NRF National Retail Federation

VIA EMAIL

June 17, 2022

Vanessa A. Countryman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090
(rule-comments@sec.gov)

Dear Ms. Countryman:

Re: National Retail Federation Comments on "The Enhancement and Standardization of Climate-Related Disclosures for Investors," SEC File No. S7-10-22.

The National Retail Federation (NRF) respectfully submits this comment on the Securities and Exchange Commission's (SEC or Commission) proposed rule entitled "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (Proposal).[1]

NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 other countries. For over a century, NRF has advocated for the economic and policy interests of retailers.

NRF's members share the concerns of their customers, employees, and other stakeholders about the impacts of unchecked climate change. These impacts are growing and include widespread drought, more intense storms, forest fires, heavier localized rainfall, increased flooding events, power outages, and more. The causes of climate change are global, complex, and interdependent. They include individual and collective human activities in every part of the world.

NRF regularly engages with its members and other sustainability stakeholders to share information on the latest insights, innovations, and practices of sustainability in the retail industry. NRF created guidance—including a pathway for setting science-based greenhouse gas emission reduction targets—to practically help its members reach for net-zero emissions. NRF also has a Sustainability Council, which focuses on corporate social responsibility, environmental, social, and corporate governance, and related sustainability issues. The Council provides members the opportunity to discuss best practices and spotlight key environmental and sustainability issues. To further this important discussion, NRF is holding a conference focused on building a stronger, more sustainable supply chain this summer.

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[1] 87 Fed. Reg. 21,334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, and 249).

NRF supports policies that enhance these sustainability efforts to combat the important challenge of climate change. We actively support reporting on emissions, climate risks, and energy transition activities in a manner that is relevant, accurate, transparent, and consistent for consumers, regulators, employees, and other stakeholders. Retailers already report on environmental, social, governance (ESG), corporate social responsibility (CSR), and sustainability topics in reports that follow the voluntary approaches, frameworks, and priorities recommended by and contained in reporting frameworks such as the Global Reporting Initiative (GRI), CDP (formerly Carbon Disclosure Project), Climate Disclosure Standards Board (CDSB), International Integrated Reporting Council (IIRC), Sustainability Accounting Standards Board (SASB), and the Task Force on Climate-related Financial Disclosures (TCFD) ("Third-Party Frameworks"). These platforms help provide a consistent ecosystem in which NRF members can report the individual, tailored, and strategic programs that work best for their stakeholders.

NRF supports climate-related reporting that results in comparable, consistent, and reliable information that is useful for investors. Unfortunately, however, in its current form, the Proposal contains elements that are unworkable and may even defeat the goals the Commission seeks to achieve. Aspects of the Proposal conflict with many of the accepted approaches to reporting on climate-related objectives and emissions without improving them. Moreover, the Proposal creates the likelihood that investors will face a flood of information in SEC reports that will make the reports difficult to mine for truly consistent and comparable information. We think the Commission's objectives—and its service to financial markets—would be better served by, among other things:

- Focusing on the long-standing, judicially accepted and investor-familiar understanding of "materiality," which is designed to limit registrants' reporting obligations to information material to a reasonable investor's investment decision, taking into account the total mix of information available to investors. Proper adherence to traditional notions of materiality in the securities context avoids flooding investors and potential investors with voluminous information that is confusing and counterproductive to their investment decisions.

- Focusing on furnished, rather than filed information. In our experience, climate-related reporting benefits from a complement of qualitative discussion and quantitative, principles-based information that does not lend itself to the structure of Regulations S-X, S-K, and their related forms. We explain below why this approach would better provide the information that stakeholders demand while recognizing that best practices for climate-disclosures are still evolving and improving, which has significant advantages over fixed disclosure rules.

- Creating a separate form for the submission of climate-related financial disclosures. The Proposal's inflexible, one-size fits all approach to climate-related disclosures is particularly problematic for retailers. Retailers are also shippers, manufacturers, real estate developers, and suppliers of goods, connected to the value and Scope 3 emissions chains of many sectors of the economy. A separate form would allow retailers to better qualitatively discuss their assessment of the costs, risks, and emissions contemplated by the Commission. It would also allow individual sectors, like retail, to better develop guidance and consistency across reports, which will be less possible under more generic

10-K filings.

- Recognizing the inherent difficulties with reporting Scope 3 emissions. The Commission should allow issuers to determine which Scope 3 metrics are material to their objective and should allow those issuers to furnish or report those emissions only to the extent material to their stated emissions reduction objectives, consistent with existing Third-Party Frameworks. Those furnished reports should also include an appropriate safe harbor and no or limited attestation requirement. Alternatively, the Commission should defer any reporting requirement on Scope 3 emissions.

- Phasing in reporting requirements over at least five years to permit investors and issuers to develop and accommodate the extremely complex and unprecedented nature of the accounting work, software development, training, and outside-consultant demands of the Proposal. The first compliance year for large accelerated filers should be fiscal year 2025, with accelerated/nonaccelerated filers and small reporting companies phasing in for fiscal years 2026 and 2027, respectively. A phase-in period will allow information collection, calculation, reporting, and validation methods to mature and better assure consistency and reliability. The proposed assurance and attestation requirements for Scope 1 and Scope 2 emissions similarly should be pushed out to begin with fiscal year 2029 for accelerated filers and 2030 for large accelerated filers.

- Enhancing legal safe harbors that reflect the evolving nature and inherent uncertainties of assessing climate risks down to the level of granularity (e.g., risks to specific locations and assets) in the Proposal that will encourage more contextual reporting. Similarly, the safe harbors should be enhanced in recognition of the evolving nature of greenhouse gas calculation and reporting standards.

Making these and other adjustments will greatly improve the Proposal and lead to more consistent reporting that is helpful to investors.

Underlying all these practical consumer-based concerns, we believe that if the suggested improvements are not made to narrow and refine the scope of the rule, the rule as proposed could encounter successful legal challenge. We believe that portions of the Proposal could exceed the Commission's rulemaking authority, making it vulnerable to legal challenges that would potentially frustrate the Commission's objectives. And we have significant concerns about the Proposal's evaluation of the economic implications of the monumental change in accounting and reporting that the Proposal would unleash. We believe the Commission's rule, as proposed, would cost much more than the Commission has estimated, largely due to the level of detail, granularity, and assurance that would go into providing this information as part of filings made pursuant to Regulations S-X and S-K. To these ends, we outline several aspects of the Proposals that the Commission should revisit below.

We look forward to the opportunity to constructively discuss these issues with the Commission staff and are eager to help the Commission advance alternative approaches that would better provide investors the information they want while adhering to the SEC's legal authority and governing principles.

I. The Proposal Is Too Broad, from Both a Practical and a Legal Perspective.

Although the Proposal aims at addressing one of the most serious issues of our time, given the maturing state of the science on climate change and rapidly evolving reporting protocols, the Commission's approach suffers from having overshot the mark in several respects. We identify three problems we believe the Commission should address before finalizing a rule that will both survive legal challenge and produce usable climate-related information: (1) the absence of a consistent approach to materiality that instead reflects the Commission's own decisions about what information must be reported, unmoored from standard and time-tested understandings of materiality; (2) the failure of the Commission to meet its own goal in producing comparable, consistent, and reliable disclosures across registrants; and (3) the one-sized-fits-all nature of the board-related provisions, which by definition fall short of established notions of materiality.

A. The Proposal's Approach to Disclosure Is Too Broad to Fit Within the Confines of Materiality.

The materiality standard has rightly been described as the "cornerstone" of the securities disclosure system.[2] Thus, companies routinely apply it in preparing SEC reports. Information is material if there is a substantial likelihood that a reasonable investor would consider it important or significant in deciding whether to buy or sell a security or how to vote as a shareholder.[3] In explaining the concept of materiality, the Supreme Court has instructed courts and policymakers "not to set too low a standard" (*i.e.*, one that would be overly expansive) to avoid "bring[ing] an overabundance of information . . . and lead[ing] management simply to bury the shareholders in an avalanche of trivial information."[4] This information overload, the Court recognized, is "hardly conducive to informed decision making" by investors.[5]

Unfortunately, the Proposal falls short of this carefully crafted and time-tested system, upon which NRF's members have come to rely, and requires disclosure of information that is financially immaterial.

