



June 17, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20548-1090

Submitted Electronically via SEC Internet Comment Form

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

Dear Ms. Countryman:

The Society for Corporate Governance (“Society”) submits this letter in response to the rulemaking proposal of the Securities and Exchange Commission (the “Commission” or the “SEC”), “The Enhancement and Standardization of Climate-Related Disclosures for Investors (the “Proposing Release”).”¹

Founded in 1946, the Society is a professional membership association of more than 3,600 corporate and assistant secretaries, in-house counsel, outside counsel, and other governance professionals who serve approximately 1,600 entities, including 1,000 public companies of almost every size and industry. The Society seeks to be a positive force for responsible corporate governance through education, collaboration, and advocacy. Our organization has 75 years of experience empowering professionals to shape and advance corporate governance within their organizations, in part through providing the knowledge and tools they need to advise their boards and executive management on corporate governance, regulatory and legal developments, investor engagement, and environmental, social, and governance (“ESG”)/sustainability issues. In this context, we believe that we are well-positioned to provide constructive feedback to the Commission with respect to corporate governance and disclosure practices at companies of all sizes and across all industries, as well as the likely impacts of proposed disclosure requirements.

Introduction

The Society acknowledges that climate change is an important issue; however, as detailed in this letter, we do not believe the rule contemplated by the Proposing Release (the “Proposed Rule”) is well-calibrated to achieve the SEC’s policy objective of providing consistent, comparable, reliable, and decision-useful information to investors about climate risk. Our comments on the

¹ The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33-11042; 34-94478; File No. S7-10-22 (Mar. 21, 2022).

Proposed Rule are organized as follows.² We first discuss three threshold issues, reflecting our overarching concerns with the Proposed Rule: the SEC’s scope of authority; the improper use, and the absence in numerous instances, of a materiality standard associated with various proposed disclosures; and the extraordinary projected costs associated with implementing the Proposed Rule.³ We then share our views on specific proposed quantitative and qualitative disclosures, the proposed amendments to Regulation S-X, and the proposed assurance requirements. Finally, we discuss other considerations relating to specific aspects of the Proposed Rule, including safe harbors, phase-in periods, exemptions, and foreseeable unintended consequences.

² Like any other large group, our individual members’ views are not uniform. The Society acknowledges that some companies have articulated, or may articulate, different views from those expressed in this letter.

³ At the outset, it should be noted that the Society agrees with the investor protection, scope of authority, and other concerns raised in the [April 25, 2022, comment letter submitted by Lawrence A. Cunningham, Professor of Law, George Washington University, Corresponding Author, on Behalf of Twenty-Two Professors of Law and Finance](#). The comments we provide in this letter should be considered in addition to the fundamental issues expressed in that comment letter.

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I. Threshold Issues

A. The Proposed Rule Exceeds the SEC’s Scope of Authority

The Society agrees with those who have expressed the view that the SEC lacks the authority to promulgate the Proposed Rule.⁴ Specifically, the proposed requirements to disclose non-material climate-related metrics and qualitative information exceed the SEC’s statutory rulemaking authority. The SEC’s enabling statutes, the Securities Act of 1933 (the “Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”), authorize the SEC to promulgate rules or regulations requiring disclosure of information that it believes is “necessary or appropriate in the public interest or for the protection of investors.”⁵ In determining whether an action is necessary or appropriate in the public interest, Congress has directed the SEC to consider, in addition to the protection of investors, “whether the action will promote efficiency, competition, and capital formation.”⁶

In addition to granting the SEC’s rulemaking authority, these statutory provisions also limit that authority. The Supreme Court has “consistently held that the use of the words ‘public interest’ in a regulatory statute is not a broad license to promote the general public welfare[; r]ather, the words take meaning from the purposes of the regulatory legislation.”⁷ Thus, the SEC’s authority to issue rules “in the public interest” is not without limits and does not convey to the SEC the power to impose disclosure obligations with respect to *any* subject matter or to use the disclosure

⁴ See, e.g., Lawrence A. Cunningham, et al., *supra* note 3 (Apr. 25, 2022); Joseph A. Grundfest, *The SEC Is Heading Toward a Climate Train Wreck*, Bloomberg Law (Apr. 5, 2022); Members of the U.S. Senate, *Letter to the Honorable Gary Gensler* (April 5, 2022); SEC Commissioner Hester M. Peirce, *We are Not the Securities and Environment Commission - At Least Not Yet* (Mar. 21, 2022); Patrick Morrissey *Office of the Attorney General, on Behalf of 16 State Attorneys General* (Jun. 14, 2021). We disagree with the assertions of Professor Jill Fisch and others in their comment letter (the “Professors’ Letter”), which argues that the Proposed Rule is within the SEC’s rulemaking authority. We believe that the argument in the Professors’ Letter hinges on an assumed fact: that climate-related matters have a material effect on all companies. As the Professors’ Letter states on page 3: “Even a narrow reading of the legislative history of the original securities laws supports the Commission’s authority to pursue the [Proposed Rule] because climate-related matters impact the most important aspect of any securities transaction—the price at which investors buy or sell—and Congress was focused on valuation matters, among others, when it adopted the Securities Act in 1933.” As explained throughout this letter, we disagree with this assertion. We also disagree with the conclusion that the Proposed Rule is within the scope of the SEC’s rulemaking authority, and we explain our reasoning in this Section. See Fisch, Jill E. and Georgiev, George S. and Nagy, Donna M. and Williams, Cynthia A., *Comment Letter of Securities Law Scholars on the SEC’s Authority to Pursue Climate-Related Disclosure* (June 6, 2022). Similarly, we disagree with the argument made by Professor John Coates in his comment letter. Professor Coates posits that the Proposed Rule is within the SEC’s authority to adopt because “[t]he rule proposes disclosures of information about financial risks and opportunities that are reasonably understood as appropriate for the protection of investors.” We disagree with that premise. As we explain throughout this letter, the Proposed Rule goes beyond requiring disclosure of information that is material—or even relevant—to an understanding of a company’s business. See John C. Coates, John F. Cogan Professor of Law and Economics, Harvard Law School, *Comment Letter re: Legal Authority* (June 2, 2022).

⁵ 15 U.S.C. §§ 77g(a)(1), 78l(b)(1); see also *id.* § 78m(a) (The Commission may prescribe rules and regulations “as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security”).

⁶ *Id.* §§ 77b(b), 78c(f); see also *id.* § 78w(a)(2) (In making rules and regulations, the Commission “shall consider among other matters the impact any such rule or regulation would have on competition”). The SEC has interpreted its authority as cabined by its “core mission to promote investor protection, market efficiency and competition, and capital formation.” SEC, *Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23,916, 23,917, 23,922 n.6 & n.55 (Apr. 22, 2016).

⁷ *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

framework to achieve objectives that are unaligned with the objectives Congress has authorized the SEC to pursue. Rather, in order to define the scope of the SEC’s rulemaking authority, it is necessary to look to the purposes for which the relevant statutory schemes were adopted.

Legislative history from the enactment of the Securities Act in 1933 and the Exchange Act in 1934 reveals that Congress deliberately enumerated specific categories of information for company disclosure and did not confer on the SEC unconfined authority to elicit any information without limitation.⁸ Notably, as the Commission itself has pointed out, when Congress wishes to later expand the subject matter of mandatory disclosures beyond matters that are financial in nature, it specifically does so *by statute*, as it has done for topics such as executive compensation, corporate governance, and conflict minerals.⁹

Furthermore, the U.S. Supreme Court has held that a federal agency’s exercise of regulatory authority over a major policy question of great economic and political importance requires a clear delegation of authority by Congress.¹⁰ Here, no such statute exists directing the SEC to adopt rules requiring disclosure of climate-related information and, in particular, climate-related information without regard for its relation to a company’s value and prospects for financial success.

The subject of the Proposed Rule is clearly of great economic and political importance. The Commission stated in the Proposing Release that “climate-related risks and their financial impact could negatively affect the economy as a whole and create systemic risk for the financial system.”¹¹ Climate change is an issue of significant political focus, evidenced by President Biden’s issuance in 2021 of executive orders announcing a “whole-of-government approach to the climate crisis” as well as an “immediate review of harmful rollbacks of standards that protect our air, water, and communities.”¹² Additionally, in June 2021, the House of Representatives passed a climate risk disclosure bill that would require companies to disclose climate-related risk exposure and risk management strategies.¹³ However, notwithstanding these efforts, the fact remains that Congress has not specifically delegated authority to the SEC to mandate climate-related disclosures.

Not only is there a lack of Congressional delegation of authority to the SEC over climate disclosure, lawmakers have affirmatively mandated environmental reporting requirements with

⁸ H.R. Rep. No. 73-1383 at 23 (1934); *see also* H.R. Rep. No. 73-85 at 7 (1933) (“[T]he bill requires enumerated definite statements” from reporting companies, but it does not confer “general power to require such information as the Commission might deem advisable,” which “would lead to evasions, laxities, and powerful demands for administrative discriminations”).

⁹ *See* SEC, *Business and Financial Disclosure*, 81 Fed. Reg. at 23,922 (citing the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)); *id.* at 23,969-70 (discussing congressional mandates for new disclosure requirements related to specific public policy concerns and environmental matters).

¹⁰ *Alabama Assn. of Realtors v. Dep’t of Health and Human Servs.*, 141 S.Ct. 2485, 2489, (2021) (*per curiam*) (“We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance.” (internal quotation marks omitted)); *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022).

¹¹ Proposing Release at 10-11.

¹² The White House, *Fact Sheet: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government* (Jan. 27, 2021).

¹³ *See* Climate Risk Disclosure Act of 2021, H.R. 1187, 117th Cong. § 402(8) (2021). The last action on the bill was passage in the House on June 16, 2021, by the Yeas and Nays: 215 – 214.

specificity to a different agency.¹⁴ Congress authorized the Environmental Protection Agency (the “EPA”) to collect reports from emission sources and make them available to the public, and the EPA implemented an annual Greenhouse Gas Reporting Program.¹⁵ As part of this program, the EPA mandates public disclosure of greenhouse gas (“GHG”) emissions. The SEC lacks the same statutory authority.

In 2016, the SEC itself affirmed that mandatory environmental and social disclosures should be supported either by materiality or by a separate legislative act,¹⁶ stating that “The Commission ... has determined in the past that disclosure relating to environmental and other matters of social concern should not be required of all registrants unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material.”¹⁷ Again, no such congressional mandate exists. Absent express authorization by Congress, we believe that the SEC fundamentally lacks the authority to promulgate the Proposed Rule, which also deviates meaningfully from the SEC’s longstanding materiality framework, as further discussed below.

B. The “Materiality” Standards Underlying the Proposed Rule, as well as the Lack of Materiality Thresholds in Many Disclosure Requirements, Depart from Governing Law and the SEC’s Investor Protection Objective

1. The Proposed Rule Deviates from the Longstanding Definition of Materiality

a. Materiality Applies to Investment and Voting Decisions Relating to a Particular Company, Not a Portfolio of Companies

The Proposed Rule deviates in numerous—and significant—ways from the longstanding definition of materiality under the U.S. securities laws and Supreme Court precedent. In *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) (“*TSC Industries*”), the Supreme Court set forth the now bedrock definition of materiality—information is material if there is a substantial likelihood that a reasonable investor would consider it important in deciding how to vote or make an investment decision. The Supreme Court reiterated this materiality standard in 1988 in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), stating that materiality exists if there is “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”¹⁸ A critical aspect of this definition is that it focuses on whether information is important in the context of a reasonable investor’s voting or investment determination *with respect to a particular company*, and not on whether the information may be useful to an investor for other reasons.

¹⁴ 42 U.S.C. §§ 7414, 7542.

¹⁵ 74 Fed. Reg. 209, 56,264, 56,265; *see also id.*

¹⁶ SEC, *Business and Financial Disclosure*, 81 Fed. Reg. at 23,970 & n.663, 687.

¹⁷ *Id.* at 915 (cross-referencing the SEC’s Environmental and Social Disclosure, Release No. 33-5627 (Oct. 14, 1975), 40 Fed. Reg. 51656 (Nov. 6, 1975)). This statement is a summary of the conclusion made by the SEC in 1975, which the SEC was reevaluating in 2016 as part of its request for input on whether environmental and social disclosures are important to investors’ voting and investment decisions.

¹⁸ *Basic Inc. v. Levinson*, 485 U.S. 224, 232-33, 108 S.Ct. 978, 983 (1988).

While the Proposed Rule cites to *TSC Industries* and articulates that the SEC’s approach to materiality has not changed, it is evident that the Proposed Rule departs significantly from this well-established definition of materiality, which underpins the U.S. securities disclosure regime. Instead of relying on the time-honored approach to materiality, which focuses on the reasonable investor’s assessment of the securities of a particular company, the Proposing Release focuses selectively on information it believes institutional or other large investors may be seeking to assess risks across their vast portfolios, or even across their firms. In particular, the Commission notes in the Proposing Release that the SEC “do[es] not necessarily consider risk and return of a particular security in isolation but also in terms of the security’s effect on the portfolio as a whole . . .”¹⁹ This portfolio or “whole firm” view, which is reiterated throughout the Proposing Release, departs widely from the longstanding legal concept of materiality.²⁰

An institutional investor may consider any number of risks to be relevant to its investment portfolio in the aggregate. For example, information regarding wildfire risk and preparedness may be relevant on an aggregate level across a portfolio but may not be relevant or material to an individual company. However, this fact does not—and should not—lead the Commission to require companies in the investor’s portfolio to disclose immaterial risks in order to enable the institutional investor to balance risks and other attributes across its entire unique portfolio. It is not appropriate for individual companies—and their other shareholders—to be burdened with subsidizing costs related to certain institutional investors’ discrete portfolio preferences and objectives and business interests.

¹⁹ Proposing Release at 9. A portfolio view and company-specific view are likely to vary substantially. As of February 2022, for example, the five largest investment management companies based on the number of funds (assets under management, or AUM) under their control, were BlackRock (\$9.464 trillion), The Vanguard Group (\$8.4 trillion), UBS Group (\$4.432 trillion), Fidelity (\$4.23 trillion), and State Street Global Advisors (\$3.86 trillion). See the balance, [The 10 Largest Investment Management Companies Worldwide](#) (Feb. 13, 2022). We also note that regardless of a portfolio vs. company-specific perspective, the Proposed Rule’s disclosure requirements far exceed the climate-related information sought by most institutional investors and, in the case of Scope 3 GHG emissions in particular, according to CalSTRS, are deliberately being excluded by institutional investors from consideration on any basis due to the unreliability of the data for decision-making purposes. See *infra* Section I.B.1.c and note 33.

²⁰ See, e.g., Proposing Release at 24 (“Several major institutional investors, which collectively have trillions of dollars in investments under management, have demanded climate-related information from the companies in which they invest because of their assessment of climate change as a risk to their portfolios, and to investments generally, and also to satisfy investor interest in investments that are considered ‘sustainable’”); *id.* at 127 (“Separate disclosure of climate-related risks could help to provide investors with information to help them more effectively evaluate their portfolio risk”); *id.* at 158 (“These investors and financial institutions are working to reduce the GHG emissions of companies in their portfolios or of their counterparties and need GHG emissions data to evaluate the progress made regarding their net-zero commitments and to assess any associated potential asset devaluation or loan default risks”); *id.* at 171 n.464, 381 (noting that the “investments” category of proposed 17 CFR 229.1500(r) would require disclosure of “financed emissions”, which include “emissions generated by companies in which a financial institution invests or to which it otherwise has exposure”); *id.* at 165 (“As many financial institutions and investors begin to set their own GHG emissions reduction goals, they may consider the total GHG emissions footprint of companies that they finance or invest in to build portfolios to meet their goals”); *id.* at 337-38 (“In particular, the enhanced disclosures may yield further benefits for the disclosures of financial firms. Because financial firms can have significant exposures to climate-related risks through their portfolio companies, any enhancements in the portfolio companies’ disclosures can subsequently be leveraged by these financial firms in assessing the risks to their portfolios and to the firm as a whole”).

b. The Proposed Rule Focuses Predominantly on Institutional Investors, Marginalizing the Interests of Retail Investors

While the “reasonable investor” standard applies both to institutional and retail shareholders alike, the Proposing Release curiously focuses almost entirely on institutional investors. In our members’ experience, retail investors, who are referenced just once in the approximately 500-page Proposing Release,²¹ generally do not seek the detailed information that would be required by the Proposed Rule, including in financial statements. Rather, retail investors typically focus on and prioritize information that bears directly on the expected rate of financial return on their hard-earned investments within a time frame that can benefit them personally.²² While we do not believe that investor interest or the lack thereof, either relative to other factors or on a standalone basis, is dispositive of materiality, we note that according to a recent Gallup poll of 953 U.S. adult retail investors, most individual investors prioritized the expected rate of return and risk for potential losses over ESG issues when selecting investments:²³

Amount U.S. Investors Research Factors Before Investing

How much do you research or think about each of the following when choosing which companies or funds you invest in?

	A lot	A fair amount	Total
	%	%	%
Expected rate of return	31	47	78
Risk for potential losses	31	43	74
Corporate governance policies (board of directors, executive pay, business ethics, etc.)	11	30	41
Social values advocated by company leadership	13	25	38
Environmental record or impact of the companies	12	23	35

Nov. 1-7, 2021; U.S. investors are adults with \$10,000 or more invested in stocks, bonds or mutual funds

GALLUP

Consistent with prioritizing financial returns in their investment decision-making, respondents ranked the principles of financial responsibility and security much higher than personal values,

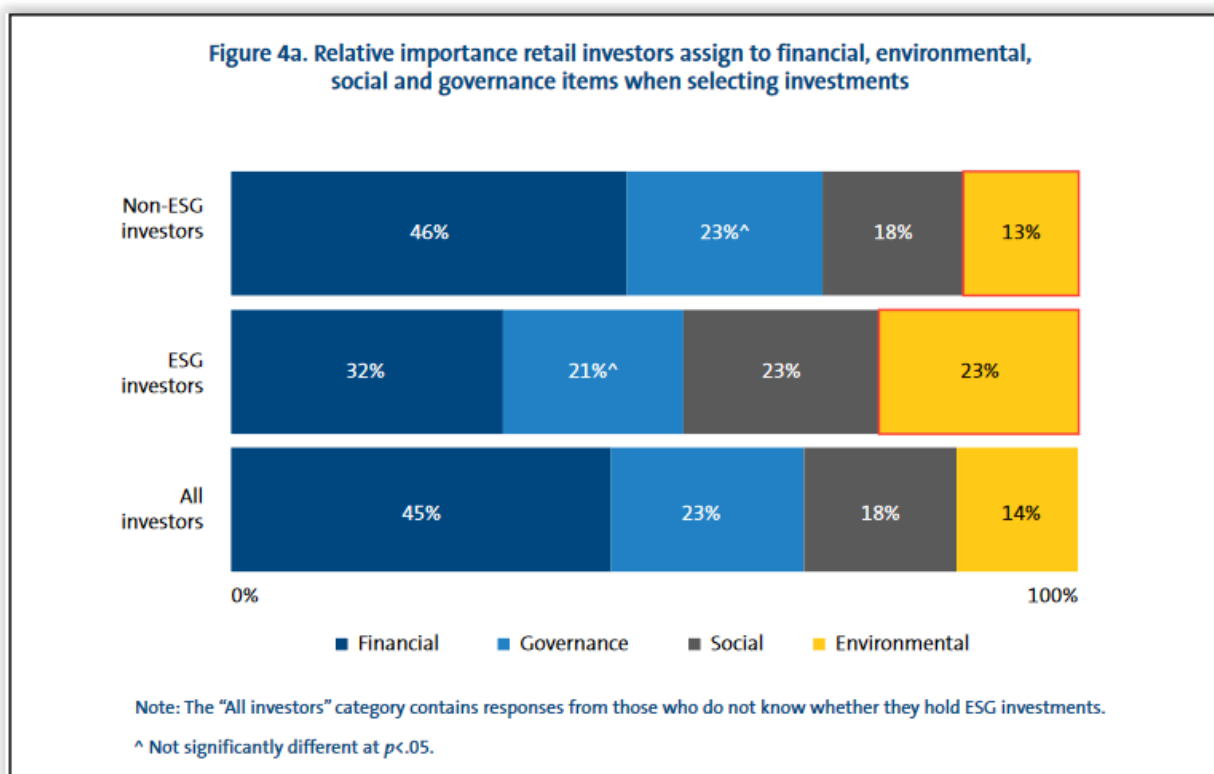
²¹ See Proposing Release at 371 for the sole reference to retail investors in the body of the release. The reference is made in the context of the Proposed Rule’s XBRL requirement.

²² We note the Commission’s website includes a specific focus on the retail investor. (“PROTECTING INVESTORS. Our focus on Main Street investors reflects the fact that American households own \$38 trillion worth of equities — more than 59 percent of the U.S. equity market — either directly or indirectly through mutual funds, retirement accounts and other investments.”) See SEC.gov/about/what-we-do (last visited June 5, 2022).

²³ See Gallup, *Where U.S. Investors Stand on ESG Investing* (Feb. 23, 2022) (“The poll also measured investors’ attention to each aspect of ESG investing – asking investors how much they research or think about a company’s performance on environmental, social and corporate governance matters -- along with their attention to a stock’s potential earnings and risk. The potentials for profit and loss emerge as investors’ main concerns when choosing stock.”); Gallup, *Gallup Investor and Retirement Optimism Index* 3 (Dec. 3, 2021).

with, for example, 92% identifying “not spending more than you earn” and 83% each identifying “putting money away for a rainy day” and “earning and saving as much as possible to achieve financial freedom,” as extremely or very important to them, compared to just 50% characterizing as important or very important “requiring that companies you invest in are aligned with your values” and 41% characterizing as important or very important “requiring that companies you invest in have a positive societal impact.”²⁴ Gallup observes: “In other words, requiring one’s investments to match their values or using them to achieve societal goals are important to a segment of investors, but they do not rise to the level of universal beliefs that investors hold about handling their money.”²⁵

As another example, a recent survey of 1,228 retail investors conducted by NORC at the University of Chicago, an independent, non-partisan research institution, and the FINRA Investor Education Foundation, found that investors prioritize their return on investment and other financial factors/considerations in their investment decision-making more than any other factor.²⁶ According to this study, retail investors, in the aggregate, identified environmental aspects of a potential investment as the least important consideration compared to financial, governance, and social factors.²⁷



²⁴ Gallup, *Gallup Investor and Retirement Optimism Index*, *supra* note **Error! Bookmark not defined.**, at 2.

²⁵ Gallup, *Where U.S. Investors Stand on ESG Investing*, *supra* note 23.

²⁶ FINRA Investor Education Foundation & NORC at the University of Chicago, *Investors say they can change the world, if they only knew how: Six things to know about ESG and retail investors* (Mar. 2022).

²⁷ *Id.*

While retail *ESG investors* ranked environmental factors higher than non-ESG investors, financial factors/considerations led in importance by a wide margin overall (even among ESG investors), as illustrated by the above graphic.²⁸

The Society acknowledges a recent news release by Public Citizen regarding the results of a retail investor survey conducted on its behalf and reportedly submitted to the SEC in response to and in support of the Proposed Rule.²⁹ However, contrary to the stated conclusion in that report, the survey results do not support the position that retail investors demand more climate-related information in companies' SEC filings, and certainly not the detailed disclosures that would be required under the Proposed Rule. The release's leading survey "finding"—that "**seventy percent of investors** support the Securities and Exchange Commission (SEC) requiring all public corporations to disclose standardized information about their financial risks due to climate change"—and other reported "findings," are generally based on flawed questions and misleading calculation methodologies, as detailed in Appendix A-1.

It should also be noted that retail investor support for shareholder proposals on environmental and social issues has historically been, and continues to be, significantly lower than the level of institutional investor support for such proposals, notwithstanding the fact that institutional investors are investing money on behalf of others—namely, end-investors whose investing priorities typically align with the average retail investor.³⁰

The Proposing Release inappropriately ignores retail investors in its analysis and makes no attempt to include them in any discussion regarding the purported materiality of the disclosures that would be mandated by the Proposed Rule. The Proposed Rule's disclosure requirements would require companies to generate voluminous disclosures that are not material to the company or to its investors under traditional materiality standards, and that would be impossible for the majority of retail investors (who generally lack the resources and data processing capabilities of institutional investors) to process. This places an unnecessary burden on companies to undertake costly data collection and analysis, which costs will ultimately be passed on to investors.

c. The Proposed Rule Would Require Significantly More Information than a Reasonable Investor Seeks

Even institutional investors do not seek the granularity of information from companies that the Proposed Rule would require. Based on a recent survey of the Society's issuer members, notwithstanding the fact that a majority of respondents represented mega- and large-cap companies, one-third or less of the 171 respondents indicated that their companies' shareholders have *engaged with them on or requested* information on one or more of the following climate-

²⁸ *Id.* at 5.

²⁹ Public Citizen, *Survey Reveals Retail Investors Want SEC to Require Climate Disclosure* (Apr. 29, 2022); Public Citizen, *Results of a Nationwide Survey: Retail Investors' Support for the SEC Mandating Climate-Related Financial Disclosures from Public Companies* (Apr. 28, 2022).

³⁰ See, e.g., PwC/Broadridge, *Proxy Pulse: 2022 Proxy Season Preview* 8 (Feb. 2022) ("In fact, institutional investors were more than twice as likely as retail investors to support environmental and social proposals. Only 18% of votes by retail shareholders were cast in favor of environmental and social proposals. The gap between these two segments continues to widen.").

related metrics or information, the disclosure of which would be mandated by the Proposed Rule.³¹

- Who in management is responsible for climate risk assessment and management (*e.g.*, certain management positions or committees) **(33%)**
- The frequency of management’s reporting to the board/committee on climate risks **(33%)**
- The frequency of the board’s discussion of climate risks **(31%)**
- Climate-related risks over the short, medium, and long term and how the company defines short-, medium- and long-term horizons **(26%)**
- The process by which management who are responsible for climate risk assessment and management are informed and monitor climate risks **(16%)**
- Detailed information about scenario analyses, including, *e.g.*, the scenarios considered (*e.g.*, an increase of no greater than 3°, 2°, or 1.5°C above pre-industrial levels), as well as the parameters, assumptions and analytical choices, and the projected principal financial impacts on the company’s business strategy under each scenario **(16%)**
- Whether any directors have expertise in climate-related risks, including supporting information to fully describe the nature of the expertise **(15%)**
- The relevant expertise of those in management who are responsible for climate risk assessment and management, including supporting information to fully describe the nature of the expertise **(4%)**
- Disclosure of Scope 1, 2, and 3 GHG emissions in a manner different than GHG Protocol (if the company discloses in accordance with GHG Protocol) **(4%)**
- Financial statement disclosure under these categories of financial statement metrics: (i) financial impact metrics, (ii) expenditure metrics and (iii) financial estimates and assumptions, along with contextual information, describing how each specified metric was derived, including a description of significant inputs and assumptions used, and if applicable, policy decisions made by the company to calculate such metrics **(4%)**
- Location of properties subject to material physical climate-related risks by ZIP or similar postal code **(3%)**
- Breakdown of GHG emissions into constituent GHGs **(1%)**

Scope 3 GHG emissions disclosures, which are further discussed in Section II.A, provide a poignant example of one of the Proposed Rule’s disclosure requirements that would impose enormous burdens on issuers without a corresponding demand from investors to justify the imposition. While 44% of respondents to the Society Investor Priority Survey overall indicated that their institutional or retail shareholders have engaged with them or requested information on Scope 3 GHG emissions, that response rate reflects significant differences across company industries and sizes, with, for example, 67% of respondents representing companies in the Energy industry identifying Scope 3 emissions as a topic of engagement versus just 27% of companies in the Healthcare/Pharma industry, and 64% of large-cap companies compared to just

³¹ Society for Corporate Governance survey: *Climate: Investor Priorities* (April/May 2022), hereinafter Society Investor Priorities Survey (on file with author). Respondent demographics consisted of approximately 53% mega- and large-caps (\$10 billion or larger market cap); 33% mid-caps (\$300 million to \$2 billion market cap); and 13% small- and micro-caps (less than \$300 million), across a wide variety of industries with the top six industries represented being Manufacturing – Industrial (15%), Banking/Finance (12%), Energy (12%), Retail/Wholesale (10%), Healthcare/Pharma (7%), and Technology (7%).

29% of mid-caps and only 5% of small-caps. This example is merely illustrative of the meaningful differences in results across company industries and sizes. In fact, looking solely at small-cap companies, no metric listed above garnered more than an 18% response rate (and this was the highest rate reported for any metric among small-cap company respondents by a wide margin).

Notably, according to Georgeson’s 2022 annual institutional investor survey, 85% of respondents said that they will not vote against a company even if the company lacks an ambitious scope 3 disclosure or target, and no respondents stated that if a company does not disclose Scope 3 emissions, it would result in a blanket policy vote against the company, including a company’s committee chair, chairman, or slate of directors.”³² These findings are consistent with a recent statement from one of the largest U.S. pension funds indicating that such disclosures would not be reliable due to current methodological limitations and therefore would not currently be valuable information to most investors.³³ These statistics underscore that the Proposed Rule would require significantly more information than either retail investors or institutional investors need.

We also note that, based on our public company members’ input about their engagements with their institutional investors, investors have not suggested that the current voluntary disclosure channels (*i.e.*, website disclosure or disclosure in ESG/CSR/sustainability reports) are insufficient and that disclosure of such information should instead be in reports filed with the SEC.

d. Material Information is Not Information that *Might* be Important

In addition to the foregoing concerns, the Proposed Rule employs an expansive view of materiality that the Supreme Court specifically rejected in *TSC Industries*—namely, an articulation of the definition of “material” that included facts that a reasonable shareholder “*might*” consider important.³⁴ This formulation was rejected by the Supreme Court on the basis that it provided too much room for second guessing whether omitted information could possibly have been important. Yet the Proposing Release states that the Commission is “proposing to require disclosures about climate-related risks and metrics reflecting those risks because this information *can* have an impact on public companies’ financial performance or position and *may*

³²Georgeson, *2022 Global Institutional Investor Survey* at 8 (May 2022); see e-mail from survey administrator (June 11, 2022) (on file with author) (reporting that “85% of respondents say in general they will not apply a strong voting policy regarding Scope 3 emissions disclosure or targets. However, in carbon intensive sectors, like O+G, they would expect to see at minimum, alignment with TCFD framework”).

³³ By way of example, in its recent update to the Teachers’ Retirement Board on its climate-related goals, CalSTRS stated: “Most investors are currently not measuring scope 3 emissions (supply chain and end-use emissions) of their investments. The current market consensus is that the methods of accounting for scope 3 emissions are still under debate, and any emissions data produced would likely not be reliable or useful for decision making. Because of this, staff concluded that measuring scope 3 emissions would not presently add value to our pledge implementation efforts.” See CalSTRS, *Investment Committee Item Number 3 – Open Session* at 5 (May 5, 2022); see also *infra* Section II.A.2.

³⁴ *TSC Industries, Inc. v Northway, Inc.*, 426 U.S. 438, 449 (1976) (“Precisely these dangers are presented, we think, by the definition of a material fact adopted by the Court of Appeals in this case a fact which a reasonable shareholder *might* consider important. We agree with Judge Friendly, speaking for the Court of Appeals in *Gerstle*, that the ‘might’ formulation is ‘too suggestive of mere possibility, however unlikely.’”)

be material to investors in making investment or voting decisions.”³⁵ Similarly, in discussing why the Proposed Rule requires GHG emissions information to be disclosed, the Proposing Release states that GHG data “*may* be relevant to investment or voting decisions.”³⁶ Likewise, the Proposing Release states that disclosures regarding management’s responsibility for assessing and managing climate-related risks and the nature of the expertise of such the individuals involved “*could* help [investors] to make better informed investment or voting decisions,”³⁷ without providing evidence that this additional information would be important to such decisions. This is, as the Supreme Court plainly elucidated in *TSC Industries*, *not* the definition of materiality that serves as the foundation of the U.S. securities laws.

