



June 17, 2022

VIA ELECTRONIC SUBMISSION

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549-1090

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

Dear Ms. Countryman,

The American Investment Council (the “AIC”) appreciates the opportunity to submit this letter to the Securities and Exchange Commission (the “SEC”) on the proposed amendments to its rules under the Securities Act of 1933 (the “Securities Act”) and Securities Exchange Act of 1934 (the “Exchange Act”) that would require registrants to provide certain climate-related information in their registration statements and periodic reports (the “Proposed Climate Rule”). The comments in this letter are focused on suggestions aimed at promoting disclosure that is both material and decision-useful to investors with respect to publicly traded private fund managers.

This letter will not address the SEC’s authority to promulgate this rule, as the AIC understands that other commenters will be addressing that issue. The AIC supports basing climate-related disclosures within the context of the existing regime, which requires an issuer to provide full and fair disclosure of its business and operations and of the material risks of investing in its securities, including climate-related risks, if material.

A registrant’s climate risk disclosure should continue to be tied to long-standing standards of materiality,¹ and the SEC should provide clear guidance to enable consistent disclosure of such material risks where appropriate. Outlined below are certain aspects of the Proposed Climate Rule that do not, as proposed, strike this careful balance and, as a result, are overly prescriptive and will result in the disclosure of immaterial information. Disclosure of immaterial information is detrimental to investors, who will now be required to sift through a registrant’s mandatory climate

¹ See Marshall J. in *TSC Industries, Inc. v. Northway Inc.*, 426 U.S. 438 (1976), who held that a fact is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision; and the Supreme Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), which held that materiality “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.”

risk disclosure in an effort to determine what is significant.² Moreover, addressing the goal for additional disclosure obligations by disregarding the current standard of materiality is a slippery slope that will not serve the best interests of investors and securities markets over the long term. Below, the AIC has provided comments to promote disclosure that is both material and decision-useful to investors.

To summarize our key points:

1. Disclosure requirements and materiality should be determined at the registrant level. As a general practice, the publicly-reported financial results of publicly traded private fund managers reflect the financial impact on such managers (e.g., management and performance fees earned) of the investment vehicles or funds they manage. Such managers also report supplemental information about the performance and activities of these investment vehicles or funds, which information is presented on an aggregated basis. These managers follow investment company accounting principles and do not provide consolidated reporting regarding the underlying investments in these vehicles or funds. The reporting by these managers provides investors with concentrated, material facts associated with the impact of fund performance on such managers, while avoiding the disclosure of substantial volumes of immaterial information. The bedrock feature of the disclosure regime is decision-useful information to investors. In contrast to the current reporting regime, which is underpinned by determinations of materiality to the issuer, the Proposed Climate Rule would appear to require publicly traded private fund managers to gather and report on information relating to many—potentially thousands of—individual investments, even if no single investment is material. Not only will this present a huge burden and challenge to publicly traded private fund managers and introduce inconsistencies with investment company accounting, but the nature and volume of such disclosures, particularly with respect to physical risk disclosures and financial impact metrics based on a 1% disclosure threshold, will result in the disclosure of immaterial information that will not be decision-useful to investors.

We object to requirements that, inconsistent with the current reporting regime, mandate granular disclosure on climate-related risks applicable to specific portfolio companies or assets, whether or not material. Instead, we support the current approach to disclosing aggregated material information consistent with the boundaries of the financial statements.

2. Any Scope 3 disclosure requirements should be part of a consistent and flexible framework that does not disproportionately burden registrants relative to its benefits to investors. The Scope 3 disclosure requirements in the Proposed Climate Rule will not “provide investors with consistent, comparable and decision-useful

² See Business and Financial Disclosure Required by Regulation S-K (SEC Release No. 33-10065; 34-77599; File No. S7-06-16) (April 13, 2016) in which the SEC acknowledged that “high levels of immaterial disclosure can obscure important information.”

information”³ and will also create unique challenges for the AIC’s members that are publicly traded private fund managers. While the Proposed Climate Rule acknowledges the difficulty of calculating Scope 3 emissions and necessarily defers to third-party methodologies of a registrant’s choosing, it goes on to require the disclosure of Scope 3 emissions in both absolute and intensity terms if material, without regard to the disproportionate burden of this requirement on any particular registrant relative to the benefit to investors. The AIC suggests that the SEC tie Scope 3 emissions disclosures to traditional standards of materiality. Specifically, the SEC should either provide registrants with the discretion to provide information on this topic in a manner that will result in the most useful disclosures to its shareholders or provide a consistent disclosure framework for Scope 3 financed emissions that better considers the impact of the rules on different segments of the investment industry.⁴

3. Filings for initial public offerings should be excluded from the scope of the Proposed Climate Rule. Consistent with the SEC’s statutory mandate to facilitate capital formation, the AIC believes that Securities Act registration statements filed in connection with initial public offerings should be excluded from the scope of the Proposed Climate Rule. We believe this is necessary in order to avoid chilling effects on companies’ use of initial public offerings as a means to raise capital for growth and thus on U.S. capital markets as a whole. Of course, newly public companies would ultimately become subject to the climate-disclosure requirements following a transition period.
4. Exchange Act and Investment Advisers Act overlap should be addressed. Publicly traded private fund managers that are regulated under both the Exchange Act and the Investment Advisers Act of 1940 (the “Investment Advisers Act”) face a unique set of challenges and concerns as compared to those issuers whose nexus to SEC oversight is solely through the securities registration and periodic reporting process. This letter flags areas where this overlap presents a challenge to publicly traded private fund managers, such as SEC examination of manager records related to compliance with the Proposed Climate Rule, and proposes potential solutions under the Investment Advisers Act.

The AIC is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by

³ Chair Gary Gensler, *Statement on Proposed Mandatory Climate Risk Disclosures* (March 21, 2022), available at: <https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321>.