1. The Proposal is too broad and vague to be consistent with the long-held understanding of materiality.

The Proposal's use of "materiality" is confusing and threatens the established order of financial reporting, whose purpose, as the Commission states, is to produce consistent, comparable, and reliable information for a typical investor. As explained above, materiality focuses on what is material to a *reasonable investor*, not all information that any investor may find interesting.[6]

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[2] *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 448-49 (1976) (explaining, for information to be material, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available").

[3] *Id.*

[4] *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (internal quotation marks and citation omitted).

[5] *Id.* (internal quotation marks and citation omitted).

[6] *TSC Indus., Inc.*, 426 U.S. at 448-49.

Investors and other stakeholders with specialized interests, such as sustainability, or climate-focused portfolios, value a great deal of information of varying quantities and types. However, the fact that many types of information regarding climate and sustainability efforts is valuable to many stakeholders does not make it material for all companies in the securities context; nor do broad-scope disclosures fit the definition of materiality in all industries. Rather than allow the materiality standard to tailor disclosures to registrants and impacts, the Proposal requires the same filings for all companies.

For example, the Proposal would require reporting on Scope 1 and 2 emissions in filings made pursuant to Regulation S-K, regardless of whether the registrant deems those data material for the purposes of SEC filings. Scope 1 and Scope 2 emissions reporting is well trod ground for many retailers who already report this information in sustainability reports. While this information is accurate and useful to many stakeholders, it is not always material to investment decisions, which is why many include these data in sustainability reports based on their and their stakeholders' preferences for various Third-Party Frameworks (e.g., GRI, TCFD, CDSB). Those reports generally are accompanied by sufficient narrative discussion to put the emissions in the context of company or regulatory emissions goals, so that they are most useful to stakeholders, regardless of materiality. The Proposal would essentially replace these helpful efforts with a broadly conceived set of disclosures in the format of SEC filings. And by failing to tie emissions reporting to any accepted notion of materiality, the Proposal will overwhelm investors with emissions data from all registrants that will lack context and utility for investments.

Although the Proposal does limit the reporting of Scope 3 to emissions that are material, all stakeholders would be better served by receiving this information in reports more focused on explaining climate goals than an S-K filing. Scope 3 emissions occur from sources owned or controlled by other entities in a company's value chain. They include the indirect greenhouse gas emissions in the upstream and downstream activities of a registrant's value chain. For example, Scope 3 emissions include those generated by a third-party who manufactures a product the registrant purchases, or even the consumer's transportation of those products from a retail store to the consumer's home. Scope 3 emissions reporting can be helpful because it can help facilitate simultaneous action of multiple entities to reduce the harms to society. However, unlike Scope 1 and Scope 2 emissions, calculating Scope 3 emissions usually requires a far higher degree of estimation, as the Proposal acknowledges, due to data gaps. As such, Scope 3 emissions do not lend themselves to the same type of clear and consistent reporting commonly associated with 10-K filings. We appreciate that the SEC has acknowledged that companies may set longer-term goals without having full knowledge of the path to get there and placing such information outside of the 10-K filing ensures that disclosure of such targets and goals should not be construed as promises or guarantees. This is particularly important for Scope 3, which will take significant efforts across companies and countries to achieve. And the Scope 3 emissions' materiality must be evaluated on a case-by-case basis. We discuss more issues concerning the complication of collecting Scope 3 emissions data in Section II.A.3. below.

2. *The Proposal requires disclosure of an overabundance of information that will not be useful to most who read reports filed with the SEC.*

The Commission's proposed revisions to Regulations S-X and S-K would require vast new accounting techniques and line-item reporting without any clear tie to accepted accounting principles.[7] The enormous costs involved are discussed in more detail in Section II.A below. Importantly, the proposed requirements would essentially force companies to report minute levels of detail that cannot be considered material to most investment decisions and thereby contravenes the materiality standard that protects investors from being overloaded with unnecessary information. And although some registrants choose to include immaterial climate information in their filings, the Proposal would require all registrants to do so at a very granular level, with the attendant liability over the information registrants are required to file, but for information that will, in many instances, not be material.

For example, issuers would be required to disclose, on each line item, the financial impacts of weather events and other natural conditions, as well as costs related to efforts to reduce emissions and mitigate climate-risks, without any meaningful materiality threshold.[8] The Proposal further would require registrants to disclose the impacts of greenhouse gas emission reduction efforts on an "aggregated line-by-line basis for all negative impacts and, separately, at a minimum on an aggregated line-by-line basis for all positive impacts."[9] These requirements will bombard investors with information that would be far more meaningful and useful at higher, more consolidated levels.

For these and other reasons, many retailers, guided by well-accepted Third-Party Frameworks, report on events that are expected to have a material impact on the firms' financial condition.[10] They often report on the percentage of expected operating cost increases due to climate and weather-related events or the amount of capital allocated toward adaptation and transition.[11] And they report on the material costs and opportunities related to legal and regulatory requirements. We are not aware, however, of a climate-reporting framework that approaches the level of granularity encompassed by the Proposal. Nor do we believe that this approach is the most helpful to most investors.

Similarly, the Proposal's description of the types of "climate-related events" and "climate-related risks" for which registrants must report financial data is too broad. It would require vast reporting on all "actual or potential" impacts of "climate-related conditions and events" on minute levels of revenue, business operations, and value chain, down to the zip code.[12] And the Proposal would require registrants to disclose and differentiate climate-related risks and costs as between "physical" or "transition" risks. For physical risks, the Proposal requires the disclosure of whether a risk "may be categorized as an acute or chronic risk."[13] But there is no commonly accepted standard for what is an "acute or chronic" physical risk and no uniform way of assessing such a

[7] 87 Fed. Reg. at 21,464-465; *see id.* at 21,467.

[8] The only limitation is that disclosure would not be required if the value of all the impacts is less than one percent of a particular line item. This effectively provides no limit, however, because the value is absolute, meaning that disclosure is required even without any net effect.

[9] 87 Fed. Reg. at 21,464.

[10] *See* Task Force on Climate-Related Financial Disclosures, *2021 Status Report* (Oct. 2021), https://assets.bbhub.io/company/sites/60/2022/03/GPP_TCFD_Status_Report_2021_Book_v17.pdf.

[11] *See id.*

[12] 87 Fed. Reg. at 21,465.

[13] *Id.* at 21,467.

risk with the level of precision required by SEC filings.

Without further limitation, or established standards or guidelines for what events would and would not be considered climate-related, this information will result in issuers bombarding readers with vast amounts of information that will not be helpful to those assessing investment decisions. Registrants will be forced to further define and explain their interpretation and application of these terms. And this will naturally lead to differing interpretations across registrants and significantly undermine the comparability and consistency of data. For example, companies operating in the same geographic region may come to different conclusions about whether a natural event, like a storm or a flood, is within the expected recurrence intervals, caused by climate change, or made more intense by climate change. Multiple conclusions could be correct yet lead to significant differences in reporting under the Proposal, thus defeating the purpose of the disclosure under the Securities and Exchange Acts.

Disclosures related to "transition risks" under the Proposal are equally challenging. The current definition of transition risks includes a wide range of events, "actual or potential negative impacts . . . attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate-related risks, such as increased costs attributable to changes in law or policy."[14] Different companies will assess these risks differently or overreport, leading to too much information and incomparable filings.