2. Many Aspects of the Proposed Rule Require Disclosures without Regard to Materiality

The Commission proposes to mandate certain climate disclosures for all companies without regard for materiality. This approach is likely to lead to an abundance of disclosures from companies in their SEC filings of information that is not material under the SEC’s longstanding definition, overwhelming investors with irrelevant—if not counterproductive—information, while imposing outsized costs on public companies and, by extension, their shareholders.³⁸

For example, the Proposed Rule imposes extensive disclosure requirements on registrants—without regard to materiality—to describe *any* actual and potential impacts of their material climate-related risks, and on registrants that utilize carbon offsets or renewable energy credits, maintain internal carbon prices, conduct scenario analyses, or have adopted climate-related targets or goals. If such climate-related strategies are material to the registrant’s business or relate to material risks, they are already disclosable under existing rules.³⁹ Among other things, Item 101 of Regulation S-K requires disclosure of the general business development of the registrant, including any material changes to a previously disclosed business strategy. Item 303 of Regulation S-K requires, among other disclosures, disclosure of known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. Item 105(a) of Regulation S-K requires the disclosure of “material factors that make an investment in the registrant or the offering speculative or risky.” These existing rules are designed to elicit *material* information about the business of registrants. Requiring immaterial details about a registrant’s business will not provide useful information to investors; it will only obscure material disclosures and serve to increase public companies’ costs and burdens.

³⁵ Proposing Release at 7 (emphasis added); *see also id.* at 443-44 (“Information about climate-related risks *can* have an impact on public companies’ financial performance or position and *may* be material to investors in making investment or voting decisions.”) (emphasis added).

³⁶ *Id.* at 147 (emphasis added).

³⁷ *Id.* at 96 (emphasis added).

³⁸ As discussed in the Proposing Release, a significant percentage of larger companies voluntarily disclose ESG-related information in sustainability or similar reports to appeal to a wide variety of stakeholders. However, as revealed by the SEC’s Division of Corporation Finance climate comment letter “campaign,” discussed further below and at note 42, voluntary disclosure in a sustainability or similar report does not make such information material for securities law purposes. *See* Proposing Release at note 5.

³⁹ *See Commission Guidance Regarding Disclosure Related to Climate Change* 12-15 (Feb. 2010).

Additionally, the Proposed Rule would require the disclosure and associated third-party attestation of Scope 1 and 2 GHG emissions without regard to the materiality of such emissions to a company or its shareholders. While an institutional investor may have various reasons to track Scope 1 and 2 GHG emissions data across its portfolio (including non-investment related reasons such as satisfying its own GHG emissions reporting requirements), the SEC’s disclosure requirements should remain focused on the materiality of the information to a reasonable investor’s investment or voting decision for a particular company.⁴⁰ The fact that the largest institutional investors’ voting and stewardship policies emphasize a company-specific materiality standard reinforces that concept’s importance in their voting and investment decision-making.⁴¹

Following the issuance of its climate change disclosure guidance in September 2021, the SEC Division of Corporation Finance has pressed a number of registrants on the materiality analysis conducted with respect to their climate-related disclosures.⁴² As noted by Audit Analytics, which

⁴⁰ See *infra* Section I.C. As one point of reference, BlackRock focuses its climate stewardship efforts on its “Climate Focus Universe,” which consists of approximately 1,000 “carbon-intensive public companies” *worldwide* that reportedly represent nearly 90% of the global scope 1 and 2 greenhouse gas (GHG) emissions of its clients’ public equity holdings. See BlackRock Investment Stewardship, *Climate Focus Universe* (2022).

⁴¹ See, e.g., BlackRock, *Proxy voting guidelines for U.S. securities* at 3 (Jan. 2022) (“Disclosure of *material issues* that affect *the company’s* long-term strategy and value creation, including material ESG factors, is essential for shareholders to be able to appropriately understand and assess how effectively the board is identifying, managing, and mitigating risks.” (emphasis added)); Legal & General Investment Management, *Corporate Governance & Responsible Investment Policy 2022* at 38 (Apr. 2022) (“LGIM focuses on the *material issues* that can impact a *company’s* long-term sustainability, both financially and reputationally.” (emphasis added)); Legal & General Investment Management, *ESG Engagement Policy* at 5 (2020) (“Identify the *most material* ESG issues. Following identification of the long-term themes and the building of a long-term strategy, we narrow our focus to *material and specific ESG issues* that we believe may impact long-term returns for our clients.” (emphasis added)); State Street Global Advisors, *Global Proxy Voting and Engagement Guidelines for E&S Issues* at 2 (Mar. 2022) (“While we believe that sustainability-related factors can expose potential investment risks as well as drive long-term value creation, the *materiality of specific sustainability issues varies from industry to industry and company by company*. With this in mind, we leveraged several distinct frameworks as well as additional resources to inform our views on the *materiality* of a sustainability issue *at a given company*, including...” (emphasis added)); T. Rowe Price, *Proxy Voting Guidelines* at 13 (Oct. 2021) (“Voting Decision Elements. The following table details the specific considerations that we take into account when assessing resolutions. Framing Question: 1: Does the resolution address an environmental or social issue that is *material for this company*? In our view, *materiality is a key consideration because it is suboptimal to distract the company and its board with resolutions on issues that are not financially material*. To determine materiality, we use frameworks specifically designed for that purpose: the SASB and our proprietary Responsible Investment Indicator Model (RIIM).” (emphasis added)); Vanguard, *Stewardship Insights: How we evaluate Say on Climate proposals* at 2 (May 2021) (In explaining its approach to “Say on climate” proposals, Vanguard noted the importance of materiality: “*Where climate change is a material risk for companies*, we expect boards to disclose those risks along with the company’s climate strategy and progress on goals. . . We evaluate Say on Climate proposals through a *lens of materiality* and consider a wide range of criteria in our analysis, including the reasonableness of the request, whether the proposal addresses a gap in disclosure, and its alignment with industry standards.” (emphasis added)); Vanguard, *Vanguard’s approach to climate change* (Apr. 2022) (“*For companies where climate risk is a material risk*, this includes effective oversight of climate risk at the board level, risk mitigation targets that are aligned with the Paris Agreement, and disclosure of progress against those risk mitigation targets.” (emphasis added)); PJT Camberview, *Engaging with Vanguard* (May 9, 2022) (On the topic of climate risk, *where it is material*, what we are looking for is clarity on the board’s assessment of the risks and opportunities the company faces, a well-disclosed plan or strategy that’s set in the context of the Paris agreement to address those risks and updates on progress against that plan over time. That is what we believe is in the best interests of shareholders.” (emphasis added)).

⁴² See SEC Div. of Corp. Fin., *Sample Letter to Companies Regarding Climate Change Disclosures* (Sept. 2021); see also, e.g., all Form 10-K climate-related comment letter exchanges from January 1, 2022 through May 8, 2022,

analyzed the initial climate-related comment letters to issuers from division staff, after several rounds of comments, “the general response from companies was that climate related disclosures—whether quantitative or qualitative—were not material.”⁴³ For example, the majority of comment letters asked specific questions about the physical effects of climate change on the issuers’ business and operations, including requests to quantify any material increased compliance costs related to climate change. Issuers’ responses to staff, which were thoughtful, robust and diplomatic, shared the common theme of well-supported explanations and determinations that none of the enumerated or reasonably foreseeable climate-related risks or associated expenses were material to the issuer or its investors. To the extent issuers identified specific climate-related risks and compliance costs generally in their responses, nearly universally, issuers explained how and why they had determined that any increase in compliance costs and the effects of climate change on their operations were not material to their overall financial results. Subsequent comment letter exchanges were comparable, *i.e.*, after extensive responses from companies supporting their non-materiality determinations (and thus, the lack of Form 10-K disclosure), division staff issued standard closure letters reminding issuers of their obligations under the securities laws for accurate and adequate disclosures. The staff’s repeated acceptance of companies’ explanations underscores the appropriateness of limiting disclosures in

between the SEC Division of Corporation Finance and these companies: (i) Amazon.com, Inc. regarding its Form 10-K for Fiscal Year Ended December 31, 2020, File No. 000-22513; (ii) Old Dominion Freight Line, Inc. regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 000-19582; (iii) Southern Copper Corporation regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-14066; (iv) General Dynamics Corporation regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-03671; (v) Abbott Laboratories regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-02189; (vi) Comcast Corporation regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-32871; (vii) EOG Resources, Inc. regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-09743; (viii) The Hershey Company regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-00183; (ix) Stanley Black & Decker, Inc. regarding its Form 10-K for the Fiscal Year Ended December 31, 2021, File No. 001-05224; (x) Starbucks Corporation regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 000-20322; (xi) Royal Caribbean Cruises Ltd. regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-11884; (xii) D.R. Horton, Inc. regarding its Form 10-K for the Fiscal Year Ended September 30, 2020, File No. 001-14122; (xiii) Meta Platforms, Inc. regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-35551; (xiv) The Progressive Corporation regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-09518; (xv) Target Corporation regarding its Form 10-K for the Fiscal Year Ended January 30, 2021, File No. 001-06049; (xvi) Union Pacific Corporation regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-06075; (xvii) Cisco Systems, Inc. regarding its Form 10-K for the Fiscal Year Ended July 31, 2021, File No. 001-39940; (xviii) The Charles Schwab Corporation regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-09700; (xix) Under Armour, Inc. regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-33202; (xx) Discover Financial Services regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-33378; (xxi) Steel Dynamics, Inc. regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 000-21719; (xxii) Las Vegas Sands Corp. regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-32373; (xxiii) Palo Alto Networks, Inc. regarding its Form 10-K for the Fiscal Year Ended July 31, 2021, File No. 001-35594; (xxiv) Dominion Energy, Inc. regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-08489; (xxv) Monster Beverage Corporation regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-18761; (xxvi) Cintas Corporation regarding its Form 10-K for the Fiscal Year Ended May 31, 2021, File No. 000-11399; (xxvii) Matson, Inc., regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-34187.

⁴³ See Audit Analytics, [The SEC Focuses on Climate Change in Latest Round of Comment Letters](#) (Feb. 24, 2022); The SEC Institute Blog, [A Climate Change Comment Letter](#) (Feb. 16, 2022); The SEC Institute Blog, [SEC Comments and Responses – Physical Effects of Climate Change](#) (Mar. 15, 2022).

SEC filings to climate-related information that the company and its management deem to be material to the company.

The Proposing Release references an increase in climate-related shareholder proposals in conjunction with investors' growing demand for such information (without regard to whether investors are demanding the granularity of disclosures that would be required under the Proposed Rule, as referenced above). This increase, however, is attributable at least in part to the SEC's policy shift in November 2021, reflected in Staff Legal Bulletin No. 14L ("SLB 14L"), which rescinded the longstanding company-specific approach to Rule 14a-8's "ordinary business" exception and replaced it with a "broad societal impact" approach.⁴⁴ Furthermore, an increase in the number of climate-related shareholder proposals is not a sound metric for gauging broad investor demand, since the top 10 proponents (generally groups or individuals who hold a nominal amount of shares for the purpose of driving special interest agendas) typically account for more than two-thirds of shareholder proposals submitted to S&P Composite 1500 companies in recent years.⁴⁵ Indeed, it is somewhat telling that these shareholder proposals rarely gain majority support when voted on at companies.⁴⁶

⁴⁴ Proposing Release at 322; *see also* SEC Div. of Corp. Fin., *Staff Legal Bulletin No. 14L* (Nov. 3, 2021).

⁴⁵ *See* Lawrence A. Cunningham et al., *supra* note 3, at 7 (citing shareholder proposal data reported by Gibson Dunn & Crutcher, and noting – among other things – that the “lion’s share of climate change proposals” in 2020 and 2021 were filed by shareholder advocacy group As You Sow, whose stated aim is to “promote environmental and social corporate responsibility”). *See also* As You Sow, *2020 Strategic Plan: A Sustainable World For All*, available at <https://www.asyousow.org/2020-strategic-plan> (last visited June 2, 2022)

⁴⁶ *See e.g.*, BlackRock, *2022 climate related shareholder proposals more prescriptive than 2021* at 3 (May 2022) (explaining the basis for its expected reduced support for climate-related shareholder proposals this proxy season, as inconsistent with its clients' long-term financial interests: “In the U.S., the Securities and Exchange Commission revised guidance on shareholder proposals, and broadened the scope of permissible proposals that address “significant social policy issues.” This has resulted in a marked increase in environmental and social shareholder proposals of varying quality coming to a vote. Our early assessment is that many of the proposals coming to a vote are more prescriptive and constraining on management than those on which we voted in the past year.”); Cydney Posner, *Is some investor support for climate-related shareholder proposals declining?* (May 18, 2022) (“As framed by BIS, climate-related shareholder proposals submitted in 2021 focused on ‘material business risks’ or requested reports providing information that would be useful to investors to help them assess a company’s ‘ability to generate durable long-term value.’ However, BIS views many of the proposals submitted in 2022 to be “more prescriptive and constraining on management than those on which [BIS] voted in the past year,” and less likely to promote long-term shareholder value. Why more prescriptive this year? BIS apparently attributes the change to Staff Legal Bulletin 14L, new SEC staff guidance on shareholder proposals, which BIS maintains ‘broadened the scope of permissible proposals that address ‘significant social policy issues,’ [resulting] in a marked increase in environmental and social shareholder proposals of varying quality coming to a vote.”); Manhattan Institute, *Proxy Monitor 2022 Voting Results: Mid-Season Review* (May 19, 2022) (“The reason for this uptick in the number of shareholder proposals is almost certainly the SEC’s announced staff decision in November to jettison longstanding guidance that socially oriented shareholder proposals had to be material to a company’s business to be placed on proxy ballots.”); As You Sow, *Proxy Preview 2022* 4-5 (Mar. 2022) (reporting on a “record-breaking” 529 shareholder proposals on ESG issues filed as of February 24, 2022, with climate change, corporate political influence, and human rights comprising 55% of the total); Bloomberg Law, *Shareholders Up Climate, Social Demands After SEC Policy Shift* (Apr. 4, 2022); Responsible Investor, *SEC allows firms to block just 15% of E&S proposals this year* (Apr. 12, 2022) (noting that the SEC staff had granted only 15% of no-action requests during the current proxy season as of the date of the report, as compared to 49% granted as of the same time last season and compared to the five-year record low of 43% in 2019); The Wall Street Journal, *Shareholders Push an Array of ESG Proposals* (Apr. 28, 2022) (reporting on the SEC’s role, based on its November 2021 policy shift, in the significant uptick in ESG proposals this year).

The Proposed Rule’s sharp departure from the Supreme Court’s materiality standard, as well as the imposition of costly requirements on companies to collect, measure, and analyze; establish controls for; obtain third-party attestation over; and publish data relating to climate change, at significant costs to companies and their shareholders, without regard for materiality, or even utility for a particular company, would be detrimental to both companies and investors.⁴⁷ Further, requiring disclosure of information that is not material would have the counterproductive effect highlighted in *TSC Industries* of “bury[ing] the shareholders in an avalanche of trivial information[,] a result that is hardly conducive to informed decision-making.”⁴⁸ The nonmaterial quantitative data and qualitative disclosures mandated by the Proposed Rule would not result in decision-useful information for investors; further, its prescriptive prominence relative to other matters that may be of equal or greater importance to the company may make it difficult for the average investor to discern what information is actually important for the company.⁴⁹ As such, the Proposed Rule would likely impair efficiency and capital formation.⁵⁰

3. The Proposed Rule Alters the Time Frames over Which Companies Gauge and Consider Materiality

The Proposed Rule further departs from the Commission’s well-established disclosure regime by altering the time frames over which companies must gauge and consider materiality. With respect to forward-looking disclosures, longstanding practice regarding materiality determinations calls for balancing the probability and magnitude of potential future events. As articulated in the recently revised rules for Management’s Discussion and Analysis (“MD&A”), companies are called on to disclose matters that “are reasonably likely based on management’s assessment to have a material impact on future operations.”⁵¹ The Proposed Rule’s requirement that a registrant disclose whether any climate-related risk is reasonably likely to have a material impact, including its business or consolidated financial statements, which may manifest over the short, medium, and long term, represents a clear departure from traditional materiality assessments regularly conducted by companies for securities law purposes.⁵² Hypothetical

⁴⁷ See *infra* Section I.C and Appendix A-2.

⁴⁸ *TSC Industries, Inc. v Northway, Inc.*, 426 U.S. 438, 448-449 (1976).

⁴⁹ See also *infra* Section I.B.5, “More Detailed and Lengthy Disclosure Implies Materiality and Thus May be Misleading.”

⁵⁰ See also *infra* Section VI, “Foreseeable Unintended Consequences of the Proposed Rule.”

⁵¹ Regulation S-K Item 303(a) 17 C.F.R. §229.303(a).

⁵² The SEC reiterated in its 2010 guidance on climate change disclosure the fact that time frame considerations as to assessing the impact of any particular issue are company- and facts-and-circumstances-specific. See SEC, *Commission Guidance Regarding Disclosure Related to Climate Change* 17-18 (Feb. 2010) (“The Commission has not quantified, in Item 303 or otherwise, a specific future time period that must be considered in assessing the impact of a known trend, event or uncertainty that is reasonably likely to occur. As with any other judgment required by Item 303, the necessary time period will depend on a registrant’s particular circumstances and the particular trend, event or uncertainty under consideration. For example, a registrant considering its disclosure obligation with respect to its liquidity needs would have to consider the duration of its known capital requirements and the periods over which cash flows are managed in determining the time period of its disclosure regarding future capital sources. In addition, the time horizon of a known trend, event or uncertainty may be relevant to a registrant’s assessment of the materiality of the matter and whether or not the impact is reasonably likely. As with respect to other subjects of disclosure, materiality “with respect to contingent or speculative information or events . . . ‘will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.’”). See also Society Investor Priorities Survey, *supra* note

scenarios that may occur 10-20, or 30-50, years in the future are generally properly considered immaterial until the point at which a hypothetical scenario becomes a known trend or an uncertainty reasonably likely to have a material impact on the financial results of the registrant and thus is required to be disclosed under Item 303 of Regulation S-K.⁵³

The disclosure requirements in the Proposed Rule regarding the targets and goals are very prescriptive, as well as vaguely and broadly worded. Issuers will likely have difficulty complying with these requirements for several reasons, not the least of which is that targets are often set many years out—sometimes as far as 10-20 years out—and determining annual progress with such long-term targets may not be readily ascertainable and certainly cannot be done without significant time and expense.⁵⁴ Any annual progress disclosure should be principles-based and focused on materiality. If an issuer’s progress toward a long-term target is material to an issuer, then it should provide disclosure. Notably, the proposed requirements for disclosure of GHG emissions targets exceed requirements with respect to the disclosure of either mid-term or long-term financial targets/guidance—a discrepancy for which there is no principled reason. In fact, climate-related issues may not be material when viewed through the same lens applied to all other disclosures.

When an issuer sets mid- and long-term financial targets, it is not subject to prescriptive SEC rules directing disclosure regarding how it intends to meet those targets. Additionally, in other contexts, SEC rules acknowledge that the difficulty in obtaining certain information may outweigh the need for it to be disclosed to investors. For example, when determining whether to require reconciliation of forward-looking non-GAAP measures, the SEC rules provide an exception for information that is not available without unreasonable efforts. Similarly, Rule 409 of the Securities Act and Rule 12b-21 of the Exchange Act provide relief from disclosure obligations for information that is unknown and not reasonably available to issuers. If adopted notwithstanding our concerns, the Proposed Rule’s requirement regarding targets and goals should, at a minimum, provide an exception consistent with the SEC’s previously established rules with respect to information that is not known and not available without unreasonable efforts or expense. Such an exception is particularly warranted in light of the extraordinary difficulty, if not impossibility, of forecasting 10-20 years out and detailing plans that extend that far into the future. Establishing such an exception with respect to targets and goals would still provide

and corresponding text. (Just 26% of the 171 respondents indicated that their shareholders have engaged with them on or requested information about climate-related risks over the short, medium, and long-term and how the company defines these horizons.)

⁵³ See SEC, *SEC Interpretive Release: Management’s Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures*, 54 Fed. Reg. 22,427, 22,429, Release No. 33-6835 (May 18, 1989) (“Required disclosure is based on currently known trends, events, and uncertainties that are reasonably expected to have material effects. . . . In contrast, optional forward- looking disclosure involves anticipating a future trend or event or anticipating a less predictable impact of a known event, trend or uncertainty”); see also Regulation S-K Item 303(a), 17 C.F.R. § 229.303(a).

⁵⁴ One society member whose company is in the utility space also notes the unique challenges associated with long time horizons given the rapidly evolving changes in the provision of energy including, among other matters: federal and state regulation; innovation and development in renewable energy such as wind, solar, renewable natural gas and hydrogen; and evolution of end-use technologies and appliances. All of these, and other rapidly-evolving innovation and change in the energy space, make long-term predictions exceedingly difficult, particularly within the context of securities disclosures and the associated risk of liability.

investors with additional disclosure while not shackling issuers with burdensome and unreasonable reporting obligations.

The time horizons contemplated by the Proposed Rule, though undefined, patently solicit disclosures about potential long-term risks that are conjectural and/or have a very low probability of occurring. At best, this will yield considerable disclosure that is likely not useful for most investors. More likely, these time horizons will yield confusing disclosure due to the hypothetical and long-term nature of the information provided. In either event, such information would be inherently speculative and inappropriate for inclusion in SEC filings.

4. The Proposing Release’s Suggestion That Companies Disclose Their Non-Materiality Determinations Is Inconsistent with Law and Longstanding Practice

In another deviation from securities laws and longstanding practice, the Proposing Release suggests that companies disclose their non-materiality determinations with regard to Scope 3 GHG emissions generally, and with regard to specific categories of Scope 3 GHG emissions, because the information “*may* be useful to investors to understand the basis for that determination.”⁵⁵ While a subset of institutional and portfolio investors may arguably find it useful to know why Scope 3 emissions are not material to a particular company, the fact that the Proposed Rule contemplates subjecting a company to the full complement of securities filing liability, disclosure controls and procedures, as well as potential enforcement over something that merely “*may be useful*” to investors is a staggering overreach. Asking companies to invest significant time and expense toward crafting additional disclosures to explain why Scope 3 GHG emissions are not material is not only unprecedented, but it also creates significant cost burdens for the company and diverts valuable resources away from more pertinent work streams. The SEC has not previously required this type of disclosure for other types of information or data; has not provided a compelling rationale that such disclosure is warranted; and has not attempted to explain why this type of disclosure would be warranted as to climate-related data, as distinguishable from other types of information and data (*e.g.*, financial data, other enterprise risks).

5. More Detailed and Lengthy Disclosure Implies the Materiality of That Information and Thus May be Misleading

Finally, we are concerned about the amount of information and level of detail that would be required by the Proposed Rule. It is not difficult to imagine that, if the rule is adopted as proposed, climate-related disclosure will eclipse a company’s other non-financial disclosures in terms of length and detail. Given that the proposed disclosure requirements are unlike anything companies currently report in their SEC filings—either related to climate or any other topic—a reasonable investor may conclude that the disclosure in response to the Proposed Rule is material to a company’s business even if that may not be the case. At a minimum, the prescriptive

⁵⁵ Proposing Release at 166 (“If a registrant determines that its Scope 3 emissions are not material, and therefore not subject to disclosure, it may be useful to investors to understand the basis for that determination. Further, if a registrant determines that certain categories of Scope 3 emissions are material, registrants should consider disclosing why other categories are not material.”).

information required would appear to be of outsized importance to a company compared to other matters that may have a greater impact on a company's performance. We believe this is likely not consistent with the Commission's intent. For this reason, we believe the disclosures that would be required under the Proposed Rule could mislead investors, impairing efficiency and capital formation.

C. The Proposing Release Grossly Underestimates the Extraordinary Costs to Implement the Proposed Rule

The Society believes the Commission has significantly underestimated the costs to implement the Proposed Rule in several ways. First, it incorrectly assumes that many companies are providing climate disclosure in alignment with the TCFD recommendations. It also assumes that many large companies "already measure and disclose their emissions" and, therefore, that the costs have already been incurred; again, this is not the case for most companies, which not only have never gathered or disclosed climate-related data, but also lack the "large company" resources to do so.⁵⁶ In addition, the analysis in the Proposing Release fails to take into account that the Proposed Rule would require more and different disclosure than either the TCFD recommendations or the GHG Protocol. The Proposing Release also greatly underestimates the costs that would be associated with extending existing disclosure controls and procedures and internal control over financial reporting ("ICFR") to the myriad sets of information and data that would be required to be disclosed under the Proposed Rule, expanding resources of internal audit and independent auditors to assess and regularly monitor such controls, adding internal resources and/or retaining consultants to develop the complex modeling that will inevitably be required to estimate emissions disclosures, and attestation. Finally, it fails to take into consideration the substantial difference in costs to provide disclosure in SEC filings as compared to costs associated with voluntary disclosure outside of SEC filings. These points are addressed below and are bolstered by the member-specific data included in Appendix A-2.

1. Contrary to Assertions in the Proposing Release, TCFD-Aligned Disclosure Is Not Widespread

The Proposing Release repeatedly cites to the widespread adoption of the TCFD framework as a basis for issuers' supposed reduced compliance burdens and costs associated with the Proposed Rule. Specifically, Question 53 of the Proposing Release asks whether "alignment with the TCFD framework [would] help mitigate the reporting burden for issuers and facilitate understanding of climate-related information by investors because the framework is *widely used by companies in the United States* and around the world" (emphasis added). Aside from the fact that the question includes the unjustified assumption that the TCFD framework is "widely used" (as detailed below), which is likely to taint the integrity of the responses, the answer to the question is "no" for two reasons: First, the disclosure statistics in the Proposing Release are based on the 2017 TCFD recommendations and associated implementation guidance, which is more principles-based and less prescriptive than the TCFD's updated implementation guidance

⁵⁶ By way of illustration, the SEC estimated that of the 6,220 domestic registrants during calendar year 2020 that would be subject to the Proposed Rule, approximately 50% were smaller reporting companies and 58% were non-accelerated filers. See Proposing Release at 295; see also *infra* note 72.

issued in October 2021, which supersedes the 2017 version.⁵⁷ Second, and importantly, contrary to the assertions and assumptions in the Proposing Release,⁵⁸ even using disclosure data based on the less prescriptive 2017 implementation guidance, TCFD-aligned disclosure is not “widespread,” “widely accepted,” or “widely endorsed” by companies either in the U.S. or worldwide. In fact, a minority of companies use the TCFD framework to inform their disclosure and, even among those companies that currently publish climate-related information under the TCFD framework, such disclosure is generally provided on a selective basis and/or under a “comply or explain” approach, where companies tend to focus only on the TCFD disclosure recommendations they believe are relevant to them specifically.⁵⁹

According to the TCFD’s own 2021 Status Report, which is cited numerous times throughout the Proposing Release, the 2020 disclosure rate in financial filings, annual reports, integrated reports, and sustainability reports among companies *worldwide* averaged 32% across all 11 recommended disclosures,⁶⁰ with significant variation in the prevalence and scope of disclosure across each of the 11 recommended disclosures and across industries and company sizes.⁶¹ On a *worldwide* basis, only 50% of companies reported in alignment with three or more of the 11

⁵⁷ See TCFD, *Annex: Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures* (Oct. 2021), hereinafter TCFD 2021 Implementing Guidance; TCFD, *2017 to 2021 TCFD Implementing Guidance (Annex) Summary of Changes* (Oct. 2021).

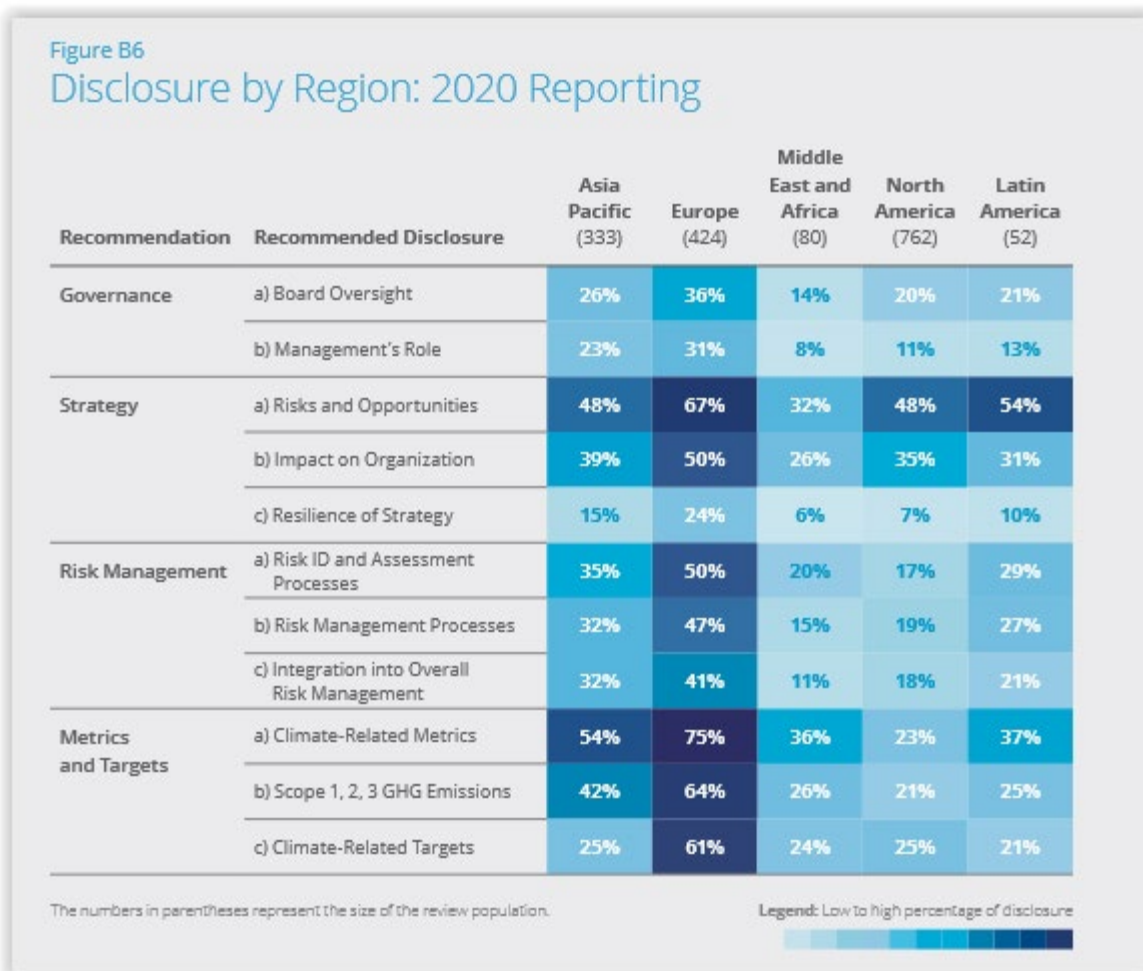
⁵⁸ In addition to its inclusion in Question 53 of the Proposing Release, the following examples are illustrative, but by no means exhaustive, of the numerous inaccurate assertions included in the Proposing Release about the use of the TCFD (*emphasis added*): “The first involves the TCFD, which has developed a climate-related reporting framework that has become *widely accepted by both registrants* and investors.” (Proposing Release at 34); “Both the TCFD and the GHG Protocol have developed concepts and a vocabulary that are *commonly used by companies* when providing climate-related disclosures in their sustainability or related reports.” (*id.*); “As discussed in greater detail below, the Commission’s Proposed Rule incorporate some of these concepts and vocabulary, which by now are *familiar to many registrants* and investors.” (*id.*); “Our proposed climate-related disclosure framework is modeled in part on the TCFD’s recommendations. A goal of the Proposed Rule is to elicit climate-related disclosures that are consistent, comparable, and reliable while also *attempting to limit the compliance burden* associated with these disclosures. The TCFD framework has been *widely accepted by issuers*, investors, and other market participants, and, accordingly, we believe that proposing rules based on the TCFD framework may facilitate achieving this balance between eliciting better disclosure *and limiting compliance costs.*” (*id.* at 34-35); “As a result, although the reporting landscape is crowded with voluntary standards that seek different information in different formats, the TCFD framework has been *widely endorsed by U.S. companies* and regulators and standard-setters around the world.” (*id.* at 37); “Building on the TCFD framework should enable companies to leverage the framework with which *many investors and issuers* are already familiar, which should help to *mitigate both the compliance burden for issuers* and any burdens faced by investors in analyzing and comparing the new proposed disclosures.” (*id.* at 46); “Commenters provided several reasons for their support of the TCFD framework. First, commenters indicated that, because of the *widespread adoption of the framework, issuers and investors have experience* making and using TCFD disclosures. As a result, according to commenters, aligning SEC rules with the TCFD *could reduce the burden on issuers...*” (*id.* at 48); “The consistency and breadth of these comments comport with our understanding that the TCFD framework has been *widely accepted by issuers*, investors, and other market participants and reinforce our view that the framework would provide an appropriate foundation for the proposed amendments.” (*id.*); “Scope 3 emissions disclosure is an integral part of both the TCFD framework and the GHG Protocol, which are *widely accepted.*” (*id.* at 173).