⁴ The AIC suggests that the SEC should use its Industry Guides (as updated per the SEC’s final rule on Statistical Disclosures for Bank and Savings and Loan Registrants in 2020), which guide business disclosure by SEC registrants engaged in banking, oil and gas, real estate, insurance, and mining activities, as a model for sector guidance. This approach is preferable to the Proposed Climate Rule’s inclusion of specific provisions applicable only to certain segments of the investment industry (such as the proposed provisions highlighting the PCAF Standard for financed emissions and requiring zip code-level physical risk disclosures for properties, discussed further below in Section I.A. and Section II). See SEC, *Industry Guides*, available at: <https://www.sec.gov/files/industryguides.pdf>.

promoting responsible long-term investment. In this effort, the AIC develops, analyzes, and distributes information about the private equity and private credit industries and their contributions to the U.S. and global economy. Established in 2007, and formerly known as the Private Equity Growth Capital Council, the AIC is based in Washington, D.C. The AIC's members are the world's leading private equity and private credit firms (including certain publicly traded firms), united by their commitment to growing and strengthening the businesses in which they invest.⁵

Private equity and private credit are at the forefront of investing in clean energy technologies and financing the clean energy transition. In fact, private equity firms have invested almost \$150 billion in clean technology and sponsored more than 1,000 U.S. clean technology companies over the past decade. In 2021, private equity investment in clean technology surged to over \$27 billion, up from roughly \$20 billion in 2020.⁶ Clean technology spans a range of energy solutions, including renewables such as solar and wind, and other alternatives such as hydrogen and hydroelectric. Private equity has also invested almost \$100 billion in environmental service companies, focused on everything from turning waste into bioproducts to oilfield cleanup services.⁷ The AIC expects this level of investment to continue to grow over coming decades. The International Renewable Energy Agency has estimated that over \$100 trillion of capital will be required to achieve the Paris Agreement goals and bring carbon dioxide emissions to net zero by 2050.⁸ The capital provided by private equity and private credit funds plays, and will continue to play, a critical role in addressing this capital need and mitigating the growing effects of climate change for years to come.

I. Gathering Information from and Assessing Climate Risks Impacts on Investments

The Proposed Climate Rule would require publicly traded private fund managers to analyze, aggregate, and disclose risks with respect to the investment portfolios of their funds without regard to materiality, and at a level of scale and detail that is unprecedented, introduces inconsistencies with investment company accounting, and subjects issuers to burdens that are wholly disproportionate to the benefits. As set forth below, the AIC provides comments to facilitate material and decision-useful disclosures for investors while minimizing undue costs and burdens on registrants, including with respect to the Proposed Climate Rule's discussion of physical climate risk, risk assessments, climate-related targets and goals, third-party standards, and financial statement metrics. The AIC is supportive of disclosures that provide a consistent view of the registrant's business across financial and climate-related disclosures and, therefore believes that disclosures should generally align with the boundaries of a public registrant's financial statements. Under this approach, more granular disclosure is provided for entities that make up the

⁵ For further information about the AIC and its members, please visit our website at: <http://www.investmentcouncil.org>.

⁶ The American Investment Council, *Investing in a Cleaner World* (April 2022), at 3, available at: <https://www.investmentcouncil.org/wp-content/uploads/2022-aic-sustainability-report.pdf>.

⁷ *Id.*

⁸ IRENA, *World Energy Transitions Outlook* (March 2021), available at: <https://irena.org/publications/2021/Jun/World-Energy-Transitions-Outlook>.

consolidated registrant and less granular disclosure is provided for unconsolidated entities that may otherwise impact the registrant's results.

A. Property Disclosure Should Be Modified

The Proposed Climate Rule should clarify that the requirement to disclose the location and nature of properties subject to physical risks is limited to a registrant's principal physical properties currently required to be disclosed under 17 CFR § 229.102. Otherwise, if read broadly, the Proposed Climate Rule's requirement that registrants should disclose the location (by zip code)⁹ and nature of the properties subject to physical risks creates an operationally overwhelming burden for publicly traded private fund managers with thousands of assets (including real estate) in their portfolios and will not result in useful information for the typical investor.¹⁰ The volume and granularity of information disclosed will also result in the disclosure of information that is generally confidential and may have an unintended anti-competitive effect in real estate markets.¹¹ Consistent with the boundaries of the financial statements, such disclosure should not be required where publicly traded private fund managers do not consolidate these investments but rather have an indirect exposure through a managed investment fund. The proposal should also clarify that entities with large portfolios of consolidated real estate investments are not required to map and disclose the "location and nature" of each underlying property in their investment portfolios that is subject to a particular physical risk at such a granular level of detail.¹² This would result in disclosure of pages and pages of property addresses that will be vast and not provide useful information to investors. For large real estate portfolios, this could result in extraordinarily lengthy disclosure that is unhelpful to investors. Investors are interested in consolidated, issuer-level risk information to understand their aggregate exposure to such risks, not individual, property-level data.

Despite our comment to the contrary, to the extent that investments in real estate are swept up in these disclosures, the SEC should, to address the above points, allow some form of aggregated disclosure similar to the collective descriptions permitted by Instruction 1 to Item 102 of Regulation S-K to address the above points.¹³ An alternative method to disclosing physical risk mapped to location via zip code is to disclose such risk in the aggregate by standardized spatial units (e.g., CRESTA zones or global ISO 3166-2 country subdivisions). Registrants would

⁹ Proposed Climate Rule 17 CFR § 229.1500(k).

¹⁰ The Proposed Climate Rule, as currently drafted, does not clarify the scope of application of the required property disclosure. This leaves open the possible interpretation that a publicly traded private fund manager may be required to disclose such risk to properties either owned directly by funds, such as real estate funds, managed by registrants, or owned indirectly through its portfolio companies.

¹¹ The disclosure of this type of information could, for example, provide insight into a registrant's strategy with respect to certain markets or real estate asset classes, which would otherwise be considered confidential information.

¹² Proposed Climate Rule 17 CFR § 229.1502(a)(1)(i).

¹³ See SEC Final Rule, *FAST Act Modernization and Simplification of Regulation S-K* (May 2, 2019), in which the SEC stated, "We believe that registrants are best suited to determine which, if any, of their physical properties warrant discussion based on what is material to them in light of their particular circumstances. Under this approach, some physical properties held by a registrant may not be material. In some cases, application of this analysis may result in a description of property on an individual basis or on a collective basis, or may result in no disclosure."

calculate physical risk at the asset level using climate risk intensity metrics correlated to the latitudinal and longitudinal position of the asset. Once asset-level physical risk is calculated, only those assets that meet or exceed a certain predetermined, universal threshold for “high” physical risk would be disclosed in the aggregate. This alternative process would ensure that physical risk information is disclosed in a useful and comprehensible format. Further, third-party physical risk data should be made available free of charge by the government (e.g., NOAA and/or FEMA) by region, and all registrants should be required to use the same data sets —otherwise, disclosures will be non-comparable for investors. In addition, the SEC should provide additional guidance on the definition of flood hazard risk to reduce the potential for wide ranges of interpretation. This type of risk data and guidance is imperative for real estate investors and issuers with a significant portfolio of physical assets.