Moreover, retailers identify many factors that influence transition risk, including changes in energy and commodity prices in global supply chains; world events such as supply chain issues stemming from the COVID-19 pandemic; and of course, international and overlapping regulatory requirements that impact transition readiness. Many registrants already disclose the types of risks and opportunities that transition presents to their operations in narrative discussions of their 10-K forms, sustainability reports, and other publications. And investors should be aware of them. It would be impractical, however, for registrants to tease out, with the degree of specificity required in SEC reports, what portion of a particular risk is due to climate change versus which impacts become risks due to a host of other factors. It thus becomes an impossible task to say what should be reported or tracked as such for purposes of the Proposal.

Further, the Proposal would require issuers to assess financial and business impacts that might occur over time frames that range from near to decades in the future. This is an unprecedented requirement and—especially over the long term—is inherently unreliable given the potential evolution of climate risks and opportunities. Applying the current materiality analysis to climate-related risks should be sufficient to weed out the truly uncertain and non-impactful.

In any event, compliance with the Proposal will result in voluminous reports with countless caveats and explanations. It will be difficult for investors to parse whether the voluminous amount of new information is actually material to a company. The climate-related disclosures section of registrants' filings may end up being larger than the management discussion and analysis section as a whole, which may place undue prominence to immaterial issues and dilute material issues discussed in other parts of the filing.

[14] *Id.* at 21,466 (proposed 17 C.F.R. § 229.1500(c)(4)).

B. Contrary to the Purpose of an SEC Rule, the Proposal Is Not Limited to Disclosures That Are Comparable, Consistent, and Reliable Across Issuers.

An inescapable issue is that many aspects of the climate-related reporting contemplated by the Proposal do not lend themselves to consistency. This is because they require subjective judgments, delve into reporting protocols that are still evolving based on changing stakeholder demands, improving methodologies, and involve predictive judgments.

Indeed, no single organization has developed a uniform set of climate-related disclosures or methodology that is appropriate to all retailers or material to all stakeholders. Rather, retailers analyze, calculate, and report their GHG emissions and climate-related efforts in accordance with a variety of established frameworks such as the Sustainability Accounting Standards Board (SASB), the Task Force on Climate-related Financial Disclosures (TCFD), Global Reporting Initiative (GRI) Standards, and the United Nations Sustainable Development Goals (SDGs). These frameworks respond to stakeholder interest in information in different ways based on the demands of those stakeholders and evolve as the understanding of risks, opportunities, and the assessment of both improve. But even within those protocols, the understanding of what information is material is not uniform. For example, the TCFD has noted that its task force recommends that climate-related disclosures should include Scope 1 and Scope 2 emissions regardless of materiality, but some "preferred keeping such disclosures as subject to materiality."[15] Thus, the notion of materiality itself is evolving in the context of emissions disclosures, and the reporting varies, based on the varying protocols and stakeholder demands.

While the reasonable investor would undoubtedly benefit from consistent, comparable, and reliable climate-related risk information, the Proposal does not create it. For example, the Proposal does not define a single methodology for calculating greenhouse gas emissions for Scope 3.[16] Rather, the Proposal would require the disclosures to "describe the methodology, significant inputs, and significant assumptions used to calculate greenhouse gas emissions."[17] One retailer might rely on its suppliers for such information, while another may decide to apply the GHG Protocol itself and calculate its own emissions intensity. This will result in an apples-to-oranges measurement, as investors dig through the disclosures to compare the underlying methodology (the disclosure of which, in an unprecedented move, is *also* required by the Proposal). Similarly, the Proposal instructs registrants to report various short-, medium-, and long-term risks and to describe how the registrant defines the various time horizons and determines the risks; again, the SEC purports to create a regime in which the reporting requirements are flexible as long as they are supported by an underlying methodology.[18] However, this disclosure, untethered to any objective or shared vision of materiality, will not result in comparable and reliable disclosures. So not only would investors receive 10-K filings with greenhouse gas emissions data and risk assessments reported under inconsistent methodologies or standards, they would also be

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[15] TCFD, GUIDANCE ON METRICS, TARGETS, AND TRANSITION PLANS 15 n.32 (Oct. 2021), *available at* https://assets.bbhub.io/company/sites/60/2021/07/2021-Metrics_Targets_Guidance-1.pdf.

[16] 87 Fed. Reg. at 21,468 (proposed § 229.1504 (Item 1504)).

[17] *Id.* (proposed § 229.1504(e)).

[18] *Id*. at 21,467.

bombarded by varying descriptions of how the information was gathered and calculated. And, because of the inherent differences in the approaches, the filings will not be consistent, comparable, and reliable across issuers.

We encourage the Commission to work with industry sectors on a usable framework for reporting climate information in some fashion. We believe that a key problem is as follows: even if the Proposal were to have attempted to create uniform standards for reporting, it is not clear that any such standards have received a critical mass of acceptance at this point in time. Stakeholder and investor demand for climate-related information is evolving and improving, as are notions of what information is material in this context. Establishing fixed filing requirements made under Regulations S-X and S-K will only serve to stagnate reporting efforts at this fixed point in time, as companies shift from responding to stakeholder input, fostered by the various Third-Party Frameworks, toward assuring regulatory compliance. In other words, the Proposal would stifle innovation at a time when the concept of what is material in the context of climate-related financial reporting and the best methods for providing this information to stakeholders is evolving. The Proposal's goals would be better served by continuing to allow companies to separately publish climate-related information in reports that can better accommodate stakeholder interests than SEC filings.

C. The Proposal's Required Disclosure of Board Expertise Is Not Necessary for All Registrants.

The Proposal, by requiring the disclosure of a board member's or board committee's expertise in climate-related risks, would effectively dictate expectations for how a company's governance should be structured.[19] As Commissioner Peirce explained, the Proposal's required governance disclosures "will have a substantive effect on companies' activities" because the Commission is "not only asking companies to tell us what they do, but suggesting how they might do it."[20] Although the integration of climate-related expertise into corporate decision-making "likely is a prudent business decision . . . whether, how, and when to do so should be left to business—not SEC—judgment."[21] To be sure, climate-related expertise may be important for some registrants. But the Proposal fails to explain why this would be important for all registrants. For many registrants, disclosing the intricacies of board expertise in climate change are not only immaterial to the financial health of the company, but contribute to "bury[ing] shareholders in an avalanche of trivial information that is hardly conducive to informed decision making."[22]

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[19] *Id.* at 21,359.

[20] *See* Commissioner Hester M. Peirce, *We Are Not the Securities and Environment Commission—At Least Not Yet*, (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.

[21] Commissioner Hester M. Peirce, *Dissenting Statement on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure Proposal by Commissioner Peirce* (Mar. 9, 2022), https://www.sec.gov/news/statement/peirce-statement-cybersecurity-030922 ("Such precise disclosure requirements look more like a list of expectations about . . . how [registrants] should operate.").

[22] *TSC Indus., Inc.*, 426 U.S. at 448.

II. Although Climate Disclosures Could Result in Net Benefits to Investors, the Commission Has Failed to Adequately Balance the Cost of Compliance with this Proposal Against the Benefit of the Mountains of Information That It Will Produce.

The Commission is required to consider the economic implications of the Proposal upon investors, registrants, and the public. The Securities Act requires that "[i]n addition to the protection of investors," the Commission must consider "whether the action will promote efficiency, competition, and capital formation."[23] Thus, the Commission must, among other things, "determine as best it can the economic implications of the rule."[24] And the Supreme Court has explained that rules predicated on an administrative determination that regulatory change is "necessary" or "appropriate" require a meaningful evaluation of the costs and benefits involved.[25]

Adequate consideration of the costs and benefits requires a detailed and evenhanded assessment. Even where some costs are uncertain or unquantifiable, the Commission must "do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure."[26] The Commission may not "inconsistently and opportunistically frame[] the costs and benefits of the rule;" fail to "quantify the certain costs or to explain why those costs could not be quantified;" "neglect[] to support its predictive judgements;" "contradict[] itself" in its economic analysis in order to achieve a preferred outcome;" or "fail[] to respond to substantial problems raised by commenters" about the economic analysis.[27]

The Commission similarly has an obligation to consider the costs of serious alternatives that would also advance the Commission's objectives.[28] And consideration of those alternatives must evaluate the relative costs and benefits of the various options.[29] Likewise, the Commission must explain why a change from the status quo is necessary at all.[30] That is, it must establish "there are good reasons" for the change in policy.[31] And the Commission also must take into consideration any "serious reliance interests" that long-standing policies may have created before deviating from

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[23] 15 U.S.C. § 78c(f); *accord id.* §§ 78w(a)(2), 80a-2(c).