⁵⁹ Our members indicate that even those companies that are exploring alignment with the TCFD recommendations are commonly doing so on a graduated basis where they take on a select few tenets at a time rather than a wholesale adoption.

⁶⁰ See TCFD, *Task Force on Climate-related Financial Disclosures 2021 Status Report* at 30 (Oct. 2021).

⁶¹ See *id.*, figs.B2, B3, B4, B9, B10.

recommended disclosures.⁶² The disclosure rate among *North American companies specifically* averaged 20% across all 11 recommended disclosures.⁶³ North American companies’ disclosure rate ranged from a low of 7% for resilience of strategy, to a high of 48% for risks and opportunities, as shown here:⁶⁴



Similarly, a Moody’s Analytics analysis of TCFD reporting of 2020/21 public disclosures (“Moody’s TCFD Analysis”) by U.S. and European companies (also cited in the Proposing Release), based on a sampling of companies provided by the TCFD, presents the prevalence of TCFD alignment by industry and company size on a regional basis. That report reveals an even lower disclosure rate across the 11 TCFD disclosure recommendations among U.S. companies:⁶⁵

⁶² See *id.*, tbl.B2 (50% of companies worldwide disclosed in alignment with at least three recommended disclosures; 75% of companies worldwide disclosed in alignment with at least one TCFD recommended disclosure).

⁶³ See *id.* at 36.

⁶⁴ See *id.* at fig.B6. We note that the prevalence of disclosure by U.S. companies on risks and opportunities as compared to other TCFD recommendations is likely driven in large part by companies’ Exchange Act reporting, rather than being driven by the TCFD recommendations.

⁶⁵ Proposing Release at 315 & n779 (reporting data from Moody’s Analytics, *TCFD-Aligned Reporting by Major U.S. and European Corporations* fig.1 (Feb. 2022), hereafter, Moody’s TCFD Analysis).

TCFD Disclosure Element		Rate of Disclosure
Governance	a) Describe the board's oversight of climate-related risks and opportunities	17%
	b) Describe management's role in assessing and managing climate-related risks and opportunities.	10%
Strategy	a) Describe the climate-related risks and opportunities the organization has identified over the short, medium, and long term	45%
	b) Describe the impact of climate-related risks and opportunities on the organization's businesses, strategy, and financial planning	34%
	c) Describe the resilience of the organization's strategy, taking into consideration different climate-related scenarios, including a 2°C or lower scenario.	5%
Risk Management	a) Describe the organization's processes for identifying and assessing climate-related risks.	15%
	b) Describe the organization's processes for managing climate-related risks.	17%
	c) Describe how processes for identifying, assessing, and managing climate-related risks are integrated into the organization's overall risk management.	16%
Metrics and Targets	a) Describe the metrics used by the organization to assess climate-related risks and opportunities in line with its strategy and risk management process.	21%
	b) Disclose Scope 1, Scope 2, and, if appropriate, Scope 3 greenhouse gas (GHG) emissions, and the related risks.	19%

Notably, the Moody's TCFD Analysis shows that, among U.S. companies, only two of the 11 TCFD disclosure recommendations, both of which relate to climate strategy, had a disclosure rate higher than 25%, and no element had a disclosure rate higher than 45% among those companies that report under the TCFD framework.⁶⁶

Consistent with the TCFD's conclusions in its 2021 Status Report, the Moody's TCFD Analysis reveals that different industries prioritize different disclosures and that, logically, companies in carbon-intensive industries tend to disclose more than those in less carbon-intensive companies.⁶⁷ The Moody's TCFD Analysis illustrates, for example, that a majority of U.S. companies in the Energy, Materials & Buildings, and Transportation industries—compared to just 15.2% of Technology and Media industry companies—provided disclosures aligned with the TCFD's disclosure recommendation on risks and opportunities. It also shows that nearly one-

⁶⁶ Moody's TCFD Analysis, *supra* note

⁶⁷ *Id.* at tbls.1a, 1b; *see also* Proposing Release at 315 & n.779. The analysis, which reportedly was conducted by Moody's Analytics on behalf of the TCFD and in support of its 2021 Status Report, is based on the disclosures of 1,651 companies, 659 of which are domiciled in the U.S. and that were provided by the TCFD to Moody's, as well as Moody's AI-based review of all public filings, including financial filings, annual reports, integrated reports, sustainability reports, and other publicly available reports that were associated with companies' annual reporting or sustainability. Non-public disclosures, such as CDP reports, were not included in Moody's analysis.

third of U.S. Materials & Buildings industry companies—compared to just 7.4% of Insurance industry companies—disclose Scope 1, 2, and 3 GHG emissions.⁶⁸

Table 1a Percentage of U.S. companies aligned with TCFD recommendations by industry

Recommendation	Recommended Disclosure	Insurance	Materials & Buildings	Transportation	Energy
Governance	a. Board's Oversight	18.5	21.6	18.8	28.8
Governance	b. Management's Role	14.8	11.2	14.1	8.5
Strategy	a. Risks and Opportunities	31.5	57.5	54.7	69.5
Strategy	b. Impact on Organization	22.2	52.2	37.5	44.1
Strategy	c. Resilience of Strategy	7.4	4.5	1.6	11.9
Risk Management	a. Risk ID and Assessment Processes	14.8	21.6	10.9	18.6
Risk Management	b. Risk Management Processes	31.5	18.7	10.9	22.0
Risk Management	c. Integration into Overall Risk Management	22.2	16.4	7.8	22.0
Metrics and Targets	a. Climate-Related Metrics	5.6	34.3	21.9	24.6
Metrics and Targets	b. Scope 1, 2, 3 GHG emissions	7.4	32.1	17.2	21.2
Metrics and Targets	c. Climate-Related Targets	9.3	30.6	25.0	39.0

Table 1b Percentage of U.S. companies aligned with TCFD recommendations by industry

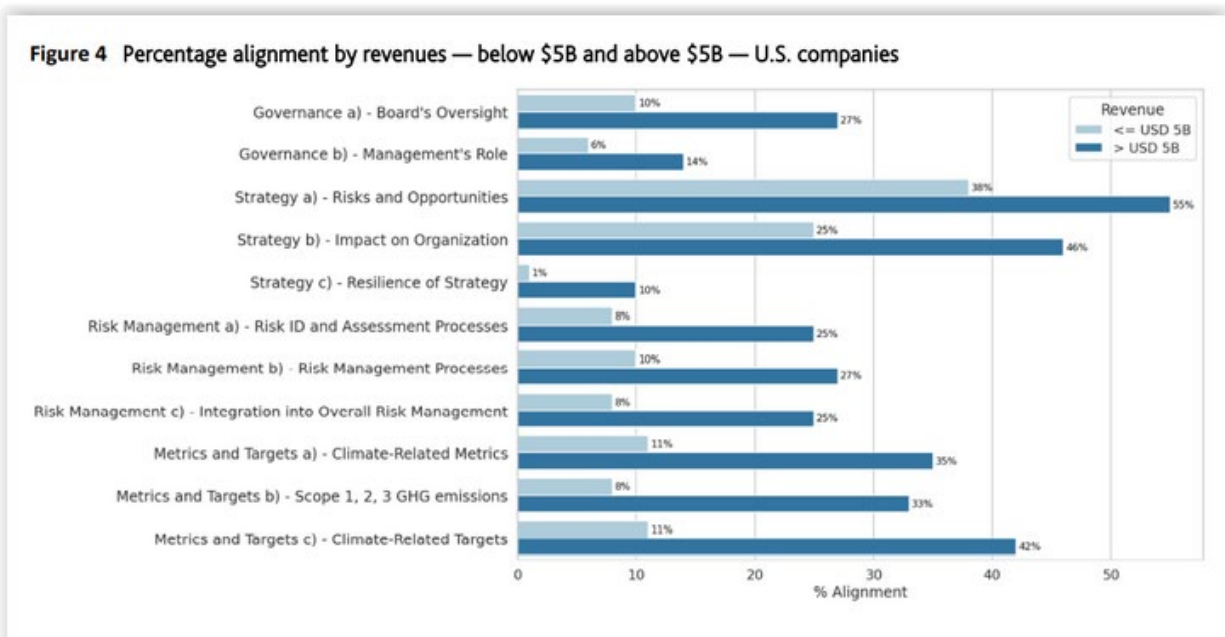
Recommendation	Recommended Disclosure	Ag., Food, & Forest	Technology and Media	Banking	Consumer Goods
Governance	a. Board's Oversight	10.2	3.0	9.7	16.9
Governance	b. Management's Role	10.2	4.5	5.8	9.9
Strategy	a. Risks and Opportunities	40.8	15.2	33	32.4
Strategy	b. Impact on Organization	18.4	27.3	27.2	16.9
Strategy	c. Resilience of Strategy	2.0	4.5	4.9	1.4
Risk Management	a. Risk ID and Assessment Processes	10.2	4.5	16.5	14.1
Risk Management	b. Risk Management Processes	14.3	4.5	18.4	14.1
Risk Management	c. Integration into Overall Risk Management	12.2	6.1	20.4	11.3
Metrics and Targets	a. Climate-Related Metrics	16.3	24.2	6.8	23.9
Metrics and Targets	b. Scope 1, 2, 3 GHG emissions	16.3	19.7	5.8	25.4
Metrics and Targets	c. Climate-Related Targets	22.4	24.2	8.7	26.8

Although not highlighted in either the TCFD's 2021 Status Report or the Moody's TCFD Analysis, the AI-reviewed data in both reports likely present an overly robust impression of alignment with the TCFD's disclosure recommendations, since, as noted above, companies that "align" with TCFD's disclosure recommendations often do so on a partial basis (e.g., disclosing only certain categories or subcategories of GHG emissions).⁶⁹

⁶⁸ See Moody's TCFD Analysis, *supra* note 65, at tbls. 1a and 1b.

⁶⁹ We also note that an AI review can identify what disclosure is being made, but not why; as such, a particular disclosure may be present, but still may not in alignment with the TCFD recommendations.

Disclosure differences by company size are equally significant.⁷⁰ For example, with respect to U.S. companies with more than \$5 billion in revenue, 42% disclose climate-related targets and 35% disclose climate-related metrics, compared to 11% in each case of U.S. companies with \$5 billion or less in revenue. Similarly, 33% of U.S. companies with more than \$5 billion in revenue disclose Scope 1, 2, and 3 GHG emissions, compared to 8% of U.S. companies with \$5 billion or less in revenue.⁷¹



These discrepancies in current disclosure practices are particularly noteworthy in that the size of companies to which the Proposed Rule would apply range from less than \$100 million to more than \$200 billion in annual revenue, subject to the limited Scope 3 GHG emissions disclosure exemption for smaller reporting companies (assuming such companies do not otherwise set a Scope 3 target or a goal that would then require Scope 3 emissions disclosure under other provisions of the Proposed Rule), and the limited attestation requirement exemptions for non-accelerated filers.⁷²

Additional benchmarking data that is derived from studies or analyses of public disclosures—and that is designed to be statistically representative of U.S. reporting companies overall—is generally consistent with the TCFD’s 2021 Status Report and the Moody’s TCFD Analysis and underscores that the SEC’s assertions that the TCFD framework is widely adopted are

⁷⁰ See Moody’s TCFD Analysis, *supra* note 65, at fig.4.

⁷¹ See *id.*, at fig.4.

⁷² The SEC defines a smaller reporting company as an entity with a public float of less than \$250 million or as an entity with (i) annual revenues of less than \$100 million and either (1) no public float (because it has no public equity outstanding or no public trading market for its equity exists) or (2) a public float of less than \$700 million. A non-accelerated filer refers to an entity with (i) annual revenues of less than \$100 million and a public float of \$75 million to less than \$700 million or (ii) a public float of less than \$75 million. See SEC, [Smaller Reporting Companies](#) (last visited June 2, 2022).

inaccurate.⁷³ As noted above, the gap between the SEC’s assertions and current practices is compounded by the fact that the referenced analyses and benchmarking data are based on the TCFD’s now-superseded, less prescriptive, implementation guidance. Accordingly, any contention regarding the supposedly “widespread” use of the TCFD framework does not support a statement that using the TCFD framework as a starting point for the Proposed Rule mitigates the compliance and cost burdens on most companies.

2. Emissions Disclosure Is Still Uncommon and Limited

According to the Proposing Release, issuers “may face lower incremental compliance costs” to the extent current disclosure practices and the proposed disclosures overlap.⁷⁴ To further support its economic analysis of the Proposed Rule, the Proposing Release notes that “sources confirm” that a “sizeable portion” of a sampling of larger firms “already measure and disclose their emissions, though not necessarily through their regulatory filings.”⁷⁵ To support that assertion, the Proposing Release cites a CDP “Climate High-Impact Sample” of 524 U.S. companies, which reflects the largest market cap companies that have the highest GHG emissions for their industries.⁷⁶ The Proposing Release also cites other non-statistical samplings of GHG emissions disclosure rates, including aggregated GHG emissions disclosure rates based on one commenter’s use of ESG ratings provider Sustainalytics’ coverage dataset, and disclosure rates expressed in terms of U.S. market cap, reflecting a much higher percentage rate than the disclosure rate expressed as a percentage of companies.⁷⁷

GHG emissions disclosure across company sizes and industries varies significantly and is rarely provided in SEC filings. As such, few companies would reap the “benefit” (if any) of reduced compliance costs or burdens associated with collecting, measuring, and reporting their GHG emissions, or having the necessary systems and processes in place to gather this information and support disclosure in their SEC filings. To the contrary, most companies would need to build out their collection and reporting structures and processes to comply with the Proposed Rule. And, as further discussed in Section II.A of this letter, even companies that are already disclosing their emissions will be saddled with additional significant costs and burdens associated with conforming their practices to the methodologies called for by the Proposed Rule.

According to the Moody’s TCFD Analysis referenced above, the average disclosure rate of Scope 1, 2, and 3 GHG emissions among the TCFD-provided sampling of U.S. companies across sizes and industries (based on the less prescriptive 2017 implementing guidance) was 19%.⁷⁸ That rate falls to 8% for companies with \$5 billion or less in revenue (across industries). Again,

⁷³ See, e.g., Governance & Accountability Institute Inc., *Sustainability Reporting in Focus* (Nov. 2021), hereinafter Governance & Accountability Institute Report (determining that of Russell 1000 reporting companies, 17% reported in alignment with TCFD recommendations, while another 13% merely mentioned the recommendations.).

⁷⁴ Proposing Release at 312.

⁷⁵ *Id.* at 311

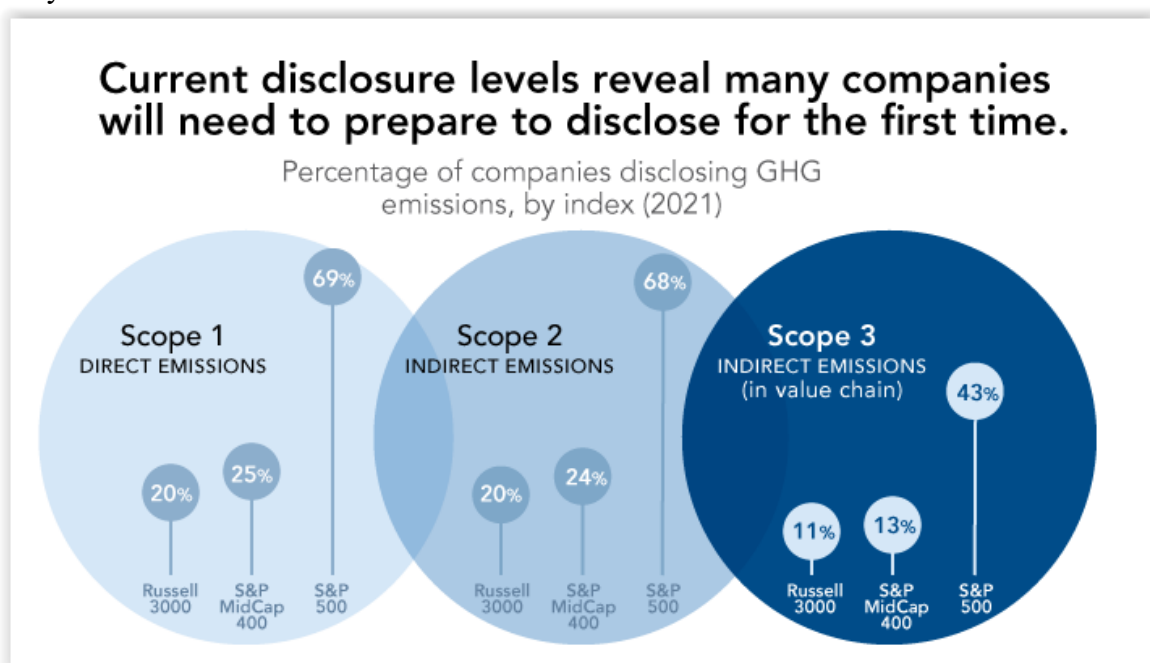
⁷⁶ *Id.* at 311-12.

⁷⁷ *Id.* at 312 (“Furthermore, the International Platform on Sustainable Finance found that among the U.S. listed firms present in the Refinitiv dataset, 10.8% disclosed Scope 1 emissions in 2019, *representing 55.4% of U.S. market capitalization.*” (emphasis added)).

⁷⁸ See Moody’s TCFD Analysis, *supra* note 65 at fig.1.

this is particularly noteworthy in light of the vast range of companies to which the Proposed Rule would apply.⁷⁹

More granular and comprehensive data from The Conference Board, which is based on an analysis of Russell 3000 Index public disclosures, including data in annual reports, proxy statements, sustainability/corporate social responsibility (“CSR”) reports, and on company websites, reveals enormous differences in GHG emissions disclosure based on company size and industry.⁸⁰



By business sector, total GHG emissions disclosure rates range from approximately 7.4% for Health Care industry companies to approximately 53% for Utilities industry companies.⁸¹

More recently, in response to the Proposing Release with a view toward understanding how companies are situated currently relative to the Proposed Rule’s emissions disclosure requirements, MSCI analyzed the 2,565 companies in the MSCI USA Investable Market Index.⁸² Based on the latest disclosures of that sample set, just 28% of companies disclosed both Scope 1 and 2 GHG emissions, and only 15% disclosed *any* Scope 3 GHG emissions data. Similarly, of the non-statistical sampling of companies that responded to the CDP climate change questionnaire in 2021 (402 companies), only 22% reportedly disclosed their Scope 3 GHG emissions in 2021.⁸³ By business sector, consistent with The Conference Board analysis,

⁷⁹ See *supra* notes 56 and 72 and accompanying text.

⁸⁰ The Conference Board, *Disclosing Scope 3 GHG Emissions* (Feb. 18, 2022). Note, however, that the data does not detail the extent of companies’ Scope 3 emissions disclosure for those companies currently such disclosure. Based on other data presented in this letter, most companies that report Scope 3 emissions data do so on a partial basis, e.g., disclosing only certain categories or subcategories of GHG emissions.

⁸¹ See The Conference Board, *Sustainability Disclosure Practices - 2022 Edition* 11 (Jan. 2022).

⁸² See MSCI, *Companies May Not Be Ready for SEC Climate-Disclosure Rules* (Mar. 29, 2022)

⁸³ See *supra* note 76 and accompanying text.

companies in more carbon-intensive industries had higher rates of disclosure than those companies in less carbon-intensive industries.⁸⁴

Consistent with these reports, JUST Capital’s review of the latest available disclosures by Russell 1000 companies in SEC filings and sustainability reports found a positive correlation between company size and carbon-intensive industries, on the one hand, and disclosure of environmental data generally (including GHG emissions), on the other, with larger companies and companies in the “highest emitting industries” disclosing more data than smaller companies and companies in less carbon-intensive industries. As to GHG emissions specifically, 57% reportedly disclosed in some manner their Scope 1 and 2 emissions; 10% disclosed Scope 3 emissions from the use of sold products; and 30% disclosed Scope 3 emissions from business travel,⁸⁵ which is just one of the 15 categories of Scope 3 GHG emissions and often considered to be the category of Scope 3 emissions easiest to measure.

Furthermore, as noted below, the vast majority of companies that do voluntarily disclose their Scope 1 and 2 GHG emissions do so in a manner that is not compliant with the Proposed Rule.

3. The Proposed Rule Seeks Information Significantly Different From, and Beyond, That Called For by the TCFD Recommendations

As previously mentioned, the Proposing Release incorrectly asserts that the TCFD framework has been widely adopted by public companies; however, even if this premise were accepted as accurate, the Proposed Rule’s requirements far exceed the TCFD recommendations.⁸⁶ Therefore, even if the TCFD framework were widely adopted, the SEC’s assertion that its reliance on the TCFD framework alleviates the Proposed Rule’s costs and other resource and compliance burdens on companies is still misguided.

For example, whereas the TCFD disclosure recommendations simply state that each company should “[d]isclose the metrics used by the organization to assess climate-related risks and opportunities in line with its strategy and risk management process,”⁸⁷ the Proposed Rule goes far beyond these recommendations, particularly in amending Regulation S-X to require financial impact disclosures to be made on an disaggregated line item basis in the notes to the financial statements. Both the placement and scope of the proposed financial statements disclosures are beyond the scope of the TCFD recommendations, which focus on material financial impacts. As a result, the proposed Regulation S-X disclosures would be significantly more granular and more costly to produce than disclosures under the TCFD recommendations, and would subject issuers to heightened liability exposure as a result of their inclusion in the financial statements, which is not contemplated by the TCFD.

⁸⁴ *Id.* (concluding that “[d]isclosure rates were higher on average in some of the most emission-intensive sectors: materials (64%), utilities (55%), consumer staples (48%) and energy (47%)” and “[d]isclosure rates were lower on average in the least emission-intensive sectors: health care (12%), financials (17%), communication services (18%) and information technology (25%)”).

⁸⁵ See JUST Capital, *The Current State of Environment Disclosure in Corporate America: Assessing What Data Russell 1000 Companies Publicly Share* (Apr. 2022). No additional categories of Scope 3 data were captured in this report.

⁸⁶ See Sullivan & Cromwell, *SEC Proposes Expansive Climate-Related Disclosure Rules* (Mar. 28, 2022).

⁸⁷ TCFD 2021 Implementing Guidance, *supra* note 57, at 15.

In addition, the TCFD disclosure recommendations with respect to strategy and metrics and targets are generally qualified by materiality. For example, the TCFD recommendations note that “where such information is material ... [o]rganizations should describe their key climate-related targets,” considering (but not required to disclose) factors such as whether the target is absolute or intensity based, time frames over which the target applies, base year from which progress is measured, and key performance indicators used to assess progress against targets, disclosing interim targets “where available.”⁸⁸ The Proposed Rule, on the other hand, provides significantly less flexibility, mandating the disclosure of granular items if a company sets climate-related targets or goals.⁸⁹ Also, where the TCFD framework recommends that companies focus on material impacts arising from material climate-related risks, the Proposed Rule would require disclosure of actual and potential impacts regardless of materiality.⁹⁰ As another example, the Proposed Rule would require disclosure on a zip code basis of material physical risks,⁹¹ which is both onerous and impractical, in addition to being inconsistent with the materiality-based approach of the TCFD framework.

Although the TCFD framework does not qualify the governance or risk management disclosures by materiality, the governance and risk management disclosures that would be required by the Proposed Rule are much more granular than those recommended by the TCFD. For example, the TCFD framework does not require issuers to identify board members or members of management with climate expertise. Also, while the Proposed Rule requires issuers to describe how a company prioritizes whether to address climate-related risks, which appears to require companies to disclose their prioritization across all types of risks (not just climate-related), the TCFD framework only requires companies to describe their processes for prioritizing among climate-related risks.

Similarly, the TCFD framework calls for companies to “provide their Scope 1 and Scope 2 GHG emissions independent of a materiality assessment, and if appropriate, Scope 3 GHG emissions,”⁹² whereas the Proposed Rule is much more prescriptive, requiring disclosure of, for example, emissions both disaggregated by each constituted GHG and aggregated in terms of carbon dioxide equivalents (“CO₂e”), as well as the impact of any purchased or generated offsets. The Proposed Rule would also require all issuers to disclose GHG emissions intensity by scope, while the TCFD’s guidance only specifically notes that emission intensity metrics are important to disclose for companies in high energy consumption industries, such as emissions

⁸⁸ *Id.* at 22.

⁸⁹ See Proposing Release at 268. The Proposed Rule would require companies with climate-related targets or goals to disclose the following:

- The scope of activities and emissions included in the target;
- The unit of measurement, including whether the target is absolute or intensity based;
- The defined time horizon by which the target is intended to be achieved, and whether the time horizon is consistent with one or more goals established by a climate-related treaty, law, regulation, policy, or organization;
- The defined baseline time period and baseline emissions against which progress will be tracked with a consistent base year set for multiple targets;
- Any interim targets set by the registrant; and
- How the registrant intends to meet its climate-related targets or goals.

⁹⁰ TCFD 2021 Implementing Guidance, *supra* note 57, at 18.

⁹¹ Proposing Release at 59.

⁹² *Id.* at 48.

per unit of economic output. Notably, unlike the TCFD framework, the Proposed Rule would also require companies to obtain assurance of their Scope 1 and 2 GHG emissions.

In light of these and other differences between the TCFD recommendations and the Proposed Rule, the Proposed Rule would impose significant additional burdens on even those relatively few companies that currently provide fully TCFD-aligned disclosures.

4. The Proposed Rule Deviates Meaningfully from the GHG Protocol

The Proposing Release also repeatedly cites to the Proposed Rule’s reliance on the emissions disclosure requirements of the GHG Protocol as a basis for claiming reduced compliance burdens on public companies.⁹³ While the GHG Protocol is the most widely used standard for emissions estimation for those companies that do voluntarily disclose their emissions, the Proposed Rule deviates from the GHG Protocol’s approach to organizational boundaries. In contrast to the GHG Protocol, which uses an equity share or control approach to drawing organizational boundaries, the Proposed Rule would require each registrant to employ U.S. Generally Accepted Accounting Principles (“GAAP”) and “set the organizational boundaries for its GHG emissions disclosure using the same scope of entities, operations, assets, and other holdings within its business organization as those included in, and based upon, the same set of accounting principles applicable to, its consolidated financial statements.”⁹⁴

For those companies that voluntarily disclose GHG emissions according to the GHG Protocol’s guidance on organizational boundaries, this proposed requirement would not only require unnecessary additional time, effort, and resources and present significant challenges, but it would also generate discrepancies between earlier-reported data and data disclosed pursuant to the Proposed Rule. For these reasons, any methodologies ultimately adopted by the Proposed Rule should align with the established methodologies of the GHG Protocol. Furthermore, by requiring boundaries for GHG emissions disclosures to align with GAAP rather than the company’s choice of permitted boundary under the GHG Protocol, companies that have set GHG emissions reduction targets based on certain GHG Protocol boundaries may effectively have to report emissions data that is inconsistent with their targets, which could lead to meaningless and even misleading disclosure. For example, it would be extremely costly and time-consuming for companies that have gone through the lengthy process of developing, vetting, and validating science-based targets under the GHG Protocol to develop entirely new goals based on the boundaries articulated in the Proposed Rule. This divergence from the GHG Protocol could have the effect of setting back and delaying companies’ ability to meet their GHG emissions reductions targets; at the same time, if and when those targets are updated, the resulting disclosures may confuse investors and other stakeholders, solely due to the Proposed Rule’s different method of calculation.

⁹³ Proposing Release at 148 (“Commenters indicated that the GHG Protocol has become the leading accounting and reporting standard for GHG emissions. By sharing certain basic concepts and a common vocabulary with the GHG Protocol, the Proposed Rule should help limit the compliance burden for those registrants that are already disclosing their GHG emissions pursuant to the GHG Protocol. Similarly, to the extent that registrants elect to follow GHG Protocol standards and methodologies, investors already familiar with the GHG Protocol may also benefit.”).

⁹⁴ *Id.* at 187.

Under the Proposed Rule, companies that have been providing disclosure consistent with the guidance of the GHG Protocol will likely need to significantly alter their methodologies and internal systems. For instance, many registrants account for their investments under the equity accounting method as permitted by GAAP, but this methodology may differ from the scope of entities for which they currently disclose GHG emissions data. Additionally, the Proposed Rule is silent as to whether these companies would need to restate historical, previously disclosed GHG emissions data, this time using the Proposed Rule’s consideration of organizational boundaries. Restating these emissions will be burdensome on companies that have already spent considerable resources calculating their GHG emissions and present significant data collection and reporting challenges. For example, for entities with significant unconsolidated operations outside the United States and Europe (e.g., minority-held joint ventures) that are reported in financial statements solely as below-the-line income, the Proposed Rule would require them to report a pro-rata portion of such operations’ emissions as Scope 3 emissions notwithstanding the fact that they exert no oversight or control over their operations or that such operations may operate in jurisdictions that do not require or practice collection and reporting of such information.

Accordingly, organizational and operational boundaries for reporting GHG emissions should be permitted to align with GHG Protocol or GAAP if the election is identified and the rationale explained. Relatedly, the allowance to exclude emissions from investments that do not qualify for the equity method should be expanded to apply to investments that are not recorded under the equity method of accounting, regardless of whether they so qualify.⁹⁵

5. The Commission Underestimates the Costs Associated with Attestation

Current assurance costs for those companies that obtain assurance over their GHG emissions do not fairly reflect the costs companies would incur assuming the Proposed Rule were adopted. This is so because, in most cases, companies that currently obtain assurance are not reporting their emissions in a manner or via a disclosure channel that comports with the Proposed Rule, nor are they necessarily obtaining assurance from the types of providers that would meet the Proposed Rule’s independence and expertise requirements.⁹⁶

In support of its position for requiring assurance, the Commission notes that many large companies are already obtaining some form of assurance for their voluntary climate-related disclosures. The Proposing Release, citing a study from the Center for Audit Quality (“CAQ”), indicates that 53% of the S&P 500 companies had some form of assurance or verification over climate-related metrics, along with other metrics.⁹⁷ In fact, however, the referenced CAQ report reveals that 53% of the S&P 500 companies had “some form of assurance or verification over **“ESG metrics”** (emphasis added), a term that encompasses significantly more than climate-related metrics.⁹⁸ Further, a mere 6% attained assurance over “some of their ESG information” from a public company audit firm; the balance that obtained such assurance used an engineering

⁹⁵ *Id.* at 189.

⁹⁶ See *infra* Section I.C.7 and Appendix A-2 for relevant Society member data on GHG emissions assurance, in addition to Section IV regarding our specific concerns with the Proposed Rule’s assurance requirements.

⁹⁷ Proposing Release at 223 & n.568; see also *id.* at 218 (indicating that “more than half of S&P 500 companies had some form of assurance or verification over ESG metrics, including GHG emissions metrics”).

⁹⁸ See CAQ, [S&P 500 and ESG Reporting](#) (Aug. 9, 2021).

or consulting firm that, based on our members' input as further discussed below, may not be qualified to provide assurance under the Proposed Rule's requirements.

As to the scope of assurance, the CAQ report reveals that less than half of companies (45%) obtained assurance over GHG metrics specifically. Of those companies obtaining assurance over GHG metrics, less than 10% used a public company auditor. In all but a small percentage of cases, the level of assurance provided by public company auditors and other providers was limited.

Similarly, a recent Governance & Accountability Institute report reveals that just 35% of Russell 1000 companies sought assurance for their non-financial ESG disclosures in 2020, with 90% of such assurances being limited/moderate in nature and 86% of such assurances being performed by engineering or consulting firms.⁹⁹ This is even more pronounced when evaluating the smaller half of the Russell 1000 companies, with 18% of the smaller half of Russell 1000 companies—only 90 of 500—having obtained external assurance for their non-financial ESG disclosures in 2020.¹⁰⁰ Of those “smaller” companies that obtained assurance, about **50 companies** (*i.e.*, 10%) obtained assurance over their GHG metrics, with the overwhelming majority (more than 90%) being obtained at a limited assurance level, predominantly by engineering or consulting firms (84%).

