, relating to the calculation of GHG emissions connected with end of life of a product including disposal method and treatment of product). Although there are a handful of emerging tools to estimate a limited portion of these Scope 3 GHG emissions for retailers, there are no comprehensive tools to accurately collect emissions data on many Scope 3 categories like the Use of Sold Products or End of Life Treatment of Sold Products for the millions of products that RILA members sell annually.[42] Because the data is impossible to collect, companies must rely on internal or third-party reasonable estimate methodologies that often differ by company, resulting in highly imprecise and variable information that is therefore unlikely to be useful to investors' decision-making.

A company's GHG (particularly Scope 3) emissions will reflect the specific scope and nature of that company's operations and will not be comparable to GHG emissions of another company. For example, companies that have vertically integrated manufacturing operations or own trucking fleets will report GHG emissions differently from retailers that are not similarly structured. Even similarly situated and structured retailers may use different assumption and methodologies to calculate GHG emissions. These differences are even more acute for companies operating in different industries. RILA and its members are concerned that investors will have trouble comparing highly detailed information across issuers. In fact, several RILA members report that they have already experienced situations where investors incorrectly assumed that voluntarily reported Scope 3 emissions data is comparable across companies within one industry and across industries and drew inaccurate conclusions. These investors failed to

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[41] *See* GHG Protocol, *Category 1: Purchased Goods and Services* at 21, *available at* https://ghgprotocol.org/sites/default/files/standards_supporting/Chapter1.pdf#:~:text=Companies%20may%20use%20the%20methods%20listed%20below%20to,first%20preference%20%28see%20figure%201.1%20and%20box%201.1%29.

[42] *See e.g.,* Environmental Protection Agency (EPA) GHG Emissions Factors Hub, https://www.epa.gov/climateleadership/ghg-emission-factors-hub; ENERGY STAR Scope 3 Use of Sold Products Analysis Tool, https://energystar.gov/sites/default/files/asset/document/ENERGY%20STAR%20Scope%203%20Use%20of%20Sold%20Products%20Analysis%20Tool%20V1.0.xlsm.

understand that different Scope 3 emissions calculations were the result of different company business model structures and variation in methodologies and data availability.

Scope 3 GHG emissions disclosures are also inherently redundant and thus cannot, taken in the aggregate, help investors understand the emissions of any one industry, sector, product category or business activity. By their nature, each company's Scopes 2 and 3 GHG emissions is another company's Scope 1 emissions. To the extent that an issuer's major suppliers are also issuers subject to the proposed rules, data on Scope 3 GHG emissions would not allow investors or other stakeholders to use these disclosures to estimate emissions across companies or industries. In addition, calculations within various GHG scope categories will be duplicative, resulting in an inflated total aggregate number for that category. For example, to the extent that data is available, companies that respectively sell washing machines, clothing and laundry detergent could each include Scope 3 Category 11 (Use of Product Sold) GHG emissions associated with their specific sold product within their aggregate Scope 3 GHG emissions calculations. This is because each product's emissions are estimated separately under the GHG Protocol, even if the product emissions are shared for a theoretical load of laundry. This also means these emissions would be duplicated even within one company's own Scope 3 Category 11 reporting if, for example, a customer purchased both clothing and laundry detergent from the same company and used them together.

These considerations, along with those described elsewhere in this Section, underscore the advocacy by RILA and its members for voluntary disclosure of Scope 3 GHG emissions. Allowing issuers the flexibility to voluntarily disclose Scope 3 GHG emissions is appropriate in light of the many challenges detailed above. If the SEC does move forward with a requirement for Scope 3 GHG emissions disclosure, issuers should be provided the flexibility to determine whether and what, if any, Scope 3 GHG data is material, and therefore decision-useful for investors, based on their business operations.

Lastly, without universally accepted standardized methodologies and data collection tools, it would be challenging for companies' chief executive officers (CEOs) and chief financial officers (CFOs) to sign certifications required under the Sarbanes Oxley Act of 2002 ("SOX") as to the design and effectiveness of internal controls. RILA members take their legal obligations seriously and are concerned that public company CEOs and CFOs to be uncomfortable making the necessary representations required in SOX Certification 302 and 906, if the proposed rules are adopted as is due to all the challenges outlined above. Therefore, the SEC should carve out GHG emissions reporting from the SOX Certification regime.

### B. The SEC Should Eliminate Its Proposal to Require Third-Party Attestation of Emissions Disclosures

The proposed rules would require third-party attestation for all Scope 1 and 2 GHG emissions disclosures, with a graduated framework for the level of assurance required.[43] RILA members believe that it would be premature to require issuers to obtain third-party attestation of their GHG emissions, particularly attestation to a reasonable level of assurance. In addition to the GHG emissions data availability and collection challenges described in Section II.A.iv above,

[43] *See* Proposed Item 1505(d) of Regulation S-K.

companies' ability to obtain third-party assurance for GHG emissions remains substantially different from obtaining third-party assurance over traditional financial metrics, given the early stages of the development of U.S. and global standards in identifying, aggregating, measuring, and attesting to emissions data.

Unlike the well-defined accounting and auditing standards provided by U.S. generally accepted accounting principles (GAAP) and international financial reporting standards (IFRS), methodologies for GHG emissions accounting are nascent and not near the level of robustness needed to ensure consistency and comparability. Although RILA agrees with the SEC that some methodologies have gained traction, none is universally accepted, either across industries or within the retail industry. In fact, in a recent survey of RILA members, the overwhelming majority of retailers that currently voluntarily report GHG emissions do so in a manner that is "informed by" or "reflective of" a particular GHG emissions calculation methodology, as opposed to fully aligned/compliant with such methodology.

A similar issue exists with respect to attestation standards. While RILA members appreciate the SEC's flexibility in proposing the standards recently developed by the Public Company Accounting Oversight Board (PCAOB), American Institute of Certified Public Accountants (AICPA), and International Auditing and Assurance Standards Board (IAASB) as acceptable attestation standards,[44] applying these standards prematurely will cause confusion and inconsistency, especially since it is still not clear what "reasonable assurance" means under these standards with respect to GHG emissions disclosures. Without sufficient clarity and alignment on attestation methodology, RILA members are very concerned that they will need to modify their disclosure processes on a frequent basis to comply with the proposed rules as calculation methodologies for GHG emissions metrics and attestation standards continue to develop. This is likely to introduce meaningful inconsistency over time and expose issuers to increased costs and liability, at least during the early years of compliance with the final rules.

Issuers also may be required to revise their GHG emissions to ensure they satisfy increasing attestation levels (*i.e.*, from limited to reasonable assurance) or updated attestation procedures, resulting in inconsistent year-over-year disclosures. In addition, issuers will have to assess and compare multiple attestation standards and may need to change their attestation standards between years as industry standards shift or a particular standard is prescribed. As a result, issuers may also need to restate prior GHG emissions disclosures on an interim basis. These inconsistencies and restatements may be confusing or even potentially misleading to investors. This will expand issuers' liability exposure as their good faith efforts to report would be open to hindsight second-guessing, notwithstanding the fact that an issuer may have expended significant efforts and resources to meet an attestation standard that is subsequently deemed to be insufficient.