[24] *Chamber of Com. of U.S. v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005); *see Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011); *Am. Equity Inv. v. SEC*, 613 F.3d 166, 177-79 (D.C. Cir. 2010).

[25] *Michigan v. EPA*, 576 U.S. 743, 752 (2015).

[26] *Chamber of Com.*, 412 F.3d at 144.

[27] *Bus. Roundtable*, 647 F.3d at 1148-49.

[28] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983); *Chamber of Com.*, 412 F.3d at 144.

[29] *DHS v. Regents of Univ. of Calif.*, 140 S. Ct. 1891, 1912-13 (2020).

[30] *Am. Equity Inv.*, 613 F.3d at 177-79 (D.C. Cir. 2010) (vacating SEC rule requiring increased transparency on fixed indexed annuities on grounds that its analyses of the rule's effect on competition, efficiency, and capital formation were inadequate because it failed to consider the effects of the specific rule it adopted and failed to compare the rule to the status quo baseline of regulation).

[31] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (agency must establish "there are good reasons" for a change in policy).

the status quo.[32]

A. The Proposal Will Be Historically Costly and Will Effect a Transformation in Accounting and Financial Reporting.

Many, if not most, NRF members are already disclosing the climate-related risks that are material under current SEC rules and are well familiar with the enormous cost associated with doing so reliably and accurately. The cost of complying with the Proposal will be tremendous, far more than the $10.2 billion in external expenses and 43,539,033 additional internal hours estimated by the Commission.[33]

1. The Proposal would require the development and deployment of new accounting systems and techniques, at great cost and in an unreasonable time frame.

Registrants will need to develop and implement new accounting, financial, and in some cases scientific processes in a matter of months and apply these methods to the previous 3 filing years. The challenges for issuers to report brand new metrics in filed reports, for which there are no experienced regulatory bodies from which issuers or auditors may seek guidance, in such a short time may be insurmountable, meaning the Proposal would fail in execution, and there is no doubt that issuers who attempt to do so will incur extraordinary expenses.

For example, the Proposal would require issuers to report the financial impacts of "severe weather events, other natural conditions, such as flooding, drought, wildfires, extreme temperatures, and sea level rise on any relevant line items in the registrant's consolidated financial statements during the fiscal years presented," with no apparent cost or materiality threshold.[34] The granularity of this requirement cannot be overstated. Issuers would essentially have to track and code all expenses that may be related to weather events and maintenance, for all line items, regardless of how immaterial. Meanwhile, the Proposal does not point to or create generally accepted principles for determining what would and would not constitute a weather-related impact. Many companies already report costs spent responding to weather events, but without a clear linkage to materiality and explanation for why it matters, this information would simply not be useful. For example, it would not be material for a company with $500 billion in annual revenue to spend $20 million per year due to severe weather events, but it may be to a much smaller registrant.

The Proposal also would require issuers to disclose the impact of "transition activities" on all relevant line items in the financial statement.[35] This would involve, among other things, calculating changes to revenues due to new emissions pricing or regulations, and changes to operating costs from the same. For retailers, it would include responding to changes in consumer preferences.

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[32] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *see DHS*, 140 S. Ct. at 1913-14.

[33] 87 Fed. Reg. at 21,461.

[34] *Id.* at 21,464. The only limiting factor is that the disclosure would not be required if the sum of the absolute value of the impacts is less than one percent of the line item. Determining that, however, would require first tallying up all costs that could potentially be considered weather-related.

[35] *Id.*

However, it will be exceptionally difficult to determine the financial impact of what changes to merchandise assortments are driven by consumer desire for goods produced in a more climate-sensitive manner compared to general changes in consumer preference (e.g., consumers are currently interested in buying 'gently used' products from retailers, which has climate benefits, but consumers might be more interested in the associated cost savings and be less interested in buying used when inflationary pressures dissipate). And, because such analyses are highly qualitative, there will be a wide variety of assessments across the industry, making it nearly impossible to deliver consistent, comparable, and reliable information.

Preparing such filings retrospectively, as contemplated by the Proposal, would be virtually impossible. Existing accounting systems are not designed for tracking and reporting such cost impacts, particularly with no meaningful cost threshold, across all line items, because registrants do not have systems in place to collect, calculate, and report these line items, especially at such a granular level.

Prospectively, complying with these requirements would require development of new accounting techniques to track and delineate expenses, as well as development of new software, training, and auditing. Each new data point that does not exist in existing accounting systems will need new processes and controls. And it will require an intensely detailed assessment of invoices to assess their potential relation to climate or transition rather than whether they are associated with a particular income segment. Some members estimate that complying with the reporting requirements under S-X and S-K would cost companies $3 to $7 million annually. Many retailers estimate it will take several years to update their accounting, auditing, and reporting protocols to the level that that Proposal would require.

Cost aside, requiring such vast changes to accounting systems in such a short time frame is simply unprecedented. For example, before adding Revenue Recognition Accounting to the accounting standards, FASB took 3 years to promulgate the new standard and allowed another 3 years to implement it.[36] The Commission has proposed far more complex standards with far less notice and only months of implementation time.

Moreover, the Proposal fails to account for the increased costs of financial auditing and legal expenses spurred by the rule. Because of the emergent nature of many of the reporting requirements, uncertainty of risks and impacts, and lack of comparability, the new climate reports will be rife with uncertainty and become litigation targets. Indeed, assuring compliance and avoiding liability will require extensive new auditing and legal review. Financial auditing and law firms will need to swiftly develop new data collection and reporting tools and employ droves of auditors to help prepare and vet the newly required information. Paying for those services alone will cost investors billions of dollars in the first few years of the requirements and similar amounts

[36] *See* AICPA, *Financial Reporting Center, New Revenue Recognition Accounting Standard—Learning and Implementation Plan* (Oct. 2018), https://us.aicpa.org/content/dam/aicpa/interestareas/frc/accountingfinancialreporting/revenuerecognition/downloadabledocuments/2014-09_liplan.pdf.

moving forward.[37]

Even if many of these costs are difficult to quantify, the Commission has failed to give them equal treatment to the purported benefits. For example, the Commission claims that the reporting requirements will save time for investors who are particularly interested in, for example, Scope 3 emissions, because they will no longer have to look for that information in other sources. But it has not calculated the value of those savings or evaluated whether they justify the immense costs on retailers. Furthermore, many of the purported benefits are targeted to investors with specific climate-focused interests that vary by industry, not the Commission's required focus—the quintessential "reasonable investor" who is making decisions based on the financial health of the issuing company and the prospects for returns.

2. *Some of the Proposal's requirements are implausible or lack sufficient parameters to make them meaningful.*

Some of the Proposed revisions to Regulations S-X and S-K are simply implausible. For example, the Proposal would require issuers to forecast climate-related risks over short-, medium, and long- term horizons and report them in 10-K and related filings. While climate-related risks are anticipated, we are not aware of tools that can accurately predict where and when natural events, like storms, flooding, or drought will occur *as a result of climate change factors*, particularly not at the level of certainty that would be required for a filed report discussing short-term risks to specific assets or operations. To be sure, modeling tools can help identify geographic areas that are anticipated to be more severely impacted by climate change. For example, many retailers have stores located in the southeastern United States, a region widely known to be susceptible to hurricanes and that may see more frequent events in the future. Some have locations in areas of the country that may experience an increased number of days requiring heating or cooling of facilities. And others may sell food products and other items sensitive to drought. But it is not currently possible to predict with certainty exactly when and how these risks will combine with other factors to impact any particular facility, or what mitigating measures retailers and others in the value chain may take.[38]

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[37] Mark Maurer, *Auditor Asses Complex New Climate Disclosures: An SEC Proposal Would Require Auditors to Consider New Climate-Change Disclosures When Opining On A Company's Financial Statements*, WALL ST. J. (Mar. 29, 2022), https://www.wsj.com/articles/auditors-prepare-to-assess-complex-new-climate-disclosures-11648546201.