B. Risk Assessment Disclosure Should Be Less Prescriptive

The Proposed Climate Rule’s requirements around assessing and disclosing risk should be less prescriptive to enable better disclosure of materiality-oriented disclosures that address a particular registrant’s oversight of material risks and avoid unintended consequences. For example, the Proposed Climate Rule states that “[a] registrant that has significant operations in a jurisdiction that has made a GHG emissions reduction commitment may be exposed to transition risks related to the implementation of the commitment.”¹⁴ This is not only overly prescriptive, but the AIC believes that this collective disclosure by multiple registrants of the impacts of transition risks with respect to state, city, or county requirements could have the unintended consequence of driving facilities or assets out of those regions or jurisdictions with the most stringent climate change policies or commitments.¹⁵ An alternative approach to jurisdiction-based disclosure of regulatory commitments or other transition risks would be to require disclosure of such impacts without regard to jurisdiction. For example, the disclosure of the impact of certain GHG emissions reductions requirements on an investment portfolio would include the percentage of emissions reduced under a regulatory imposed carbon-pricing scheme with no reference to which specific regulatory body has imposed such a goal.

The Proposed Climate Rule also specifies that a registrant must disclose such risks that manifest over the “short, medium and long term.”¹⁶ While the AIC appreciates that the SEC has not assigned specific year ranges to these time horizons, registrants should have the flexibility to determine which time horizons are relevant to their individual materiality assessments. For a publicly traded private fund manager, the time horizons that matter are often the holding period

¹⁴ Proposed Climate Rule 17 CFR § 229.1502(a)(B)(ii).

¹⁵ State-based carbon reductions and renewable commitments vary considerably and are subject to constant change. For example, as of August 2021, 15 states, two territories, and Washington, D.C. have passed legislation to increase or expand renewable or clean energy targets. See National Conference of State Legislatures, *State Renewable Portfolio Standards and Goals* (August 13, 2021), available at: <https://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx>.

¹⁶ Proposed Climate Rule 17 CFR § 229.1502(a).

and the exit period.¹⁷ Those are the points at which a publicly traded private fund manager would assess climate risk and its impact on an asset’s valuation.

Each of these required risk assessments will exponentially increase the burdens on a publicly traded private fund manager, given the scope of underlying investments in each of its funds or vehicles. The costs quoted in the Proposed Climate Rule do not sufficiently address the actual costs that will be incurred by publicly traded private fund managers. Indeed, the costs presented in the economic analysis are anecdotal, relevant only to operating companies (not publicly traded private fund managers), do not consider the costs of maintaining compliance with the constantly updated standards upon which they are based, the Task Force on Climate-Related Financial Disclosures and Partnership for Carbon Accounting Financials’ Global GHG Accounting & Reporting Standard (the “PCAF Standard”). The SEC also does not address any costs associated with using or continuing to maintain the third party methodologies that the SEC has pointed to with respect to calculating GHG emissions.

C. Targets and Goals Disclosure Requirement Should be Removed or Tied to Materiality

If a registrant has set “any targets or goals related to the reduction of GHG emissions” or “any other climate-related target or goal,” then the Proposed Climate Rule would require the registrant to disclose specific information about such targets or goals.¹⁸ Again, the SEC must focus such related disclosures on the long-standing principles of financial materiality that the SEC disclosure framework was designed to address.¹⁹ The Proposed Climate Rule provides disclosure requirements broadly covering “any targets or goals” related to climate change regardless of whether they have been made publicly. The absence of a requirement that these goals be “public” may be an oversight given that the press release issued in conjunction with the Proposing Release refers to “publicly set climate-related targets or goals.”²⁰ Further, these requirements are divorced from any materiality standard and would likely require registrants to disclose targets and goals that are not material to their operations, performance, or investors. Publicly traded private asset managers, in particular, may set targets or goals that apply to a certain subset of their investments and that are (i) not relevant to a majority of their assets or operations, (ii) not financially material to the registrants’ performance as a whole, or (iii) not otherwise material to an investment decision.²¹ Additionally, the AIC notes that the existing disclosure regime for financial targets does not require registrants to provide the level of detail that the Proposed Climate Rule requires with respect to climate targets, even when a registrant’s financial targets are material or public. As

¹⁷ McKinsey & Company, *Private Equity Exits: Enabling the exit process to create significant value* (July 2018), available at: <https://www.mckinsey.com/industries/private-equity-and-principal-investors/our-insights/private-equity-exits-enabling-the-exit-process-to-create-significant-value>.

¹⁸ Proposed Climate Rule 17 CFR § 229.1506(a)(1).

¹⁹ *TSC Industries v. Northway*, 426 U.S. 438, 445 (1976).

²⁰ See SEC, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors* (March 21, 2022), available at: <https://www.sec.gov/news/press-release/2022-46>.

²¹ See Business and Financial Disclosure Required by Regulation S-K (SEC Release No. 33-10065; 34-77599; File No. S7-06-16) (April 13, 2016) in which the SEC acknowledged that “high levels of immaterial disclosure can obscure important information.”

such, the Proposed Climate Rule’s requirements with respect to climate targets suggests support for environmental and political objectives rather than the SEC’s stated goal of providing investors with “consistent, comparable, and decision-useful information for making their investment decisions.”²²

The SEC raises the question, “Would our proposal discourage registrants from setting such targets or goals?”²³ Given the cost of collecting and preparing new disclosures for submission,²⁴ as well as the growing litigation risks associated with securities disclosures, the AIC expects the Proposed Climate Rule to discourage registrants from setting climate-related targets or goals.²⁵ In particular, the Proposed Climate Rule broadly defines “climate-related targets or goals” to include any goals “regarding energy usage, water usage, conservation or ecosystem restoration, or revenues from low-carbon products,” as well as any goals related to “actual or anticipated regulatory requirements, market constraints, or other goals established by a climate-related treaty, law, regulation, policy, or organization.” Registrants may weigh the potential benefit of setting voluntary targets or goals related to any one of these topics against the certain cost, burden, and risk²⁶ associated with triggering a new disclosure requirement, and may avoid environmental goal-setting as a whole - including any goal-setting in anticipation of climate-related regulatory or market developments. Publicly traded private fund managers will likely consider that the SEC’s 2022 Examination Priorities emphasize private funds²⁷ and that litigation risks for private funds are increasing,²⁸ and may be uniquely discouraged from setting climate-related targets or goals.