Further, since there is no internationally recognized accreditation body to certify the qualifications of third-party attestation providers, issuers may not have sufficient clarity as to

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[44] *See* Proposing Release at 217 n.565.

which third-party attestation providers have adequate qualifications under the proposed rules.[45] RILA members also have serious concerns that there will not be enough qualified third-party attestation providers to meet the needs of all issuers within the proposed rules' implementation time frame. Third-party attestation providers that currently provide the limited assurance over GHG emissions disclosures for voluntary reporting outside of SEC filings may be unwilling to provide the required attestation for the GHG emissions disclosures under the proposed rules if subject to potential liability exposure under the Securities Act. Additionally, several RILA members have shared their anecdotal conversations with outside auditing firms that have highlighted the current lack of qualified staff that would be able to do this work. For example, one large public accounting firm shared that they currently only have 100 employees with ESG-related experience nationwide. While the firm also noted that it has ramped up hiring in this area, it is not clear that the firm and other auditing firms will have enough trained and experienced employees to service all impacted public companies in need of third-party attestations.

In light of the above concerns, RILA and its members recommend that the SEC eliminate its proposed requirement to make Scope 1 and 2 GHG emissions disclosures subject to third-party attestation.

## III. The SEC Should Eliminate New Financial Statement Disclosure Requirements From Its Final Rule

RILA and its members urge the SEC to reconsider its proposed requirement to include qualitative and quantitative climate-related disclosures in the notes to an issuer's audited financial statements.[46] This requirement will dilute the usefulness and value of financial statements for investors, increase the cost and complexity of issuers' public company reporting process, and is not necessary to meet the SEC's stated goal of providing investors decision-useful information regarding companies' climate-related risks and opportunities. Current rules already require issuers to disclose material financial impacts on their financial statements, including material climate-related impacts, in the Management Discussion & Analysis (MD&A) section of their annual reports. However, if the SEC includes the financial statement disclosures in its final rules, RILA and its members strongly encourage the SEC to eliminate the 1% disclosure threshold for financial statement metrics in favor of the long-standing materiality standards used by financial statement preparers. Finally the SEC should not impose any new financial statement disclosure requirements nor require related SOX certifications until appropriate generally accepted accounting rules have been established by the FASB.

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[45] *See* Proposing Release at 44-45 (noting the proposed rules "would require an attestation service provider to meet certain minimum qualifications" but not expanding on those qualifications); *see also* Proposed Item 1505(b) of Regulation S-K (requiring issuers to engage an "expert" in GHG emissions with "significant experience" without defining qualifications for expertise).

[46] *See* Proposing Release at 110-13.

### A. The Proposed Financial Statement Disclosures Are Not Well-Tailored for Providing Investors with Reliable and Material Information Regarding the Impact of Climate Change on an Issuer's Financial Statements

RILA members have serious concerns about the implementation challenges associated with the proposed Regulation S-X financial statement disclosure requirements, as well as their usefulness to investors. The financial statements included in an issuer's SEC filings should provide investors the material information they need to assess and value a company so they can decide on whether or not to invest in that company. Instead, the proposed Regulation S-X disclosures require a level of granularity that will likely distract investors from key financial metrics and economic information about a company. At best, these new financial statement disclosures will require investors to sift through immaterial information that will be challenging for issuers to prepare and disclose. The SEC can avoid these undesirable results by maintaining the integrity of its materiality standard as it applies to companies' financial disclosures.

In addition, unlike traditional metrics included in a company's financial statements, the proposed disclosures relating to climate risk and transition activities will require issuers to make highly subjective judgments. This is contrary to the SEC's position on the use of non-GAAP measures. Given the nature of retailers' operations and business decisions, it is often unclear what financial impacts relate to a climate risk, and what financial impacts relate to other considerations. Here, it may be helpful to share a couple of real-world examples:

> **Example 1**: Whenever a snowstorm or hurricane is predicted, Retailer A typically sees increased sales of snow shovels, snow melt, umbrellas, rain gear, generators, plywood, and tarps. Retailer A may also see increased sales of bread, toilet paper, batteries, pizza, and Pop Tarts. For any of these sales, it is impossible for Retailer A to know if such increased sales were actually due to the predicted weather event, and thus might be considered to be a climate impact or part of the normal cyclical sales (*e.g.*, a short-term spike that will be offset by lower future sales of those products). In this situation, a company's disclosure of the "lost revenues" at one location due to climate would be completely subjective and contrary to the SEC's prior position of not allowing companies to present a non-GAAP measure that adjusts for lost revenue.
>
> **Example 2**: Several of Retailer B's stores have HVAC systems that are 10 years old and nearing the end of their useful life. Under the company's asset management processes the aging units are scheduled to be replaced with more advanced up-to-date HVAC units that are more energy efficient. In addition to addressing its business operational needs, Retailer B anticipates that replacing the old HVAC units will result in lower energy usage and cost savings for the company. Under the proposed rules, this routine business action for asset management could be deemed to have some climate-related benefits and thus would be required to be reported.
>
> **Example 3**: Over the past 12 years, Retailer C's energy management team has transitioned the company's stores and facilities to LED lighting. The company incurred higher up-front costs for the LED lights but has benefitted from the energy efficiencies of the LED lighting and resulting energy cost savings. While the LED light bulbs last longer than other light bulbs, they also must be replaced at the end of their lives just as any other

> bulb. Under the proposed rules, it is not clear if the replacement cost of a LED light (which would be required to be replaced) would constitute a climate-related matter because Retailer C is not replacing it with a non-LED bulb.

As detailed above, determining what would be required to be included in the proposed rules' Regulation S-X disclosures may be extremely difficult for issuers to ascertain because business decisions and practices could also be construed to be climate-related. Companies do not track the impact of climate risks in a manner that is conducive to the Regulation S-X disclosures proposed by the SEC, particularly when disclosure can be triggered by amounts that are immaterial to the company's overall financial performance. Retailers make thousands of business and operational decisions daily and sell millions of consumer products in tens of thousands of product categories each year. Tracking every business decision and product sold (even at the category level) to determine whether there was any climate-related impact, and, if so, in what amount, would require significant capital commitments for new systems as well as staff resources and impose undue administrative burdens on filers without commensurate benefits for investors.

In addition, the resulting determinations with respect to causality would be highly subjective, yielding variability in results across issuers that may make different decisions with respect to how the climate-related impacts are categorized for the purposes of preparing quantitative disclosures. The resulting climate-related quantitative disclosures would not be compatible with other quantitative determinations included in financial statements subject to audit. This is particularly true if the SEC retains the proposed 1% disclosure threshold and the line-item approach, which could provide investors with an improperly inflated impression of the precision of such metrics. Further, current SEC rules already require companies to identify material climate-related impacts on their financial statements in the MD&A section,[47] providing investors with narrative insight into how material items have affected the company's financial performance. Requiring more detailed quantitative disclosures in the financial statements instead of the MD&A section, especially when those disclosures are inherently subjective, also creates a danger that such disclosure could obscure material financial statement disclosures.