[38] As written, the Proposal might require the retailer to simply include a laundry list of store zip code locations for those in hurricane prone regions, but it is difficult to see how this would be meaningful to investors when 10-Ks already itemize property locations by state, and it is not currently possible to highlight any more specific risks to those locations. We note that some current SEC reporting does include subjective assessments of material risks, such as potentially material losses from litigation outcomes. However, that type of information typically is presented only when the potential loss is material to the registrant and is accompanied by an estimate of the potentially material loss, an estimate of the reasonable possible range of losses, or a statement that such an estimate cannot be made. The Proposal, in contrast, does not include the same materiality threshold or appear to allow registrants to provide a range of potential losses or clarify that the potential losses cannot be estimated. If the Commission's intention is to make the assessment of climate risks more like the assessment of litigation

Furthermore, to calculate the impact of a climate-change related event on assets, one must first distinguish that event from standard events that result from other factors, such as normal weather fluctuations, labor shortages, and other issues. But no current method exists that allows filers to distinguish what is a climate-change related event and what is not. Even if an event can be said to be partially caused by climate-change, determining to what extent is impossible with any reasonable degree of certainty or with any degree of consistency. Rather, the reporting will reflect judgment calls, which will differ across a company, industry, and the economy.

A concrete materiality threshold before mandating data collection, evaluation, and disclosure would solve some of these problems. The only metric the Commission has chosen is whether the sum or absolute value of the impact is less than 1% of line-item value.[39] But 1% is essentially equivalent to no threshold at all and no materially valuable information will be derived from such an exercise. Again, materiality generally takes into account, among other things, the size of the registrant.

It would be far more useful for investors to receive more general information on expenditures made responding to weather events and preparing for climate-related risks, while allowing retailers to specifically call out those risks that are material to investors. For this reason, most retailers' climate-related disclosures in 10-K forms refer investors to more in-depth reports prepared pursuant to Third-Party Frameworks, such as SASB and TCFD that display their emissions and climate-related goals in sufficient context and detail for readers to understand where the retailers' risks and efforts stand in the wider context of global climate change. Where climate risks are material, such as potentially significant increases to important raw materials caused by drought, flood, or other conditions, they identify the potential impacts along with low and high-end estimates, given the difficulty in predicting future costs. By essentially ignoring materiality and treating all climate and weather-related costs and risks the same, the Proposal would both mask the most important costs and impacts and bombard readers with data that lacks sufficient context to be useful.

3. ***The emissions reporting requirements are unreasonably complicated and inconsistent with the SEC reporting cycle.***

While many retailers already collect and report emissions based on well-accepted protocols, the Proposal is not consistent with them. For example, the Proposal asserts that its emissions reporting requirements are largely based on the Greenhouse Gas Protocol,[40] but some requirements are misaligned with the Protocol and are inconsistent with retailers' established practices. For example, the requirement to calculate a registrant's greenhouse gas emissions metrics by applying organizational boundaries that are consistent with consolidated financial statement boundaries is not consistent with the widely established Greenhouse Gas Protocol guidelines, nor is it common practice among companies. The challenge is that retail business models are incredibly variable and complex. In its simplest form, retailers buy from suppliers and sell to consumers. In more complex

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or other risks that require subjective analysis, it should make that clear and issue significant guidance on how to make such assessments before requiring them in 10-K filings.

[39] 87 Fed. Reg. at 21,464.

[40] *Id.* at 21,345.

business models, retailers buy from suppliers, pay contractors to manufacture some private-label goods (products bearing the retailers own-brand), and own some manufacturing facilities to make select private-label goods, all of which they sell to consumers either in-store, online, or both. While the financial reporting boundaries might be clear and consistent, the Greenhouse Gas Protocol guidelines are significantly more challenging and would require complex assumptions and significant investment to align them with the financial statement boundaries. It will be even more complicated to create retail industry-wide approaches that allow investors to compare retailers. Requiring that companies shift to a completely different basis would require that all issuers change their methodologies for company-wide reporting, develop new expertise, obtain data from their partners using different boundaries, and restate their greenhouse gas emissions targets, baselines, and other performance indicators. This could present challenges for third-party attestation because it would introduce new methodologies that are not familiar to third-party verifiers with greenhouse gas expertise. The incremental administrative burden associated with a forced shift to the consolidated financial statement basis would be enormous (as would be the costs).

Moreover, the emissions reporting requirements would be inconsistent with the current SEC filing cycle. It may not be possible to file accurate emissions reports on the proposed time frame because key data needed to prepare those reports will not be available. In particular, many retailers rely on data reported through EPA's GHG Reporting Program to calculate Scope 2 emissions. Scope 2 emissions include emissions generated offsite for a company's operations, such as the emissions associated with the electricity a retailer purchases from utilities. Those data generally become available in October for the prior year, and EPA publishes emissions rates commonly used to estimate Scope 2 emissions at even longer intervals. For example, EPA most recently released "e-GRID emissions rates" (commonly used under the GHG Protocol) based on 2020 data on January 27, 2022.[41] While retailers are confident they can accurately *estimate* emissions based on electricity use and emissions rates for prior years, requiring registrants to *file* such estimates in 10-K reports raises the specter that they may need to update past reports as new data become available. These problems would be alleviated by (1) explicitly recognizing that limitations in data and data quality may impact the accuracy of the required information, and (2) creating appropriate legal safe harbors to shield registrants from liability associated with potential information flaws created by data quality and information limitations.

The tools for analyzing Scope 3 emissions are still evolving and different retailers have found different and equally appropriate solutions because Scope 3 reporting methodologies are more mature for the product categories sold by some retailers than for others. The Higg Index, originally developed by the Sustainable Apparel Coalition, for example, provides useful tools for retailers focused on the fashion and apparel sector. Retailers selling primarily food or electronics or furniture, for example, lack access to comparable tools. Retailers that sell a broad assortment of product categories (e.g., fashion ***<u>and</u>*** apparel ***<u>and</u>*** food ***<u>and</u>*** electronics ***<u>and</u>*** furniture) might opt to use a spend-based methodology that assumes impacts based on the cost of goods sold. A retailer with a smaller number of suppliers for which the retailer is the suppliers' largest customer might have greater success getting the suppliers to report Scope 3 data consistently and accurately than retailers with a less substantive relationship with suppliers. Other retailers might choose to use

[41]*See* EPA, *Power Profiler: How Clean Is the Electricity You Use?* (Apr. 28, 2022), https://www.epa.gov/egrid/power-profiler#/RFCE.

multiple methods depending on the product category. The different possible approaches for retailers trying to provide the same basic information on their Scope 3 emissions creates challenges for investors trying to compare retailers. In addition, the complexity of the multiple retail models that exist within the industry combined with the complexity of the embedded assumptions retailers are using to approximate their Scope 3 emissions makes the resulting information inappropriate for use in a 10-K. The Commission should continue to allow Scope 3 emissions reporting to mature before including any requirements in its regulations.

Finally, although some registrants currently report more than one category of Scope 3 emissions because they are of interest to stakeholders and some categories are material to some companies' performance metrics, a requirement to *file* Scope 3 emissions could have a "chilling effect" on companies' efforts to offer more information to their stakeholders. The increased liability exposure and the potential to misconstrue the provision of this information to stakeholders as material to investment decisions would simply discourage the setting of Scope 3 goals. It therefore may wind up limiting the amount of information available to stakeholders.