²² Chair Gary Gensler, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors* (March 21, 2022), available at: <https://www.sec.gov/news/press-release/2022-46>.

²³ Request for Comment #168, Proposing Release at 272.

²⁴ See Proposing Release at 371.

²⁵ “As U.S. securities law and SEC regulations make issuer statements to investors—whether within securities filings or otherwise—potentially actionable, issuers may be open to significant liability in their ESG disclosures.” Woodcock, David R., Kotte, Amisha S., Guynn, Jonathan D., Harvard Law School Forum on Corporate Governance, *Managing Legal Risks from ESG Disclosures* (August 2019), available at: <https://corpgov.law.harvard.edu/2019/08/12/managing-legal-risks-from-esg-disclosures/>. While the Proposing Release indicates that disclosures related to targets or goals would be subject to protection under the Private Securities Litigation Reform Act, there are important limitations to this protection. In particular, the Commission can still bring enforcement actions in connection with these statements.

²⁶ “For example, the proposed rules may result in additional litigation risk since the proposed climate-related disclosures may be new and unfamiliar to many registrants. The proposed rules would significantly expand the type and amount of information registrants are required to provide about climate-related risks. Registrants unfamiliar preparing these disclosures may face significant uncertainty and novel compliance challenges. To the extent this leads to inadvertent non-compliance, registrants may face additional exposure to litigation or enforcement action.” Proposed Climate Rule at 388.

²⁷ See SEC Division of Examinations, *SEC 2022 Examination Priorities* (March 30, 2022), available at: <https://www.sec.gov/files/2022-exam-priorities.pdf>.

²⁸ “The regulatory and litigation risks for private funds are greater than at any time since the financial crisis in 2008.” The National Law Review, *Top Ten Regulatory and Litigation Risks for Private Funds in 2022* (February 2, 2022), available at: <https://www.natlawreview.com/article/top-ten-regulatory-and-litigation-risks-private-funds-2022> [citing The National Law Review, *Top Ten Regulatory and Litigation Risks for Private Funds in 2021* (March 18, 2022)].

Investors “recognize that climate risks can pose significant financial risks to companies.”²⁹ As such, it would not serve the interests of investors or companies to increase the regulatory burden around setting targets and goals to address climate risks - especially through disclosure requirements that are not grounded in materiality.

Finally, to the question, “Should we require a registrant to disclose whether it has set any targets related to the reduction of GHG emissions, as proposed?”³⁰ the AIC does not believe that this disclosure requirement aligns with the SEC’s mandate to establish disclosure requirements for information that is material to investors or with its expertise in regulating financial markets.³¹ Publicly traded private fund managers routinely set targets and goals covering a wide range of issues affecting their performance and operations, and it is unclear why the SEC would single out targets related to the reduction of GHG emissions in its rulemaking.

D. Financial Statement Metric Disclosure Requirements Should Be Modified

The Proposed Climate Rule would require registrants to disclose the financial impacts of, and financial expenditures relating to, climate-related events (including severe weather events and other natural conditions) and transition activities on the line items of a registrant’s consolidated financial statements, as well as impacts on the financial estimates and assumptions used in the financial statements, unless the sum of the absolute values of all the impacts on the line item is less than 1% of the total line item for the relevant fiscal year.³² Clarity is needed around the expected scope of this analysis for publicly traded private fund managers, including whether the impact is with respect to the reporting period only or if registrants are also expected to disclose potential future impacts, given the reference to “climate-related risks” and “climate-related opportunities,” which include potential impacts.

As a preliminary matter, the AIC opposes the 1% threshold and would strongly advocate for a higher threshold tied to materiality.³³ However, even with a higher threshold, there are clear complications with this requirement that the AIC believes need to be more fully considered. Publicly traded private fund managers do not consolidate most funds they manage.³⁴ It would be

²⁹ Chair Gary Gensler, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors* (March 21, 2022), available at: <https://www.sec.gov/news/press-release/2022-46>.

³⁰ Request for Comment #168, Proposing Release at 272.

³¹ “The SEC disclosure framework was designed to require reporting of information that is financially material to investors, not information that may be important at a societal level.” Katz, David A., McIntosh, Laura A., Harvard Law School Forum on Corporate Governance, *SEC Regulation of ESG Disclosures* (May 2021), available at: <https://corpgov.law.harvard.edu/2021/05/28/sec-regulation-of-esg-disclosures/>.

³² Proposed Climate Rule 17 CFR § 210.14-02

³³ The AIC does not view the Proposing Release’s references to §§ 210.5-03.1(a), 210.12-13, and 229.404(d) as analogous (at 347). It is one matter to require immaterial disclosure on a single, easily quantifiable metric (such as amount of excise taxes), and an entirely different matter on a metric that will entail wide-ranging and subjective analysis and not result in easily comparable disclosures. In this instance, the burden of this requirement is not commensurate with the benefit to investors.

³⁴ Financial statement users and the Financial Accounting Standards Board (the “FASB”) recognize that requiring asset managers to consolidate the investment funds they manage may lead to financial statements that are not relevant on a consolidated basis. The FASB issued *Accounting Standards Update (“ASU”) 2015-02*,

extremely burdensome for publicly traded private fund managers to quantify the financial impact of climate-related events or transition activities on management fees, performance revenues, and investments if publicly traded private fund managers are expected to look through to investments in their funds. As a general matter, the investment funds apply investment company accounting and fair value their investments. If there were a decrease in management fees or performance revenues, are publicly traded private fund managers expected to determine whether any of these changes resulted from the impact of climate-related events on the financial value of any of potentially hundreds of portfolio companies or thousands of real estate assets? If so, would it only be required for private valuations and not public valuations? Otherwise, would publicly traded private fund managers be expected to determine whether any change in the value of a publicly traded security is climate related? This is highly subjective and will not result in consistent and comparable disclosures. This problem is acute in an investment company complex but extends to all securities that are fair valued, whether under investment company accounting or other accounting standards. This problem becomes even more pronounced and challenging to calculate and substantiate as it relates to potential changes in management fees or performance revenues due to lost revenue or cost saving improvements relating to transition activities, given that these will not be immediately apparent on the face of the financial statements. For example, what if an investor in an investment vehicle or fund commits less or does not commit to a future fund because they wanted to increase exposure to ESG-focused funds? Are publicly traded private fund managers expected to determine this intent? This becomes a highly subjective exercise.