The proposed Regulation S-X requirement to disclose granular climate-related financial impacts in notes to financial statements will not yield consistent, comparable decision-useful information for investors; therefore, RILA and its members strongly urge the SEC to eliminate this requirement from the final rule.

### B. If the SEC Retains the Regulation S-X Disclosure Requirement, the SEC Should Eliminate the 1% Disaggregated Line-Item Threshold

The Commission's currently proposed 1% disaggregated line-item threshold for the financial statement disclosures is inconsistent with other thresholds for determining materiality in connection with financial statement disclosures. Without eliminating the 1% threshold, the resulting financial statements would result in clearly inconsequential items being included in the financial statements, ultimately undermining the integrity and value of financial statements for investors. Without allowing issuers to assess materiality using "a well-reasoned, holistic,

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[47] *See* The Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations, Release No. 33-8350 (Dec. 19, 2003), codified at 68 FR 75056.

objective approach from a reasonable investor's perspective based on the total mix of information, both quantitative and qualitative,"[48] the proposed climate-related financial statement disclosures would distract investors from material items and create uneven disclosure of climate-related metrics compared to other financial statement metrics. The aggregation of absolute values of impacts to get to 1% will also lead to results that are confusing and inconsistent for investors. In addition, companies will have to spend significant resources and time to assess every single line item to determine if the low 1% threshold is met (even if in the end the company may have no items that meet the reporting threshold), without any clear benefit to investors.

If the SEC proceeds with requiring climate-related financial statement disclosures, the Commission should replace the 1% disaggregated line-item disclosure threshold for financial statement metrics with the long-standing materiality standards used by financial statement preparers, such as the SAB 99 standard, which requires reference to both a quantitative threshold and qualitative factors that are not necessarily analyzed on a line-item basis.[49] RILA and its members believe that such an adjustment is necessary to streamline reporting and focus disclosures on risks and activities that are material to an issuer's business and to ensure that a company's financial report provides investors clear and consistent financial information.

### C. The SEC Should Follow the Normal FASB Process Before Imposing Any Requirement to Include the Proposed Financial Statement Disclosures

RILA and its members encourage the SEC to refrain from requiring issuers to include the proposed Regulation S-X financial statement disclosures until a standard accounting framework, methodology, and detailed guidance has been developed. Retailers recommend that the development of any climate-related disclosure requirements in the financial statements follow a process that is consistent with the SEC's approach to other financial statement requirements and includes using FASB, a private standard-setting body subject to SEC oversight, to establish any new generally accepted accounting principles.

FASB's process is appropriately deliberative and includes debate and feedback from issuers, resulting in sufficient alignment and clarity among issuers to enable them to minimize the need for restating prior financial statements. Without undergoing such a process to establish one commonly used methodology for climate-related financial statement disclosure requirements, issuers will have to rely on a myriad of metrics and methodologies exacerbating the inherent inconsistencies discussed above. As a result, contrary to the SEC's stated goals, financial statement climate disclosures will not be comparable across issuers.

By following the normal FASB process before imposing any requirement to include climate impacts in a company's financial statement disclosures, the SEC can take affirmative steps toward reaching its goal of ensuring consistent, comparable, and decision-useful climate-related disclosures for investors. We encourage the SEC to do so. Also, similar to the concerns noted

[48] Paul Munter, Acting Chief Accountant, *Assessing Materiality: Focusing on the Reasonable Investor When Evaluating Errors* (Mar. 9, 2022), *available at* https://www.sec.gov/news/statement/munter-statement-assessing-materiality-030922.

[49] SEC Staff Accounting Bulletin No. 99-Materiality, 64 Fed. Reg. 45150 (Aug. 12, 1999), codified at 17 CFR 211, *available at* http://www.sec.gov/interps/account/sab99 htm.

above regarding SOX certification of the design and effectiveness of internal controls for GHG emissions, absent appropriate FASB accounting principles upon which to base the design and implementation of internal controls, retailers also are concerned about SOX certification related to the proposed required climate financial statement disclosures. Therefore, until appropriate FASB standards have been set, any required climate financial statement disclosure should be carved out from the SOX certification regime.

## IV. The SEC Should Provide Issuers Adequate Liability Protections Given the Nature of the Climate-Related Information

RILA members agree that issuers should be responsive to investors' growing interest in climate-related information, by providing information on companies' material climate-related risks and mitigation efforts. However, under the proposed rules, many public companies will be required to disclose new historical and forward-looking information and metrics that they have not previously disclosed. Additionally, much of the required disclosure—especially quantitative information such as GHG emissions calculations, and largely forward-looking information such as potential climate impacts, climate targets and goals, transition plans and scenario analysis—require heavy reliance on tools, assumptions and science that are still under development.

To ensure that issuers are not liable for the uncertainties inherent in climate-related disclosures, RILA and its members suggest that this data be disclosed on a separate form on a furnished, rather than filed, basis. If the SEC requires any information disclosed pursuant to the proposed rules to be filed, such information should benefit from the protection of a robust safe harbor while methodologies and disclosure procedures evolve globally. Safe harbors should also be provided for any information that an issuer is required to incorporate by reference from a furnished report into a filed report.

### A. The Commission Should Revise Its Proposal to Permit All Climate-Related Disclosures to Be Furnished Rather than Filed under the Securities and Exchange Act

RILA and its members strongly urge the SEC to reconsider its decision to require the proposed climate-related disclosures to be filed (rather than furnished) in Securities Act and Exchange Act filings.[50] Many RILA members are still developing appropriate and accurate mechanisms to collect GHG emissions and other climate-related data, as well as to report on climate-related risks and impacts. Even those companies with more mature programs will need to expand their data collection and reporting to meet the expansive scope of the proposed disclosures.

Based on their experience, RILA members respectfully disagree with the SEC's assessment that the majority of the disclosures under the proposed rules will be based on a company's internal climate-risk assessment and strategy.[51] While some data is gathered internally, RILA members also rely on multiple external sources of information, including third-party data collection tools, scientific analysis of climate scenarios, and research on the global and local impacts of climate

[50] *See* Proposing Release at 286.

[51] *See* Proposing Release at 288.

change over the short-, medium-, and long-term horizons, as well as best practices drawn from industry, peer groups, voluntary reporting standard setters and other stakeholders.

The tools to collect and report on GHG emissions and other climate-related risks are in a nascent stage. While retailers anticipate that climate data collection and reporting resources will continue to change and adapt rapidly, as in recent years, RILA and its members do not anticipate that these changes will allow issuers to meet the higher standard for filed information at any point in the near future. Until that time, issuers—which are not well-positioned to evaluate emerging standards and developing science—will be tasked with choosing among different data collection, calculation, assurance, and analytical methodologies and standards as industry standards continue to develop. As detailed in Sections I and II, much of the climate-related information retailers will use to meet the proposed rules' numerous detailed climate disclosure requirements will be based on third-party data, and reasonable best estimates as well as subjective assumptions and decisions on what to include. Even when information is gathered internally, such as tracking actual performance against an issuer's climate targets, goals, and transition plans, these calculations can be speculative, based on estimates and subject to change as methodologies evolve.