B. The Proposal Will Undermine Efficiency, Competition, and Capital Formation.

The Proposal also would cause misallocation of capital. By imposing enormous expenses on publicly traded U.S. companies and not the others, the Proposal would provide a competitive advantage to those who do not issue securities and will therefore not incur the Proposal's costs. Similarly, the Proposal may have negative consequences for public capital formation and the number of companies that offer securities. Some private retailers who might consider public offerings will be incented to avoid doing so, given the enormous compliance costs and liability exposure caused by the Proposal. For these same reasons, some retailers may give serious consideration to "going private."

C. The Proposal Will Confuse Investors and May Result in Less Helpful Disclosures.

The Proposal also would cause unintended consequences to registrants and investors. If finalized, the Proposal would likely have a chilling effect on issuers that choose to provide their stakeholders with climate-related sustainability reports apart from those required in the Proposal. For example, many retailers publish extensive and detailed sustainability reports. However, if the Proposal is adopted some of those same companies may be reluctant to separately publish detailed sustainability reports, and significantly limit the amount of information and detail they disclose, to avoid any potential confusion when compared to the less qualitative and less instructive data that the Proposal would require. Similarly, by establishing regulatory requirements for reporting on emissions and the costs and risks of climate and transition related activities, the Proposal could serve to halt the progress and innovation that businesses and the Third-Party Frameworks have been making to improve reporting and better respond to consumer demand and evolving standards.

Furthermore, the Proposal's requirement that companies disclose additional information, such as internal carbon pricing, scenario planning, and related information if a company has an emission reduction target (particularly regarding Scope 3 emissions that might not otherwise be considered financially material) will discourage companies from setting such targets to avoid the additional cost and liability risks caused by having to file such information.

Additionally, reporting emissions data in SEC filings will cause confusion or be unhelpful to most investors. To be sure, there are investors focused on ESG topics and many valued stakeholders interested in greenhouse gas emissions and our members' emissions reduction efforts. That is part of why many of our members are proud to present relevant, vetted information through one of the various greenhouse gas reporting protocols and sustainability reports. The response to these protocols has been positive and it is far from clear that the Proposal would improve the mix of available information.

As outlined below, we believe that the Commission can alleviate many of these concerns by considering alternatives and revising the proposal.

III. The Commission Should Consider Alternatives to Better Balance the Cost of Compliance with the Proposal Against the Mountain of Information That It Will Produce.

The SEC should seriously consider alternatives that may lower the economic costs while still advancing the Commission's lawful objectives. That consideration should include an evaluation of the relative costs and benefits of various options.

A. The Commission Should Employ a Readily Understandable and Traditional Form of Materiality.

As discussed in detail above, many of the Proposal's financial reporting requirements would be overly granular, expensive, and unhelpful. The Commission should require issuers to report only those costs and impacts of climate- and transition- related risks and opportunities that the issuer deems material to investors using existing understandings of materiality—*including* for Scope 1 and 2 disclosures. This would ensure investors are provided with important information relating to the soundness of the investment and the securities' risks. And it would enable companies to continue to provide more robust and helpful information to stakeholders through the separate, established, and market-demanded climate and sustainability reporting protocols.

B. The Commission Could Achieve Its Goals by Allowing Registrants to Furnish, Rather than File, Reports.

The SEC should consider substantially less burdensome alternatives to accomplish the same goals, including removing the obligation to include the required information in filings made under Regulations S-X and S-K. For example, rather than mandating that climate-change related disclosures be made through registrants' 10-K filings, the Commission should allow registrants to furnish climate-related disclosures as part of separate climate-related disclosure reports or sustainability reports. These would be provided on a consistent basis but separate and apart from a registrant's 10-K and S-K filings.

Having registrants furnish, rather than file, these reports would provide registrants with some measure of liability protection, which is essential, given the imprecise and subjective nature of the information and the difficulties of collecting it. The Exchange Act imposes liability for omissions or misstatements in information filed with the SEC. In contrast, information that companies furnish is excluded from some—though not all—of the Act's liability provisions. Furnished information, unlike filed reports, also is not automatically incorporated by reference into a registration statement. Allowing registrants to furnish climate-related disclosures would offer a significant measure of liability protection to issuers and alleviate many of the concerns raised above. And this approach would recognize the inherently evolving nature of how information about greenhouse gas emissions is calculated and how climate and transition risks are evaluated.

For example, while there is a long history of greenhouse gas reporting in the retail sector, newer, more accurate, and more comprehensive methods are continuously being developed and implemented. Many retailers update their greenhouse gas emissions reports, consistent with well-established standards, such as the GHG Protocol and ISO 14064-3, when more accurate information or better methodologies become available through those standards. Indeed, this is inherent to the evolving and improving nature of GHG reporting. Similarly, because the retail sector is so broad and diverse, retailers follow different reporting guidelines under the Third-Party Frameworks, such as guidelines for apparel, footwear, or manufacturing. Much more work needs to be done to develop consistent frameworks that could apply across the economy or even to a broad sector like retail. But requiring registrants to file emissions data in 10-K reports will stifle these continuous improvements. Registrants will be far less likely to support initiatives by the various protocols to enhance and improve calculation methods because it might require addressing past filings through corrections or require more expensive changes to accounting and auditing practices.

This approach also recognizes that climate-related information is less precise, more subjective, and harder to capture than most information contained in 10-K filings, as discussed in Section I.B. above. And it would better preserve the concept of materiality discussed in Section I.A. above.

A furnished report would also present a better opportunity to provide useful qualitative information on governance, strategy, risk management, and metrics/targets, than 10-K filings. Registrants could continue to follow TCFD, SASB, and related Third-Party Frameworks for the best metrics on which to discuss their management of climate risks and opportunities. Such a report would include specific information around company efforts to meet any stated climate commitments and targets, the approach to those commitments and targets, as well as expected risks, opportunities, and costs.

Finally, allowing registrants to furnish climate-related disclosures would not have negative consequences for investors. The federal securities laws, including anti-fraud protections, apply to furnished information ensuring the trustworthiness of such reports. Reporting of furnished information would be included on an established SEC form with lines that have specific definitions and descriptions to support consistent reporting. Moreover, when registrants furnish this type of information, companies generally perform assurance checks at various levels to ensure that the information collected, and methodologies used are reliable. Furnishing this type of information has been an acceptable practice for decades without misinforming investors. For example, quarterly earnings materials are furnished rather than filed. This information, which is demanded by investors, is technically voluntary, but sill accurate, reliable, and comparable. A furnished rather than filed approach may actually provide investors with *superior* climate information. Not only would it encourage broader disclosure and more robust explanation, it would also allow for the incorporation of a company's existing sustainability reports, reduce instances of issuer and shareholder confusion, and align definitions with existing regulations from other agencies. Furthermore, while some investors regularly tell our members they want climate-related information and they want it as comparable as possible, they also express that they do not care *where* that climate information is provided. As such, it is not clear why the enormous burdens of filing this information in a 10-K discussed above would outweigh the benefits of furnished reports.

In short, allowing climate-related information to be furnished provides investors with reliable, needed information but in a way that is workable for registrants and reduces compliance costs and burdens.

C. The Commission Should Consider Creating a New Form for Climate-Related Disclosures.

The Commission should also consider shifting any required climate-related disclosures to a new form specifically geared toward this purpose. The new form should be developed on a sector-specific basis, based on sector-specific parameters, like the GHG Protocol has done for several sectors.[42] The form should create a standardized methodology for calculating emissions and other information that is important to investors on an "apples-to-apples" basis for each sector. This would alleviate much of the need for explaining the various methodologies applied, as contemplated by the Proposal. It would alleviate some of the concerns raised above about flooding investors with overwhelming amounts of information in 10-K filings, and it would make it easier for those investors most interested in climate-related disclosures to find and identify the information they seek. It would allow registrants to submit this information on a different cycle than the 10-K filings, alleviating some concern we have regarding the ability to obtain emissions and other data from third parties on the time frame necessary to comply with 10-K deadlines. And it could provide opportunities for registrants to accompany the quantitative information contemplated by the Commission with qualitative discussions placing the information in context and describing the registrant's sustainability goals and plans.