This exercise becomes further complicated by the lack of clarity under the Proposed Climate Rule with respect to investments accounted for under the equity method of accounting. As a general matter, publicly traded private fund managers account for their interest in non-consolidated investment funds under the equity method. Even if the publicly traded private fund manager were able to assess whether or not any change in the value of a security, portfolio company or real estate asset owned by a given fund is climate-related, assessing the flow-through impact on the manager's financial statements from such climate-related item would require a mechanistic and burdensome process. For other equity method investments, a registrant would be required to make numerous judgments and assumptions to estimate the impact to the equity method pick-up as a result of climate-related matters, with different registrants using different judgments and assumptions that would inevitably make such an approach inconsistent among registrants and incomparable from the perspective of shareholders. This concern extends beyond the publicly traded fund manager context, as registrants across industries would similarly be required to make judgments and assumptions, which would exacerbate even further the lack of comparability across public filers and result in information that is not decision-useful to investors. Based upon the foregoing, the SEC should exclude investments accounted for under the equity method and

Consolidation (Topic 810): Amendments to the Consolidation Analysis to address stakeholder concerns that, in certain situations in which consolidation was required, “deconsolidated financial statements [were] necessary to better analyze the reporting entity’s economic and operational results.” The FASB considered these concerns “in conjunction with the objective of general purpose financial reporting, which is to provide financial information about the reporting entity that is useful to existing and potential investors, lenders, and other creditors in making decisions about providing resources to the reporting entity.” Additionally, the ASU reduced the burden on the preparers of financial statements by simplifying the financial reporting process (“The amendments in this Update are an improvement to current GAAP because they simplify the Codification.”). See FASB, *ASU 2015-02: Consolidation (Topic 810), Amendments to the Consolidation Analysis* (February 2015), available at: <https://asc.fasb.org/imageRoot/92/63493892.pdf>.

investments measured at fair value (including pursuant to investment company accounting), given the practicalities and highly subjective nature of trying to quantify the applicable amounts. In addition, the SEC should similarly exclude equity and other investments that do not qualify for equity method from this requirement entirely.

To conduct these calculations becomes impossible if registrants are also expected to disclose how their financial statements are affected by potential future impacts, given the reference to “climate-related risks” and “climate-related opportunities.” These references to risks and opportunities should be removed, and the SEC should clarify that only actual material impacts from known events and activities should be disclosed. In addition, any financial metric disclosure should be prospective only. Given that so much clarity is needed on these points, registrants can neither design processes and systems today, nor apply these to prior reporting periods.

The AIC also notes the problematic use of an arbitrary bright line materiality threshold in the assessment of climate-related impacts to a registrant. The SEC itself has previously held that assessments of materiality should not rely solely on a quantitative assessment or predetermined bright line percentage threshold alone and must also include an assessment of qualitative factors.³⁵ Further, the SEC considered related issues in its amendment to Regulation S-K Item 103, which now permits registrants to elect their own materiality threshold for the disclosure of environmental legal proceedings with government entities, provided such threshold does not exceed the lesser of \$1 million or one percent of their current assets.³⁶ The SEC arrived at this hybrid standard after acknowledging the limitations of a singular quantitative threshold and the necessity to afford each registrant the flexibility to select a threshold that “it determines is reasonably designed to result in the disclosure of material environmental proceedings”.³⁷ The AIC proposes that the SEC allow registrants the same flexibility to elect their own threshold with respect to climate-related financial risk disclosures with either a much higher minimum threshold or reference to qualitative factors. We note that the distinct thresholds for disclosure of proceedings under environmental law under Item 103 of Regulation S-K are set on the basis of the SEC’s rationale that the disclosure of fines by governmental authorities under environmental law may be of particular importance in assessing a registrant’s environmental compliance, as such fines may be more indicative of possible illegality and conduct contrary to public policy.³⁸ This rationale is not applicable to climate-related impacts

³⁵ See SEC Staff Accounting Bulletin Release No. 99 - Materiality; SEC, *Progress Report of the SEC Advisory Committee on Improvements to Financial Reporting* (February 14, 2008) available at: <https://www.sec.gov/rules/other/2008/33-8896.pdf> and SEC Acting Chief Accountant Paul Munter, *Assessing Materiality: Focusing on the Reasonable Investor When Evaluating Errors* (March 9, 2022) available at: <https://www.sec.gov/news/statement/munter-statement-assessing-materiality-030922> (“A materiality analysis is not a mechanical exercise, nor should it be based solely on a quantitative analysis.”)

³⁶ 17 CFR § 229.103.

³⁷ See Final Rule, Modernization of Regulation S-K Items 101, 103, and 105 (85 FR 63726).

³⁸ See Final Rule, Modernization of Regulation S-K Items 101, 103, and 105 (85 FR 63726)

which do not provide any indication of a registrant’s potential illegal conduct or conduct contrary to public policy. Therefore a threshold that is significantly higher than 1% is appropriate.³⁹

II. Scope 3 GHG Emissions Metrics

Publicly traded private fund managers would be uniquely impacted by the Proposed Climate Rule’s approach to the disclosure of financed emissions, which is an extraordinarily extensive and complex category of Scope 3 emissions.⁴⁰ Financed emissions are the GHG emissions of companies in an investment fund’s investment portfolio.⁴¹ This category will therefore constitute a significant portion of a publicly traded private fund manager’s overall carbon footprint.

As an initial observation, we note that the Proposed Climate Rule appears to take the position—correctly in the AIC’s view—that the GHG emissions of all portfolio companies should be treated as Scope 3 emissions of the fund, and should not be included in the fund’s Scope 1 and 2 emissions (notwithstanding that the fund may have control over a portfolio company for GHG accounting purposes). However, the Proposed Climate Rule does not specifically address investment company accounting for the purposes of determining organizational boundaries. The AIC therefore suggests that the SEC provide clearer guidance that all GHG emissions of an investment company investee should be considered as part of Scope 3 emissions (“financed emissions”, as they are otherwise referred to in this letter), consistent with the PCAF Standard.

While the Proposed Climate Rule acknowledges the difficulty of calculating Scope 3 emissions,⁴² there are several well-known challenges and concerns when it comes to the disclosure of financed emissions in particular. In short, calculating financed emissions accurately is very difficult, not least because of a lack of high-quality, granular data on the underlying investments’

³⁹ To the extent the Commission considers also incorporating a dollar threshold, as it has done with the respect to material environment proceeds, such dollar threshold should be significantly higher than the \$1 million threshold in the case of the environmental proceedings disclosure.