6. The Release Significantly Underestimates the Initial and Ongoing Compliance Costs Associated with Implementing the Proposed Disclosure Requirements

The Proposing Release significantly underestimates compliance costs associated with the Proposed Rule by relying on small and non-representative samplings of current costs largely associated with voluntary sustainability reporting, which fail to reflect the vast scope of companies that would be directly and indirectly impacted by the Proposed Rule and the outsized impact of the Proposed Rule requirements on the substantial number of small- and mid-cap companies that would be subject to the Proposed Rule.¹⁰¹ Notwithstanding variations in company size, industry, and other relevant factors,¹⁰² the estimated compliance costs cited in the Proposing Release are not on par in any respect with the actual costs that would be necessary to comply with the Proposed Rule, including those resulting from the scope and granularity of the requisite disclosure; the inclusion of non-material information in SEC filings; the development of new systems, processes, and controls; the hiring of additional internal staff and outside

⁹⁹ See Governance & Accountability Institute Report, *supra* note 73, at 18. See also LoPucki, Lynn M., *Corporate Greenhouse Gas Disclosures*, UCLA Sch. of Law (forthcoming Nov. 2022) (finding that, based on an empirical study, of those companies obtaining assurance over their GHG emissions: 74% are obtaining limited assurance, 10% are obtaining reasonable assurance, 11% are obtaining moderate assurance, and 2% are obtaining high assurance).

¹⁰⁰ See Governance & Accountability Institute Report *supra* note 73, at 18.

¹⁰¹ See *supra* notes 56 and 72.

¹⁰² See Proposing Release at 333 (In discussing its inability to accurately quantify the costs of preparing the proposed climate-related disclosures, the SEC notes: “Costs related to preparing climate-related disclosures are generally private information known only to the issuing firm, hence such data are not readily available to the Commission. There is also likely considerable variation in these costs depending on a given firm’s size, industry, complexity of operations, and other characteristics, which makes comprehensive estimates difficult to obtain.”)

consultants; and the audit-related and attestation requirements. As noted further below, our members expect the actual costs of implementation and ongoing compliance to be significantly higher than the estimates included in the Proposed Rule.

For all companies other than smaller reporting companies, excluding assurance costs, the Proposing Release estimates initial compliance costs of \$640,000 (\$180,000 for internal costs and \$460,000 for outside professional costs) and annual ongoing compliance costs of \$530,000 (\$150,000 for internal costs and \$380,000 for outside professional costs).¹⁰³ For accelerated filers, the Proposing Release estimates current third-party assurance costs at \$30,000 to \$60,000 (with a median of \$45,000) for limited assurance and \$50,000 to \$100,000 (with a median of \$75,000) for reasonable assurance. Large accelerated filers are expected to incur costs ranging from \$75,000 to \$145,000 (with a median of \$110,000) for limited assurance and \$115,000 to \$235,000 (with a median of \$175,000) for reasonable assurance.¹⁰⁴

A recent, widely publicized survey by ERM and the Sustainability Institute by ERM (collectively, “ERM”) of annual voluntary climate disclosure costs of 39 corporate respondents reportedly generated an annual average spend of \$533,000.¹⁰⁵ This average spend compares favorably with the SEC’s estimate of \$530,000 for annual ongoing costs of compliance with the Proposed Rule after the first year. ERM contends that “it is possible to use [its] estimates of issuers’ current costs to support predictions of the future costs of compliance with the SEC’s proposed rule.”¹⁰⁶

ERM’s survey, however, is fundamentally unsound in several respects, rendering its purported conclusions overly simplistic and misleading. As a threshold matter, the nature and scope of the voluntary reporting costs captured in the survey are highly unlikely to resemble the nature and scope of reporting and assurance that would be required by the Proposed Rule. As discussed throughout this letter, the Proposed Rule is overly expansive and unprecedented in scope, and would require granular disclosures that are not included in the voluntary disclosures of even those companies that are mature in their climate reporting. Notably, the survey was conducted before the Proposed Rule was issued and did not seek specifics regarding the voluntary disclosures made by companies, nor did it attempt to compare those voluntary disclosures with the specific, prescriptive requirements of the Proposed Rule.

Similarly, with respect to average spend for climate-related assurance, the survey did not seek information about the scope or level of assurance; whether the assurance covered all locations or business units; or the independence or expertise of the assurance provider (not to mention the

¹⁰³ *Id.* at 373.

¹⁰⁴ *Id.* at 382-83.

¹⁰⁵ Sustainability Institute by ERM: [Costs and Benefits of Climate-Related Disclosure Activities by Corporate Issuers and Institutional Investors](#) 5 (May 2022), hereinafter ERM Report; Sustainability Institute by ERM, [Cost of Climate Disclosure Survey Fact Sheet](#) (May 2022), hereinafter ERM Fact Sheet; *see also, e.g.*, Robert Eccles, [The Benefits And Costs Of Climate-Related Disclosure Activities For Companies And Investors](#), Forbes (May 18, 2022); Jean Eaglesham & Paul Kiernan, [Fight Brews Over Cost of SEC Climate-Change Rules](#), Wall Street Journal (May 17, 2022); Kristina Wyatt (Persefoni), [Full Disclosure: Time to Level the Playing Field](#), LinkedIn (May 17, 2022).

¹⁰⁶ ERM Report, *supra* note 105, at 3. It should also be noted that at least one of the parties that commissioned the ERM survey provided cost estimates for GHG emissions measurement and reporting to the SEC to inform the Proposed Rule; *see, e.g.*, Proposing Release at 423, 427-28; [Memorandum from the SEC to Comment File – Climate Change Disclosures](#) (Nov. 30, 2021).

likelihood that assurance costs will rise steeply if the Proposed Rule is adopted given the limited number of qualified and willing assurance providers, coupled with the increased demand that would be triggered by the Proposed Rule).¹⁰⁷ For these reasons, the ERM survey data cannot properly be used to inform the SEC’s estimates of costs to comply with the Proposed Rule and is not a valid basis “to develop predictions of future costs of compliance.”¹⁰⁸

In addition, the ERM survey has major methodology flaws that further undermine the integrity of its purported findings. In calculating companies’ average annual spend based on a single year of each respondents’ costs, the survey administrators included responses of “zero” cost; such responses may be from companies that incurred the relevant costs in a prior or subsequent reporting year (respondents were asked to select one financial year—either 2020 or 2021—for purposes of responding to the survey), as well as respondents that otherwise did not incur costs in a particular category, perhaps because the company is not engaging in that particular climate-related activity or providing that disclosure.¹⁰⁹ This approach undoubtedly reduces the average costs significantly. For example, with respect to the survey’s “assurance/audits related to climate” cost category, ERM notes that 28 issuers reported spending in this category; yet according to ERM’s methodology, the average costs were determined based on a total cohort of 39 issuers.¹¹⁰ In addition, the survey provides the percentage of respondents that “currently measure Scope 3 emissions,” without acknowledgment that there are numerous categories of Scope 3 emissions, and that many companies that disclose Scope 3 emissions disclose emissions with respect to only one category or a narrow subset of categories of Scope 3 emissions.¹¹¹ This approach skews the survey’s results with respect to the prevalence of Scope 3 emissions disclosure.

In light of these and other serious deficiencies in the survey’s approach and methodology, the ERM report’s conclusions that the SEC’s estimated costs are “realistic”¹¹² and that “many companies” are well-positioned to address the Proposed Rule based on their current practices¹¹³ are unfounded.

¹⁰⁷ *Id.* at 8.

¹⁰⁸ *Id.* at 4. For the same reasons, the purported “benefits” to investors from climate-related disclosure, as outlined in the ERM Report, as well as investors’ reported uses of climate data, are overly simplistic and not meaningful. Neither the climate-related disclosure purportedly benefitting investors nor the “climate data” being used by investors are tied in any way to the prescriptive and onerous requirements of the Proposed Rule. *See id.* at 12-13. Moreover, the theoretical benefits listed in the report are not provided within the context of the costs to investors of companies producing additional disclosure.

¹⁰⁹ *Id.* at 18 n.20.

¹¹⁰ *Id.* at 5, Table 2.1.

¹¹¹ *Id.* at 14.

¹¹² ERM Fact Sheet, *supra* note 105, at 1 (“Compared to the SEC’s estimate of \$530,000 per corporate issuer, the ERM survey finds that corporate issuers currently spend \$533,000 per year on climate-related disclosure activities that would be required by the SEC’s proposed rule. This suggests the SEC’s estimated costs closely align with corporate issuers’ current average spend and reflect a realistic assessment of market practice.”).

¹¹³ ERM Report, *supra* note 105, at 17. The ERM survey purports that there is considerable evidence of climate-related disclosure activity being undertaken by U.S. corporate issuers, suggesting that adoption of the rule is “something that many companies[?] current activity will have helped prepare them to address.” In addition to the fact that the survey does not support this conclusion, it is notable that ERM acknowledges that “[f]ive respondents indicated that their company did not ‘spend time or resources collecting and/or analyzing data related to climate change’ in 2020 or 2021,” yet those companies were “not included in the tally . . . of total responses analyzed for the survey data.” *Id.* at 23.

In fact, the Commission’s cost estimates with respect to both disclosure and attestation are based on data and assumptions that do not reflect the likely true costs of compliance for a number of reasons, including the following:¹¹⁴

- The Proposing Release relies on current costs associated with voluntary disclosure that takes place predominantly outside of SEC filings as a basis for estimates associated with mandatory disclosure in the Form 10-K. Based on the scope and granularity of disclosure, level of liability, proposed timing of disclosure, attestation requirements, and associated staffing, costs associated with legal review, consultation systems, processes, and other factors associated with the proposed mandatory Form 10-K disclosure, the current costs associated with voluntary disclosure are simply not comparable. Even assuming that the costs cited in the Proposing Release reflect current disclosure efforts, they cannot justifiably be used to reasonably inform the far more significant costs associated with implementation of, or ongoing compliance with, the Proposed Rule.
- The Proposed Rule borrows heavily from the TCFD framework on the inaccurate assumption that the TCFD framework is widely-used and endorsed by issuers. As noted above, however, the prevalence of disclosure across all of the 11 TCFD recommendations, which is based on the 2017 TCFD implementing guidance rather than the now operative, more prescriptive TCFD 2021 Implementation Guidance, is low; additionally, most companies that use the TCFD framework for disclosure tend to report in alignment with, at most, three of the 11 recommended disclosures, and the prevalence of disclosure varies significantly by company size and industry.¹¹⁵
- As noted above and below, the Proposed Rule’s disclosure requirements with respect to GHG emissions depart in meaningful ways from the methodologies outlined in the GHG Protocol.¹¹⁶ Few of the issuers represented by Society members that we polled and/or who provided information for this letter and that voluntarily disclose their Scope 1 and 2 GHG emissions indicated that they do so in a manner that would be compliant with the Proposed Rule, both in light of the GHG Protocol deviation mentioned above and the level of granularity the Proposed Rule would require. As such, as referenced above, relatively few issuers will be able to avail themselves of the cost and burden mitigation benefits purportedly associated with current emissions disclosures.
- As noted above, relatively few registrants currently report any category (let alone all categories) of their Scope 3 GHG emissions, yet the Proposing Release postulates that many companies will be subject to the Scope 3 disclosure requirements.¹¹⁷ Furthermore, although

¹¹⁴ SEC Commissioner Hester Peirce, *supra* note 4.

¹¹⁵ *See supra* Section I. C.1 (noting that the 2017 version of the TCFD implementation guidance, on which the Proposing Release’s statistics are based, was superseded in October 2021 by the more prescriptive and more granular TCFD 2021 Implementation Guidance. Disclosure benchmarking against the TCFD 2021 Implementation Guidance guidance is not yet available.); *see also supra* Section I.C.1 at note 72 and accompanying text regarding the differences in disclosure by company size.

¹¹⁶ *See infra* Section II.A.7.

¹¹⁷ Proposing Release at 162–63 (“Given their relative magnitude, we agree that, for many registrants, Scope 3 emissions may be material to help investors assess the registrants’ exposure to climate-related risks, particularly

the Scope 3 disclosure is subject to a materiality qualifier for those companies that have not set GHG emissions reduction targets or goals that include Scope 3 emissions, even companies that have not set GHG emissions reduction targets or goals that include Scope 3 emissions may be required to—or, in any event, may feel compelled to—conduct a full Scope 3 analysis simply for purposes of making a materiality/non-materiality determination under the Proposed Rule. The Proposing Release suggests this is the case.¹¹⁸ At the same time, as further discussed in Section II.A below, the Proposing Release acknowledges the difficulty in collecting and estimating Scope 3 GHG emissions.¹¹⁹

In that regard, if the Proposed Rule would require most companies to collect and measure their Scope 3 GHG emissions for purposes of making a materiality/non-materiality determination, any purported mitigation in compliance costs and burdens associated with the Proposed Rule’s materiality qualifier for Scope 3 emissions would be all but obliterated. While the limited exemption for smaller reporting companies is helpful (assuming such companies do not otherwise set a Scope 3 target or a goal that would then require Scope 3 emissions disclosure under other provisions of the Proposed Rule), for most other companies subject to the Proposed Rule, the compliance costs and burdens associated with these requirements would be excessive in light of these companies’ revenues and associated resources, and would not produce decision-useful information for investors.¹²⁰

- Finally, as discussed above and below, the assurance and additional audit-related costs associated with the Proposed Rule are expected to be significant. Few of the companies currently obtaining third-party assurance over all or a portion of their voluntary GHG emissions disclosures (which are predominantly outside of SEC filings) are reporting their emissions in a manner that comports with the Proposed Rule. In addition, as detailed below, only a minority of Society member companies recently surveyed were able to affirm that their current assurance provider would be qualified to provide assurance under the Proposed Rule.¹²¹

transition risks, and whether they have developed a strategy to reduce their carbon footprint in the face of regulatory, policy, and market constraints.”).

¹¹⁸ *Id.* at 165 (“When assessing the materiality of Scope 3 emissions, registrants should consider whether Scope 3 emissions make up a relatively significant portion of their overall GHG emissions. While we are not proposing a quantitative threshold for determining materiality, we note that some companies rely on, or support reliance on, a quantitative threshold such as 40 percent when assessing the materiality of Scope 3 emissions.”).

¹¹⁹ *See id.* at 160 (“Unlike Scopes 1 and 2 emissions, Scope 3 emissions typically result from the activities of third parties in a registrant’s value chain and thus collecting the appropriate data and calculating these emissions would potentially be more difficult than for Scopes 1 and 2 emissions.”); *id.* at 162 (“To balance the importance of Scope 3 emissions with the potential relative difficulty in data collection and measurement, the Proposed Rule would require disclosure of Scope 3 emissions only if those emissions are material, or if the registrant has set a GHG emissions reduction target or goal that includes its Scope 3 emissions.”); *id.* at 174 (“We also recognize, as discussed below, that the reporting of Scope 3 emissions may present more challenges than the reporting of Scopes 1 and 2 emissions.”); *id.* at 209 (“Depending on the size and complexity of a company and its value chain, the task of calculating Scope 3 emissions could be challenging.”); *id.* at 209-10 (“Notwithstanding these anticipated developments, calculating and disclosing Scope 3 emissions could represent a challenge for certain registrants, in particular those that do not currently report such information on a voluntary basis.”).

¹²⁰ *See supra* notes 32 and 33 and associated text.

¹²¹ *See infra* notes 122 and 124 and corresponding text concerning the results of the Society Climate Survey.

7. **Society Member Data Underscores That Compliance Costs Associated with Initial Implementation of, and Ongoing Compliance With, the Proposed Disclosure Requirements Will be Exponentially Greater than the SEC’s Estimates**

In response to the Proposing Release, the Society reached out to member companies that are reporting climate-related information beyond that already required under the securities laws to understand current practices and associated costs. The responses we received, which are included in Appendix A-2 to this letter, varied considerably by company based on the company’s current disclosure scope, granularity, and reporting channel(s); overall staffing, processes, and practices; size, industry, and business model; the complexity of their organizations; the nature and locations of their operations; and other relevant factors. Notably, these companies are not the norm. They represent a discrete subset of predominantly larger companies that have undertaken these reporting efforts voluntarily and generally reflect a much greater level of maturity in climate-related reporting than the average company. As reflected by the several reports and surveys cited in this letter, many companies have not undertaken any climate-related reporting to date. Of those that have, the overwhelming majority do not currently disclose in a manner that would be compliant with the Proposed Rule. A recent Society member survey is illustrative, revealing that only 11% of issuers represented by the respondents (as detailed below) reported currently disclosing their GHG emissions in accordance with the Proposed Rule.¹²²

That said, a few of our member companies were able to provide rough estimates of the additional costs they anticipate they would incur to comply with the Proposed Rule; others simply provided us with the costs and/or resources associated with their current voluntary disclosures, which are informative as well, in the sense that it is clear that in light of the scope and granularity of the Proposed Rule’s requirements, compliance costs will be on an order of magnitude greater than those current costs. As detailed in Appendix A-2, a few large cap companies estimated their costs of initial implementation to be somewhere between \$5 million and at least \$10 million, and estimated their ongoing annual compliance costs to be between \$4 million and \$5 million. A small-cap company that expects its initial implementation costs to be at the low end of the range based on its business model (*i.e.*, single line of business), and thus not representative of other companies, roughly estimated initial implementation costs of \$650,000 to \$1.5 million, and upwards of an additional \$650,000 per year in ongoing expenses, in addition to its current expenditures, to comply with the Proposed Rule.¹²³

¹²² Society for Corporate Governance, *Climate/GHG Emissions Assurance* (May 2022), hereinafter Society Climate Survey (on file with author). Respondent demographics (154 respondents) consisted of approximately 49% mega- and large-cap companies; 35% mid-cap companies; and 16% small- and nano-cap companies, across a wide variety of industries with the top five industries represented being Financials (20%), Industrials (14%), Consumer Discretionary (12%), Energy (10%), and Information Technology (10%). Only 11% of 100 respondents reported their current emissions disclosure as compliant with the Proposed Rule; 76% of respondents said their companies’ current emissions disclosure is not compliant with the Proposed Rule; 13% were unsure.

¹²³ As noted in Appendix A-2, this company (identified as “Company 4”) also indicated that the “Proposed Rule will force the company to divert both monetary and staff resources from important energy transition initiatives, including new ventures and new technology, a result it believes is not in the best interest of its shareholders.” Notwithstanding the fact that company believes its estimated costs are at the lower end of the range, equally concerning is this company’s observation that it “view(s) the staffing and data integrity issues perhaps more worrisome than the added costs.”

Notably, most of the members we reached out to acknowledged that their companies are not yet in a position to reliably estimate costs associated with initial implementation or ongoing compliance with the Proposed Rule. Nonetheless, all of the members who participated in the comment letter process and that specifically weighed in on this issue indicated that their company believes that the Proposing Release grossly or significantly underestimates the implementation and ongoing compliance costs. By way of example, some comments we received include:

- The company thinks that the SEC’s estimated costs “are off by an order of magnitude.”
- “The cost of complying with the SEC rule is expected to be several times of order of magnitude greater than preparing voluntary disclosures.”
- The company believes that the Proposing Release “grossly underestimates the implementation and compliance costs.”

Based on substantial input from Society members during this comment letter process, we believe many other Society members similarly believe that their costs to comply with the Proposed Rule would be well in excess of the SEC’s estimated costs.

Both through the Society Climate Survey and our member outreach, we requested information about the prevalence of third-party assurance over companies’ climate-related disclosures and the costs associated with that assurance. While 46% of issuers represented by respondents to the Society Climate Survey are obtaining third-party assurance for all or a portion of their current emissions disclosure, in the vast majority of cases, those issuers are: (i) obtaining limited assurance over voluntary disclosure included in a sustainability or similar report (*i.e.*, not in an SEC filing) in a manner that does not comport with the Proposed Rule’s emissions disclosure requirements, and (ii) obtaining that assurance from providers that may not be compliant with the requirements of the Proposed Rule.¹²⁴

Specifically, according to the survey results:¹²⁵

- Of those 109 respondent companies currently disclosing their GHG emissions and responding to a survey question about the location of that disclosure, 4% are making such disclosure in their Form 10-K and 6% are making such disclosure in their proxy statement. Nearly 95% are disclosing their emissions in a sustainability/ESG/TCFD or similar publicly disclosed report, and about one-third are making website disclosure.
- As noted above, only 11% of 100 respondents to a survey question about whether their current emissions disclosure comports with the requirements of the Proposed Rule reported their current emissions disclosure as compliant with the Proposed Rule (comprised of 64% mega- and large-cap companies; 36% mid-cap companies; and 0% small- and nano-cap companies). Seventy-six percent of respondents said their companies’ current emissions disclosure is not compliant; 13% were unsure.
- Of those companies providing information about their assurance provider (46 respondents), 80% obtain assurance from a provider other than a registered public

¹²⁴ Society Climate Survey, *supra* note 122.

¹²⁵ *Id.*

accounting firm, such as a sustainability consulting firm or environmental engineering firm.

- Of the respondents who indicated that their company obtains third-party assurance (in whole or in part) over their emissions disclosure (46% of 101 respondents), 83% were mega- or large-cap companies; 17% were mid-cap companies; and 0% were small- and nano-cap companies.
- Just 29% of the 45 respondents whose companies obtain assurance over their GHG emissions (in whole or in part) and who answered a survey question about their current attestation provider's compliance with the Proposed Rule's independence and expertise requirements indicated that their company's provider would be compliant with the Proposed Rule (comprised of 69% mega- and large-cap companies; 31% mid-cap companies; and 0% small- and nano-cap companies); 16% said they would not, and 56% were unsure.
- The majority (70%) of the 44 respondents whose companies obtain assurance over their GHG emissions (in whole or in part) and who answered a survey question about the level of assurance provided, obtain limited assurance; 11% obtain a mix of limited and reasonable assurance; and 14% obtain reasonable assurance (comprised of 67% mega- and large-cap companies; 33% mid-cap companies; and 0% small- and nano-cap companies).

For these reasons, and because the Proposed Rule would impose attestation requirements with respect to climate impacts on financial statement line items—disclosures that are currently very rare (if prevalent at all) among issuers—we do not believe that issuers' current attestation costs are predictive of future attestation costs under the Proposed Rule.

All of our issuer members who participated in this comment letter process and who volunteered information about third-party assurance costs believe that the costs will be considerably higher if the Proposed Rule is adopted. Nonetheless, we note that current costs for third-party assurance over voluntary GHG emissions for those companies that provided the information in response to the recent survey range from \$10,000 to \$250,000. Assurance costs for those companies that provided information in response to our member outreach and whose data is included in Appendix A-2 range from \$10,000 to approximately \$522,000. We believe that these attestation costs will skyrocket if the Proposed Rule is finalized as proposed given that the demand for assurance will be exponentially greater and likely will outpace the supply of assurance providers that could meet the Proposed Rule's independence and expertise requirements, in addition to the fact that eligible assurance providers, facing greater potential liability, will likely employ a different and higher level of scrutiny, which will drive cost increases.

Moreover, the costs associated with GHG emissions assurance are not inclusive of the additional costs companies will incur for the auditing of the Proposed Rule's new financial-statement related disclosures. We believe the Commission's assumption that the "incremental costs associated with these climate-related financial statement metrics and disclosures" will be "modest"¹²⁶ is inaccurate and that the Commission's estimate is highly unlikely to reflect actual costs. For example, one large-cap Society member estimates the company will incur an

¹²⁶ Proposing Release at 428.

additional \$1-2 million in audit fees for both the reasonable assurance of Scope 1 and 2 GHG emissions and additional auditor-related work for the incremental financial statement-related disclosures.¹²⁷ Even assuming the low end of this estimated cost range (*i.e.*, \$1 million) less estimated costs for assurance at the high end of the range provided by our membership as noted above (*i.e.*, \$522,000) would yield incremental audit firm costs for an audit of internal controls and the financial statements and footnotes that are significantly higher than the Commission’s estimate of \$15,000.

II. Comments on Specific Disclosures and Provisions in the Proposed Rule

Should the SEC decide to adopt the Proposed Rule notwithstanding the significant issues raised above, the Society respectfully requests it consider the following concerns and recommendations.

A. GHG Emissions Disclosure

1. The Quantitative Disclosure of Scope 1 and 2 GHG Emissions Should Be Required Only If Material to a Company Under *TSC Industries*

The Proposed Rule’s requirement that companies disclose Scope 1 and 2 GHG emissions that are not material to the company contradicts established disclosure practices, would be unduly burdensome and costly for companies, and will result in issuers’ disclosure of immaterial information that, as discussed above, is not necessary for their shareholders to make investment or voting decisions and will only muddle SEC filings.¹²⁸ For these reasons, the Society believes that the disclosure of Scope 1 and/or 2 GHG emissions should be required only if such emissions are *material to a particular company*. Materiality of Scope 1 and 2 GHG emissions varies by industry, as direct and indirect emissions vary substantially. For industries/companies where Scope 1 and/or 2 GHG emissions are not material under the Supreme Court’s definition of materiality, the costs of disclosure certainly outweigh any anticipated benefits to investors from disclosure.

The Society believes that with respect to Scope 1 and 2 GHG emissions, investors would be better served if the SEC followed an approach similar to that of the Sustainability Accounting Standards Board (“SASB”). SASB’s industry-specific standards are rooted in financial materiality and recognize, as do our securities laws, that each company’s management is in the best position to determine the materiality of the information at issue to the company, given its unique facts and circumstances.¹²⁹ In addition to SASB’s appropriate deference to management’s

¹²⁷ See Appendix A-2.

¹²⁸ See *supra* Sections I.B and I.C and Appendix A-2 regarding estimated compliance costs.

¹²⁹ See SASB, *Materiality: The Word that Launched a Thousand Debates* (May 13, 2021) (noting that “a company should – using the definition of materiality appropriate in the legal jurisdiction in which it operates – determine for itself which SASB Standard (or Standards) are relevant to its business, which disclosure topics are reasonably likely to have material financial implications, and which associated metrics to report” and citing its and citing its Conceptual Framework, SASB, *Conceptual Framework* 30 (Aug. 28, 2020), wherein SASB explains that “[f]or the purpose of SASB’s standard-setting process, information is financially material if omitting, misstating, or obscuring it could reasonably be expected to influence investment or lending decisions that users make on the basis of their assessments of short-, medium-, and long-term financial performance and enterprise value. The Standards Board

materiality determinations, SASB’s standards are designed to provide data and metrics that are likely to be most useful to companies and their investors in understanding the risks presented by climate change. Through its standard-setting process, SASB has identified Scope 1 GHG emissions as a potentially material metric in 22 industries out of a total of 77 industries for which it provides disclosure standards.¹³⁰ These 22 industries have significant direct emissions and are thus deemed reasonably likely to have significant material financial impacts relating to their Scope 1 GHG emissions. Similarly, SASB has identified 35 industries for which Scope 2 GHG emissions may be material; these industries indirectly contribute to GHG emissions through significant use of purchased electricity.¹³¹ Again, however, ultimately, consistent with the U.S. securities laws, SASB standards defer to company-specific materiality determinations.¹³²

While we do not believe that institutional investors should unduly influence the Proposed Rule as discussed above in Section I.B.1.b above, we nevertheless refer to the approaches of these institutions to illustrate that Scope 1 and 2 GHG emissions are, in fact, not material to hundreds, if not thousands, of companies. BlackRock’s approach is one such example. BlackRock’s portfolio is vast, consisting of thousands of companies, but it focuses its engagement efforts on the Scope 1 and 2 GHG emissions of only 1,000 companies *globally*, which the investor indicates represent 90% of the Scope 1 and 2 GHG emissions in its portfolio.¹³³ This means that there are thousands of companies in which BlackRock is invested whose emissions are low enough that they do not even comprise 10% of the total Scope 1 and 2 GHG emissions in its own portfolio. This example underscores that there is no need to mandate that every issuer disclose its Scope 1 and 2 GHG emissions, regardless of materiality.

If, notwithstanding our concerns, the Commission determines to require Scope 1 and 2 GHG emissions disclosures regardless of materiality, the Commission should implement a *de minimis* exception for immaterial subsets of categories of Scope 1 and 2 GHG emissions. The need for *de minimis* exceptions is widely recognized in a variety of climate related protocols. For example, the GHG Protocol identifies *de minimis* emissions as “a permissible quantity of emissions that a company can leave out of its inventory.”¹³⁴ The Climate Registry’s General Reporting Protocol describes miniscule (*i.e.*, *de minimis*) sources as “very small sources of emissions that represent

evaluates sustainability issues for inclusion in the Standards by assessing whether a given topic is reasonably likely to materially affect the financial condition, operating performance, or risk profile of a typical company within an industry.”).

¹³⁰ See SASB, *SASB Implementation Supplement: Greenhouse Gas Emissions and SASB Standards* 1 (Sept. 2020).

¹³¹ See Corporate Secretary, *More than half of S&P Global 1200 using SASB framework* (Sept. 2021) (noting that more than half of the S&P 1200 index companies, 65% of the S&P 500, and 70% of the S&P/TSX 60 companies, use the SASB standards in their external reporting); See also SEC Professionals Group, *2022 SEC Professionals Group Benchmark Report* at 20 (May 2022) (revealing that a plurality of 324 members of the SEC Professionals Group responding to the group’s recent benchmarking survey (31%) identified SASB as the framework they use for ESG reporting, compared to just 14% that reported using the TCFD.)

¹³² See Value Reporting Foundation, *SASB Standards, Implementation Primer* (“SASB Standards are intended for use in communications to investors regarding sustainability issues that are likely to impact corporate ability to create long-term shareholder value. However, reporting with SASB Standards is not an “all or nothing” proposition. A company determines for itself which standard or standards are relevant to the company, which disclosure topics are financially material to its business, and which associated metrics to report, taking relevant legal requirements into account.”).

¹³³ See BlackRock, *supra* note 40 at 2.

¹³⁴ The Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard, Revised Edition*, at 70 (Mar. 2004).

a high reporting burden, such as hand-held fire extinguishers, refrigerant in office water coolers, or CO2 from soda fountains.”¹³⁵ Other examples include lawn equipment and emergency generators. It is unduly burdensome to collect and report such direct emissions. Inclusion of a *de minimis* exception for Scope 1 and 2 GHG emissions would greatly reduce the burden on a company while not impacting in a material way the information available to investors.¹³⁶

2. Scope 3 GHG Emissions Estimates Should be Disclosed Only on a Voluntary Basis, Whether or Not Material

The Proposed Rule requires public companies to disclose Scope 3 GHG emissions, expressed both in absolute terms and in terms of intensity, if “material” or if the company has set a GHG emissions reduction target or goal that includes its Scope 3 GHG emissions.¹³⁷ However, given the data and methodological challenges that are involved in estimating Scope 3 GHG emissions on a reliable, consistent, and comparable basis, requiring disclosure of Scope 3 GHG emissions (whether or not material) is not justified, and issuers should be allowed to disclose Scope 3 GHG emissions estimates on a fully voluntary basis.¹³⁸

Our members believe that, for most issuers, it will be impossible to gather reliable quantitative information for even a limited number of Scope 3 GHG emissions categories (let alone collecting such information for all Scope 3 categories).¹³⁹ Putting aside the significant resources that measuring Scope 3 GHG emissions entails, the Commission itself acknowledges that companies may need “to rely heavily on estimates and assumptions to generate Scope 3 GHG emissions data.”¹⁴⁰ In particular, there are inherent difficulties in obtaining data from suppliers and other third parties in the registrant’s value chain and verifying the accuracy of the data.

There are significant barriers to measuring, estimating, and disclosing high quality Scope 3 GHG emissions estimates, which will inevitably increase compliance costs,¹⁴¹ burdens, and liability exposure for issuers, and which are likely to result in disclosures that lack the reliability, comparability, and consistency that the SEC is seeking through the Proposed Rule. These barriers include, among other things: (1) the need to heavily rely on a large number of third

¹³⁵ See The Climate Registry, *General Reporting Protocol Version 3.0*, at B-7 (May 2019).

¹³⁶ See, e.g., Company 7 on Exhibit A-2.

¹³⁷ See proposed Item 1504(c)(1).