RILA and its members urge the SEC to allow issuers to furnish rather than file *all* climate-related information disclosed under the proposed rules. This approach is appropriate given the nature of the information disclosed. Because disclosure of GHG emissions, climate targets and goals, transition plans, and scenario analysis rely heavily on rapidly shifting climate models and methodologies, allowing issuers to furnish these types of information, regardless of materiality, would somewhat alleviate RILA members' concerns about the liabilities associated with preparing these disclosures, and encourage issuers to explore and adopt evolving best practices.

At a minimum, the SEC should allow issuers to furnish any immaterial disclosures, as well as disclosures related to GHG emissions, climate targets and goals, transition plans, and scenario analysis. With respect to any information that is required to be filed, RILA and its members strongly urge the SEC to adopt the safe harbors described in Section IV.B below.

### B. If Issuers Are Required to File Any Portion of Their Climate-Related Disclosures Under the Proposed Rules, the SEC Should Provide Robust Safe Harbors for the Filed Information

The proposed rules only provide narrow safe harbors for the proposed required disclosures that are, in many respects, more limited than the current safe harbors provided for currently required information that can be calculated on a much more reliable basis. If the SEC is unwilling to allow issuers to make all their climate-related disclosures on a furnished basis, RILA strongly recommends that the SEC provide appropriate safe harbors to protect issuers against meritless litigation, which would likely disincentivize issuers from disclosing additional climate-related information that could benefit investors. The rationale underlying the creation of the existing forward-looking statement safe harbor was the mitigation of issuers' and their investors' exposure to expensive litigation with respect to information that is inherently forward-looking and/or likely to contain inaccuracies. That same rationale applies to the proposed climate-related disclosures.

RILA and its members strongly urge the SEC to provide a robust safe harbor against both SEC enforcement and private litigation with respect to all of the new climate-related disclosures required by the proposed rules. We are particularly focused on the following disclosure requirements:

GHG Emissions Generally: RILA and its members request that the SEC adopt a safe harbor for all GHG emissions in recognition of current data challenges (including those described in Section II.A) and the evolving state of underlying methodologies. To ensure that issuers are not subjected to liability for making good-faith adjustments that align with current standards, RILA requests that the SEC ensure that any safe harbor applicable to GHG emissions protect disclosures made on the basis of then-current standards, notwithstanding disclosure updates made as a result of new standards.

Scope 3 Emissions: As noted in Section II.A, if the SEC does not adopt our recommendation to permit fully voluntary disclosure of Scope 3 emissions, we urge the SEC to extend the proposed Scope 3 disclosure safe harbor to issuers' materiality determinations, and to clarify the meaning of "reasonable basis" and "good faith," including with respect to the use of third-party data.

Financial Statement Impacts, Targets and Goals, Scenario Analysis and Transition Plans: RILA and its members request a safe harbor that will encompass disclosures under proposed Regulation S-K Item 1502(d), which requires disclosure of how climate risks are likely to affect a company's financial statements. While the proposing release compared Item 1502(d) to disclosures issuers are required to make in the MD&A section, the disclosures under proposed Item 1502(d) would require issuers to estimate medium- and long-term impacts on financial statements, which makes the resulting disclosure far more speculative. The disclosures with respect to targets and goals under proposed Regulation S-K Item 1506, scenario analysis under proposed 1502(f), and transition plans under proposed Item 1503(c) are similarly based on inherently more subjective assumptions that are subject to rapid change as relevant scientific underpinning evolve. Therefore, RILA and its members urge the SEC to either adopt a new safe harbor covering all of these disclosure requirements that are heavily reliant on assumptions about future events, or to clarify that all of such disclosures would fall under the protection of the existing forward-looking statements safe harbor.

Board of Directors Climate Expertise: The SEC should provide a safe harbor for directors identified as having climate expertise, similar to that which is currently provided to directors who are identified as having financial statement expertise[52] and proposed to be provided to directors with cyber expertise under the proposed new cyber rules.[53]

[52] *See* Item 401(h)(4) of Regulation S-K; Item 401(e)(4) of Regulation S-B; Item 16A(d) of Form 20-F; paragraph (8)(d) of General Instruction B to Form 40-F.

[53] *See* SEC Release Nos. 33-11038; 34-94382 (Mar. 9, 2022), Proposed Item 407(j)(2) of Regulation S-K.

## V. The Commission Should Gradually Phase In the Climate Disclosure Rules and Align the Rules with the General Timing and Availability of Climate-Related Data

Despite the historic nature of the proposed rules, which would impose new wide-ranging requirements for issuers to collect and report massive amounts of granular climate-related data, the SEC has outlined an aggressive timeline for the implementation. Large accelerated filers would be required to include robust climate disclosures by 2024 with respect to fiscal year 2023.[54] This ambitious timeline requires impacted companies to begin to assess their compliance needs and develop and strengthen new reporting procedures immediately, even before the SEC has adopted the final rules. Also, the extremely short timeframe for implementation by large accelerated filers assumes that the challenging schedule presents a relatively lesser burden for these businesses, but for large retailers it also means larger and more complex supply chains and reporting on a wider range of products. And experience with RILA members demonstrates that there is a range of maturity levels in the GHG emissions calculation experience and capabilities even among this group.

RILA and its members request that the SEC extend its proposed phase-in periods by two years for each reporting category if the SEC adopts the other recommendations in this letter, and by a five-year period if the SEC declines to adopt the recommended adjustments. Extension of the effective compliance date and phase-in period will avoid the unnecessary expenditure of resources and staff time in trying to hastily prepare for compliance to rules which ultimately may not be adopted in the proposed form. Issuers should also be allowed to phase in their compliance with the historical period disclosure requirements to avoid further truncating the initial implementation timeline.

In addition, RILA and its members recommend that the SEC allow issuers more time to prepare their climate disclosures on an ongoing basis, rather than requiring them to be included in an issuer's annual report. Allowing climate disclosures to be provided in a separate form on a lagged basis will also address timing concerns. RILA members generally find that the inputs needed for their climate disclosures are not ready until six months or more after the end of their fiscal year. To ensure that climate disclosures are reliable and based on vetted information, RILA recommends that the SEC's deadline for requiring such disclosures to be furnished at least 240 days after an issuer's fiscal year-end.

Further, the SEC should provide accommodations for newly public or newly acquired companies to phase in compliance with the proposed rules. Doing so will eliminate potential obstacles to capital formation and promote shareholder value creation.