⁴⁰ GHG Protocol, Scope 3, Category 15 (“This category includes scope 3 emissions associated with the reporting company’s investments in the reporting year, not already included in scope 1 or scope 2.”). *See also* McKinsey & Company, *Aligning portfolios with climate goals: A new approach for financial institutions* (November 2021), available at: <https://www.mckinsey.com/business-functions/risk-and-resilience/our-insights/aligning-portfolios-with-climate-goals-a-new-approach-for-financial-institutions>; pwc, *Financial institutions are pledging to lower carbon footprints. Here’s what you need to know about financed emissions* (2021), available at: <https://www.pwc.com/us/en/services/esg/library/financed-emissions.html> [hereinafter “pwc Article”]; Bryce Wagner, *Financed emissions reporting*, KPMG (2021), available at: <https://advisory.kpmg.us/blog/2022/financed-emissions-reporting.html> [hereinafter “KPMG Article”]; Camilla Hodgson, *Banks feel the heat on financed emissions*, *The Financial Times* (May 2021), available at: <https://www.ft.com/content/1a7f573c-9a5a-4e41-a113-a96ce7fa80a8/> [hereinafter “FT Article”].

⁴¹ PCAF, *The Global GHG Accounting and Reporting Standard for the Financial Industry* (November 2020), at 4, available at: <https://carbonaccountingfinancials.com/files/downloads/PCAF-Global-GHG-Standard.pdf> [hereinafter “PCAF Standard”].

⁴² Proposing Release at 208-209.

emissions.⁴³ Publicly traded private fund managers therefore will necessarily rely on estimation and third-party proxy data.⁴⁴ There is also no agreed standard or methodology to measure and report financed emissions.⁴⁵ As a result, this will not result in consistent, comparable, and decision-useful information, which we understand to be the goal of the Proposed Climate Rule.⁴⁶ In addition, in many instances, portfolio companies caught up in such financed emissions disclosure calculations are small businesses, which are commonly private entities that would not individually be subject to the Proposed Climate Rule (and indeed are not subject to the same reporting requirements as public issuers, generally). These companies may share similarities to smaller reporting companies that the Commission has already proposed to exempt from Scope 3 reporting. When the Commission singles out and asks whether business development companies (“BDCs”) should be exempt from some or all requirements of the Proposed Climate Rule at Question 175, the AIC notes that the Commission anticipated the complexities and questionable value proposition of including public issuers that invest in or hold portfolio companies that are themselves typically privately-held or small businesses that are not reporting companies.⁴⁷

To the extent that the Commission adopts the Proposed Climate Rule’s requirement to disclose financed emissions, below are comments on how the proposed approach to financed emissions could be modified to focus on a publicly traded private fund’s actual exposure to climate risk. In addition to these suggested modifications, to the extent that disclosure of financed emissions will be required as envisaged in the Proposed Climate Rule, the internal complexities in gathering and processing that data necessitates a longer time line in certain instances. The AIC’s view is that the SEC should either (x) remove the requirement to disclose Scope 3 emissions, measured as absolute and intensity values, if determined to be material, and allow registrants to determine the best way to disclose this risks associated with Scope 3 emissions in line with the traditional approach to materiality or (y) issue a new proposal that provides a consistent disclosure

⁴³ See PCAF Standard at 9; Margaret Peloso, et al., *Credit for Climate Action*, *Harvard Law School Forum on Corporate Governance* (April 2021), available at: <https://corpgov.law.harvard.edu/2021/04/08/credit-for-climate-action/>; KPMG Article; pwc Article.

⁴⁴ See PCAF Standard at 9; Robert S. Kaplan and Karthik Ramanna, *We Need Better Carbon Accounting. Here’s How to Get There*, *Harvard Business Review* (April 2022), available at: <https://hbr.org/2022/04/we-need-better-carbon-accounting-heres-how-to-get-there> [hereinafter “HBR Article”]; Andy Marks, *For Banks, 5 Steps to Credible Financed Emissions Measurements*, *The Wall Street Journal* (December 2021), available at: <https://deloitte.wsj.com/articles/for-banks-5-steps-to-credible-financed-emissions-measurements-01640116370>; KPMG Article.

⁴⁵ The Proposing Release lists the PCAF Standard as an option. Proposing Release at 196-197. However, PCAF has not yet issued a methodology specific to private fund managers.

⁴⁶ Chair Gary Gensler, *Statement on Proposed Mandatory Climate Risk Disclosures* (March 21, 2022), available at: <https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321>.

⁴⁷ In response to Question 175, the AIC further notes that BDCs should be exempt from all requirements of the Proposed Climate Rule, which is a “public issuer” release that should not apply to closed-ended investment companies that typically hold small portfolio companies that themselves are not public issuers. In fact, the SEC proposed new rules and amendments under the Investment Company Act on May 25, 2022 that are designed specifically to address ESG and climate-related matters in a bespoke manner for registered investment companies and BDCs. This specialized reporting proposal should supersede the broader Proposed Climate Rule, which was not designed specifically for BDCs.

framework for Scope 3 emissions that better takes into consideration how the rules will affect different segments of the investment industry differently.

A. Indiscriminate Disclosure of Financed Emissions Will Not Result in Useful Information for Investors

If determined to be material, the Proposed Climate Rule would require publicly traded private fund managers to disclose the financed emissions of all of the companies and assets in their funds⁴⁸—which may be extensive and composed of non-controlled assets—notwithstanding the data quality and methodological limitations described above. Ultimately, the AIC does not believe that indiscriminate disclosure of estimated financed emissions across publicly traded private fund managers’ entire portfolios will enable investors to identify material climate risks, which are concentrated in certain industries and sectors.⁴⁹ Instead, if a particular registrant determines there is a substantial likelihood that a reasonable shareholder would consider information regarding its financed emissions important in making an investment or voting decision,⁵⁰ then that registrant should have the discretion to convey the information in the most useful way possible to its shareholders. The Proposed Climate Rules fails to assess how its rules will affect different segments of the investment industry differently; it also fails to consider alternative approaches that would avoid favoring some sectors at the expense of others.⁵¹

For example, a publicly traded asset manager may choose to convey exposure to climate risk across their portfolios. Instead of using complicated and varied third-party methodologies and proxy data to disclose the emissions of all investments, a publicly traded asset manager could disclose the industries and sectors that are being financed and are material with respect to climate risk. Crucially, publicly traded private fund managers are tasked with investments by their funds and therefore have full access to industry and sector data. This approach would also have the benefit of removing the need for third-party proxy data and would give investors a direct view into their exposure to high emitting sectors.