¹³⁸ See, e.g., *supra* Section I.B.1.c and note 33 (noting CalSTRS’ decision to forego Scope 3 emissions measurements across its portfolio at this time because “any emissions data produced would likely not be reliable or useful for decision making.”); See also note 32 (reporting on Georgeson’s 2022 annual institutional investor survey wherein 85% of investors indicated they won’t apply a strong voting policy on Scope 3 emissions disclosure or targets).

¹³⁹ Currently, issuers must use inherently unreliable estimates and assumptions to calculate their Scope 3 emissions. The EPA’s current supply chain factor dataset, which is used to determine the relevant “emissions factors”, is overly broad, as it groups together myriad unrelated industries and activities. As a result, Scope 3 emissions calculations are inherently unreliable, as they require an issuer to multiply its cost of carbon emissions (which itself can only be estimated, as financial statements do not track activities based on whether they are carbon emitting or not) by the estimated emissions factor, which is a high-level category that is not industry specific. This underscores the assertion that Scope 3 emissions do not belong in the Form 10-K. See e-mail from Society Member (May 31, 2022) (on file with author).

¹⁴⁰ See *id.* at 208. We note that in no other context does the SEC encourage such unverifiable reporting.

¹⁴¹ See *supra* Section I.C. and Appendix A-2.

parties for the necessary inputs; (2) the redundant and potentially inconsistent reporting by issuers and the public companies in their value chain; (3) lack of sophistication and data collection and reporting technologies across each company's value chain; and (4) the absence of a uniformly accepted reporting and calculation standards and methodologies.

The burdens associated with identifying the categories of upstream and downstream activities and quantifying and analyzing the GHG emissions of all parties in a company's value chain have real-life consequences. Notably, these costs will come at the expense of shareholders and other company investments, including in human capital. Naturally, the resources required to make and update the Scope 3 materiality determinations will place a disproportionate burden on small-cap and mid-cap issuers, especially those already struggling with profitability. These costs and burdens may also incentivize late-stage private companies to opt out of the public market and current public companies to deregister with the SEC and go private.

By allowing issuers to report Scope 3 emissions on a fully voluntary basis if, when, and to the extent such information is attainable and can be reliably reported, the SEC will allow methodologies and standards to continue to develop and mature with respect to Scope 3 GHG emissions.¹⁴² The SEC will also avoid chilling issuers' adoption of Scope 3 reduction targets and goals, which would trigger Scope 3 estimates to be disclosed under the Proposed Rule. Institutional investors will continue to drive voluntary adoption of the Scope 3 GHG emissions disclosures while standard setters and industry participants make the advances that must take place before issuers can provide Scope 3 disclosures that are reliable, comparable, and consistent.

3. If the SEC Requires Scope 3 GHG Emissions Estimates to Be Disclosed, It Should Apply Its Longstanding Materiality Standard and Provide Clarification on the Disclosure Requirements

As discussed above, we believe it is inappropriate to mandate disclosure of Scope 3 emissions estimates in light of the data collection and accuracy challenges that exist today. However, if the SEC nevertheless determines to mandate such disclosures, then, at a minimum, the required disclosures should be limited by the SEC's traditional materiality approach and with the clarifications requested below.

a. The Proposed Rule's Quantitative Suggestion and Qualitative Tests with Respect to Determining the Materiality of Scope 3 Emissions are Inconsistent with the SEC's Longstanding Approach to Materiality and Will Increase Confusion

Although the Proposing Release references the Supreme Court's *TSC Industries* decision, it proceeds to provide guidance that is inconsistent with the well-established materiality standard

¹⁴² Notably, the GHG Protocol is nearly 20 years old and has seen few updates since it was last revised in 2004, notwithstanding rapid changes in technology, climate science and the increasing complexity and breadth of issuers' value chains since that time. See Greenhouse Gas Protocol, *Looking Back on 15 Years of Greenhouse Gas Accounting* (Jan. 23, 2014). In particular, the Scope 3 Standard has significant room to improve and evolve before it can be used consistently across issuers in different industries and regions. The Society's issuer members' experience with calculating Scope 3 emissions is illustrative.

set forth in that decision. In addition, the Proposing Release suggests that Scope 3 GHG emissions data may be desirable not because it is material to a given company, but because it may provide investors with a more complete picture of transition risks. If, however, transition risk is the sought-after disclosure objective, many public companies may have more effective and significantly less costly ways of disclosing those risks than calculating and disclosing in their securities filings estimated Scope 3 GHG emissions; furthermore, Scope 3 GHG emissions do not necessarily equate to transition risk. If the material risk is disclosed, then overall GHG emissions do not add meaningfully to the “total mix of information” made available. Even in the automobile manufacturer example offered in the Proposing Release, the Commission acknowledges that Scope 3 GHG emissions are only a partial gauge of transition risk.¹⁴³ The Commission has historically and appropriately not required the disclosure of immaterial information in order for investors to better understand disclosed material risks. Disclosure of the material information is, by definition under *TSC Industries*, sufficient for investors.¹⁴⁴

The Proposing Release instructs public companies to consider, when assessing the materiality of Scope 3 GHG emissions, whether Scope 3 GHG emissions make up a relatively significant portion of their overall GHG emissions; however, that instruction is without regard to whether total GHG emissions are material to the company. For example, if a company has very low overall GHG emissions and has little or no Scope 1 and 2 GHG emissions, Scope 3 GHG emissions will, mathematically, represent a large (likely over 40%) portion of total GHG emissions, even though they are also not material to the company. In fact, this exercise suggests materiality when in reality, it is more accurately characterized simply as “a relatively larger percentage of emissions.” In this vein, we note that the Proposing Release references favorably a quantitative metric—where Scope 3 GHG emissions represent 40% or more of a company’s total GHG emissions—and requests comments on whether the Commission should use a quantitative threshold (*e.g.*, 25%, 40%, or 50% of a company’s total GHG emissions) for requiring the disclosure of Scope 3 GHG emissions.¹⁴⁵ These quantitative thresholds are both arbitrary and inconsistent with the Commission’s longstanding approach to materiality and, absent materiality, offer dubious value to investors while saddling public companies with unnecessary and extraordinary burden and expense.

The Proposing Release also references a variety of qualitative tests, which likewise deviate from the Commission’s traditional principles-based and company-specific approach to materiality, and require speculation over time horizons far beyond traditional planning horizons, with little utility for both public companies and investors. The referenced qualitative standards are based on whether “Scope 3 represents a significant risk, is subject to significant regulatory focus, or ‘if

¹⁴³ See Proposing Release at 164.

¹⁴⁴ Notably, very few investors consider information regarding a registrant’s Scope 3 emissions to be material to their investment or voting decisions. In a recent survey of the Society’s issuer members, only 4% of 171 respondents said that their shareholders requested disclosure of Scope 1, 2, or 3 emissions in a manner different than the GHG Protocol. See *supra* note **Error! Bookmark not defined.** regarding the Society Investor Priorities Survey and corresponding text. Additionally, one survey, which purports to support the Proposing Release, found that “most investors are currently not measuring Scope 3 emissions (supply chain and end-use emissions) of their investments.” See also CalSTRS, *supra* note **Error! Bookmark not defined.****Error! Bookmark not defined.**

¹⁴⁵ See Proposing Release at 174 & n.471, 176.

there is a substantial likelihood that a reasonable investor would consider it important.”¹⁴⁶ As an example, most notably, the latter prong lacks a reference to the total mix of information and also lacks reference to an investment or voting decision—both critical elements under the *TSC Industries* test. Additionally, the prong “subject to significant regulatory focus” is not in any way indicative of company-specific materiality. Moreover, in several places, as noted above and detailed in Section I.B.1.a of this letter, the Proposing Release inappropriately bases the GHG emissions disclosure requirements on investor portfolios in the aggregate rather than on a company-specific basis, marking a further departure from the Commission’s historical company-specific disclosure regime and reasonable investor standard.¹⁴⁷

b. The Proposing Release Inappropriately Suggests Disclosure Regarding Why Scope 3 GHG Emissions Are NOT Material

The Proposing Release suggests that, if a public company determines that its Scope 3 GHG emissions are not material, it should consider disclosing the basis for its non-materiality determination. This “suggestion” clearly appears aimed at driving issuers to disclose their non-materiality decision-making. In order to satisfy anticipated inquiries from the Commission, investors, or other stakeholders in light of this suggestion, it appears that companies would need to gather and analyze a substantial amount of data to make an initial materiality determination with respect to Scope 3, and may need to update that determination on an annual or more frequent basis (including in connection with significant acquisitions).

In addition to the fact that the materiality determination process will result in significant challenges, burdens, risks, and costs, as discussed in Sections I.C. and II.A.2 above, suggesting that companies disclose their non-materiality determinations is inconsistent with the U.S. securities disclosure regime, sets a bad and potentially dangerous precedent, and creates an unnecessary burden and expense on companies, particularly in light of the robust mechanisms that are already in place to ensure that companies are making sound materiality determinations and providing appropriate disclosures under the law.¹⁴⁸ Additionally, there is no principled reason to suggest that companies disclose their non-materiality determinations with respect to one item—Scope 3 emissions—when there could be dozens or hundreds of items that management considered and determined were not material.

Instead, if the SEC requires disclosure of Scope 3 GHG emissions estimates notwithstanding our (and others’) significant concerns, we urge the SEC to not only clarify that such disclosure is

¹⁴⁶ *Id.* at 166. We also note that a regulatory agency creating a standard in a proposed rulemaking that relies on “significant regulatory focus” appears to be circular reasoning.

¹⁴⁷ See *e.g.*, *id.* at 170-71 & n.464, 381 (including potential upstream and downstream activities from which Scope 3 emissions might result and noting that the “investments” category of proposed 17 CFR 229.1500(r) would require disclosure of “financed emissions,” which include emissions generated by companies in which a financial institution invests or to which it otherwise has exposure”).

¹⁴⁸ The fact that the Commission has pressed numerous companies on their materiality analyses with respect to climate-related disclosure specifically and has accepted companies’ explanations of their non-materiality determinations following robust interchanges with SEC staff underscores that: (i) issuers are in the best position to determine what is material to their business, and (ii) such determinations are generally consistently well-considered and sound. See *supra* note 42 and accompanying text.

limited by the traditional materiality standard, but also to (1) clarify that issuers do not need to disclose the basis for their non-materiality determinations, and (2) expand the Scope 3 safe harbor to cover determination of non-materiality.

c. The SEC Must Clarify the Scope of the Disclosure Requirements with Respect to Scope 3 Emissions

While, overall, we support the SEC providing flexibility to issuers to make the best judgment about disclosure that they believe is material to the reasonable investor, we recommend that, in some places, the SEC provide more guidance where the ambiguity would unduly burden issuers and undoubtedly lead to inconsistent approaches that will confuse investors. Given the absence of precise approaches on estimating Scope 3 GHG emissions as described above, if the final rule retains a Scope 3 disclosure requirement, it should clarify that issuers only need to disclose material categories or subcategories of estimated Scope 3 emissions. As currently drafted, the Proposed Rule provides a non-exhaustive list of the Scope 3 GHG emissions categories, but is not clear on whether estimates across all categories must be disclosed if Scope 3 GHG emissions are material overall, or if an issuer includes only certain categories or subcategories of Scope 3 GHG emissions in its targets or goals. The proposal requires registrants to separately identify and provide Scope 3 emissions data for any category that is “significant” to a registrant, as well as “total Scope 3 emissions.” If the Proposed Rule is not amended to remove the Scope 3 disclosure requirement for all of the reasons set forth in this letter, we recommend that the Commission permit registrants to disclose Scope 3 emissions in material categories (since it is not clear what “significant” means) and to calculate “total Scope 3 emissions” based only on emissions disclosed from those categories deemed by a registrant to be material based on the traditional definition of materiality. Taking this approach would reduce issuers’ burdens of collecting Scope 3 emissions data in categories that are immaterial and cannot be reliably estimated, both of which companies would typically be permitted to exclude under the GHG Protocol. Otherwise, issuers will be forced to either expend significant resources to estimate other categories of Scope 3 GHG emissions that are immaterial or face potential legal challenges for failing to make such disclosures.

In addition, before mandating disclosure of Scope 3 GHG emissions, the SEC must work with market participants and standard setters to provide further clarity on organizational and operational boundaries with respect to such emissions. The Proposed Rule would require issuers to provide detailed disclosures on their organizational and operational boundaries without providing necessary guidance and while methodologies continue to evolve. This inappropriately forces issuers to bear the risk associated with a rapidly shifting Scope 3 GHG emissions reporting framework even though issuers have little input in, and are not well situated to coordinate, the development of these frameworks. Finally, the Commission’s reliance on Rule 409 and Rule 12b-21 is inadequate and thus any final rule should implement a separate “reasonable efforts” standard for Scope 3 GHG emissions disclosure, as explained in greater detail in Section V.A below.

4. GHG and Climate-Related Target/Goal Setting Disclosure Should Be Required Only If It Is Material and Publicly Announced

The Proposing Release requires issuers to provide disclosure if the issuer has set GHG emissions or other climate-related targets or goals, regardless of whether such targets or goals are material

to the issuer. Additionally, if an issuer has set such targets or goals, the Proposed Rule contemplates requiring additional prescriptive disclosures, including a requirement to disclose Scope 3 GHG emissions data, even if such Scope 3 data is otherwise not material to the issuer. This approach deviates from the foundational tenet of the U.S. securities laws of materiality-based disclosure, and deviates from the Proposed Rule’s repeatedly stated goal of requiring disclosure of information about climate-related risks that are “reasonably likely to have a material impact” on a company’s the business or consolidated financial statements.¹⁴⁹ If the Proposed Rule is not amended to remove the Scope 3 disclosure requirement, its disclosure requirements regarding targets and goals should also adhere to traditional materiality concepts—including with respect to Scope 3 GHG emissions disclosures—to provide relevant, decision-useful information for investors.

Some climate-related targets or goals are not material to the issuer and thus should not trigger requirements for disclosure in SEC filings. There could be any number of reasons an issuer may establish a climate-related target or goal. An issuer may want to inform stakeholders that it intends to reduce GHG emissions, even if this commitment is not material to the issuer, similar to how an issuer may disclose community philanthropic efforts that are not material to its business. The costs and burdens that the Proposed Rule place on public companies that have announced emissions reduction targets when such targets are not material have no commensurate benefit to investors. Without a materiality threshold, the disclosure requirement is, in fact, antithetical to the SEC’s mission of protecting investors, as it puts investors in the position of wading through extraneous information to determine whether such information is material to the company and, therefore, to an investment decision.

We believe the SEC should require the disclosure of a GHG emission reduction or other climate-related target or goal only if it is material to the issuer. If the SEC nonetheless determines to mandate disclosure relating to climate-related targets or goals regardless of materiality, it should only require disclosure of such targets and goals at a high level, without the prescriptive and burdensome requirements contemplated by the Proposed Rule. Additionally, if the SEC mandates disclosure about progress towards a target or goal, it should only require disclosure of progress towards such target or goal if such progress is otherwise material to the issuer.¹⁵⁰ Furthermore, if a smaller reporting company sets a target or goal related to Scope 3 emissions, any final rule should provide a similar exemption that is provided to smaller reporting companies for Scope 3 emissions disclosures under the Proposed Rule.

Additionally, the Proposed Rule should be amended to clarify that issuers need only disclose climate-related targets or goals in their reports filed with the SEC if they otherwise have chosen to make such targets or goals public. As currently drafted, even internally established targets and goals that the company has chosen not to publicize appear to trigger detailed disclosure requirements under the Proposed Rule. As with other internal company goals on any one of a broad variety of issues, internal climate-related targets or goals should not be required to be publicly disclosed unless they rise to the level of materiality contemplated by U.S. securities laws as discussed above. Internally established targets and goals may only be in a pilot stage and

¹⁴⁹ See, e.g., *id.* at 1, 40.

¹⁵⁰ We note, however, that if progress towards such targets is material to an issuer, the issuer would already be required to disclose it in its MD&A. See *supra* note **Error! Bookmark not defined.** and corresponding text.

not fit for disclosure, as an issuer may still be conducting analysis to determine whether the pilot should be rolled out more broadly across the company. Requiring premature disclosure of internally established targets may be misleading to investors or, at the very least, generate confusion. Furthermore, these internal targets or goals may constitute competitively sensitive information. Perversely, as noted below in Section VI, our issuer members report that the Proposed Rule is already having a “chilling effect” on their companies’ adoption of targets or goals and piloting initiatives related to those targets and goals as a result of the additional disclosure burdens that would be imposed by the Proposed Rule. This is especially true for smaller-reporting companies, which would lose the Scope 3 emissions disclosure exemption if they set a Scope 3 emissions target or goal that includes their Scope 3 emissions.

5. Disaggregation of GHG Emissions Is Unnecessary and Imposes Additional Costs

In addition, the Proposed Rule would require all issuers to disclose Scope 1 and 2 (and, in some cases, Scope 3) GHG emissions on an aggregated *as well as disaggregated basis*. Disaggregation may be sensible for specific industries that emit large volumes of various greenhouse gases, *i.e.*, not only carbon dioxide, but also methane, etc. For most registrants, however, carbon dioxide is by far the largest (if not only) source of GHG emissions, with other GHGs constituting a negligible or immaterial fraction of a registrant’s overall emissions. Thus, requiring all registrants to disaggregate all of their GHG emissions into their constituent gases will impose costs that, with the exception of a few industries that are already conducting disaggregation voluntarily, will not provide much, if any, benefit to investors while imposing a very high cost to issuers.¹⁵¹ Therefore, we request that any final rule should require disaggregated data only if and to the extent an issuer already publicly discloses such aggregated data elsewhere (*e.g.*, in an ESG report) and if material.

6. The Timing of the Proposed Rule’s Mandated Disclosures Is Extremely Challenging, If Not Impossible, and Disclosure Should Not Be Required to Be Filed on Forms 10-K or in Registration Statements

The Proposed Rule’s requirement that companies include the proposed mandatory Scope 1, 2 and 3 GHG emissions data in their annual reports on Form 10-K for the preceding fiscal year presents serious practical, logistical, and resource challenges. As annual reports on Form 10-K are required to be filed, at the latest, within ninety days after the end of the fiscal year (with earlier deadlines for many filers), this would afford companies very limited time to gather, calculate, review, and audit the data, even assuming that the data were widely available and reliable, which is not the case.

As previously noted in the Society’s response to the SEC’s 2021 request for public input on climate disclosures, the gathering and processing of climate data is a complex task, often requiring data from third parties, estimates based on activity and emissions factors, and extended

¹⁵¹ Based on a recent survey of the Society’s issuer members, just 1% of the 171 respondents indicated that their shareholders have engaged with them on or requested a breakdown of their GHG emissions into constituent GHGs. See Society Investor Priorities Survey, *supra* note 31 and corresponding text.

timelines.¹⁵² The SEC itself acknowledges that Scope 3 emissions data availability is limited and, accordingly, it may be “necessary to rely heavily on estimates and assumptions.”¹⁵³ While somewhat more easily gathered, Scope 1 and 2 emissions data also involve timing challenges that would make compliance with the SEC’s proposed timing difficult at best. For example, companies may not even receive utility bills necessary to calculate Scope 2 emissions until almost 45 days after year-end.

While data collection and analysis timelines vary by company, depending on each company’s activities, staffing, and the data providers it utilizes, the Society estimates, based on member input, that Scope 1 and 2 GHG emissions generally take roughly six months to produce. Estimated data concerning Scope 3 GHG emissions, which, by definition, is generated from the activities of third parties, is exponentially more challenging, time-consuming, and resource-intensive to seek to collect, analyze, and verify (to the extent feasible). These timing issues are, in part, why CDP’s timeline for company submission is around mid-year. And it is in light of these timing considerations that many companies that voluntarily report GHG emissions often do so six to nine months after their fiscal year ends.¹⁵⁴ One Society small-cap member, whose company discloses Scope 1 and 2, and partial Scope 3 GHG emissions in its annual sustainability report, indicated that reporting emissions data in its Form 10-K would require acceleration of its data collection process by approximately six months, and “would pose data integrity and quality concerns and create a significant strain on internal resources that are already committed to the Form 10-K and proxy reporting during the first quarter of the year, as well as for its independent registered public accounting firm.”¹⁵⁵ This challenge would not, however, be limited to small-cap companies. Several large-cap company members noted that even teams at larger-cap companies will find themselves stretched extremely thin attempting to gather and analyze this data while concurrently drafting the balance of the Form 10-K and their proxy statement.

It is noteworthy that other programs for reporting GHG emissions, such as the EPA’s Greenhouse Gas Reporting Program, generally require reporting of annual Scope 1 GHG

¹⁵² Society for Corporate Governance, *Letter to the U.S. SEC regarding Public Input on Climate Disclosure* at 11-12 (Jun. 11, 2021).

¹⁵³ See, e.g., Proposing Release at 208 (“It may be difficult to obtain activity data from suppliers and other third parties in a registrant’s value chain, or to verify the accuracy of that information. It may also be necessary to rely heavily on estimates and assumptions to generate Scope 3 emissions data.”); *id.* at 209-10 (“[C]alculating and disclosing Scope 3 emissions could represent a challenge for certain registrants”).

¹⁵⁴ Note that certain companies may face special challenges that could exacerbate these timing issues. These include, for example, financial institutions calculating their “financed emissions” for Scope 3 Category 15. Category 15 is likely to be the most significant source of a financial institution’s emissions, yet it depends in part, on using Scope 1 and 2 data (and Scope 3 data, where available) from clients. This creates a sequencing challenge in that financial institutions cannot produce timely financed emissions figures for the prior fiscal year until they have client data which, as described above, generally takes six months to produce. Furthermore, much of the client Scope 3 figures provided by data services are modeled and will need to be verified by the institution, which will add to the time delay. At present, financial institutions generally receive this data on a nearly 15-month time lag. Requiring financed emissions reporting for the just-ended fiscal year would require using GHG data that is at least one, if not two, years out of date, which calls into question not only its accuracy, but also its representation of actual company performance given the volatility in emissions year-over-year.

¹⁵⁵ See *supra* Section I.C and accompanying data in Appendix A-2.

emissions for the prior year by March 31.¹⁵⁶ Even accelerated or large accelerated filers that are already subject to such regulatory requirements will have to materially modify their current processes and will likely incur significant costs for additional personnel to meet the accelerated deadlines, assuming that meeting such a deadline were possible. For companies that are not subject to such EPA requirements, the burden will be even greater.

Similarly, the lack of readily available and accurate emission rates creates additional challenges for the Form 10-K reporting deadline. Many registrants source their Scope 2 emission rates from the Emissions and Generation Resource Integration Database (“eGRID”), EPA’s Clean Air Markets Division. The eGRID calculates and reports electricity grid average emission factors and further refines them in sub-regions of electricity distribution grids based on distribution companies. While the eGRID methodology provides accurate emissions rates, the program relies on a complicated data gathering apparatus that delays the release of emissions rates by 1-2 years. For example, the most-recent emissions factors, from eGRID2020 were released on January 27, 2022. Commitment by the EPA for updated emissions factors in eGRID2021 is the end of Q1 2023.

This lag in releasing updated emissions rates does not allow sufficient time for year-end GHG calculations, investment grade disclosures, and assurance to be included within Form 10-K filings. The timeline will also lead to non-comparable disclosures among registrants, as accelerated filers who file in January and late February may use different eGRID emission rates based on availability. The total U.S. output CO₂e emission rate has shown meaningful change year over year, including a 7.5% decline from eGRID2019 to eGRID2020 and a 6.7% decline from eGRID2018v2 to eGRID2019. While the total U.S. output CO₂e emission rate has declined, the underlying sub-regions and state emission rates fluctuate depending on specific facts and circumstances. These year-to-year discrepancies can lead to vastly different Scope 2 emissions estimates, which will lead to confusion for registrants and investors alike.

While the Society appreciates that the Proposed Rule allows registrants to use a reasonable estimate of its GHG emissions for its fourth fiscal quarter as long as the registrant promptly discloses any material difference between the estimate and actual data, as noted above, this accommodation ignores the fact that compiling data and going through the assurance process – even for the first three quarters of the fiscal year—will not measurably reduce the significant strain on companies’ resources. Additionally, this proposed solution will further degrade the accuracy of the reported figures, which, as to Scope 3 emissions data, may already be based largely on surrogate data and assumptions.¹⁵⁷ Most companies will already be modeling their Scope 1 and 2 GHG emissions based on actual activity numbers (*e.g.*, power consumption) using emissions factors (*e.g.*, emissions per kwh generated). Using estimates of activity figures (estimated power consumption) for the fourth quarter will add an additional layer of assumptions

¹⁵⁶ Companies that report to the EPA through the Greenhouse Gas Reporting Program file their reports at the end of March, which is before those numbers are verified. See EPA, [Learn About the Greenhouse Gas Reporting Program \(GHGRP\)](#) (last visited June 2, 2022).

¹⁵⁷ See Proposing Release at 208-09 (“It may be difficult to obtain activity data from suppliers and other third parties in a registrant’s value chain, or to verify the accuracy of that information. It may also be necessary to rely heavily on estimates and assumptions to generate Scope 3 emissions data. For example, registrants may need to rely on assumptions about how customers will use their products in order to calculate Scope 3 emissions from the use of sold products.”).

to the final figures, calling into question the reliability of the information and its usefulness for investors.¹⁵⁸

Further, the reporting of estimated data is not consistent with general Form 10-K reporting practice and would impose additional costs on companies, which would be required to determine and verify the underlying calculations and obtain the Scope 1 and 2 GHG emissions attestation twice (first on an estimated, and then on an actual, basis).¹⁵⁹ This approach could also necessitate restatements, which will be cost-, time-, and resource-intensive for companies, and limit the data's value to investors, as well as lead to increased litigation risk, regardless of any safe harbor. The use of estimated fourth quarter data may cause issues, for example, if the party from whom a registrant obtained data discloses in a subsequent filing that there were material differences between its estimated and actual fourth quarter data. In that scenario, a registrant would be burdened with keeping up with the third party's subsequent reporting and determining whether such differences materially affected its own disclosures, which could require it to promptly update its own disclosures.

The Society suggests that to the extent the SEC requires disclosure of GHG emissions notwithstanding our significant concerns, companies be permitted to report the data later in the year when most companies' data will be available (e.g., 180 days after the fiscal year end), on a specially designated form to be furnished with the Commission.¹⁶⁰ Alternatively, companies should at least be permitted to report the data once available and verified on the next appropriate Form 10-Q or 10-K.

For those companies that are currently providing some type of emissions data, the timelines required to produce carbon emissions data are well understood and accepted without opposition by the investor community, which is accustomed to receiving that data on voluntary basis, typically on a time lag of six months to a year. We believe that accelerating this timeline will come at the expense of accuracy and create significant resource challenges for companies, which may also compromise the quality of their other disclosures.

We also believe GHG emissions information should be considered "furnished," not "filed," and in any case, should not be incorporated by reference into issuer registration statements. Should the Proposed Rule be adopted, existing public companies will face significant challenges, as detailed throughout this letter, in—among other things—updating their SEC reporting systems, processes, internal controls, staffing, and accounting, to comply with the proposed disclosure requirements.

¹⁵⁸ Further, if companies are forced to use partially estimated numbers to meet the timing constraints of the Form 10-K filing, subsequent reporting of GHG emissions – for example, within the companies' ESG reports or as part of their submission to CDP – may not reconcile with what is reported in their Form 10-K. This inconsistency in reporting may also lead to data unreliability and investor confusion.

¹⁵⁹ See *infra* Section III. "The Proposed Rule's Amendments to Regulation S-X Are Not Operable and Will Not Result in Material Information for Investors."

¹⁶⁰ We note that investors are accustomed to evaluating information, whether that be in the form of disclosure in Form 10-Ks and Form 10-Qs, Form 8-Ks, proxy statements, conflict minerals reports, earnings releases, engagements, investor days, sustainability reports, or otherwise, as it is released. Based on our members' input, investors have not expressed concerns about the current practices of many companies releasing climate-related or other ESG-related information late in the second quarter or in the third quarter, and certainly would be unlikely to do so at the expense of having accurate and complete information.

7. The Proposed Rule’s GHG Emissions-Related Methodologies Should Align with Those of the GHG Protocol

As discussed above in Section 1.C.4, for those companies currently reporting their GHG emissions in alignment with the GHG Protocol, the Proposed Rule’s deviation from its consideration of organizational boundaries will impose additional cost and compliance burdens and generate meaningful discrepancies between their past and future reporting. For this reason, as well as the fact that the GHG Protocol is the most widely used reporting and accounting standard for GHG emissions for those companies that choose to disclose them, the methodologies ultimately adopted by the Proposed Rule should permit alignment with the established methodologies of the GHG Protocol.¹⁶¹

B. The Proposed Rule’s Governance Disclosures Are Too Granular and Would Regulate Company Behavior in Addition to Disclosure

We have two overarching concerns with the Proposed Rule’s requirements regarding management and board oversight of climate-related risks at companies. First, the extensive detail that the Proposed Rule would mandate with respect to the disclosure of oversight and management of climate-related risks is a significant departure from disclosures currently required by the federal securities laws and rules, as well as information sought by investors.¹⁶² Second, while the proposed requirements are disclosure-based, if adopted, they will have the effect—whether intended or not—of indirectly imposing corporate governance changes in a manner that may not be in the best interests of each company’s shareholders.

In addition, we believe the Proposed Rule’s requirements are unnecessary in light of the current disclosure requirements in Regulation S-K, which we believe are not only intended to capture much of the proposed disclosure requirements, but also do not inhibit companies from providing additional disclosure, such as that detailed in the Proposed Rule, as warranted.

1. The Proposed Rule’s Approach to Disclosure of Governance Is an Unnecessary and Harmful Departure from the SEC’s Longstanding Approach to Such Disclosure

¹⁶¹ Based on a recent survey of the Society’s issuer members, just 4% of the 171 respondents indicated that their shareholders have engaged with them on or requested disclosure of GHG emissions in a manner other than the GHG Protocol, for those companies currently disclosing in accordance with the GHG Protocol. *See* Society Investor Priorities Survey, *supra* note 31 and corresponding text.

¹⁶² Based on a recent survey of the Society’s issuer members, of the 171 respondents, one-third or less indicated that their companies’ shareholders have engaged with them on or requested information on one or more of the following information, the disclosure of which would be mandated by the Proposed Rule: whether any directors have expertise in climate-related risks, including supporting information to fully describe the nature of the expertise (15%); the frequency of the board’s discussion of climate risks (31%); who in management is responsible for climate risk assessment and management (e.g., certain management positions or committees) (33%); the relevant expertise of those in management who are responsible for climate risk assessment and management, including supporting information to fully describe the nature of the expertise (4%); the process by which management who are responsible for climate risk assessment and management are informed and monitor climate risks (16%); and the frequency of management’s reporting to the board/committee on climate risks (33%). *See* Society Investor Priorities Survey, *supra* note 31.

The Proposing Release states that “[m]any commenters asserted that climate-related issues should be subject to the same level of board oversight as other financially material matters.”¹⁶³ Assuming that is the case, and if this statement expresses the Proposed Rule’s rationale for the requirements, the requirements regarding climate-related disclosure should be consistent with those relating to board oversight of other financially material matters. However, the proposed requirements are not, as the Proposing Release states, “similar” to current disclosure requirements. In fact, there is no parallel rule in Regulation S-K that mandates the level of detail about board oversight and management of risks contemplated by the Proposing Release.

Rather, the Proposed Rule would create an entirely new style of board and management governance disclosure, wherein companies disclose (and are expected to have) a specialized director for each type of risk and report on the frequency of discussions with respect to each topic. The former of these requirements, as discussed further below, will likely pressure companies to compose their boards and conduct business in a manner that may not be aligned with the best interests of the company or its shareholders. And the proposed disclosure requirements regarding frequency of discussions bear no relation to the quality of board oversight, company-specific risks, or the board governance structure, practices, or processes that must account for the myriad of risks companies encounter.

In addition to being incongruous with existing SEC requirements, the Proposed Rule is far from consistent with both state law and stock exchange listing requirements that are actually intended to direct a company’s governance structure. If state law and stock exchange listing requirements are sufficient for all other corporate governance matters, there is no principled reason for the SEC to depart from this historically effective approach with respect to governance of climate-related matters.