D. Scope 3 Emissions Reporting Should be Limited to Furnished Filings.

If the SEC decides to require registrants to file emissions data in their 10-K and related filings despite the concerns raised above, it should not include Scope 3 emissions, even where companies have made specific Scope 3 emissions reduction goals. Registrants have more control over Scope 1 and Scope 2 information, and methodologies for collecting the data are better established. As the Proposal recognizes, Scope 3 emissions estimates are complicated by data gaps and uncertainties. As such, Scope 3 information would be more useful to investors when accompanied by a significant qualitative discussion surrounding the reasons for providing the data and description of the methods used to estimate Scope 3 emissions. Registrants should not be required to report quantitative Scope 3 information until more established calculation and estimation methodologies are developed and adopted by the SEC.

But this doesn't mean that investors will not have access to Scope 3 information. Many retailers

[42] *See* Greenhouse Gas Protocol, *Guidance Build on GHG Protocol* (last visited June 15, 2022), https://ghgprotocol.org/guidance-built-ghg-protocol.

are keenly attuned to investors who want Scope 3 data. Voluntary reporting accommodates these investors, as companies can decide to assess which categories of Scope 3 emissions are most useful based on their unique value chain and stakeholders' needs.

E. The Commission Should Limit Financial Reporting Requirements to Prospective Reports.

The significant costs and complexity of the Proposal's financial reporting requirements are aggravated by the Proposal's requirement that issuers update certain reports that predate a final rule. As noted above, that is because yet-to-be-developed accounting systems with the level of granularity contemplated by the Proposal have not been in place, and compliance will require enormous amounts of backward evaluation. As with most rulemakings, the Commission should ensure that any final rule's requirements affect only reports prepared after the rule's effective date.

F. The Commission Should Phase in Requirements Over a Longer Period.

The complexity of the Proposal's requirements will involve significant technical hurdles, extensive training, and coordination with outside auditing, assurance, and legal firms. As noted above, the costs and challenges will be enormous. Many of these costs would be significantly mitigated by allowing longer lead times to develop and implement the needed resources. We believe that a five-year phase-in time for any new requirements would better ensure investors and other stakeholders are provided the best information available while alleviating many registrants' compliance concerns. As such, the first compliance year for large accelerated filers should be fiscal year 2025. Similarly, the Commission should phase in requirements for accelerated/nonaccelerated filers and small reporting companies beginning with fiscal years 2026 and 2027, respectively. And the proposed assurance and attestation requirements for Scope 1 and Scope 2 emissions should be pushed out to begin with fiscal year 2029 for accelerated filers and 2030 for large accelerated filers.

G. The Commission Should Strengthen the Safe Harbors.

Finally, shareholder-liability safe harbors should be well established. All assessments of climate and transition risks should be treated as forward looking statements. All emissions calculations and estimates should be shielded from any liability that may arise from changes to calculations and estimates caused by changing standards and methods for calculating emissions, and from data gaps or infirmities caused from relying on data from third parties, as would be required for the reporting on Scope 2 and Scope 3 emissions.

Revising the Proposal in light of the alternatives suggested above would result in more consistent, reliable disclosures that would be more helpful to investors. It would also greatly reduce the regulatory costs. And it would alleviate concerns that the Proposal would disincentivize more robust disclosures and the improvement of those disclosures under the Third-Party Frameworks. The development of separate forms, furnished by registrants, also would assist the goal our sector shares with the Commission of ensuring more consistent and comparable reporting.

IV. Aspects of the Proposal Are Vulnerable to Legal Challenge as Exceeding the Commission's Legal Authority and Should Be Redrafted with Industry Input.

As indicated above, we are concerned that the Proposal suffers from legal flaws that will undermine the Commission's objectives by making any final rule vulnerable to challenge. Although climate-related information is important to many stakeholders, and NRF members support consistent, reliable, and useful climate-related disclosures as evidenced by NRF members' voluntary climate and sustainability reporting regimes, the Proposal would result in a mountain of information and require official reporting on prognostic judgments that arguably fall beyond what the federal securities laws require or authorize.

The SEC's rulemaking authority is limited to topics for which Congress has expressly delegated rulemaking authority.[43] Generally speaking, the SEC is charged with protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.[44] Its authority does not extend to all aspects of registrant company operations, and the Proposal may overstep the Commission's delegated authority by seeking to regulate private companies' climate and sustainability policies in a manner that exceeds traditional notions of materiality.

The Proposal explains that the Commission's statutory basis for promulgating the climate-related disclosure rules is found in "Sections 7, 10, and 19(a) of the Securities Act and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act."[45] While these provisions give the Commission broad authority to require registrants to disclose information "necessary or appropriate in the public interest or for the protection of investors," the Commission's authority under these provisions is not limitless.[46]

The Proposal's cited provisions include multiple "necessary" or "appropriate" provisions, two of which are general rulemaking provisions—Section 19(a) of the Securities Act and Section 23(a) of the Exchange Act—and several of which are specific rulemaking provisions—Sections 7(a)(1) and 10(c) of the Securities Act and Sections 12(b)(1), 13(a), and 15(d)(1) of the Exchange Act.[47] While necessary and appropriate provisions may seem quite broad, they cannot be read in isolation. These rulemaking provisions "must be read in their context and with a view to their place in the overall statutory scheme."[48] The text, context, and history of the Securities Act and Exchange Act

[43] *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 554 (D.C. Cir. 2020) (The Commission "cannot . . . act with the force of law without delegated authority from Congress."); *see also Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

[44] The Exchange Act authorizes the SEC "to facilitate the establishment of a national market system for securities" and "having due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority" to achieve this goal. 15 U.S.C. § 78k-1(a)(2).

[45] 87 Fed. Reg. at 21,462 (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, and 249).

[46] *Id.* at 21,335.

[47] 15 U.S.C. §§ 77s(a), 78w(a), 77g(a)(1), 77j(c), 78l(b)(1), 78m(a), 78o(d)(1).

[48] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (cleaned up) (noting requirement "is a fundamental canon of statutory construction").

seem to cabin the Commission's authority under these cited provisions to require the disclosure of information closely connected with the value of a registrant's securities.

It is difficult to see how the two general rulemaking provisions cited by the Proposal authorize the scope of the Proposal's required disclosures. Section 19(a) of the Securities Act empowers the Commission to "make . . . rules and regulations as may be necessary to carry out the provisions of [the Securities Act]."[49] Likewise, Section 23(a) of the Exchange Act enables the Commission "to make such rules and regulations as may be necessary or appropriate to implement the provisions of [the Exchange Act]."[50] These provisions require the Commission to identify why the rules and regulations are necessary to carry out another specific provision of the Act. As the United States Court of Appeals for the District of Columbia Circuit recently explained, these general provisions do not "empower the agency to pursue rulemaking that is not otherwise authorized[.]"[51] In other words, these general grants of authority, alone, are insufficient to provide the SEC with broad legal authority to finalize the Proposal, and the Commission has not explained why this Proposal is necessary and appropriate to carry out other provisions of the Acts.[52]

The specific rulemaking provisions cited by the Commission, when read in context, also seem to fall short of giving the Commission the authority to finalize the Proposal in its current form. For example, Section 7(a)(1) of the Securities Act, entitled "Information Required in Registration Statement," provides that a registration statement for a security must "be accompanied by the documents[] specified in Schedule A."[53] Schedule A is a detailed list of 32 required documents that reveal information about the identity of the actors involved and the financial status of the company.[54] The House report preceding the Securities Act explained that items in Schedule A "are

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[49] 15 U.S.C. § 77s(a).

[50] *Id.* § 78w(a)(1).