B. Disclosure of Scope 3 Emissions Should Be Tied to Traditional Definitions of Materiality

⁴⁸ See Proposing Release at 171 and 196.

⁴⁹ See Alicia Seiger, et al., *How the SEC’s rules will – and won’t – solve climate change*. ImpactAlpha (March 2022), available at: <https://impactalpha.com/how-the-secs-rules-will-and-wont-solve-climate-change/> (regarding the weakness of Scope 3 emissions reporting) [hereinafter “ImpactAlpha Article”]; Mengpin Ge, et al., *4 Charts Explain Greenhouse Gas Emissions by Countries and Sectors*, World Resources Institute (August 2021), available at: <https://www.wri.org/insights/4-charts-explain-greenhouse-gas-emissions-countries-and-sectors>; Organization for Economic Co-operation and Development, *By focusing on 5 economic sectors, we can tackle nearly 90% of emissions* (2022), available at: <https://www.oecd.org/stories/climate-action/key-sectors/>; Dr. Paul Griffin, *CDP Carbon Majors Report 2017*, CDP (July 2017), at 8, available at: <https://cdn.cdp.net/cdp-production/cms/reports/documents/000/002/327/original/Carbon-Majors-Report-2017.pdf?1501833772> [stating that operational and product greenhouse gas (“GHG”) emissions of 100 fossil fuel producing entities accounted for 71% of global industrial GHG emissions between 1988 and 2015].

⁵⁰ *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); see *Basic v. Levinson*, 485 U.S. 224, 231 (1988)

⁵¹ See *Business Roundtable v. SEC*, 647 F.3d 1144, 1150 (D.C. Cir. 2011).

Subject to the comments above on financed emissions, the AIC considers that disclosure of Scope 3 emissions by public companies may be appropriate in certain circumstances as determined by registrants. However, any such Scope 3 disclosure requirement should be clearly tied to the well-established legal definition of materiality. The Proposed Climate Rule’s approach on this issue is unclear. On the one hand, the Proposed Climate Rule states that disclosure of Scope 3 emissions would be required if those emissions are “material” for the purposes of U.S. securities law, meaning that “there is a substantial likelihood that a reasonable investor would consider them important when making an investment or voting decision.”⁵² On the other hand, the Proposed Climate Rule suggests elsewhere that the relative magnitude of Scope 3 emissions to a company’s overall GHG emissions might be relevant to the materiality question.⁵³ Although the Proposed Climate Rule does not propose a “bright-line quantitative threshold for the materiality determination,” it nevertheless references a suggestion that Scope 3 emissions disclosure should be mandatory where Scope 3 emissions account for more than 40% of a company’s total emissions.⁵⁴ In the vast majority of circumstances, a registrant’s Scope 3 emissions will, by their nature, comprise the largest percentage of a registrant’s total emissions. Therefore this suggested de facto threshold would effectively render disclosure of Scope 3 emissions mandatory in almost all cases, further severing the Scope 3 disclosure requirement from traditional materiality concepts.

C. Use of Proxy Data Will Be Necessary

To the extent registrants are ultimately required to disclose financed emissions regardless of materiality, the AIC strongly supports being able to use estimates and proxy data for all such emissions. While this the Proposed Climate Rule’s reference to the PCAF Standard recognizes such an approach,⁵⁵ the industry would welcome clarification on this point. While registrants may be able to collect emissions data from certain investments, collecting such underlying data from all investments in investment vehicles and funds will not be possible, and certainly not within the referenced 60-day filing period. Investment portfolios in vehicles and funds can change significantly from year to year and to even disclose proxy data with respect to a publicly traded private fund manager’s financed emissions will be a challenge.

A 60-day filing period is short for calculating and disclosing Scope 1 and 2, let alone Scope 3 emissions. Each of these categories of emissions may change significantly year to year for certain registrants. The AIC considers that a more realistic and reasonable timeframe would be to extend the 60-day filing period to 180 days following the end of a registrant’s fiscal year. Given that such an approach conflicts with the deadline for registrants to file Form 10-K, which ranges between 60 to 95 days after fiscal year end for Large Accelerated, Accelerated, and Non-Accelerated Filers, the AIC proposes that the SEC either authorize registrants to file GHG emissions data pursuant to the Proposed Climate Rules in Form 10-Q for the second fiscal quarter or consider the creation of new filing type, due in the middle of a registrant’s fiscal year, that is dedicated entirely to climate-related disclosures. Allowing registrants to report on this alternative time line will lessen the burden of compiling climate data at year end and have the added benefit of separating this valuable

⁵² Proposing Release at 162.

⁵³ Proposing Release at 165, 166.

⁵⁴ Proposing Release at 165. *See also* Proposing Release at 174, n. 471.

⁵⁵ PCAF Standard at 9.

disclosure into a distinct filing rather than adding it to already dense annual reports. Otherwise, filers may need to base their calculations on incomplete information as of a date earlier than year end and potentially be required to file an amended Form 10-K when additional information is received. This will lead to confusion for investors and additional burdens to registrants. Additionally, given the timing and complexity concerns with calculating GHG emissions as well as the challenges associated with collecting this information from third parties in a registrant's value chain, to the extent they are required to be disclosed, we support having an option for Scope 3 emissions information be furnished rather than filed.

D. Delegating Calculation of Scope 3 Emissions to Unspecified Third Party Methodologies Will Not Result in Consistent and Comparable Disclosures

As mentioned above, with respect to the calculation of Scope 3 financed emissions, the SEC has not proposed to require a particular methodology for registrants, in order to provide flexibility to choose the methodology that best suits their particular portfolio and financing activities.⁵⁶ The Proposed Climate Rule allows registrants to use “any appropriate methodology,” and highlights the PCAF Standard as “one methodology that complements the GHG Protocol and assists financial institutions in calculating their financed emissions.”⁵⁷ The use of such third party frameworks and standards may create efficiencies and minimize compliance burdens for registrants by allowing registrants to leverage frameworks with which many companies and investors are already familiar. However, such third party frameworks and standards are independently governed and are expected to change over time, and the SEC has not provided for an appropriate level of oversight or due process to ensure that any changes reflect the feedback, needs, or best interests of registrants or investors.⁵⁸

Additionally, the SEC has not clearly delegated authority for standard setting around the new climate-related metrics required to be disclosed in registrants' financial statements to any entity or established a source of funding to maintain the operations of such entity.