2. The Proposed Rule Will Likely Result in a Modification of Company Behavior, Irrespective of Whether the Modification Is in the Best Interest of Shareholders

As referenced immediately above, the imposition of unnecessarily detailed disclosure requirements is likely to result in companies modifying their behavior in a way that may not be in the best interests of the company and its long-term shareholders. While we recognize that the Proposed Rule does not require each company’s board of directors to include one or more directors with climate expertise, the proposed disclosure requirement will very likely pressure companies to add a board member with specialized climate credentials that would allow the company to enhance its disclosure in this area, regardless of whether doing so is in shareholders’ best interest.

Boards are, by design, deliberative bodies tasked with the oversight of numerous traditional and emerging risks, of which climate change is only one. It is critical that boards be equipped to oversee myriad risks with a view toward prioritizing the company’s principal and “mission critical” risks based on the company’s unique facts and circumstances, rather than placing undue emphasis on specific risks that are the focus of the SEC at a given point in time, which may or may not be among the most significant risks the company is facing. Directors with focused

¹⁶³ Proposing Release at 93.

expertise in a particular risk or other singular area of oversight who lack broad-based skills and experience threaten to undermine the very model of corporate governance—which has proven successful for decades—by assuming that each risk to a company cannot be adequately overseen by the board without a dedicated member. If this were true, companies could end up with exceedingly large boards with many directors placed on the board for the sole purpose of overseeing a singular risk or matter. Adding “expert” directors also creates the risk that board members will become shadow members of management, inserting themselves into day-to-day management decisions and stifling talent and innovation that is otherwise within management’s purview, rather than overseeing the individuals or teams who are charged with managing the company’s climate-related issues. In addition, unless a board member with climate experience is actively employed in this field (which is properly the role and expectation of management), truly technical expertise could quickly become stale, and having such a director on the board may provide investors, management, and other directors with a false sense of assurance. This requirement, together with the similar proposed requirement in the SEC’s recently proposed cybersecurity rule, portends the beginning of an unprecedented push by the SEC to more greatly influence the composition of boards to reflect the SEC’s priorities (which could change each time the composition of the Commission changes).¹⁶⁴

The need for specific areas of expertise or skills on the board varies by company and industry. Proposed Item 1501 of Regulation S-K implies that all companies are identically situated. The SEC and its staff have, however, long recognized that certain disclosures should be specific to particular industries. This point is underscored by the fact that the SEC’s Division of Corporation Finance is divided into industry groups, each responsible for reviewing filings made by companies within the same industry.¹⁶⁵ The SEC’s Division of Corporation Finance has also published several industry guides to improve disclosure by industry, with the Commission recently updating and replacing Industry Guide 3, Statistical Disclosure by Bank Holding Companies, with disclosure requirements in a new subpart of Regulation S-K.¹⁶⁶ Climate change is the quintessential example of an occurrence that is likely to have a disparate impact on companies in different industries, of different sizes and scopes, and across business models. Board composition should begin with corporate strategy and reflect the skills, experiences, and attributes needed to best position the company for long-term success. Corporate boards must be well-positioned to oversee a broad array of risks and opportunities, including those relating to the pandemic, geopolitical changes, succession/talent and human capital management, supply chain issues, economic uncertainties and volatility, competitive conditions, cybersecurity, data privacy, and regulation, to name a few. Climate or other expert directors may or may not be suitable to oversee any given company. It should be up to each company’s board to determine the requisite skills that need to be represented on the board to appropriately oversee the company and its operations. By dictating which skills should be represented on the board—whether by directly requiring such skills or influencing the board’s composition through a disclosure requirement

¹⁶⁴ See SEC, *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, Release Nos. 33-11038; 34-94382; File No. S7-09-22, at 44 (Mar. 9, 2022).

¹⁶⁵ See SEC, *Filing Review Process* (last visited June 2, 2022) (explaining that “The Division assigns filings by companies in a particular industry to one of seven offices and conducts its primary review responsibilities through these offices, whose staff members have specialized industry, accounting and disclosure review expertise.”).

¹⁶⁶ See SEC, *Update of Statistical Disclosures for Bank and Savings and Loan Registrants*, Release No. 33-10835; 34-89835; File No. S7-02-17 (Sept. 11, 2020).

focused on one specific risk—the SEC would undercut this essential tenet of board composition.¹⁶⁷

More broadly, pressure on companies to elect a director with climate-focused expertise could also result in lower quality directors in the aggregate. The pool of available climate experts who can, while serving as a director, retain that expertise in the context of evolving risks in a way that is more common with day-to-day risk management (as opposed to oversight), and who also have the skills and experience to perform the director role more broadly, is not large. Moreover, that limited pool would likely be absorbed by large-cap companies that can afford to pay more for the experts' services. In addition, there is little incentive for an individual to join a board of directors as a designated expert—or to even have their climate-related risk expertise disclosed, as required by the Proposed Rule—if there is potential for increased liability, including liability under Section 11 of the Securities Act. The proposal contains no safe harbor to clarify that the Proposed Rule would not impose on such person any duties, obligations, or liability that is greater than the duties, obligations, and liability imposed on such person as a member of the board of directors in the absence of such designation or identification. If adopted notwithstanding our significant concerns, the Proposed Rule should, at a bare minimum, provide a safe harbor similar to the one proposed in Item 407(j)(2) of the SEC's cybersecurity rule proposal.¹⁶⁸

The same concern regarding pressure to alter behavior applies equally to the SEC's proposed disclosure requirement regarding the management of climate-related risks. When companies are compelled to disclose who on their management teams are experts, where that expertise originated, where those employees fit within the organization, how often they meet with other management experts and the board of directors, and other information, they will likely feel pressured to create a structure and program that looks "good" on paper and conforms to other companies' programs regardless of the materiality of the risk to the company or the company's particular needs. Conversely, this proposed requirement will also disincentivize some companies from changing their personnel or programs, even where change will improve the management of relevant risks. In other words, in reliance on our past experience, we believe that implementation of the Proposed Rule is likely to result in the convergence of behavior and prompt boilerplate disclosure that companies will have no incentive to update, improve, or tailor to the company's unique circumstances for fear of deviating from the SEC's codified "best practices".

3. Alternatives for Consideration

¹⁶⁷ A Society issuer member expressed the company's concern that it is extremely plausible that the Proposed Rule's requirements will turn into a "name and shame" scenario where registrants will be criticized for not achieving an arbitrary level of climate expertise on their boards regardless of whether climate change is material for the particular company.

¹⁶⁸ See SEC, *Cybersecurity Risk Management*, *supra* note 164 at 45-46; ("Proposed Item 407(j)(2) would state that a person who is determined to have expertise in cybersecurity will not be deemed an expert for any purpose, including, without limitation, for purposes of Section 11 of the Securities Act (15 U.S.C. 77k), as a result of being designated or identified as a director with expertise in cybersecurity pursuant to proposed Item 407(j). This proposed safe harbor is intended to clarify that Item 407(j) would not impose on such person any duties, obligations, or liability that are greater than the duties, obligations, and liability imposed on such person as a member of the board of directors in the absence of such designation or identification.").

In light of the aforementioned concerns, we offer several alternatives for consideration that would provide a greater benefit to public company investors and mitigate the potential for the unintended consequences outlined above and below.¹⁶⁹

We request that instead of adopting the rule as proposed, the Commission’s 2010 Guidance Regarding Disclosure Related to Climate Change be updated and enhanced to clarify that the current disclosure requirements in Regulation S-K apply to climate-related issues.¹⁷⁰ For example, we believe that current Items 401 and 407 of Regulation S-K are sufficient to elicit disclosure as effective as that proposed without pressuring companies to conform their governance or management practices to those of others or to defend themselves if, as just one of many examples, they do not have a director with climate change expertise on the board or a designated board committee. The Commission could also update its climate change guidance with a focus on industry-specific disclosure, in recognition of the fact that not all companies are similarly situated when it comes to climate risk.

As noted in Section I.B above, there are robust and effective monitors in place today to ensure that registrants are disclosing reliable information to the market. With respect to disclosures in SEC filings, these monitors include the Commission’s comment letter process and enforcement actions, an active plaintiffs’ bar (which serves as another means of investor protection), and private ordering. Along those lines, the Division of Corporation Finance could continue to use its sample comment letter to evaluate companies’ compliance with the securities laws, the responses to which have demonstrated and should satisfy the Commission that companies are thoughtfully considering these issues and evaluating whether climate-related information is material to their businesses.¹⁷¹ For instance, if the SEC staff concludes that more detailed disclosure about the climate expertise of the board is warranted, it could simply ask each issuer to explain why it believes the board, collectively, has the ability to oversee these risks adequately. This would also help to ensure that disclosures are meaningful to investors. If investors do not believe that the composition of a particular board is adequate to address climate risks at any particular issuer, they can ask the issuer for more information about the expertise of existing directors and any external advisors. This type of private ordering has proven to be effective; issuers want to be responsive to their investors.

If the SEC adopts additional disclosure requirements, we ask that the approach be modified to a require categories of disclosure, rather than the detailed, prescriptive requirements proposed. Instead, the SEC could amend current Regulation S-K risk and governance disclosure requirements to add language to indicate that climate-related information must be disclosed. For example, the SEC could amend Item 407(h) of Regulation S-K to expressly require disclosure of the board of directors’ oversight of climate-related risk. The last sentence of the paragraph could be revised to state the following: “In addition, disclose the extent of the board’s role in the risk oversight of the registrant, **including climate risk**, such as how the board administers its oversight function, and the effect that this has on the board’s leadership structure.” This would ensure that companies disclose climate-related information in a manner that is meaningful to

¹⁶⁹ See *infra* Section VI.

¹⁷⁰ See SEC, *Commission Guidance Regarding Disclosure Related to Climate Change*, Release No. 33-9106 (Feb. 2, 2010).

¹⁷¹ See SEC, [Sample Letter to Companies Regarding Climate Change Disclosures](#) (Sept. 2021); *supra* Section I.B.2 and note 42.

investors and consistent with other SEC reporting requirements, rather than in a boilerplate manner to appease the SEC. This would also significantly reduce the likelihood of misleading disclosure, because it would not appear to inflate a company's focus on climate-related risks relative to other (and in many cases, more significant) risks faced by the company.¹⁷²

Furthermore, most companies currently provide disclosure about their corporate governance and board oversight in their proxy statements. If the final rule requires information about board and management oversight of climate-related risks, we ask that companies be permitted to provide that information in the proxy statement to avoid duplicative or isolated disclosure.

C. A More Principles-Based Approach Is Needed for the Proposed Rule's Strategy and Risk Management Disclosure Requirements to Avoid Generating Misleading Disclosure and Harming Investors

Along similar lines, we believe the Commission should not require issuers to disclose whether and how the board or a board committee considers climate-related risks as part of the company's business strategy, risk management, and financial oversight, as proposed. Boards of directors consider countless risks related to companies' business strategy, risk management, and financial oversight. As explained above, singling out one particular risk would lead to materially misleading disclosure in instances where climate-related risk is not material to the company; the significance of climate-related risks would be taken out of context if disclosed in the manner proposed.¹⁷³ Furthermore, certain of the proposed disclosures—specifically, disclosure about whether and how the board or board committee considers climate-related risks as part of its business strategy, risk management, and financial oversight, and whether and how the board sets climate-related targets or goals and how it oversees progress against those targets or goals—could pose competitive risks. For example, financial institutions' credit review procedures are proprietary, and disclosing any part of the process, including detail related to risk assessment, could cause competitive harm. As another example, a natural gas company's plans to transition its business focus to renewable natural gas or hydrogen are competitively sensitive, and the public disclosure of such plans could cause competitive harm if required to be disclosed prematurely.

We believe the Proposed Rule, if adopted, would create a board oversight and risk management structure that not only makes little sense for certain companies but could harm investors in companies that have no need for such extensive oversight of climate risk. The Proposed Rule, if adopted, would present a costly distraction for companies with limited resources (particularly small-cap and many mid-cap companies) to attempt to align their behavior and disclosures with those of other companies that similarly felt pressured by the rule to adapt their behavior to what appears to be the SEC's preferred response to climate-related risks.

We provide below three examples of proposed disclosure related to strategy and risk management where a more principles-based approach is needed to ensure that companies can

¹⁷² See *supra* Section I.B.5.

¹⁷³ It makes little sense why the Commission would or should place such significant emphasis on a singular risk. Climate-related risk should be treated similarly to any other risks facing an organization, which necessarily encompass threshold materiality determinations.

tailor disclosure to be meaningful to investors and avoid disclosing information that is confidential, immaterial, or likely to be misleading to investors.

1. Value Chain-Related Climate Risks Are Variable and Often Opaque

Mandating disclosure of the climate-related risks of a registrant's entire value chain, as opposed to limiting the disclosure requirement to those material risks related to the registrant's financial statements and operations, would inappropriately compel registrants to seek to assess and disclose risks for which they commonly have little or no insight. Further, the proposed disclosure requirement would distinguish the typically opaque climate-related value chain risks from a multitude of other potential risks to issuers' value chains for no principled reason. A registrant's value chain is extraordinarily dynamic, and the climate-related risks facing each supplier, distributor, and others upstream and downstream from the registrant's operations vary greatly. Registrants have varying degrees of visibility into different players in their value chain, which depend in part on the value chain's scope, composition, complexity, and structure, as well as the nature of the risk and the registrant's privity with each of the parties in that chain. While some value chain climate-related risks may be possible to identify and disclose, others are not. It is impracticable, if not impossible, to seek to identify the multitude of climate-related risks that are reasonably likely to arise from all of the differing moving pieces in a registrant's value chain for purposes of accurate and complete disclosure beyond the current materiality- and principles-based approach that currently guides registrants' MD&A, risk factor, and other disclosure, which are designed to—and do—capture material risks, including value chain-related risks.

Relatedly, a registrant generally has no opportunity to verify information provided to it by third parties in its value chain, and small and/or privately-held suppliers and distributors may not produce the data necessary for a registrant to assess and disclose the climate-related risks of conducting business with that third party, resulting not only in a lack of reliable information from the point of view of registrants, but also, more generally, providing larger, publicly-traded companies with a competitive advantage over small and/or privately-held companies. Accordingly, this proposed disclosure requirement would subject registrants to liability for disclosures for which they rely entirely on third parties—over whom they have no control—to provide, including third parties that may have differing disclosure obligations and fewer resources than publicly-traded companies.

For these reasons, the disclosure requirement is unduly burdensome and would result in unwieldy disclosure of questionable use to investors. To address these concerns, the required disclosure should be limited to climate-related risks, including value chain-related risks, reasonably likely to materially impact the registrant's financial statements and operations.

2. The Exact Physical Location of Assets May be Confidential and Should Not Be Disclosed

The Proposed Rule calls for an unprecedented level of granularity in the contemplated disclosures regarding physical risks and locations—in particular, in requiring that a registrant include in its description of an identified physical risk the location of the properties, processes, or operations subject to physical risk, including the disclosure of ZIP codes (or similar subnational postal zone or geographic location) for the properties at issue. First, this proposed disclosure

requirement would undoubtedly be extremely burdensome for companies—particularly companies whose operations span geographies—without a corresponding benefit to investors.¹⁷⁴ Many, if not all, chronic and acute climate-related risks straddle large parts of the world and are not confined to zip codes. For example, the western coast of the United States, which is at risk for coastal erosion, the impact of which is impossible to predict at this time, is associated with approximately 500 zip codes, 176 of which are in the San Francisco Bay-Oakland-Hayward metro area alone. For registrants with numerous locations throughout the West Coast, as well as other coastal locations throughout the world (such as global restaurant chains or consumer brands with standalone stores), this disclosure would be overly burdensome and would produce a massive list of zip codes that is not beneficial to investors with the goal of describing the general risk of coastal erosion. Additionally, registrants have dynamic operations, and a registrant’s properties may change on a weekly basis as locations are closed and new locations opened. While such individual movements are otherwise immaterial to the registrant, the registrant may, as a result of the Proposed Rule, be required to develop disclosure controls and procedures to track the precise timing of these store movements in real time to ensure the accuracy of its list of zip codes.

An additional and significant concern is that this proposed disclosure requirement may necessitate the disclosure of competitive and/or sensitive information by some registrants. For example, some registrants may consider the physical location of certain properties or facilities to be competitively sensitive information. In addition, depending on the nature of the assets involved, disclosure could present a risk to American national security and the stability of the American economy more generally. Registrants may own or operate important pieces of national infrastructure in secure locations and guard the confidentiality of the location of these important facilities or other pieces of infrastructure.¹⁷⁵

To mitigate these significant concerns, we believe that the Commission should permit registrants more discretion in describing physical climate-related risks by a less prescriptive, more-principles-based, approach to the disclosure of physical risks that does not necessitate ZIP code (or similar postal code) disclosure.

3. Analytical Tools Such as Climate Scenario Analyses Are Competitively Sensitive and, In Any Event, Likely to Result in Disclosure That Is Confusing or Misleading to Investors

The assumptions and analyses underlying internal scenario analyses are widely considered by registrants to be competitively sensitive information and an internal risk management tool, somewhat akin to a cybersecurity tabletop exercise. Requiring registrants to disclose details related to such analyses (beyond the existing securities disclosure requirements that would necessitate the disclosure of information relating to the company’s scenario analyses where material) is analogous to requiring that registrants disclose the results of strategic tabletop

¹⁷⁴ Based on a recent survey of the Society’s issuer members, less than 3% of the 171 respondents indicated that their shareholders have engaged with them on or requested such information. *See* Society Investor Priorities Survey, *supra* note 31 and corresponding text.

¹⁷⁵ One member representing a natural gas company notes these non-exhaustive examples: natural gas lines, oil pipelines, electric generation facilities, and grid interconnects.

exercises designed to stress test the registrant’s business strategies or risk management practices.¹⁷⁶ For example, climate scenario analyses and other analytical tools often contain assumptions related to a company’s projected growth over a number of years. These assumptions are not only competitively sensitive, but are also speculative assumptions used for a discrete purpose that, if disclosed, are likely to be misleading to investors. Moreover, some registrants, like those in the insurance or finance industries, may conduct extensive climate and catastrophe predictive modeling in the ordinary course of business, which models and tools are proprietary and confidential trade secrets that underlie the registrant’s business model and business decisions. The requirement in proposed Item 1502(f) to “describe any analytical tools, such as scenario analysis, that the registrant uses to assess the impact of climate-related risks on its business and consolidated financial statements, and to support the resilience of its strategy and business model” is overbroad, contains no materiality threshold, and could potentially require disclosure of details regarding a voluminous amount of models and tools from such registrants, including all of the proprietary and confidential modeling underlying those registrants’ business model.

Climate scenario analysis is also still a very nascent field, and disclosure of scenario analysis outputs is likely to be confusing and even misleading to investors. Climate scenario analysis involves significant assumptions, use of data that is still developing, and modeling of projected scenarios for which there is no historical basis. At this stage, companies are still beginning to develop climate scenario analysis capabilities, and disclosure of outputs is not yet appropriate for public regulatory disclosure. Disclosure of the use of scenarios would be appropriate; however, companies should be able to disclose their use of climate scenario analysis without providing detailed inputs, assumptions, parameters, and outputs.

Additionally, as noted in Section VI below, which details the foreseeable negative consequences of the Proposed Rule, this detailed disclosure requirement is likely to have a “chilling effect” on climate scenario analyses. A chilling effect with respect to these analyses would be particularly devastating because these analyses, while they may be useful to companies, are still expensive to conduct and rare. Based on a database of climate disclosure practices,¹⁷⁷ in 2021, less than 7% of the companies analyzed made any mention in their annual sustainability report of having conducted a climate scenario analysis; companies that did reference that they had conducted a scenario analysis rarely disclosed the parameters, assumptions, and analytical choices, or the projected principal financial impacts on their business strategy under each scenario, instead simply noting, at a high level, that a climate scenario analysis was conducted. Companies that

¹⁷⁶ Based on a recent survey of the Society’s issuer members, just 16% of the 171 respondents indicated that their shareholders have engaged with them on or requested detailed information about scenario analysis along the lines that would be required by the Proposed Rule if adopted. *See* Society Investor Priorities Survey, *supra* note 31 and corresponding text.

¹⁷⁷ ESG Database (on file with author). This data is from an ESG database maintained by a law firm whose lawyers are members of the Society. 73% of the companies analyzed have a market cap of \$10 billion or greater. 17% of companies in the database have a market cap of \$2-\$5 billion and 10% have a market cap of less than \$2 billion. The companies are primarily in the technology sector (31%), pharmaceuticals and life sciences sector (18%), energy sector (12%), consumer goods, food, retail and hospitality sector (11%), industrials sector (8%), financial services sector (8%), and the remaining 12% in other sectors, including real estate, media, sport and entertainment, insurance, infrastructure/construction/transportation. Approximately 1/3 of the companies analyzed were featured for their effective ESG disclosures in Donnelley Financial Solutions’ annual Guide to Effective Proxies in the years 2018-2022. *See* Donnelley Financial Solutions, [Guide to Effective Proxies](#), at 382-407 (9th ed. 2021).

decline to disclose such details often do so because the information is competitively sensitive. Importantly, the database shows that the number of companies that mention climate scenario analyses in their annual sustainability reports increased exponentially from 2019 to 2021, indicating that market pressures are successfully persuading more registrants to invest in scenario analyses in an effort to oversee climate change risk management more proactively. For these reasons, the Commission should not impose specific disclosure requirements on companies with respect to climate scenario analyses they may have conducted.

If the Commission proceeds nonetheless to mandate details related to climate scenario analyses and other internal climate-related strategies, we request that the Commission, at a minimum, allow companies to submit a streamlined form of confidential treatment request to the Commission with respect to such disclosures if the companies believe that the information may be competitively sensitive. A safe harbor is also warranted given the nascent stage and ongoing development of these exercises.

III. The Proposed Rule’s Amendments to Regulation S-X Are Not Operable and Will Not Result in Material Information for Investors

The Society has significant concerns regarding the Proposed Rule’s amendments to Regulation S-X requiring the inclusion of climate-related financial metrics in audited financial statements.¹⁷⁸

A. Rather than Amending Regulation S-X, the Commission Should Rely on Item 303 of Regulation S-K

As an initial matter, we do not believe that registrants can operationalize the portions of the Proposed Rule that would amend Regulation S-X. To comply with these portions of the Proposed Rule, registrants would be forced to spend a significant period of time and inordinate amounts of money to develop and implement controls to estimate and model outputs built on several disparate judgments and assumptions. This time and money would amount to squandered investor dollars and management time, however, as these judgments, assumptions, estimates, and models cannot yield the objective and economically sound picture of a registrant’s financial situation that financial statements are intended to present. The challenges apply not only to a registrant’s financial statements, but also to the audit of a registrant’s internal controls and financial statements and footnotes in conformity with U.S. GAAP. In particular, the high degree of subjectivity, the lack of generally accepted accounting principles related to the Proposed Rule, the 1% materiality threshold (which we discuss below), and the accelerated timeline, would impose significant and heretofore novel challenges on companies that would need to design these internal controls.

Request for Comment No. 53 in the Proposing Release asks whether the SEC should require a registrant to report climate-related metrics with reference to the consolidated financial statements and, if not, how registrants should report these metrics. We believe that the SEC should *not*

¹⁷⁸ We reiterate that financial statement disclosures based on climate-related risks are rare, if at all prevalent, even among those issuers that have been voluntarily disclosing climate-related information for years and that are considered “mature” in their sustainability reporting. *See supra* Section I.C.7.

require any such disclosures in the financial statements and should instead replace the proposed requirement entirely with an amendment to Item 303(b) of Regulation S-K that would require registrants to consider material climate-related impacts when discussing the results of operations, capital resources, and liquidity. Climate-related disclosures would be more meaningful and understandable in the context of the MD&A alongside a registrant’s disclosures of other trends, risks and impacts to their financial condition. We believe that this approach will significantly reduce registrant costs (which ultimately investors incur) while enhancing the quality of disclosures provided to those same investors.

B. If the Final Rule Nonetheless Requires Climate-Related Metrics to Be Included in Financial Statements, Significant Changes Are Needed to Reduce the Burden on Registrants, Although We Still Do Not Believe the Resulting Disclosures Would Result in Consistent, Comparable, Reliable or Decision-Useful Information for Investors

While the Society strongly believes that the proposed amendments to Regulation S-X are unworkable for public companies, we urge the Commission to make the following modifications to the Proposed Rule if the SEC determines nonetheless to include climate-related disclosure requirements in the financial statements:

1. The 1% Threshold Should Be Eliminated, and a Principles-Based Materiality Threshold Should Be Adopted Instead

The Proposed Rule would require registrants to disclose the financial impacts of severe weather events, other natural conditions, transition activities, and identified climate-related risks on the consolidated financial statements if the sum of absolute values of all impacts on the line item is equal to or greater than 1% of the total line item. The Proposing Release states that the 1% threshold both reduces overall costs for registrants and will promote comparability and consistency among registrants as compared to a principles-based approach. We disagree. We believe that the 1% threshold is arbitrary and would impose undue costs and burdens on public companies.¹⁷⁹ Accordingly, if the SEC determines to include climate-related disclosure requirements in the financial statements, the 1% materiality threshold should be replaced with a general, principles-based materiality threshold, which would be consistent with GAAP or SEC Staff Accounting Bulletins (“SAB”).¹⁸⁰

Notably, registrants would have extreme operational difficulty implementing a numerical threshold. In general, registrants cannot look at incurred expenses and realized cost savings as categorically objective data. We provide below several practical examples that illustrate both the

¹⁷⁹ The Proposing Release references other instances where the SEC employs a 1% disclosure threshold. *See* Proposing Release at 121, n.347 (citing 17 CFR 210.5-03.1(a), 17 CFR 210.12-13, and 17 CFR 229.404(d)). But none of these provisions support using a 1% here. All of the disclosure provisions cited by the Commission lend themselves to straightforward quantification and do not in all cases apply to all public companies. None of them relate to an amorphous term such as climate-related events. Our concerns with attempting to apply 1% or another numerical threshold to climate-related events is discussed in this Section.

¹⁸⁰ In order to be consistent with the interpretative response to materiality thresholds provided in SEC Staff Accounting Bulletin No. 99, 17 C.F.R. Part 211 (Aug. 12, 1999), both qualitative and quantitative analysis should be considered in order to assess materiality, and quantitative thresholds should only be a “rule of thumb” and an initial step in assessing materiality. We also note that that 5% is a widely used rule of thumb for materiality assessments, subject to consideration of all relevant circumstances, including qualitative factors.

serious challenges that registrants would face in abiding by a strict numerical threshold and the counterproductive effect of this proposed requirement.

First, the Proposed Rule fails to define “severe weather event,” nor does the Commission provide any guidance on how to distinguish “severe” weather events from less severe weather events that would not require disclosure. Moreover, the Proposing Release, at times, appears to include all “severe weather events” as “climate-related events” regardless of whether those events occurred in whole or in part as a result of a changing climate and without explaining which weather events it believes stem from climate change.¹⁸¹ And given the amorphous nature of this topic and how it does not avail itself of an objective definition, it may be impossible for regulators, issuers, and investors alike to agree upon one uniform, objective definition of every weather event, making it impossible for all registrants to account for climate-related events uniformly. As a consequence of this proposed amendment, climate-related disclosures in the financial statements may relate to events unrelated to climate change and would be inconsistent across registrants, rendering comparability impossible. In other words, the result will be the same “lack of . . . standardization with regard to the methodologies companies apply in disclosing climate-related information” that the Proposed Rule purports to avoid.¹⁸² If any amendments to Regulation S-X persist in any final rule, the Society believes that replacing a numerical threshold with a materiality threshold would be the most appropriate solution for all the reasons articulated in this letter.

The Proposed Rule would also require registrants to disclose expenses incurred from weather-related events, such as those associated with an asset that was destroyed by a hurricane or a wildfire. The Proposed Rule does not clarify whether registrants are required to disclose expenses that may result from a warming climate (such as increased utility bills to a U.S.-based registrant due to the potential future need for air conditioning during winter months) to calculate the proposed 1% threshold. If so, in order to factor the resulting expenses into the 1% threshold, the Proposed Rule would appear to require registrants to determine whether the hurricanes, wildfires, or other weather-related events at issue were triggered (or exacerbated) by climate change or some other factor (for example, if a wildfire was caused by the locality’s failure to conduct periodic controlled burns or lightning from a storm, which may or may not be climate-related). We note that registrants are generally not equipped to determine whether severe weather events resulted (or primarily resulted) from climate change, nor is that data readily available to calculate a 1% threshold.

Additionally, tracking the absolute value of all impacts on a per-line item basis is exceedingly difficult, if not impossible. Even assuming companies could disaggregate these climate-specific impacts and associated costs from other responsive actions and expenditures, such disclosure is likely to be riddled with estimates and assumptions that would pose significant liability concerns and audit challenges (not to mention that the disclosure would therefore not be decision-useful to investors). Again, assuming this exercise were possible, accounting for these impacts would require companies to write entirely new and significant accounting policies, design and implement new controls, and develop or acquire new software to track these items alongside the existing software currently used for their audited financials to comply with a 1% threshold. A 1%

¹⁸¹ See, e.g., Proposing Release at 117-19.

¹⁸² See Proposing Release at 31.

threshold would thus impose exorbitant compliance expenses that are not commensurate with any perceived benefit as compared to a materiality threshold.

We note that simply increasing the arbitrary 1% threshold to a higher arbitrary threshold would not resolve the fundamental issue with this proposed disclosure. Regardless of the numerical threshold chosen, companies would still need to implement the same policies and procedures subject to external audit and evaluate each transaction to determine if it counts towards that threshold, and would not be able to calculate a dollar value for that threshold until the end of the relevant period. Similarly, a numerical threshold would not result in decision-useful information for investors, since companies would still experience the same challenges around operability.

In contrast, the longstanding principles-based materiality threshold, which defers to a registrant's judgment based on relevant facts and circumstances, would allow registrants to better make difficult judgments regarding climate-related metrics and would yield more meaningful and reliable disclosure for investors.

2. The Proposed Rule's Absolute Value Concept Should Be Eliminated

In addition to replacing the proposed 1% threshold with a materiality standard, the Commission should allow registrants to use net losses and savings in calculating the threshold and should not require absolute value as the metric for determining if the threshold is met. If absolute value is applied universally, everything could be considered material. And if everything could be considered material, the resulting disclosures will not provide decision-useful information for investors. On the other hand, permitting registrants to use net losses and savings will streamline the disclosures by eliminating net value impacts of less than 1%.

3. Consideration of "Lost Revenue" Should Be Removed from Any Financial Calculations

The Proposed Rule would require registrants to disclose the financial impacts of transition activities and identified climate-related risks, including transition risks, on their consolidated financial statements. The Proposed Rule defines "transition risks" to include "reputational impacts (including those stemming from a registrant's customers or business counterparties) that might trigger changes to market behavior, consumer preferences or behavior, and registrant behavior."¹⁸³ This, in essence, could force registrants to calculate "lost revenue" as customers shift to cleaner energy types. But the concept of "lost revenue" does not exist under GAAP as a component of net income. Revenues are either earned and recorded on the income statement or not earned and altogether outside of the realm of net income under GAAP.

Moreover, the Commission has expressly declined to require inclusion of lost revenues in other contexts. For example, the recently released Disclosure Guidance: Topic No. 9, Coronavirus (COVID-19) from the Division of Corporation Finance reinforces that estimates of lost revenue are a non-GAAP measure that should not be included to normalize the results of operations in

¹⁸³ See proposed Regulation S-K Item 1500(c)(4).

SEC filings.¹⁸⁴ This would require registrants to separately track lost revenue, which does not exist under GAAP as a component of net income, and would require the implementation of new — and auditable—systems, processes, and controls. In addition, there would be inconsistent application in calculating lost revenue between registrants. Therefore, if any final rule includes any amendments to Regulation S-X, we urge that the rule specifically provide that registrants are not required to calculate or disclose any climate-related lost revenue in any line item or footnote disclosure.

4. Consideration of Cost Savings Should Be Removed from Any Financial Calculations

In addition to tracking and disclosing incurred expenses, the Proposed Rule would require registrants to detail any cost savings arising from investments that relate to climate mitigation when calculating any numerical threshold. Unlike GAAP, which generally requires companies to track items only in general ledger accounts, the Proposed Rule’s requirement would compel companies to track items that companies normally do not consider in their financial statements. Tracking items outside of a company’s general ledger accounts would require registrants to exercise significant judgment and create bespoke assumptions. Inevitably, registrants cannot and will not employ consistent or comparable judgments or assumptions, leading to potentially inconsistent disclosures. If any final rule includes amendments to Regulation S-X, we urge that it not require registrants to disclose or account for any climate-related cost savings.