[51] In *New York Stock Exchange LLC*, the Court analyzed, and ultimately vacated, the SEC's Pilot Program Rule 610T promulgated under its general rulemaking authority in Exchange Act Section 23(a). *See* 962 F.3d at 556. The Court relied on the Supreme Court's decision in *Michigan v. EPA*, which made clear that the mere reference to "necessary" or "appropriate" in a statutory provision authorizing an agency to engage in rulemaking does not afford the agency authority to adopt regulations as it sees fit with respect to all matters covered by the agency's authorizing statute. *Id.*; *see also Michigan v. EPA*, 576 U.S. 743, 751 (2015) ("EPA strayed far beyond th[e] bounds [of reasonable interpretation] when it read [an "appropriate and necessary" provision] to mean that it could ignore cost when deciding whether to regulate power plants.").

[52] The statutory context of the general rulemaking provision in Section 19(a) of the Securities Act confirms this reading. The language after the general rulemaking provision in Section 19(a), which lists examples of the types of rules the Commission can promulgate under the provision, includes generating forms, detailing items included on a balance statement, and dictating methods to be followed in the preparation of accounts. 15 U.S.C. § 77s(a). These examples show that this general rulemaking power is not all-encompassing, but that Congress meant to empower the SEC to determine details necessary to fulfill specific directives in the Securities Act and Exchange Act.

[53] *Id.* § 77g(a)(1).

[54] 15 U.S.C. § 77AA. Schedule A requires, for example, that a registrant include the names and addresses of the directors, the amount of securities of the issuer held by those directors (and other key persons), and the amount of the funded debt outstanding. *Id.* §§ 77AA(4), (7) & (12).

items indispensable to any accurate judgment upon the value of a security . . . . The type of information to be disclosed is of a character comparable to that demanded by competent bankers from their borrowers[.]"[55] The SEC has also acknowledged that the items in Schedule A "are largely financial in nature and were intended to help investors assess a security's value."[56] Although Section 7(a)(1) of the Securities Act empowers the SEC to promulgate rules excluding some unnecessary Schedule A information[57] and to require additional information as "necessary or appropriate in the public interest or for the protection of investors," the Commission should not read the section to authorize the Commission to require broad disclosures on any topic of interest, like climate-related emissions and policies.[58] Rather, when this rulemaking provision is read in context, it seems that Congress gave the Commission the ability to require the disclosure of additional Schedule A-type documents, which are largely financial in nature.[59]

Similarly, Section 12(b)(1) of the Exchange Act, which provides that an application for registering a security shall contain "information, in such detail as to the issuer [and affiliated entities and persons] as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors, *in respect to the following* [categories of information]," also likely fails to provide the Commission the needed authority to finalize this particular Proposal.[60] Section 12(b)(1)'s rulemaking provision explicitly limits the Commission's power under that section to enact rules only with respect to twelve specific categories of information,[61] which do not include climate-related information. When Section 12(b)(1)'s rulemaking provision is read in the limited sense of creating rules directly related to the prescribed categories of information, it is clear that the Commission's authority under this provision to promulgate the Proposal's broad climate-related disclosures is not limitless.[62]

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[55] H.R Rep. No. 73-85, 73rd Cong., 1st Sess., 1933.

[56] SEC, *Concept Release, Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23,921, 23,921 (Apr. 22, 2016).

[57] 15 U.S.C. § 77g(a)(1) ("[T]he Commission may by rules or regulations provide that such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for protection of investors is otherwise required to be included within the registration statement.").

[58] *Id.*§ 77g(a)(1).

[59] A similar contextual analysis applies when the necessary and appropriate provision in Section 10(c) of the Securities Act, which governs a registrant's prospectus, is read in context. *Id.* § 77j(c).

[60] *Id.* § 78l(b)(1) (emphasis added).

[61] *Id.* § 78l(b)(1)(A)-(L) (The categories include the nature of the business, the terms of outstanding securities, descriptions of directors, officers, and major shareholders, material contracts, balance sheets, profit and loss statements, and other financial statements.).

[62] Similarly, Section 13(a) of the Exchange Act likely falls short of empowering the Commission to finalize the Proposal when viewed in its statutory context. Section 13(a) states:

> Every issuer of a [registered security] shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate

When the cited rulemaking provisions in the Securities Act and Exchange Act are read in context, as they must be, the provisions are circumscribed more than the Proposal seems to acknowledge—they are best read to empower the SEC to require disclosures of specific financial-related information to give investors a true picture of the securities on the market. The cited provisions have not clearly authorized the Commission to promulgate regulations requiring registrants to make the broad disclosures envisioned by the Proposal like information regarding costs incurred addressing past weather events or incomparable assessments of future events and policies that are neither concrete nor certain. Nor have they clearly authorized the Commission to require the disclosure of information that is not material to investment decisions.

This limited reading of the cited provisions makes sense. Congress has repeatedly disapproved of the complexity and breadth of the disclosure burdens on registrants and has commanded the Commission to simplify, not vastly increase, the disclosure burdens on registrants.[63] It is also more Consistent with the Commission's prior interpretation of its authority regarding environmental disclosures, which focused on environmental information and liabilities that materially affect the financial health of a company.[64]

The cited provisions are best understood to empower the Commission to require disclosures related to the financial health of a registrant and to give investors a true picture of the securities on

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> for the proper protection of investors and to insure fair dealing in the security—
>
> > (1) such information . . . the Commission shall require to keep reasonably current the information [supplied to register securities under Section 12 of the Exchange Act]
> >
> > (2) such annual reports . . . certified if required . . . by independent public accountants, and such quarterly reports . . . as the Commission may prescribe.

Id. § 78m(a)(1)-(2). Section 13(b)(1) clarifies that the rulemaking power described in Section 13(a) is limited to subjects directly related to items indicative of financial health of the registrant, like balance sheets and earnings statements, not the granular climate information envisioned by the Proposal. *See id.* § 78m(b)(1).

[63] Fixing America's Surface Transportation Act, Pub. L. No. 114-94, §§ 72002 & 72003, 15 U.S.C. Code §§ 77g *note* & 77s *note*, 129 Stat. 1784, 1784-85 (2015) (directing the Commission to revise Regulation S-K to reduce the disclosure burden on emerging growth companies and small issuers and to conduct a study to determine "how best to modernize and simplify" the requirements in Regulation S-K "in a manner that reduces the costs and burdens on issuers while still providing all material information"); Jumpstart Our Business Startups Act of 2012 (JOBS Act), Pub. L. No. 112-106, § 108, 26 Stat. 306, 313 (2012) (requiring the Commission to review Regulation S-K to determine how it could be modernized and simplified and to reduce the costs and burdens of compliance for emerging growth companies).

[64] *See Environmental and Social Disclosure, Notice of Commission Conclusions and Rulemaking Proposal*, 40 Fed. Reg. 51,656, 51,656 (1975) ("The Commission has concluded that . . . it is generally not authorized to consider the promotion of social goals unrelated to the objectives of the federal securities laws."); *see also Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1039 (D.C. Cir. 1979) (explaining that the federal securities laws "were designed generally to require disclosure of financial information in the narrow sense only"); Release No. 33-6383, 47 Fed. Reg. 11,380 (Mar. 3, 1982); *Commission Guidance Regarding Disclosure Related to Climate Change*, Release No. 33-9106, 75 Fed. Reg. 6,290 (Feb. 8, 2010).

the market. By broadly requiring the filing of emissions data, climate risks, and other subjective factors regardless of whether and how that information specifically impacts the financial health of the registrant or the particular securities offering, the Commission has overstepped its authority.

* * *

For the reasons stated above, we respectfully request that the Commission revise the Proposal. The Commission should consider implementing the alternatives recommended by NRF. It should better address and account for the significant costs presented by the proposal and clarify why it believes the anticipated benefits justify those costs. Finally, the Commission should be careful to ensure the Proposal better adheres to its statutory authority to avoid legal vulnerabilities.

We look forward to the opportunity to discuss these issues with the Commission and its staff.

Sincerely,

Stephanie A. Martz
Chief Administrative Officer and General Counsel, National Retail Federation