### A. The SEC Should Extend Its Proposed Effective Compliance Dates and Phase-In Periods by a Minimum of Two Additional Years for Each Reporting Category

Simply put—the proposed compliance date and phase-in periods do not provide sufficient time for issuers to develop the reporting controls and procedures necessary to prepare disclosures that are high quality, reliable, and decision-useful for investors. As currently proposed, the rules would require publicly held retailers to collect voluminous amounts of quantitative and

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[54] *See* Proposing Release at 290.

qualitative data internally and from tens of thousands of third parties (including onboarding third parties that do not currently share emissions data with the issuer), and to do so in ways that are capable of meeting not only SEC controls requirements but also, eventually, third-party attestation standards. Therefore, RILA and its members recommend that the SEC extend its proposed effective compliance date by a minimum of two years and phase in some of the more burdensome requirements over subsequent years, similar to the phased-in approach taken in the implementation of the SOX, which provided issuers with up to an additional two years to implement some of the more onerous requirements that required new or additional disclosure controls and procedures, including third-party assurance (if required), to be set up.[55]

Even those RILA members that currently provide relatively advanced voluntary climate-related disclosures expect that they will need to spend considerable time and expense to be in a position to comply with the proposed rules, given the significant additional information required under the proposal combined with the heightened standards applicable to SEC disclosures. As one example, most internal teams and external service providers that oversee the collection and reporting of climate-related information are not typically trained on the technical nature of devising and maintaining effective internal controls to the same level as accounting personnel. Accordingly, such teams will need to be retrained and/or supplemented with new headcount to support such efforts. They also anticipate needing to increase head count in their sustainability, internal controls, accounting, legal, and internal audit departments, as well as hire consultants to assist with setting up systems, controls, procedures, etc., or to assist with data collection, and/or onboard new data collection systems. Furthermore, issuers will need time to adequately vet and work with third-party assurance providers to review certain disclosures if the related requirements are included in the final rules. These efforts will be complicated, challenging, and expensive, and will require time to implement. Other members that are at an earlier stage in the development of their GHG-emissions tracking systems and processes will face an insurmountable task to meet the SEC deadlines.

A minimum extension of two additional years to each of the SEC's proposed compliance dates is necessary for issuers to develop the necessary internal capabilities, for third-party data providers to adjust to issuers' reporting needs, for assurance providers (as applicable) to obtain sufficient qualifications and establish widely accepted standards and methodologies, and for industries to coalesce around standard practices, all of which are necessary for issuers to create useful and comparable disclosures.

### B. The SEC Should Permit Issuers to Disclose Climate Information at Least 240 Days After Fiscal Year-End

The proposed rules would require issuers to publish their climate-related disclosures in their annual reports, an aggressive timeline which the SEC itself acknowledges might be difficult for issuers to meet.[56] RILA members agree with the SEC's assessment of the difficulty of meeting

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[55] *See* SEC Release No. 33-8220 (Apr. 9, 2003); SEC Release No. 33-8238 (June 5, 2003); SEC Release No. 33-8128 (Sept. 5, 2002); SEC Release Nos. 33-8335 and 34-48766 (Nov. 17, 2003).

[56] *See* Proposing Release at 198 (noting that the proposed rules permit a registrant to use a reasonable estimate of its GHG emissions for its fourth fiscal quarter if no actual reported data is reasonably available).

the proposed report filing timeline. Even if the SEC were to adopt the other recommendations in this letter, given RILA members' reliance on third parties for required disclosure data, RILA members still believe they will not be able to comply with the proposed rules to file climate disclosures concurrently with filing their annual reports on Form 10-K or Form 20-F.

RILA members rely on aggregated third-party reports for major portions of their total emissions data, and in doing so they consistently face significant data delays, need time to scrub the mountains of data received, and may require numerous rounds of corrections to fix errors, which makes it impossible for retailers to integrate this data into their climate models on the required timeline to responsibly include the information in the Form 10-K. Based on RILA members' experience, data directly received from third-party partners usually lags by at least six months or more after year-end. For example, energy data for Scope 2 emissions is often provided through bill-pay systems on a delayed basis, with some retailers receiving final utility bills in May or later for the prior calendar year. Retailers with operations in countries that lack sophistication in climate data collection may face even greater delays in collecting and validating third-party emissions data. More indirect third-party data is subject to even further time lags.

As discussed in Section II.A above, individual apparel manufacturers using the Higg Index will report their total production emissions data to the Sustainable Apparel Coalition (SAC) after the close of the calendar year. SAC then takes several months to compile the data for release to Higg Index users, typically releasing such data in June or July. A retailer then needs several months to scrub the data and determine what portion of each manufacturers' overall GHG emissions relate to that retailer. By the time a retailer has completed the process of assuring that the data is accurate and complete and ready to be incorporated into a company report, the GHG emissions data will be at least nine months old. Other emissions data collection tools have similar time-lag issues that make meeting a Form 10-K filing deadline impossible.

If companies are required to meet the proposed 10-K reporting timeline, they will need to abandon more precise supplier data collection-based methodologies for SEC reporting purposes and instead start using less accurate broad-strokes spend-based methodologies in order to meet the SEC's compressed reporting timeline. This could significantly slow the momentum of years of work by stakeholders across the spectrum, including climate advocates, investors, and industry, to mature tools for accurate GHG emissions reporting. In addition, many climate-related targets and goals have been set based on methodologies using Higg Index data and would have to be reevaluated and transformed if the primary data methodology is no longer able to be used as a result of the timing requirement for the disclosure.

Although RILA members appreciate the SEC's attempt to provide flexibility by allowing issuers to use reasonable estimates for fourth quarter data, the underlying issues and concerns remain. For example, a retailer that uses the Higg Index will have no basis to make estimates for third or fourth quarter data to enable it to include emission data in its annual filings because the Higg Index data is only available on an annual basis, after the end of a calendar year. The Higg Index annual reporting cadence also makes it difficult for retailers with off-cycle fiscal year-ends, which is common in the retail industry, to incorporate emissions data into the SEC reporting cycle.

In addition, RILA and its members are concerned that the use of estimated fourth quarter data will introduce additional assumptions and errors into climate disclosures, complicate the attestation process, and potentially subject companies to additional liability, without fully alleviating the timing pressure that the SEC is seeking to address. Further, requiring disclosures to be revised once fourth quarter data is obtained will only increase the complexity, cost, and liability associated with the reporting process.

If issuers are required to report their climate information in their annual reports, the timing constraints created by collecting and reporting data will be further amplified by overlapping timing of preparing and reviewing both climate-related data and traditional year-end financial reporting. RILA members typically rely on the same finance, legal, internal audit, investor relations, and operations teams to assist with their traditional financial reporting and climate-related reporting, including obtaining third-party assurances, as applicable. RILA members broadly agree that adding the proposed climate-related disclosures to the annual reporting process will overwhelm the internal teams that are responsible for these processes, as well as strain external resources, such as auditors, accountants, and outside counsel.

Finally, investors have not requested that general climate disclosure data be part of a retailer's annual report and have come to expect climate disclosures to be provided on a later timeline than companies' annual SEC filings. RILA members have been in active discussions with their investors about the type of climate data that they need to evaluate their investments and timing of disclosure. RILA member investors have emphasized that they are interested in receiving accurate and complete information and recognize that, due to data availability and resource constraints, companies generally do not provide their climate information until well after their annual reports are filed.