5. Consideration of “Financial Impacts Related to Transition Activities” Should Include Only Those Impacts That Are Entirely or Primarily Driven by a Registrant’s Efforts to Mitigate Climate-Related Transition Risks

The Proposed Rule would require registrants to disclose “the impact of any efforts to reduce GHG emissions or otherwise mitigate exposure to transition risks on any relevant line items in the registrant’s consolidated financial statements during the fiscal years presented.”¹⁸⁵ The Commission’s use of the phrase “any efforts” makes this requirement impractical. Activities that have the ancillary benefit of reducing GHG emissions are often motivated by a myriad of factors that may or may not include sustainability-related objectives. For example, a registrant may wish to replace aging technology with new, more efficient equipment because the new equipment is safer or will reduce maintenance costs. This registrant may consider GHG emissions reduction a motivating factor, but significantly less important than other benefits obtained by replacing old equipment. If proposed amendments to Regulation S-X are adopted notwithstanding our significant concerns, the Commission should amend the language in § 210.14-02 such that the registrant must disclose only the impact of efforts taken exclusively to reduce GHG emissions.

6. Additional Guidance from the FASB is Critical

Financial impact metrics that require companies to disclose disaggregated information about the impact of climate-related conditions and events and transition activities are a new concept. As such, the line item reporting requirements imposed by the Proposed Rule are onerous and

¹⁸⁴ See SEC, Division of Corporation Finance Securities and Exchange Commission CF Disclosure Guidance: Topic No. 9 (COVID-19) (Mar. 2020).

¹⁸⁵ See Proposing Release at 454.

complicated. Many registrants, even large and sophisticated ones, are at a loss as to how to implement this Proposed Rule. The Proposed Rule is largely silent with respect to how to implement these requirements. If adopted, we respectfully request that the SEC direct the Financial Accounting Standards Board (“FASB”) to provide further accounting guidance for these reporting items. The Proposing Release, in Request for Comment Nos. 52 and 53, asks if providing additional guidance would assist registrants in preparing this disclosure. We believe that additional guidance would not only be helpful, but is imperative; accordingly, we suggest that these portions of the Proposed Rule go through the FASB’s objective, deliberative process.

This suggested approach is supported by considerable precedent. Any significant Commission proposal affecting financial statement disclosures is typically accompanied by accounting guidance to issuers to assist them in their compliance efforts. For example, the Commission issued an interpretive release after the FASB adopted its major new revenue recognition standards, ASC 606, in mid-2014.¹⁸⁶ During that time, the FASB set up a Transition Resource Group that held public meetings and published interpretive memos on its website around issues raised by various stakeholders relating to the implementation. As another example, in 2018, when the SEC issued rules to enhance the standard of conduct for broker-dealers, it also concurrently issued a separate proposed interpretation of the standard of conduct for investment advisors.¹⁸⁷ The Commission then issued an additional interpretive release in 2019 that offered further clarification on the 2018 rules.

While the Proposing Release does not contemplate transition guidance, every accounting or disclosure pronouncement requires a transition to the new standard, particularly one as significant and consequential as the one currently proposed.¹⁸⁸ The Proposed Rule is a much more extensive regulatory undertaking than anything the Commission has adopted in the recent past. Thus, considered and deliberative guidance, ideally from the FASB, is essential to enable registrants to comply with the Proposed Rule.

7. The Requirement to Include Climate-Related Metrics in the Financial Statements for Historical Periods Should Be Eliminated

Assuming the Proposed Rule is finalized in December 2022—and therefore large accelerated filers would need to provide all mandatory disclosures for fiscal year 2023 in 2024—the Proposed Rule would require large accelerated filers to include in their filings financial metrics going back to 2021 and 2022. This would be extremely challenging and costly given that companies will be developing these climate-related disclosures for their financial statements for the first time, likely after these periods have concluded, and also do not currently have the internal controls in place to collect the required information for 2021 and 2022; even those

¹⁸⁶ See Accounting Standards Update 2014-09; *Guidance Regarding Revenue Recognition for Bill-and-Hold Arrangements*, Release No. 33-10402 (Aug. 18, 2017); *Updates to Commission Guidance Regarding Accounting for Sales of Vaccines and Bioterror Countermeasures to the Federal Government for Placement into the Pediatric Vaccine Stockpile or the Strategic National Stockpile*, Release No. 33-10403 (Aug. 18, 2017).

¹⁸⁷ See SEC, *Regulation Best Interest, Exchange Act*, Release No. 83062 (Apr. 18, 2018); SEC, *Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation, Investment Advisers Act*, Release No. 4889 (Apr. 18, 2018).

¹⁸⁸ See Proposing Release at 114 (including Request for Comment Nos. 52 and 53, which reference the possible need for more guidance to support the transition to the new standard).

companies that have voluntarily disclosed climate-related risks and metrics will need to adjust their practices to comply with the Proposed Rule, as well as to ensure that the information can be audited. This is especially true if the necessary information—especially impact information—does not exist. As discussed in detail above, this challenge will be exacerbated if a numerical threshold proposed by the Commission is adopted. Accordingly, any final rule should apply prospectively and not retrospectively. In response to Request for Comment No. 57, which asks if the SEC should provide additional guidance as to when a registrant may exclude a historical metric for a fiscal year preceding the current fiscal year, we believe the SEC should not require any historical metrics to be disclosed.

While the Proposed Rule states that registrants would be able to rely on Rule 409 or Rule 12b-21 to exclude information to the extent the information is not reasonably available and would require unreasonable effort to obtain, that is typically an extremely high hurdle to overcome. Rule 409 of the Securities Act and Rule 12b-21 of the Exchange Act provide relief from disclosure obligations for information that is *unknown and not reasonably available to registrants*. Those rules usually provide relief to registrants when they cannot obtain information needed to make otherwise required disclosures in prospectuses and Exchange Act reports. The Proposed Rule states that these rules would apply to Scope 3 emissions disclosure to the extent that Scope 3 emissions data is *not reasonably available* and *would require unreasonable effort or expense* to obtain.

While this sounds promising in theory, there are two related issues with the SEC’s cursory mention of Rule 409 and Rule 12b-21. First, the SEC staff has historically adopted a narrow reading of “not reasonably available,” thus establishing a high bar for registrants to overcome. Second, as discussed in Section V.A below, disclosure of Scope 3 emissions would not be deemed fraudulent statements unless it is shown that the disclosure was made or reaffirmed without a “reasonable basis” or was disclosed other than in “good faith.” But there is little guidance as to what a company would need to do to ensure that it has a “reasonable basis” or has acted in “good faith,” and there is no guidance from the SEC discussing how these requirements of “reasonable basis” or “good faith” would interact with Rule 409 or Rule 12b-21. For example, in a foreseeable circumstance where registrants believe that obtaining voluminous Scope 3 emissions data would require an unreasonable expense, yet the SEC believes that withholding such data means the disclosure was not made in “good faith,” it is subject to interpretation whether Rule 409 or Rule 12b-21 would offer any meaningful protection to such registrants.

If adopted, the final rule should make clear that if a registrant states that it determines unilaterally, after reaching out to a third-party source for data needed to support historical climate-related disclosures, that the data is not reasonably available or is available only at an unreasonable expense, the registrant is entitled to a presumption that the statement is made in good faith, which presumption can be overcome only by clear and convincing evidence.

8. Safe Harbors Must Be Adopted for Forecasting Information in Financial Statements

The safe harbor established by the Private Securities Litigation Reform Act does not apply to forecasting information in financial statements, and the Proposed Rule does not create a safe harbor for these disclosures. Thus, the Proposed Rule would present an immediate liability risk

even for those companies that seek to comply with it in good faith. Inevitably, this risk will ripen into actual and potentially costly litigation for many companies that strive in good faith to comply with a rule that requires so many judgments and assumptions. If the SEC declines to substitute the proposed financial statement disclosures with MD&A disclosures, it is imperative that the final rule feature a broad safe harbor for any forward-looking financial disclosures in the financial statements and their footnotes that are made in good faith.

IV. The Proposed Rule’s Assurance Requirement Is Not Justified

A. Climate-Related Disclosures Should Not Be Treated Differently from Other Information Disclosed Outside of the Financial Statements

The Commission acknowledges that SEC rules typically do not require assurance of disclosures provided outside of the financial statements.¹⁸⁹ The Commission justifies treating GHG emissions disclosures differently based on the rationale (among others) that information outside of the financial statements is typically derived, at least in part, from the same books and records that are used to generate a registrant’s audited financial statement and accompanying notes, and that are subject to ICFR. This rationale, however, is misguided and provides an insufficient justification for adopting changes of this magnitude to public company disclosure and imposing assurance requirements.

First, GHG emissions information may also be derived, at least in part, from those same books and records; we can discern no principled reason to treat the disclosure of GHG emissions differently by requiring third-party review and attestation. Moreover, claiming that quantitative information outside of the financial statements is “typically” subject to ICFR is inaccurate. Public companies provide in their SEC filings extensive quantitative disclosures that are not subject to internal control over financial reporting—for example, compensation disclosure under Item 402 of Regulation S-K, disclosures about market risk under Item 305 of Regulation S-K (including quantitative disclosure), and disclosures under Item 407 of Regulation of S-K—all without attestation.

Registrants are already responsible for ensuring that their Form 10-K disclosures are accurate and complete in all material respects and must certify as to the conclusions of their Chief Executive Officer and Chief Financial Officer each fiscal quarter on the effectiveness of their disclosure controls and procedures. And they are already subject to a robust and effective system to ensure the reliability and material accuracy and completeness of the disclosures – a system that, as noted above, includes the SEC’s comment letter process, SEC enforcement actions, and a private right of action under Exchange Act Rule 10b-5. Requiring assurance by an independent third party unnecessarily exceeds the already stringent requirements to which companies are subject when including information in a Form 10-K. The assurance requirement creates additional and unnecessary burdens and costs for companies with only a perceived, unsubstantiated benefit that such assurance will provide an additional degree of reliability with respect to the disclosures and the assumptions, methodologies, and data sources used.

¹⁸⁹ Proposing Release at 220.

B. Requiring Use of Independent Third-Party Providers with Relevant Subject Matter Expertise Is Highly Unusual and Will Increase Issuers' Costs and Burdens

The Commission also justifies the proposed assurance requirement by noting that “[i]n other contexts, such as mineral resources and oil and gas reserves, the Commission has recognized the value that third parties with specialized expertise in audit and engineering can bring to company disclosures.”¹⁹⁰ This comparison, however, is inapposite; it ignores the fact that the Proposed Rule requires assurance from an *independent* party, while disclosures regarding mineral resources and oil and gas reserves do not contain similar independence requirements.¹⁹¹ In fact, with respect to oil and gas reserves estimates, the Commission agreed with commenters that urged the Commission *not* to adopt a requirement to retain an “independent” third party to prepare, or conduct a reserves audit of, the company’s reserves estimates.¹⁹² This determination was based in part on comments that a company’s internal staff, particularly at larger companies, is generally better situated to prepare those estimates and that there was a potential lack of qualified third-party engineers and other professionals available to conduct the increased work that would ensue from such a requirement. These considerations are equally applicable to the current situation.

Moreover, the Proposed Rule’s independence requirements regarding attestation providers will place additional burdens on companies, given that they will need to perform procedures to assess the independence of those attestation providers. Registrants and public audit firms determine auditor independence based on well-established rules, regulations, and procedures, including those promulgated by the Public Company Accounting Oversight Board.¹⁹³ In light of the fact that there is no entity providing oversight of attestation providers for GHG emissions, this burden will fall squarely on issuers.

In addition to the independence requirement, the Proposed Rule would require that the third party providing the attestation be “an expert in GHG emissions” and have sufficient competence and capabilities necessary to perform engagements “in accordance with professional standards and applicable legal and regulatory requirements.”

Assuming this provision of the Proposed Rule is adopted substantially as proposed, we believe there is likely to be a severe shortage for a prolonged period of qualified third parties available to meet the demand for the requisite assurance services, particularly given the independence and expertise standards that would be imposed by the Proposed Rule. Even if companies engage their

¹⁹⁰ *Id.*

¹⁹¹ The SEC determined *not* to require that the qualified person preparing a technical report summary to support disclosure of mineral resources, mineral reserves and material exploration results be independent because of the compliance burdens on registrants of an independence requirement, other safeguards for investors exist, and the Committee for Reserves International Reporting Standards (“CRIRSCO”) based codes generally allowed qualified persons to be employees or affiliates of the registrant. See SEC, *Modernization of Property Disclosures for Mining Registrants*, Release No. 33-10570 (Oct. 31, 2018).

¹⁹² See SEC, *Modernization of Oil and Gas Reporting*, Release No. 33-8995, at 71-72 (Jan. 14, 2009).

¹⁹³ With respect to audit firms providing the attestation services for their audit clients, we recommend, for the sake of clarity and to avoid confusion, that the Commission explicitly state in Proposed Item 1505(b)(2) or an instruction thereto that a registered public accounting firm engaged to provide the attestation services under Proposed Item 1505 will still be considered independent if that firm audits the financial statements of the company.

independent accountants to perform the attestation, it is likely that those firms will need to engage specialists. Alternatively, it could take time for audit firms to hire and or train personnel with sufficient expertise to meet the requirements set forth in the Proposed Rule.

While the cost and compliance burdens on public companies that have not voluntarily disclosed Scope 1 and 2 GHG emissions (including companies for which Scope 1 and 2 GHG emissions are not material but that would nevertheless be required to disclose such emissions under the Proposed Rule) will be even more pronounced than for the minority of companies that have volunteered such disclosure and obtained assurance, nearly all companies subject to the assurance requirement will be significantly impacted from a cost and burden standpoint. Based on our membership outreach, even those companies considered “leaders” in this disclosure space do not currently disclose in a manner that is compliant with the Proposed Rule, and the monetary, staffing, and other resources projected by these companies to attain compliance is high.¹⁹⁴ Most companies subject to the Proposed Rule will need to develop internal data management capabilities for calculating and reporting emissions and will likely need to engage one or more third-party consultants to assist in developing controls and procedures for calculating their emissions. Pursuant to the Proposed Rule, any such third-party consultants would be ineligible to provide assurance, as they would not meet the independence requirements. These companies would need to engage a separate provider to fulfill the assurance requirement, adding to an already likely shortage of service providers and an immense additional cost to many companies. The shortage of qualified, independent third parties will, in turn, further drive up the cost and impair the efficiency and quality of assurance services. In fact, based on at least one Society member’s experience, service providers are already raising their prices and delaying delivery of their attestation reports due to anticipated demand prompted by the Proposed Rule.¹⁹⁵

C. Assurance Is Not as Prevalent as the Proposing Release Implies, nor Is It as Valuable as an Audit Opinion on Financial Statements

As discussed in detail above, a minority of the largest companies currently obtain third-party assurance over their GHG emissions, and most that do so obtain limited assurance from providers that may not meet (or may not be willing to meet) the Proposed Rule’s independence and expertise requirements.¹⁹⁶

We do not believe that assurance of GHG emissions will provide value commensurate with an audit opinion on financial statements. There is a significant difference between an opinion based on U.S. GAAP—a transparent and well-established reporting framework—and an assurance report on GHG emissions in an environment of evolving and competing frameworks, employing

¹⁹⁴ See *supra* Section I.C.7 and Appendix A-2.

¹⁹⁵ *Id.*

¹⁹⁶ See *supra* Section I.C.7 regarding the Society Climate Survey and notes 122 and 124 and corresponding text. Anecdotally, a large-cap member was informed by a representative of one of the Big Four public accounting firms that they believe that most of the current attestation providers do not have the size and/or compliance structure to meet the SEC’s requirements, and are not going to be willing to accept the potential liability associated with being a named expert, making it likely that most companies would need to look to the public company accounting firms for this service. This is among the several reasons why current attestation costs for voluntary climate-related reporting are not expected to in any way approximate or predict costs associated with the third-party attestation that the Proposed Rule would require.

varying estimates and assumptions, whose differences are not necessarily transparent or well understood by users. Since reporting frameworks for determining and calculating GHG emissions, as well as frameworks for attesting to GHG emissions disclosures, are not mature and have not been adequately tested, assurance will not be sufficiently valuable to justify the increased costs on issuers. In spite of the attestation requirement, the proposed disclosures may even be misleading, given, in the words of the Commission, the “fragmentation with respect to assurance and the need for investors to assess and compare multiple attestation standards.”¹⁹⁷

D. The Proposing Release Underestimates the Costs Associated with Attestation of the Type Anticipated By the Rule

As detailed in Section I.C and Appendix A-2, which provide empirical cost data, we believe the Proposing Release significantly underestimates the costs associated with the proposed attestation requirement.¹⁹⁸

E. Requiring Attestation Exacerbates the Timing Challenges Associated with the Proposed Disclosures

As explained in detail in Section II.A.6 above, the timing of the required GHG emissions disclosures under the Proposed Rule is problematic; the additional requirement for assurance of such disclosures exacerbates the issue. Accelerated and large accelerated filers have deadlines for the filing of their Forms 10-K of 75 days and 60 days after year end, respectively. In practice, many of these companies file their Forms 10-K earlier than the regulatory deadline—for example, to be closer in time to the release of their fourth quarter earnings and year-end results. The proposed attestation requirement will simply aggravate the already significant challenges associated with compiling the GHG emissions data in time for the Form 10-K filing.

Additionally, when an issuer that had previously estimated fourth quarter data is required to update its disclosures after identifying material differences between its estimated and actual fourth quarter data, it is assumed that the Proposed Rule would require attestation of any such updated disclosures (though the Proposing Release is somewhat unclear on this point). Assurance of updated data would result in additional, compounded costs to those already imposed by the Proposed Rule.

V. Other Considerations

A. Companies Must Be Afforded Appropriate Safe Harbors to Safeguard against Meritless Litigation over New Climate Disclosure

The Proposed Rule will require significant disclosure of historical and forward-looking information and metrics that many public companies have not previously disclosed; rely heavily on estimates, assumptions and third-party information; and include information that is not, in

¹⁹⁷ Proposing Release at 226.

¹⁹⁸ See also *supra* Section 1.C.7 regarding the results of the Society Climate Survey.

many cases, material.¹⁹⁹ Yet the Proposed Rule provides only narrow safe harbors that are, in many respects, more limited than the safe harbors that are currently provided to issuers for disclosures of information that can be calculated on a much more reliable basis. We respectfully urge the Commission to provide a safe harbor for the Proposed Rule’s new climate disclosures to safeguard against meritless litigation.

A broad safe harbor is necessary in this instance to incentivize robust disclosures of information despite substantial challenges arising from, among other things: (1) the nature and scope of the data to be disclosed, (2) the current lack of maturity and standardization for collecting and calculating climate-related data across all companies, but especially at smaller companies and in particular industries, (3) the need to rely on third parties with respect to whose climate-related data collection an issuer has no control and limited visibility, (4) the lack of widely accepted market standards with respect to data collection, assurance, and analytical and calculation methodologies, which are nascent in many cases, and (5) other significant practical challenges of defining, identifying, and measuring climate-related risks and integrating them into risk management frameworks.

Many of the challenges described above factored into the Commission’s decision to propose a safe harbor for Scope 3 GHG emissions estimates, which provides that disclosures on Scope 3 estimates would not be deemed to amount to 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.²⁰⁰ It is critical that this narrow safe harbor be clarified and broadened to cover all of the new climate disclosures that would be required by the Proposed Rule since the proposed climate-related disclosures will be considerably more difficult for issuers to prepare in a reliable manner than other business and financial information currently required to be included in SEC filings.

A broader scope of coverage under the safe harbor is particularly important in the early years of the Commission’s adoption of a final rule. As market practice develops and methodologies with respect to many elements of the requirements (including but not limited to Scope 1 and 2 GHG emissions, scenario analysis, attestation, and auditing procedures for the proposed financial statement disclosures) continue to evolve over the coming years, an issuer may deem it appropriate to refine previously published information on the basis that methodologies have improved.²⁰¹ History has taught us that without an appropriate safe harbor, issuers are likely to face expensive and meritless litigation, especially as market practice, standards, and methodologies continue to shift, as they have meaningfully over recent years. Such a safe harbor is also necessary to counter (at least in some measure) the disincentives the Proposed Rule

¹⁹⁹ See, e.g., Proposing Release at 82 (“A registrant’s disclosure of any internal carbon price necessarily would include assumptions about future events”); *id.* at 87 (noting that, under the Proposed Rule, a “registrant’s scenario analysis disclosure would necessarily include predictions and other forward-looking statements based on assumptions concerning future events”); *id.* at 208 (“It may also be necessary to rely heavily on estimates and assumptions to generate Scope 3 emissions data”).

²⁰⁰ See *id.* at 212, 474.

²⁰¹ See, e.g., *id.* at 85 (“Other commenters stated that they opposed a scenario analysis requirement because of the lack of a common methodology for scenario analysis”); *id.* at 226 (recognizing that “both the reporting and attestation landscapes are currently evolving”); *id.* at 257 (recognizing the “estimation uncertainties inherent in the quantification of GHG emissions, driven by reasons such as the state of the science, methodology, and assumptions used in the measurement and reporting processes”).

creates for private companies that are considering entering the public markets, especially since the Commission has not provided an extended compliance period or a liability safe harbor for companies making climate-related disclosures in connection with a public offering.²⁰²

Furthermore, providing strong liability protection for climate-related disclosures that extends beyond the forward-looking statement safe harbors included in the Proposed Rule²⁰³ will likely encourage companies to continue to take voluntary climate-related actions, such as conducting climate scenario analysis, using an internal price on carbon, adopting a transition plan, or setting targets or goals related to climate impact. The lack of adequate safe harbor provisions will disincentivize public companies from taking such measures. Finally, as discussed in Section II.B, if the “climate expert director” provision is adopted notwithstanding our significant concerns, we urge the Commission to adopt a liability safe harbor for directors identified as having climate expertise that aligns with the safe harbor that currently exists for audit committee financial experts and that has been proposed with respect to cybersecurity expert directors.²⁰⁴

B. Additional and Layered Compliance Phase-In Periods Are Warranted

The Society believes that additional and layered compliance phase-in periods are warranted for all companies subject to the Proposed Rule, in light of:

- The breadth and complexity of the Proposed Rule;
- The corresponding need for virtually all companies (including most large accelerated filers) to develop, enhance, test, and refine new systems, controls, and procedures necessary to prepare the required disclosures with an appropriate level of reliability;
- The need to develop the requisite internal and external expertise to provide the consulting, attestation, and audit services required by the Proposed Rule; and
- The very significant costs that companies will likely incur to comply with the Proposed Rule (as addressed more fully in Section I.C and Appendix A-2), which will be compounded by the timeline proposed.

As explained more fully below, the Society recommends an extended and layered schedule for compliance with the final rule as the Commission has adopted in other rulemaking contexts “in light of both the substantial time and resources needed to properly implement the rules.”²⁰⁵

Further, the Society believes additional phase-in accommodations should be provided with respect to acquired businesses and for companies going public.

²⁰² See *id.* at 67.

²⁰³ In addition to the Scope 3 safe harbor described above in Section V.A, the Proposed Rule offers some protection for the disclosure of certain climate-related information under the forward-looking statement safe harbors pursuant to the Private Securities Litigation Reform Act. Notably, however, these safe harbors are not available for registration statements.

²⁰⁴ See SEC, *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*, Release Nos. 33-11038; 34-943529; IC-34529, at 45-46 (Mar. 9, 2022); SEC, *Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002*, Release Nos. 33-8177; 34-47235 (Jan. 23, 2003). We did not support the proposed “cybersecurity expert director” provision contemplated by this release for similar reasons. See Society for Corporate Governance, *Comment Letter on Proposed Rule: Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure* at 16-17 (May 9, 2022).

²⁰⁵ See SEC, *Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports*, Release No. 33-8238 (June 5, 2003).

As the Commission notes in the Proposing Release, there are many companies that publish little, if any, disclosure relating to climate change (typically because those companies have concluded that the information is not material under their specific circumstances).²⁰⁶ For those companies that provide some climate-related information (usually non-material information provided outside of their SEC filings), the disclosures vary widely in scope. As discussed in Section I.C.1 above, a minority of companies are actually disclosing in alignment with any part of the TCFD recommendations, let alone the more prescriptive TCFD 2021 Implementation Guidance, which is likely to reveal a decline—potentially substantial—in TCFD-aligned disclosure compared to current practices.²⁰⁷ Because all 11 TCFD disclosure recommendations are reflected in the Proposed Rule—in addition to other extensive disclosure and related requirements—it is clear that most companies will need to spend a significant amount of time and other resources to be in a position to comply with the Proposed Rule.²⁰⁸ As noted throughout this letter, few companies—even large companies that are voluntarily reporting climate-related information, currently have the requisite staffing, infrastructure, systems, processes, or internal controls to implement the Proposed Rule’s requirements of unprecedented scope and granularity.

Further, applying the illustrative schedule included in the Proposing Release assumes that large accelerated filers would have the requisite systems, controls, and procedures in place within days or a few weeks following adoption of the final rule.²⁰⁹ This point is obscured when narrowly considering that the disclosures would appear in annual reports (and registration statements) beginning with those filed in 2024. The reality, however, is that (based on the Commission’s illustrative timeline) the required disclosures would relate to events and financial statement periods commencing well in advance of January 1, 2023 (particularly in light of the proposed requirement applying to prior year financial statements). This schedule effectively requires filers to begin investing resources immediately and, in any event, well in advance of the adoption of a final rule that could vary from the Proposed Rule—an extremely costly and burdensome outcome that is inconsistent with the principle of providing for a public notice and comment period to help inform the scope and details of the SEC’s rules.

Moreover, the initial cohort of companies to comply under the earliest proposed compliance dates—large accelerated filers—spans a wide range of companies under any measure. By the Commission’s own statistics, there are approximately 2,000 large accelerated filers.²¹⁰ Accordingly, the Commission is proposing that companies classified as “small cap,” “mid-cap,” “large cap” and “mega cap” come into compliance with the Proposed Rule (assuming they have the same fiscal year end) on the exact same timeline, regardless of their readiness for compliance.²¹¹ This proposed schedule would impose particularly burdensome obligations on

²⁰⁶ See *supra* Section I.B.2 and note 42.

²⁰⁷ See *supra* Section I.C.1.

²⁰⁸ Most companies would likely need to begin preparing before the Proposed Rule is even finalized to possibly achieve compliance.

²⁰⁹ See Proposing Release at 290.

²¹⁰ *Id.* at 304.

²¹¹ Because the Rule 12b-2 definition of “large accelerated filers” includes companies that have an aggregate market capitalization of \$700 million or more, at least some “small cap” companies – commonly referring to companies with a market capitalization of \$300 million to \$2 billion – as well as mid-cap companies – commonly referring to companies with a market capitalization of \$2 billion to \$10 billion, would be classified as large accelerated filers and thus subject to the earliest compliance schedule under the Proposed Rule. See 17 C.F.R. § 240.12b-2(2).

smaller and mid-sized companies, most of which currently do not measure and report on their GHG emissions.²¹² And, as detailed in Section I.C and Appendix A-2, few of those companies currently reporting their emissions are doing so in a manner that comports with the Proposed Rule. The timing contemplated by the Proposed Rule would require these companies to prepare the requisite disclosures in a very limited window.²¹³ Additionally, putting approximately 2,000 companies on the same disclosure timeline with respect to novel and complex disclosure requirements that are unprecedented in scope and scale will inevitably require those companies to compete for the limited external consulting resources qualified to assist them with compliance.

1. The Commission Should Adopt a Sequential, Layered Phase-in Schedule Based on the Degree of Preparation, Data, and External Resources Required for Compliance

As proposed, upon the applicable compliance date, a company must comply with all of the new disclosure requirements other than the Scope 3 GHG emissions estimates (if applicable) and attestation requirements. The Society believes that this proposed compliance schedule fails to take into consideration the effort; the implementation of processes, systems, and controls; and the extraordinary internal and external resources that would be necessary for most companies to comply with the proposed requirements.

The Society believes that, to the extent the rule is adopted largely as proposed, a layered approach—starting with qualitative disclosures, then adding quantitative non-financial statement disclosures, and then adding financial statement disclosures—would provide a more reasonable compliance schedule. As explained above, the proposed disclosure requirements would be exceedingly more extensive and complex than the climate disclosures provided by the vast majority of the minority of companies that currently elect to provide voluntary disclosure. And as further detailed in Section I.C and Appendix A-2, given its breadth and complexity, compliance with the Proposed Rule would likely require significant investments of time and resources even for companies that currently provide some, or even relatively robust, climate-related disclosures.

In particular, companies should be afforded more time for compliance with those climate-related disclosure items that likely will demand substantial internal and external resources. Assuming the Proposed Rule is adopted largely as proposed, these items include quantitative disclosures of GHG emissions estimates and intensity measures, climate-related financial statement disclosures that would be subject to audit, and attestation reports on Scope 1 and 2 GHG emissions. These quantitative and financial statement disclosure requirements are expected to significantly change how corporate data, expenses, and line items are captured in reporting systems, and such system changes and related control testing will take time to implement. Companies will also need sufficient time to coordinate with external advisors, consultants, auditors, and attestation providers. For example, according to a recent survey by Ernst & Young LLP and the Financial Education & Research Foundation of 72 chief accounting officers and controllers from *large U.S. public companies*, **only 8%** of the respondents indicated that they had a relatively complete

²¹² See *supra* Section II.A.6 for a discussion of the timing of disclosure in the annual reporting cycle of GHG emissions specifically.

²¹³ Proposing Release at 289-90.

and robust set of policies and procedures to drive consistent application of ESG data, and less than half reported having tools in place (such as software) to facilitate a review process around ESG information.²¹⁴

Given these considerations, the Society believes the Commission should provide additional time so all companies have at least one full year from the time of adoption of the final rule to develop, implement, test, and refine necessary systems, controls, and procedures before the commencement of collecting data for their first reporting year under the final rule.²¹⁵ Such a timeline would also be consistent with the Commission's past practices to provide extended compliance phase-in periods for complex rules. For example, after adopting the final rules implementing Section 404 of the Sarbanes-Oxley Act of 2002 (the "SOX Rulemaking"), which requires annual reports to include a management report on the company's internal control over financial reporting, the Commission extended the transition periods on multiple occasions.²¹⁶ In that context, the Commission had also recognized the benefits of a sequential approach to compliance, noting that it would enable "management to more gradually prepare for full compliance with the Section 404 requirements and to gain some efficiencies."²¹⁷ Here, too, permitting a layered or staged compliance timeline for the more resource-intensive portions of the final rule that involve quantitative and financial statement disclosures would help ease the compliance burden on companies and facilitate the proper implementation of the final rule.

Similarly, when adopting the conflict minerals disclosure rules, the Commission permitted a transition period that spanned the first two calendar years of reporting (and four years for smaller reporting companies), during which issuers were permitted to follow a modified reporting structure for certain products and not conduct an independent private sector audit. In the adopting release, the Commission noted that a two-year temporary period was appropriate because "the processes for tracing conflict minerals through the supply chain must develop further to make such determinations for the issuer community at large."²¹⁸ This observation is particularly relevant here, in light of the need to coordinate with suppliers, and further supports

²¹⁴ See Ernst & Young LLP and the Financial Education & Research Foundation, *How Finance Professionals Are Helping to Advance ESG Reporting* (May 2022); see also Proposing Release at 371-72 ("To the extent that they are not already gathering the information required to be disclosed under the proposed rules, registrants may need to re-allocate in-house personnel, hire additional staff, and/or secure third-party consultancy services. Registrants may also need to conduct climate-related risk assessments, collect information or data, measure emissions (or, with respect to Scope 3 emissions, gather data from relevant upstream and downstream entities), integrate new software or reporting systems, seek legal counsel, and obtain assurance on applicable disclosures (i.e., Scopes 1 and 2 emissions). In addition, even if a registrant already gathers and reports the required information, some or all of this information may be in locations outside of SEC filings (such as sustainability reports posted on company websites or emissions data reported to the EPA). These registrants may face lower incremental costs by virtue of already having the necessary processes and systems in place to generate such disclosures; however they may still incur some additional costs associated with preparing this information for inclusion in SEC filings."). Relatively few companies, including those voluntarily disclosing climate-related information in sustainability reports or through other channels, already have the necessary processes and systems in place to comply with the Proposed Rule.

²¹⁵ In this regard, the Society agrees with the Commission's proposed approach to provide additional time for smaller registrants. See Proposing Release at 291 ("[R]egistrants that are not large accelerated filers may need more time to develop the systems, controls, and processes necessary to comply with the proposed rules, and may face proportionately higher costs.").

²¹⁶ See, e.g., SEC, *Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies*, Release No. 33-8760 (Dec. 15, 2006).

²¹⁷ See *id.* at 17.

²¹⁸ SEC, *Conflict Minerals*, Release No. 34-67716, at 30-31 (Aug. 22, 2012).

the need for additional phase-in periods, given that the vast majority of companies have not provided or are in the early stages of providing climate-related disclosures.

For illustrative purposes, assuming the final rule is adopted substantially as proposed by December 2022, the Society proposes the following compliance schedule to allow companies to prepare adequately for compliance:²¹⁹

Requirement	Large Accelerated Filer	Accelerated Filer	Non-Accelerated Filer	Smaller Reporting Company
Qualitative/narrative disclosures only – climate-related risks and opportunities, governance and risk management processes, targets and goals, and transition plan and annual updates	FY 2024	FY 2025		FY 2026
Scope 1 and 2 emissions disclosure	FY 2025	FY 2026		FY 2027
Climate-related financial statement disclosures	FY 2026	FY 2027		FY 2028
Scope 3 emissions estimates	FY 2027	FY 2028		Exempt
Attestation report – limited assurance	FY 2027	FY 2028	N/A	N/A
Attestation report – reasonable assurance	FY 2028	FY 2029	N/A	N/A

In addition, assuming the final rule is adopted substantially as proposed, climate-related financial statement disclosures for historical periods preceding the first applicable compliance date should not be required. For instance, under the Society’s proposed schedule above, large accelerated filers would be required to provide climate-related financial statement disclosures beginning with their annual report for fiscal year ending in 2026. In that annual report, large accelerated filers should not be required to provide historical climate-related financial statement disclosures with respect to fiscal years 2024 and 2025, as doing so would be inconsistent with providing companies the appropriate transition time to develop necessary controls and procedures. The following year could then contain climate-related financial statement disclosures for 2026 and

²¹⁹ This chart is for illustrative purposes only. As previously noted, the Society does not support the Proposed Rule based on the numerous concerns raised in this letter.

2027, and the next year could contain the relevant note disclosures for three years of financial statements.

As discussed above, we believe that delaying implementation will give the FASB more time to consider and issue much-needed implementation guidance. In this regard, we note that ASC 606, another major accounting standard referenced above, was adopted in 2014 but did not take effect until fiscal year 2018, with disclosure required starting only in annual reports filed in 2019—a gap of nearly five years. This is a significantly longer and more reasonable implementation schedule than the timeline contemplated in the Proposed Rule, which would create new accounting and reporting requirements that would likely exceed what issuers had to manage to comply with ASC 606.

2. The Commission Should Provide Additional Phase-in Accommodations with Respect to Acquired Businesses

The Society believes that additional flexibility should be provided with respect to acquired businesses. Specifically, an issuer should be permitted to omit acquired businesses from its climate-related disclosures, including financial statement disclosures pursuant to the proposed amendments to Regulation S-X, until the commencement of the first reporting fiscal year that begins no sooner than 12 months after the effective date of the acquisition—similar to the temporary exemption from the requirement to include an acquired business in management’s report on ICFR.²²⁰ Absent this relief, companies may have a significant disincentive to complete acquisitions beyond a certain point in their fiscal year. An issuer acquiring a private company or a public company with a different filer status and compliance schedule would likely need to enhance and align the acquired business’s systems, controls, and procedures. Even when the acquired company has the same filer status and compliance schedule as the issuer, the acquired company’s systems may not be as rigorous or may simply be different, requiring integration into the issuer’s systems. Such integration process could require a substantial amount of time, especially in light of the extensiveness of the proposed disclosure requirements. Absent relief, the Proposed Rule could complicate mergers and affect the timing of when issuers can close mergers and remain in compliance with the rule for their next annual report. For the same reasons, the Society believes climate-related financial statement disclosures for acquired businesses should not be required for historical periods preceding the first reporting fiscal year with respect to such acquired businesses.

3. The Commission Should Provide Additional Phase-in Accommodations with Respect to Companies Going Public

In addition to relief for acquired businesses, all newly public companies should be permitted an additional two-year phase-in period. Initial securities offerings already involve complex and lengthy processes, as well as corporate governance, disclosure, and numerous other compliance considerations. In particular, companies going public spend a significant amount of time and effort to build controls and procedures for compliance with existing SEC disclosure requirements and otherwise transition to operating as a public company. Requiring newly public companies to

²²⁰ See SEC, *Management’s Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Frequently Asked Questions*, (Sept. 24, 2007), (discussing, as outlined in Question 3, the available exception).

implement additional controls and processes for extensive climate-related disclosures on the same timeline as established and mature public companies could significantly delay the initial securities offerings process and even discourage companies from going public. In addition, providing newly public companies an additional phase-in period would be consistent with Congressional intent (as expressed in the JOBS Act of 2012) to reduce disclosure burdens for new companies.

In this regard, in the SOX Rulemaking, the Commission noted that additional compliance time for newly public companies “would benefit investors by making implementation of the internal control reporting requirements more effective and efficient and reducing the costs that a company faces in its first year as a public company,” and that such relief “would limit any interference by our rules with a company’s business decision regarding the timing and use of resources relating to its initial U.S. listing or public offering.”²²¹ For the same reasons, the Society believes an additional two-year delay in the compliance timeline for newly public companies is warranted with respect to the final climate rule.

C. Certain Classes of Filers Should Be Exempt from Compliance with the Proposed Rule

The Proposed Rule would apply to nearly all issuers of all listed securities with very few exceptions for smaller reporting companies, and it does not exclude certain issuers that are excluded from many of the Commission’s other disclosure rules, such as foreign private issuers and debt-only issuers. The Society believes that it would be appropriate for the Commission to exempt foreign private issuers and debt-only issuers from the final rule.

The Commission has repeatedly expressed a desire to exempt foreign private issuers from onerous requirements that are not required under those issuers’ home country laws. The Commission’s rationale for such exemptions is based on deference to the issuer’s home country law. The Commission should recognize that many other countries have alternative regulatory regimes; subjecting them to this additional proposed U.S. climate disclosure rule would be extremely burdensome and costly. If foreign private issuers fall within the scope of the final rule, it is possible that a substantial number of such issuers may choose to delist from U.S. exchanges. Delisting by foreign private issuers is detrimental to investor protection, since when foreign private issuers delist from a U.S. securities exchange, investors no longer receive the benefit of their disclosures pursuant to the robust U.S. disclosure regime.

We also recommend excluding debt-only issuers from coverage under the final rule. Similar to foreign private issuers, debt-only issuers (and particularly those that are wholly-owned by a reporting company) are exempt from many disclosure requirements that are not material to debt investors. In contrast to equity investors, debt investors are primarily concerned with information material to an issuer’s ability to repay its debts. Investors in debt securities have different expectations when they purchase debt securities, and are not investing on the premise that the investment represents an ownership stake in the company with rights beyond those negotiated in the debt instruments, such as in the covenants. Debt investors that are motivated by concerns

²²¹ SEC, *Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies*, Release No. 33-8760, at 24 (Dec. 15, 2006).

regarding climate change negotiate with issuers for covenants addressing such concerns, including, for example, limitations on the use of proceeds for certain environmentally friendly uses. Accordingly, we believe it would be appropriate to exclude debt-only issuers from the final rule.

VI. Foreseeable Negative Consequences of the Proposed Rule

The Proposed Rule will likely trigger significant negative consequences that are plainly foreseeable. First, aside from the costs it would impose on public companies, the Proposed Rule is likely to have adverse impacts on private companies, which are not otherwise subject to the SEC's disclosure scheme. Specifically, the Proposed Rule's requirement with respect to Scope 3 GHG emissions estimates appears to require registrants to first obtain the GHG emissions estimates of the various parties within its supply chain to determine whether those GHG emissions estimates, when aggregated, are "material." This process would necessitate that the registrant's upstream and downstream suppliers and distributors measure and disclose their Scope 1 and 2 GHG emissions to the registrant. It is probable that registrants will seek to impose such reporting requirements on their upstream and downstream vendors, whether through their contractual arrangements or otherwise. However, even this expected response would merely address the registrant's first-tier suppliers and distributors rather than the indirect, and often multiple tiers of, suppliers and distributors.

As detailed elsewhere in this letter, the majority of companies currently providing GHG emissions estimates are larger, public companies that are generating sufficient revenue and have considerable resources to gather, analyze, assure, and disclose this information. However, smaller companies that are outside of this disclosure scheme that provide goods and services to issuers would have to incur considerable costs to produce GHG emissions data even though they would not be subject to the reporting requirements of the Proposed Rule. Vendors that are unwilling or unable to provide their GHG emissions could eventually be excluded from consideration for contracts to provide goods or services to registrants, which could diminish opportunities for these smaller businesses.

The Commission's suggestion that an issuer can influence its Scope 3 GHG emissions by "choosing to purchase from more GHG emission-efficient suppliers" and "working with its suppliers and downstream distributors to take steps to reduce those entities' Scope 1 and 2 GHG emissions (and thus help reduce the issuer's Scope 3 GHG emissions risks) and any attendant risks" yields the same result, *i.e.*, effectively forcing issuers to exclude from their value chains small businesses and private companies that are unable to produce the requested emissions data.²²² We further believe that this suggestion is inappropriate in light of the multitude of business-relevant considerations that go into companies' vendor selection.²²³

²²² Proposing Release at 161.

²²³ By way of example, one Society issuer member notes: "Many manufacturing companies (regardless of overall size) have plants in small towns and have small local vendors as suppliers. These "mom and pop" vendors may not be able (or willing) to provide the data required within the time frame required, or at all. The proposed rule may require these companies to move their business to bigger suppliers, which could adversely affect these small vendors and the local economy. "

The Proposed Rule may also induce public companies to abandon or scale back current “buy local” or “buy small” initiatives intended to strengthen economic access and resilience in financially vulnerable communities, as these suppliers may be less able to afford to collect emissions data. Among other negative consequences, a disclosure regime that would have the effect of forcing issuers to shift away from smaller, newer suppliers and distributors and toward larger, more established ones could further limit the ability of financially vulnerable communities to address the impact of climate change, especially in areas that have been disproportionately impacted by the effects of climate change.

For similar reasons, the proposed disclosure requirements may also have the unintended consequence of hampering other ESG-related initiatives of public companies. For example, as part of their diversity or community impact initiatives (or to comply with federal contracting guidelines), some issuers have established or are in the process of establishing programs to increase the number of businesses owned by women or members of underrepresented communities with which they conduct business. Such vendors may lack the resources and/or personnel to track and report on GHG emissions that may not be material to, and may detract from operating, their businesses. To the extent they are unable to comply with issuers’ information demands required to make their own Scope 3 emissions materiality determinations, such underrepresented vendors may be placed at a disadvantage in trying to secure or maintain business with issuers. In turn, issuers may be unable to meet their goals to increase their spend with, and support for, businesses owned by women or members of underrepresented communities. Furthermore, issuers may be forced to devote time and resources in order to assess whether their existing suppliers are able to track and report GHG emissions. To the extent such suppliers can provide this information, issuers would likely have to amend existing contracts which did not contemplate such reporting at the time of their original negotiation and execution.

In addition, by imposing additional disclosure burdens on those companies that opt for a proactive approach to managing climate risk, the Proposed Rule will have a chilling effect on the adoption of such proactive strategies (including—based on our members’ input—the adoption of an internal price on carbon, conducting climate scenario analyses, establishing and committing to climate-related targets or goals, and initiating climate-related pilot projects to determine the viability on a broader scale). This is due in part to the time, resources, and expense involved in disclosure, concerns about the increased liability associated with the disclosure, and/or concerns about sharing competitively sensitive information.

That chilling effect is already apparent. For instance, one Society member company, which has begun conducting climate scenario analysis and was planning to expand upon this analysis in the coming years, is having active conversations about whether to abandon that process, solely in light of the Proposed Rule. We are also aware of recent instances in which companies have chosen not to set or publicly announce GHG reduction targets due to the Proposed Rule’s disclosure requirements or have tabled a planned internal price on carbon due to the Proposed Rule. This chilling effect, which will undoubtedly continue if the rule is adopted as proposed, is clearly counterproductive to the stated objectives of the Proposed Rule. Accordingly, we urge the Commission not to impose additional disclosure burdens on companies that are taking voluntary climate-related measures such as those discussed in the Proposing Release.

Conclusion

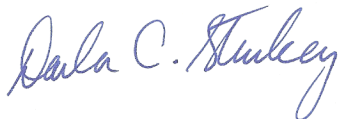
For all of the reasons above, we believe the Proposed Rule would be detrimental to U.S. public companies and their shareholders, as well as other businesses and prospective businesses within public companies' value chains. We urge the Commission not to adopt the rule as proposed or substantially as proposed.

Finally, we note the risk in approving the Proposed Rule amid the significant concerns that companies have expressed to us about not having sufficient time to digest it or to explore and consider all the consequences that could flow from it.²²⁴ While Society members and staff have done their best in this letter to identify all possible material consequences, it is evident that more will become known with the passage of time as public companies have an opportunity to fully evaluate the potential cost, resource, value chain, and other implications of the Proposed Rule.

Respectfully submitted,

A handwritten signature in blue ink, consisting of a vertical line on the left and a long horizontal line extending to the right.

Randi Morrison
Senior Vice President – Communications,
Member Engagement and General Counsel
Society for Corporate Governance

A handwritten signature in blue ink, written in a cursive style.

Darla C. Stuckey
President and CEO
Society for Corporate Governance

²²⁴ We note and concur with the comment period concerns expressed by numerous financial associations in the [Comment Letter from Alternative Credit Council \(ACC\) et. al., to the Securities and Exchange Commission re: Importance of Appropriate Length of Comment Periods](#) (“The Office of the Federal Register’s Guide to the Rulemaking Process states that “[f]or complex rulemakings, agencies may provide for longer time periods, such as 180 days or more.”). We believe that a full 180-day comment period is appropriate and warranted considering the magnitude and anticipated impacts of the Proposed Rule.

Appendix A-1 Retail Investor Survey Data

The following supports the discussion in Section I.B.1.b of this letter concerning the survey of retail investors conducted on behalf of Public Citizen.²²⁵

The release’s leading survey “finding”—that “**seventy percent of investors** support the Securities and Exchange Commission (SEC) requiring all public corporations to disclose standardized information about their financial risks due to climate change”—and other reported “findings,” are generally based on a series of questions that:

- **Inaccurately portray the proposed mandated disclosures as “free,” notwithstanding the extraordinary costs companies would incur to generate the disclosures, which costs would be passed on to investors and divert resources from revenue-producing activity.**
 - Examples:
 - “How likely is it that you would factor in information about an investment’s financial risks and opportunities related to climate change if that information was standardized, *free*, and easy to find?” (emphasis added)
 - “Which types of corporate information would you factor into your investment decisions if the information was standardized, *free*, and easy to find?” (emphasis added)
- **Inaccurately portray the climate-related information that would be provided under the Proposed Rule as inherently financially material to the respondents’ investments, notwithstanding the fact that many of the proposed disclosures lack a materiality qualifier.**
 - Examples:
 - “How likely is it that you would factor in *information about an investment’s financial risks* and opportunities related to climate change if that information was standardized, *free*, and easy to find?” (emphasis added)
 - “How likely is it that you would factor in *information about a corporation’s financial risks* related to climate change if that information was audited and disclosed to the SEC?” (emphasis added)
- **Fail to acknowledge the granularity of the climate change information that would be mandated by the Proposed Rule or the fact that climate-related information material to a company is already disclosable under existing rules, instead asking more broadly and**

²²⁵ Public Citizen, [Survey Reveals Retail Investors Want SEC to Require Climate Disclosure](#) (Apr. 29, 2022); and [Results of a nationwide survey: Retail investors’ support for the SEC mandating climate-related financial disclosures from public companies](#) (Apr. 28, 2022). *See supra* note 29.

vaguely whether the investor would be interested in *any* information about companies' climate-related risks and strategy.

- Example:
 - “How important do you think it is for corporations, banks, and other financial institutions to disclose information to investors about their climate change risks and strategy?”
- **Misleadingly suggest the majority of respondents would factor specified climate-related factors into their investment decision-making, when not one of the enumerated factors actually garnered a majority response, notwithstanding the above-described question flaws that would foreseeably inflate positive responses.**
 - Example:
 - “Despite the technical complexity and novelty of these issues, **63% of investors would factor in at least one** of the following climate change related factors into their investment decisions if that information was standardized, free, and easy to find:
 - corporations’ records on environmental justice, Indigenous rights, and impacts on communities (48% of investors)
 - corporations’ climate commitments, strategies, and progress (46%)
 - corporations’ risk management plans around climate change (44%)
 - greenhouse gas emissions produced by a corporation’s products and supply chain (42%)
 - greenhouse gas emissions produced by a corporation’s day-to-day operations (41%)
 - greenhouse gas emissions produced by activities funded by banks’ and financial institutions’ investments and loans (37%)
 - a corporation’s use of carbon offsets (35%).”
- **Misleadingly suggest the majority of respondents believe specified climate-related factors *could* significantly affect a company’s financial performance or stock price, when not one of the enumerated disclosures garnered a majority response and that failed to address company-specific “significance” (or, more properly, materiality), notwithstanding the above-described question flaws that would foreseeably inflate positive responses.**²²⁶
 - Example:
 - “Sixty-eight percent of investors believe at least one of the following climate change related factors could have a significant effect on the financial performance and/or stock price of a company:
 - regulations on greenhouse gas pollution (45% of investors)

²²⁶ See *infra* Section I.B.1.d “Material Information is Not Information that *Might* be Important”.

- consumer demand for more environmentally friendly products and business practices (45%)
 - climate change and extreme weather events (42%)
 - investor demand for action on climate change (35%)”
- **Fail to inform respondents about companies’ potential liability under existing federal and state securities laws for materially false or misleading disclosure within and outside of its SEC filings, regardless of: (i) whether the information is voluntary or mandated and (ii) third-party auditor “validation” (*i.e.*, assurance)**
 - Example:
 - “Generally speaking, how much do you trust information that corporations, banks and other financial institutions *voluntarily* disclose about their climate change risks, impacts and strategy?” (emphasis added)
- **Inaccurately portray the proposed attestation requirement as “validation [of the climate change information] by a third-party auditor” by (i) misstating both the Proposed Rule’s attestation provider requirements, as well as the fact that obtaining auditor (or other third-party) assurance does not “validate” the assured information, and (ii) omitting the significant costs associated with obtaining assurance over the scope of information from a provider that would be eligible under the Proposed Rule to provide such assurance.**
 - Example:
 - “How much would you trust corporations’ climate change risk information if their disclosure to the SEC was also validated by a third-party auditor?”

Appendix A-2 Society Member Climate-Related Disclosure and Assurance Cost Data

- **Company 1**, a large-cap company that is voluntarily reporting and assuring its Scope 1, 2 and 3 GHG emissions, estimates that its one-time costs to bring the company into compliance with the Proposed Rule will be in the \$5 million to \$10 million dollar range. Included in its estimate are consultant and internal staffing costs to (1) perform a gap analysis between the company’s current climate-related reporting and the Proposed Rule, (2) create a new governance infrastructure for reporting climate-related financial impacts, (3) develop new accounting policies, (4) design and implement new systems and/or processes to track the financial impacts, and (5) design and implement new financial reporting controls.

Also included are costs for anticipated changes to the company’s GHG emissions reporting to comply with the Proposed Rule, including changing its calculation methodology to comply with the Form 10-K reporting deadline and the organizational and operational boundaries prescribed by the proposal, potentially restating its historical GHG emissions data to ensure consistency and comparability year over year, and potentially adjusting its current science-based emissions reduction targets to reflect the change in the reporting boundaries.

The company obtains limited assurance from a public company accounting firm over select environmental metrics disclosed in its sustainability report, including its Scope 1, 2 (location-based and market-based), and Scope 3 (including a comparison against the base year) GHG emissions; total energy consumed; percentage grid electricity; percentage renewable energy; and water usage. The cost for the current year assurance is more than \$400,000.

- **Company 2**, a large-cap company, discloses Scope 1 and 2 GHG emissions in its annual ESG report, on its website, and through the CDP questionnaire. Its disclosure is not in compliance with the Proposed Rule because it follows the GHG Protocol operational control method. Its level of disclosure, including with respect to the assumptions and methodologies applied, is more high level than that called for by the Proposed Rule for disclosure of assumptions and methodologies employed. The company has been using, for the past two years, a third-party sustainability consultant from a Big Four accounting firm to help facilitate its implementation of, and data collection for, GHG emissions reporting under the GHG Protocol and broader climate-related disclosures.

Company 2 estimates its costs will be significantly above the Commission’s estimates, both in terms of the initial costs to come into compliance with the Proposed Rule—estimated at approximately \$6 million, and annual ongoing compliance costs—estimated at approximately \$4 - \$5 million. Initial preparation costs primarily include approximately \$3 million for outside consultant services and \$3 million for development of technology solutions to better collect and aggregate data. Annual, ongoing compliance costs primarily include between \$1 million to \$2 million in audit fees covering both an independent reasonable assurance audit of Scope 1 and 2 GHG emissions and additional auditor-related work for the incremental financial statement-related disclosures under the Proposed Rule, and approximately \$3 million for incremental internal headcount needed on a permanent basis to comply with the Proposed Rule. Inherent in these estimates are practical realities that: (i) limited assurance

audits would likely be performed at the reasonable assurance level (even when a limited assurance opinion is given), as auditors will not want to chance a later restatement when the reasonable assurance requirement becomes effective, and (ii) the need for incremental headcount increases if the Proposed Rule requires reporting in the Form 10-K as compared to a separate report at a later time when current financial reporting and legal teams would have more bandwidth.

The company does not obtain third-party assurance.

- **Company 3**, a large-cap company, currently discloses Scope 1 and 2 GHG emissions, and one category of Scope 3 GHG emissions in its annual ESG report and through CDP. Its current disclosure does not comply with the SEC's proposed emissions disclosure requirements (among other differences the company is evaluating, it follows the GHG Protocol operational method). The company uses a sustainability consultant to assist with its GHG emissions data gathering. The company currently obtains limited assurance over its disclosed emissions from a sustainability consultant that it does not believe would not be compliant with the Proposed Rule. Historically, the company has paid \$13,000 annually for the limited assurance, although the company expects this cost to increase under the Proposed Rules, both due to the cost of the consultant complying with the Proposed Rules and the increased demand for these services.

The company believes that compliance with the SEC's rules, taking into account hiring needs, consultants/accounting firms, additional internal controls and internal audit needs, and the increased costs from its external auditors, could cost at least \$10 million to set up and that much of the cost would be recurring, subject to some expected modest cost savings if the phase-in timeline for compliance with the Proposed Rule were less aggressive and if the disclosures required under the Proposed Rule were in a separate filing due later in the year.

- **Company 4**, a small-cap company, discloses Scope 1 and 2 and partial Scope 3 GHG emissions in its sustainability report posted on its website. While the company has estimated and reported CO₂ data for the years covered by its most recent financial statements, specific GHG components are not currently available and the company has no reasonable method at its disposal for capturing that information now or in the immediate future on an enterprise-level basis. In addition, the requirement in the Proposed Rule to include emissions data in the Form 10-K would require acceleration of its data collection process by approximately six months as, currently, its sustainability report for the prior year is published the following summer. The company indicates that the accelerated timing for gathering and reporting information would pose data integrity and quality concerns and create a significant strain on internal resources that are already committed to the Form 10-K and proxy reporting during the first quarter of the year.

The company retains a third-party contractor that provides Scope 1 GHG emissions estimates in conjunction with other services. It does not currently retain a sustainability or other consultant to assist with its GHG emissions data collection but anticipates it would need to do so to comply with the Proposed Rule.

The company does not currently obtain third-party assurance but has considered it and, regardless of the Proposed Rule, had already planned to work toward, at a minimum, limited assurance within the next several years as its processes and procedures mature.

The company has not calculated the costs and manpower associated with its current emissions inventory/data gathering and reporting; however, it roughly estimates \$300,000 annually in staff time for its Scope 1 data collection and reporting. Except as noted above, all work is currently performed internally by existing staff. The company is committed to achieving a significantly reduced environmental footprint and has created three separate teams dedicated to environmental performance: technology, new ventures, and sustainability. The company expects the time and cost to transform its business will be significant because technological advances and new processes and procedures will need to be invented, developed, and implemented to achieve meaningful emissions reductions in the future while maintaining energy affordability and availability.

The company roughly estimates \$650,000 to \$1.5 million in initial implementation costs and upwards of an additional \$650,000 per year in ongoing expenses, in addition to current expenditures, to comply with the Proposed Rule. Certain additional costs associated with improved monitoring and reporting are planned irrespective of the Proposed Rule and are not included in this estimate. The company notes that, based on its business model (*i.e.*, single line of business), it expects its initial implementation costs to be at the low end of the range and thus not representative of other companies with a different business model. Importantly, the company adds that Proposed Rule will force it to divert both monetary and staff resources from important energy transition initiatives, including new ventures and new technology—a result it believes is not in the best interest of its shareholders.

- **Company 5**, a large-cap company, captures total energy and Scope 1, 2 and 3 GHG emissions; total water use; waste generated (hazardous/non-hazardous); and waste recycled (hazardous/non-hazardous). The company currently spends more than \$1,500,000 on climate-related disclosure annually, consisting of \$990,000 for sustainability consultants; \$350,000 for compiling its ESG report; and \$160,000 for CDP and other climate-related surveys, including supply chain surveys. In addition, it is obtaining limited assurance from a professional audit firm for disclosure in its sustainability report of its Scope 1 and 2 GHG emissions and defined categories of its Scope 3 GHG emissions (exclusive of processing and use of, and end-of-life treatment for, sold products, and certain other downstream activities); this limited assurance costs the company \$45,000 annually.

This company employs 3.5 full-time employees or full-time equivalents (“FTEs”) to manage all of its current climate-related disclosures over the course of 42 weeks. In addition, the company’s personnel spend approximately 5,000 hours annually on current reporting efforts (*e.g.*, research, engaging relevant stakeholders, collecting information, drafting, reviewing, vetting/internal controls, reporting, providing data to third parties, etc.). The company projects it would need approximately an additional 1,000 FTE hours annually to collect the expanded set of Scope 3 data that would be required to comply with the Proposed Rule.

- **Company 6**, a large-cap company, gathers data and reports on progress towards the company’s low-carbon financing goal, progress toward the company’s carbon-neutrality goal, the percentage of renewable energy sourced to support the company’s operations, the percentage of energy reduction year-over-year, and the company’s Scope 1 and 2 GHG emissions and certain Scope 3 operational emissions such as emissions associated with business travel and downstream leased assets.

Staffing dedicated to climate reporting and sustainability at this company consists of a head of Corporate Sustainability and Reporting and that individual’s team of six. Within that team, two employees focus on climate change, including disclosure, and 1.5 employees focus on sustainability reporting overall. Teams across the company contribute to its climate reporting, including a senior sustainability disclosure committee that oversees the process.

The company spends about nine months on its TCFD report and has historically responded to the CDP Climate Change Questionnaire, which takes about four months.

In addition to its staff costs, the company currently spends approximately \$55,000 annually on sustainability consultants and \$15,000 annually for assurance of its GHG emissions from an external engineering firm.

- **Company 7**, a large-cap company, gathers climate data, including Scope 1, 2, and some categories of 3 GHG emissions (with additional categories planned to be calculated in 2022 and certain categories excluded either because they are not applicable to the company or are not currently estimated due to their “minor impact” in line with the GHG Protocol), plus total energy use, broken down by source and renewable versus non-renewable; it then reports on this data pursuant to the Global Reporting Initiative (“GRI”) and SASB standards.

The company dedicates four FTEs to climate reporting, as well as staff at various corporate sites associated with entering emissions, water, waste, and other data into the company’s data collection system every January, totaling an estimated 10 FTEs globally. Costs associated with external advisors, including environmental engineering consultants, outside counsel, sustainability consultants (including database development), and report design services are estimated at \$1.4 million, with \$1 million of that attributable to building a database for target baseline and projections. The company obtains third-party assurance from an engineering consulting firm with respect to its Scope 1, 2, and 3 GHG emissions disclosures for \$50,000 annually; assurance for other climate-related activities costs the company an additional \$40,000 annually.

The company expects overall costs to increase, particularly with respect to Scope 3 emissions data gathering and reporting. The company indicates that its cost estimates to comply with the Proposed Rule are conservative and likely at the lower end of the range because it has not yet conducted a detailed analysis that would provide a more reliable cost estimate.

- **Company 8**, a large-cap company, currently discloses Scope 1 and 2 and limited Scope 3 (North American-based air travel) GHG emissions on its corporate website. Its current disclosure does not comply with the SEC’s proposed emissions disclosure requirements. The

company retains a third-party sustainability consultant to assist with its Scope 3 GHG emissions gathering. It obtains limited assurance for its Scope 1 and Scope 2 GHG emissions from an engineering and environmental consulting firm for \$10,000 - \$15,000 annually. The company is uncertain whether its current assurance provider would meet the Proposed Rule's expertise requirements.

- **Company 9**, a large-cap company, currently discloses Scope 1 and Scope 2 and some Scope 3 GHG emissions in its ESG report. Its current disclosure does not comply with the SEC's proposed emissions disclosure requirements. The company conducts the emissions inventory/data gathering in-house at an estimated cost of at least \$200,000 annually. The company obtains reasonable assurance for its current emissions disclosures from an engineering and environmental consulting firm for \$10,000. One of the "big four" accounting firms offered to do the same assurance work for \$180,000.
- **Company 10**, a large-cap company, discloses Scope 1 and Scope 2 and some Scope 3 (fuel and energy-related activities, business travel, and use of sold products) GHG emissions in its annual ESG report, on its IR website, and through CDP. Its GHG emissions disclosure partially aligns with the Proposed Rule. The company does not retain an external third party to assist with its GHG emissions data gathering. From an operations standpoint, there are more than 25 people involved in the emissions inventory/data gathering. Of that group, approximately five to seven staff members are involved with the emissions calculations and reporting to various agencies and for verification. The company estimates 188 hours for emissions gathering/annual operating reporting across the company's utility and gas infrastructure business unit, and its final verification support, not including additional requested analysis, communications, edits, quarterly updates, CDP, ESG report support, etc.

The company obtains limited scope assurance over its Scope 1 and 2 and partial Scope 3 (fuel and energy-related activities and business travel) from a sustainability consultant for \$15,000 annually.

- **Company 11**, a large-cap company, currently discloses Scope 1 and 2 and some Scope 3 (business travel, commuting, waste, downstream leased assets) GHG emissions through CDP. Its current disclosure does not comply with the SEC's proposed emissions disclosure requirements. The company retains its bill pay vendor as a third party carbon management consultant to assist with gathering its Scope 3 GHG emissions. It estimates its internal time and external resources associated with emissions inventory/data gathering to be about \$75,000 annually. It obtains limited assurance for all of its disclosed emissions from an engineering and environmental consulting firm for \$15,000 annually.
- **Company 12**, a mid-cap company, obtains limited assurance from a sustainability consulting firm for the Scope 1, 2, and 3 GHG emissions it discloses in its sustainability report. The cost for that service is \$30,000. The company indicates that its current assurance provider would be compliant with the Proposed Rule. A different consultant offered to do the same assurance work for \$60,000, and a public company auditing firm offered to do the same assurance work for \$75,000.

- **Company 13**, a large-cap company, obtains limited assurance from a public company accounting firm of select sustainability metrics disclosed in its sustainability report and Form 10-K consisting overwhelmingly (95%) of Scope 1, 2, and 3 GHG emissions and renewable energy procurement, with the balance associated with assuring select diversity, equity, and inclusion metrics and grants/donations. The company's assurance cost for the current year is \$550,000.