For all the above reasons, RILA and its members strongly urge the SEC to allow issuers to provide their climate disclosures at least 240 days after fiscal year-end. This timing will meet investors' expectations for timing of climate-risk related reporting, and increase the likelihood that issuers will be able to obtain the necessary third-party data to provide more robust and accurate information for investors while alleviating some of the stress on internal and external teams involved in the reporting process.

### C. The SEC Should Adopt a Gradual Phase-In Period for the Proposed Historical Look Back Fiscal Reporting Requirement

The proposed rules would require companies to report certain climate-related information (*e.g.*, GHG emissions) for two historical fiscal years as part of the new disclosure requirements. With a proposed effective compliance date of 2024, large accelerated filers will have no phase-in period. Instead, these companies must already begin implementation, including reviewing data on a retroactive basis for fiscal year 2021 which, for most impacted issuers, ended before the proposed rules were even released. Impacted companies will have to engage in this effort immediately despite the absence of final SEC rules. Companies will not know the specific information they will be required to report on, or the appropriate methodologies to use. These efforts will impose significant burdens on impacted issuers as the information will need to be reviewed and potentially modified multiple times to ensure final reporting reflect the final SEC rules and changing methodologies. RILA members are already concerned about the potential need to disclose 2021 and 2022 emissions data that may not meet the operational bounds in the proposed rules and may not already have been collected using the internal controls necessary for a "filed" Annual Report on Form 10-K.

Thus, RILA and its members request that the SEC include a phase-in period for historical period reporting. Specifically, issuers should not be required to report data for historical fiscal years that occurred prior to the first year of implementation of the rule.[57] RILA and its members recommend a staggered two-year phase-in of the historical look back requirements. Under this scenario, one year after the effective compliance date, issuers would provide a one-year historical look back and two years after the effective compliance date, a two-year look back requirement would kick in.

### D. The SEC Should Include a Two-Year Phase-in Period for Newly Public Companies and Newly Acquired Companies to Provide Climate Disclosures

Without a permanent two-year phase-in period for newly public and newly acquired companies to comply with the proposed rules, the added costs and compliance burdens to develop data collection and reporting could affect how markets analyze a private company considering becoming public. In addition, these burdens could cause private companies to reconsider potential public offering plans, resulting in a negative impact on capital formation and valuation and limiting investment options for investors.

RILA members often look to acquire strategically important skills and technologies through acquisitions, which often involve small private companies. A requirement to consolidate a newly acquired private company's climate-related information into a public company acquiror's next annual report could both limit public companies' options for acquisition targets and could make private buyers a more attractive option for private companies that are unwilling or unable to comply with the requirements of the SEC's proposed climate reporting regime. Even if the acquired company is a public company that has established public company reporting processes, these processes and methodologies may not be consistent with those adopted by the acquiror and would require time for the acquiror to integrate the acquired company into its own reporting framework.

Providing a two-year phase-in period for newly public or newly acquired companies will help mitigate some of the potential negative impact of the proposed rule. RILA and its members encourage the SEC to make this reasonable accommodation in its final rules.[58]

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[57] *See* Proposed Item 14-01(d) of Regulation S-K.

[58] If the SEC is unwilling to provide a phase-in for the historical period disclosures, to avoid investor confusion and duplicative and inconsistent reporting, at a minimum the SEC should align with the GHG Protocol methodology, which does not require disclosure on acquisitions that take place in the second half of the year. Further, RILA and its members respectfully request that the SEC clarify what constitutes "unreasonable expense" under Rule 12b-21 in the context of climate disclosures and provide a safe harbor for the historical information.

## VI. Certain of the Proposed Governance Provisions Could Have a Negative Impact on Companies' Climate Risk Management Processes

RILA and its members fully support board and management oversight of an issuer's significant risks and strategies, including climate-related risks and strategy. However, while RILA members' investors want to understand the resources that companies are devoting to manage climate-related risks, they have not demanded the level of detail that would be required by the proposed rules. In addition, requiring robust details about climate-related risk disclosures, while other material risks are only briefly discussed, can distort investors' view of the importance of climate-related risks to an issuer's business and financial statements. Also, RILA and its members are concerned that the identification of key employees with climate expertise could lead to their competitors poaching these employees, which would ultimately hurt issuers' ability to oversee climate risks and strategies.

Thus, RILA and its members recommend that the SEC require less prescriptive details about how issuers and their boards manage climate-related risks. Instead, the SEC should allow issuers to include governance and risk management disclosures to the extent material to investors' investment or voting decisions in a manner that is similar to their current proxy statement disclosure process. Issuers should also be allowed to include these disclosures in their proxy statement, so that complete information about an issuer's governance structure can be found in a single document.

### A. RILA and Its Members Encourage the SEC to Allow for More Flexible Disclosures on How Issuers Manage Climate-Related Risks

The proposed governance-related disclosures would require detailed descriptions of the positions responsible for monitoring and assessing specific climate-related risks, as well as with respect to in-house staff with the relevant expertise and management's reliance on such staff. RILA members have expressed concern that the level of detail required in connection with a company's internal management climate expertise could increase employee poaching risks. Given the small size of the climate-focused teams at many companies, RILA and its members believe that such detailed disclosures allow for a company's competitors to identify and recruit specialized and hard-to-replace talent at the company.

Prescriptive requirements, such as the identification of individual "experts" and their credentials, would create additional risk for companies that jeopardizes climate risk oversight and those companies' abilities to carry out climate-related strategies. Moreover, it is not clear that providing this level of information will produce more decision-useful information than a more general disclosure that provides materially complete and relevant information about management oversight of climate-related risks. Therefore, RILA and its members recommend that the SEC narrow the proposed requirements regarding management expertise and structure to allow a more generalized disclosure of the climate-risk oversight and management process.

### B. The SEC Should Not Require Certain Members of the Board to be Identified as Having Climate Expertise

The proposed rules would require companies to disclose whether any director has expertise in climate-related risks.[59] RILA and its members are concerned about the potential governance implications of requiring issuers to identify climate "expert" directors, even though many issuers' boards appropriately approach climate risks and risk oversight on a holistic basis, recognizing that climate-related governance may impact and be impacted by issuers' audit and overall risk management processes, executive compensation approach, and overall director training, company policies, and governance framework. Therefore, RILA and its members recommend that the SEC eliminate the requirement to identify the "climate expert" director (if any) on an issuer's board.

Further, it is not clear from the proposed rules what qualifications would constitute "climate expertise." The qualifications of a climate expert will necessarily vary depending on the industry of the issuer. For example, a climate expert in the extraction industry (*e.g.*, oil and gas) may not be well equipped to consider the very different climate-related risks of the retail industry, including complex supply chains, large number of facilities and widespread operations. If the SEC retains this requirement to identify a "climate expert" director, RILA members urge the SEC to provide issuers with the flexibility to define "climate expertise" such that it captures the skill set relevant to a particular issuer and its industry. Finally, as discussed in Section IV.B above, RILA and its members recommend that the SEC provide an appropriate safe harbor for directors identified as having climate expertise, consistent with other required director expertise disclosures.

## VIII. The SEC Has Significantly Underestimated the Substantial Compliance Costs the Proposed Rules Will Impose on Issuers and the Adverse Impact on Investors and the Public

RILA and its members strongly urge the Commission to consider the significant reporting cost of the new rules to issuers when determining the scope and timing of information required under the proposed rules, especially when such required information is unlikely to be useful to investors and their investment and voting decisions. RILA members have begun to estimate the compliance costs associated with the proposed rules and believe that the SEC has vastly underestimated the true compliance costs, including an issuer's initial years of compliance as well as ongoing compliance. In addition, RILA and its members are concerned that the cost and burdens imposed by the proposed rules will have chilling effects on the wide adoption of measures that could advance the SEC's and retail industry's shared climate goals, as well as undermine other public policy goals.

### A. The SEC Should Revise Its Economic Analysis to Reflect the True Compliance Costs and Burdens that the Proposed Rules Will Impose on Issuers and Adjust its Final Rules to Minimize Undue Costs and Burdens

In the cost-benefit section of the proposed rules, the SEC estimates that the cost of implementation will be roughly $490,000 in the first year of compliance and $420,000 thereafter for non-small reporting company registrants.[60] Retailers are already investing significant

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[59] *See* Proposed Item 1501(a)(ii) of Regulation S-K.

[60] *See* Proposing Release at 373.

resources to collect, analyze, and disclose material climate-related risks that enable their investors to evaluate material climate-related risks and opportunities. Many RILA members also voluntarily provide additional climate-related information in their sustainability or corporate social responsibility reports. While those retailers that voluntarily report to one of the various voluntary reporting frameworks may be able to use some of the information they currently collect, the SEC's proposed rules also impose new and additional requirements that require disclosure at a very granular level, which will significantly add to compliance cost and burdens.

For example, the difference between the approach of SEC's proposed rules, which would require issuers to align the organizational boundaries used for GHG emissions and financial statements,[61] and of the GHG Protocol, which many of RILA's members already follow when voluntarily reporting their GHG emissions today, will require significant and unnecessary additional time, effort, and resources and present significant challenges, while at the same time creating discrepancies between earlier reported data and data disclosed pursuant to the proposed rules that are likely to create investor confusion. Furthermore, for companies that have gone through the time and effort to set science-based targets under the GHG Protocol, a change in organizational boundaries may force reassessment and redevelopment of those targets, furthering investor confusion and creating significant additional and unnecessary burden on issuers. Revising the proposed rules to permit issuers to elect to use boundaries for reporting that align with either the GHG Protocol or with GAAP, provided that the election is identified and explained, would significantly reduce the burden on issuers without negatively impacting, and in fact likely benefiting, investors.

Additionally, as discussed in Section V above, unless modified, the proposed SEC climate rules would trigger an obligation, not present with voluntary reporting, to comply with applicable rules regarding disclosure controls and procedures, internal controls over financial reporting, and subject the resulting disclosures to the liability scheme for filed periodic reports and financial statements. These considerations heighten by an order of magnitude the cost of associated infrastructure for publishing the underlying information.

Therefore, it is not surprising that, based on feedback from RILA's members, the SEC's cost estimate woefully understates the actual costs that issuers will bear, including hiring and salary costs; consulting costs to set up controls and systems; third parties to assist with data collection; new technology to collect, analyze and report data; training costs; and external auditor costs for the financial disclosure requirements and attestation costs. Contrary to the SEC's estimates, RILA members estimate that the initial costs of implementing the proposed rules would be somewhere in the $5 million to $15 million range, depending on the size of the company and the complexity of its value chain. In addition, there would be ongoing compliance costs (not just in the years of initial implementation) that would drive the total cost of SEC reporting compliance even higher. As noted in the sections above and below, the high compliance costs will strain filers' limited resources and divert resources and staff away from the very goal that is the basis of the SEC's proposed rules – understanding companies' climate-related risks and encouraging affirmative action to mitigate those risks.

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[61] *See* Proposed Item 1504(e)(2) of Regulation S-K.

RILA and its members have provided several recommendations in this letter that, if adopted by the SEC, would increase material climate risk-related disclosures while at the same time go a long way to lessening the proposed rules' significant compliance costs and burdens. These recommendations include, among others, limiting the new climate-related impacts disclosures to information that meets the SEC's traditional materiality standard, making all Scope 3 GHG emissions disclosures and GHG emissions attestation voluntary, narrowing and clarifying disclosure triggers, extending compliance timelines, phasing in historical reporting requirements, and allowing staggered reporting that is furnished rather than filed. We strongly encourage the SEC to adopt these recommendations.

### B. Reporting Obligations and Increasing Compliance Costs Could Discourage Companies from Taking Proactive Action to Address Climate Risks

RILA and its members believe in the benefits of allowing an issuer the flexibility to take actions to mitigate risks related to a company's operations, including climate-related risk, that the issuer believes are in the best interests of it and its shareholders. These actions could include adopting transition plans, setting climate-related targets and goals, moving to science-based climate targets, seeking GHG certifications, conducting scenario analysis, and/or using internal carbon pricing and renewable energy credits as part of an issuer's net emissions reduction strategy. However, RILA and its members are concerned that the proposed rules create a disincentive for companies to take these proactive steps.

In many cases, retailers have led other industries in climate-related improvements. As a result, government agencies and nongovernmental organizations often come to retailers to set targets that may be more aspirational in nature but will inspire and lead other retailers and industries. However, under the SEC's proposed burdensome disclosure requirements, retailers may not be willing to risk the impact to their stock prices or brand image if they miss a target. Therefore, there could be a retraction of industry enthusiasm toward setting impactful climate goals.

Additionally, given the level of granular detail required by proposed Regulation S-K Item 1502, issuers that do not currently engage in practices related to setting climate-related transition planning, internal carbon pricing, and scenario analysis may be disincentivized from doing so in the near future because these new activities could trigger detailed and ongoing disclosure requirements, massive reporting-related costs, and increased liability exposure.

As one example, the proposed requirements of Section 1502(f) would impose granular disclosure requirements on any scenario analysis or similar analytical tool used by an issuer.[62] As the SEC acknowledged in its proposing release, the relevant methodologies and scientific underpinnings related to scenario analysis are continuing to evolve. As issuers contemplate whether to explore using scenario analysis as one of the tools in their climate risk assessment toolbox, part of the cost/benefit calculation will now be the added cost of preparing detailed disclosures on its analysis as methodologies and best practices evolve. Together, the costs of the analysis and disclosure, as well as potential reputational and liability exposure associated with premature

[62] *See* Proposed Item 1502(f) of Regulation S-K.

disclosure, will likely have a chilling effect on the willingness of issuers to embrace these analytical processes and tools.

Similarly, companies may be less likely to adopt internal carbon pricing, a relatively new tool to help companies assess the financial impact of GHG on various aspects of their operations, with a view to moving toward identifying areas of opportunity and incentivizing efforts to lower the company's overall carbon footprint. In a preliminary survey of RILA members, the majority of respondents stated that they do not currently use internal carbon prices for purposes of climate-risk planning, and several reported that they were now reluctant to do so because of the burdens and costs that would be imposed by the SEC's proposed disclosure requirement.[63]

Certain RILA members have also reported that, in light of the proposed rules, they are now apprehensive about seeking GHG certifications and partnering with SBTi and other organizations that work with companies to reduce their emissions and climate footprints. In addition, RILA has had multiple discussions with members who are carefully reviewing their current climate action plans, and in some instances putting some or all of those plans on hold, pending publication of the SEC's final rules. And it is not just public companies that are hitting the pause button. Private companies that are contemplating going public or potentially being acquired by a public company at some point in the future are also considering whether to move forward with planned climate strategies or to trim them in some way, and those that are private but SEC-registered seek confirmation that the proposed rules will not apply to them. We urge the SEC to adopt the recommendations laid out in Sections VII.A and B to ameliorate these very real chilling effects.

### C. The Proposed Rules Will Have an Adverse Impact on and Undermine Other Industry- and Investor-Shared Public Policy Goals

RILA and its members are also concerned that the proposed rules will have an adverse impact on companies' other ESG priorities, including supporting diverse suppliers and service providers, and small and local U.S. businesses. Many retailers have made commitments to grow supplier and service provider diversity, which has increased their partnerships with small private companies.[64] For example, some RILA members have created start-up incubators and diversity programs to assist minority-owned small businesses and provide mentorship and financial support to budding entrepreneurs.[65] In addition, many grocery retailers have programs featuring

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[63] *See* Proposing Release at 465-66, Proposed Item 1502(e).

[64] *See e.g.*, 15% Pledge, https://15percentpledge.org/pledged, listing retailers that have pledged to dedicate 15% of shelf space to black-owned brands; *Press Release: Target Provides Update on Commitment to Spend $2 Billion with Black-owned Businesses and Announces New Media Fund Initiatives* (May 10, 2022), https://corporate.target.com/press/releases/2022/05/Target-Provides-Update-on-Commitment-to-Spend-2-Bi; *Press Release: Ulta Beauty Announces 2022 Diversity, Equity and Inclusion Commitments* (Feb. 3, 2022), https://www.ulta.com/investor/news-events/press-releases/detail/144/ulta-beauty-announces-2022-diversity-equity-and-inclusion; *Making it with Lowes* (a program that provides opportunities for diverse-owned small business to sell products to Lowe), https://www.lowes.com/l/shop/making-it-with-lowes.

[65] *See e.g.*, Booth Moore, *Serena Williams and Nike Hatch Diverse Design Incubator*, Women's Wear Daily (Aug. 17, 2021), https://wwd.com/fashion-news/fashion-features/serena-williams-design-crew-nike-launch-1234899649/; Sharon Edelson, *Nordstrom Unveils Five-Year Plan To Promote Racial Equality*¸ Forbes (Aug. 25, 2020),

local and regional products including produce, dairy, and meat.[66] These products are grown or made by small, frequently private, U.S. businesses, farmers, and ranchers.

The SEC should consider the potential adverse impact of the proposed rules on supposedly exempt smaller and private companies, which would need to report their emissions to non-exempt issuers in order for the latter to prepare their Scopes 2 and 3 GHG emissions disclosures. These smaller and private companies are unlikely to be equipped to take on the significant cost and challenges, and may lack the resources or scale to process and verify the Scopes 2 and 3 GHG emissions data of the issuer. By requiring issuers to prioritize reporting of precise emissions data above all else, the SEC's rules could undermine companies' DEI-linked supplier diversity goals and disadvantage small private U.S. businesses by incentivizing issuers to rely on larger, well-established partners that have the resources to provide the required information, even though they may have less diverse ownership and teams or less connection to local communities. This unintended consequence will also place issuers at odds with those investors that have made expanding portfolio companies' diversity, equity, and inclusion an ESG priority.

To avoid the unintended adverse impacts of the proposed rules, RILA and its members encourage the SEC to adopt the recommendations laid out in this letter, including adding a uniform materiality threshold and eliminating requirements to disclose comprehensive and highly granular details about locations of physical risks, Scope 3 emissions, climate-related targets, plans, and other risk-management tools such as scenario analysis. In addition, we encourage the SEC to actively engage with issuers and industry groups while it develops the final rules to ensure that the rules do not undermine policy goals.

## IX. The Expansive Scope of the Proposed Rules and Unprecedented Interest by a Wide Range of Stakeholders Supports the SEC Re-proposing Revised Rules Prior to Moving to Final Climate Disclosure Rules

RILA and its members recognize that the proposed rules are complex and expansive covering a wide range of climate related and financial information and potentially imposing new and novel reporting obligations. Not surprisingly given their wide scope and significant impact on public companies, the proposed rules have generated significant interest from thousands of stakeholders representing different industries, investors, public interest groups and other interests, with a record-breaking number of comments offering different recommendations and suggestions which the agency will need to consider as part of its rulemaking process. Given the broad impact of the rule and the keen interest by impacted stakeholders, investors, issuers, industry, and consumer

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https://www forbes.com/sites/sharonedelson/2020/08/25/nordstroms-parity-play-invites-everyone-to-the-party/?sh=60310f4d5828; *Press Release*: *The Home Depot Commits $10 Million to Venture Capital Focused on Diversity and Innovation*, Home Depot (Sept. 28, 2021), https://corporate homedepot.com/newsroom/commits-10-million-to-diversity-innovation-venture-capital; *Target Forward Founders, an Accelerator Program Designed to Help Historically Under-Resourced Founders Of Early-Stage Consumer Product Goods Companies*, https://targetaccelerators.com/programs/target-forward-founders/: *Walmart Start, a beauty brand accelerator program*, https://corporate.walmart.com/suppliers/walmart-start.

[66] *See, e.g.*, *Welcome to Kroger's Go Fresh & Local Supplier Accelerator*, Kroger, https://www.thekrogerco.com/gofreshlocal/; *Near Our Stores*, Wegmans, https://www.wegmans.com/about-us/near-our-stores/; *We Support Local Famers,* Publix, https://www.publix.com/products-services/produce/grown-close-to-home#states.

and climate advocates, RILA and its members recommend that the SEC take the time to "get it right" and not move directly to a final rule. Instead, the Commission should issue a re-proposal of its rule, which will provide interested parties additional opportunity to comment. By doing so, the SEC will ensure that it adequately considers and balances the benefits and costs of disclosure and appropriately tailors its final rules accordingly.

**Conclusion**

In conclusion, RILA and its members support the SEC's ongoing efforts to provide investors with all material climate-related information relevant to investment decision-making and appreciate the opportunity to provide feedback on the SEC's proposed climate disclosure rules. RILA and its members would welcome the opportunity to assist the SEC including by engaging and expanding on the recommendations in this letter or providing additional information that the SEC may request.

If you have any questions or need any additional information, please contact Kathleen McGuigan, EVP and Deputy General Counsel, at [redacted] or Erin Hiatt, VP Corporate Social Responsibility, at [redacted]

Sincerely,

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