The AIC believes that the SEC should therefore establish effective oversight over third-party standard setters. In the AIC's view, the organization of such standard setters must reflect the following principles, which AIC considers to be foundational requirements for an independent and impartial standard setter—and important to ensuring broad stakeholder support for the standard setter's work. Firstly, there must be no conflicts of interest in the leadership of the standard setter due to commercial interests in selling ESG or climate-related services, including selling ESG data or providing climate consulting. Secondly, the following good governance policies and processes should be established: (i) transparency and public participation in respect of the standard-setting process, including publicly available rules of procedure that clearly describe the standard setter's operating procedures and the activities that are to be open to public participation or observation, and transparency with respect to how the standard setter is funded and how its budget is set; (ii) accountability, including effective monitoring; and (iii) due process for registrants, including fair

⁵⁶ Proposing Release at 197.

⁵⁷ Proposing Release at 196.

⁵⁸ Similarly, how will the SEC ensure the quality of the attestation providers? Will they need to register with an oversight body, similar to how audit firms must register with the PCAOB to perform PCAOB audits? We would recommend the SEC consider to this point.

and neutral grievance mechanisms. Thirdly, the standard setter should operate under a fee model whereby the standard setter sets a budget that is approved by Congress and is funded by a fee collected pro rata from registrants based on their market capitalization.

Without appropriate SEC oversight, there is no guarantee that these standards will continue to exist or to develop, improve, and respond to investor needs. There is also nothing to require these third-party standard setters to act in the best interest of investors. Further, the third-party standard setters generally do not provide due process for registrants, including fair and neutral grievance mechanisms. Given the SEC’s goal of comparable, consistent, and reliable disclosed information, this absence of guardrails around third-party standard setting supports the SEC not requiring the disclosure of specific Scope 3 metrics at this time.

III. Initial Public Offerings

Facilitation of capital formation is one-third of the SEC’s mission and is critically important to the U.S. economy.⁵⁹ Over the past several years, there has been considerable analysis and debate around the balance between issuer use of public and private markets to raise capital, the growth of the private markets, and the implications of this trend for capital markets.⁶⁰ The AIC believes that the SEC, with the Proposed Climate Rule in its current form, will significantly impact an issuer’s assessment to enter the public markets through an IPO or instead to continue to raise capital in the private markets. Publicly traded private fund managers work extensively with their portfolio company holdings to assess sources of capital, including public offerings. Going public has become increasingly more complex and less advantageous over the years,⁶¹ and these rules, if adopted as proposed, will continue that trend, further impacting issuers capital raising decisions.⁶²

⁵⁹ See, e.g., Commissioner Caroline Crenshaw, *Remarks of Commissioner Carolyn Crenshaw at Virtual Roundtable on the Future of Going Public and Expanding Investor Opportunities: A Comparative Discussion on IPOs and the Risk of SPACs* (“Finally, I encourage everyone at this symposium to think about the ever-growing divide between the public and private markets and how the paths to public markets can be improved and made more efficient while preserving key investor and market integrity protections”), available at: <https://www.sec.gov/news/speech/crenshaw-remarks-spac-symposium-042822>.

⁶⁰ See, e.g., Commissioner Caroline Crenshaw, *Grading the Regulators and Homework for the Teachers* (April 14, 2022), available at: <https://www.sec.gov/news/speech/crenshaw-remarks-symposium-private-firms-041422>; and Commissioner Allison Herren Lee, *Going Dark: The Growth of Private Markets and the Impact on Investors and the Economy* (October 12, 2021), available at: <https://www.sec.gov/news/speech/lee-sec-speaks-2021-10-12>.

⁶¹ See, e.g., Langevoort, Donald C. and Thompson, Robert B., “Publicness” in Contemporary Securities Regulation after the JOBS Act (2013). Georgetown Law Faculty Publications and Other Works. 976. (Conceptualizing the public-private divide), available at: <https://scholarship.law.georgetown.edu/facpub/976>; Fontenay, Elisabeth De., *The Deregulation of Private Capital and the Decline of the Public Company* (2017) [“The direct and indirect costs of mandatory disclosure and other requirements of securities law (such as the federal proxy rules) represent one of the most significant costs to becoming and remaining a public company.”]; and Georgiev, George. S., 18 New York University Journal of Law & Business 221 (2021) (stating “firms can effectively eschew public company status, which is both more costly and much less essential to firm success than ever before”), available at: <https://scholarlycommons.law.emory.edu/faculty-articles/2>.

⁶² On March 30, 2022, the SEC proposed new rules to make wide-ranging changes to the disclosure and liability landscape in initial public offerings by special purpose acquisition companies (“SPACs”) and in business combination transactions involving shell companies, such as SPACs, and private operating companies. See SEC, *Special Purpose Acquisition Companies, Shell Companies, and Projections* (March 30, 2022), available at: <https://www.sec.gov/rules/proposed/2022/33-11048.pdf>.

The AIC believes that the SEC should be taking steps to lower the barriers to public market financing and IPOs, to make them a more cost effective means to raise capital instead of raising additional barriers, particularly around significant amounts of disclosure of immaterial information, or applying public market policy to long-standing private market arrangements.⁶³

The Proposed Climate Rule would require climate-related disclosures to be included in registration statements, including those for initial public offerings. The SEC asks in its Proposing Release, “Should we exclude Securities Act registration statements filed in connection with a registrant’s initial public offering? Would such an accommodation help address concerns about the burdens of transitioning to public company status?”⁶⁴ The AIC believes that the answer to each of these questions is an emphatic yes. This question is specific to Scope 3 emissions, but the AIC believes the question is appropriate to all aspects of the Proposed Climate Rule. Investors rely on initial public offerings as a key means to realize returns on the fund’s investments.⁶⁵ The burden of additional disclosure obligations imposed on initial public offerings could have a chilling effect on companies’ use of initial public offerings as a means to raise capital for growth and thus on U.S. capital markets as a whole.⁶⁶

Establishing a transition period whereby newly public companies, including both emerging growth companies and non-emerging growth companies, would first be subject to the proposed amendments in a subsequent annual report filed on Form 10-K or Form 20-F and would avoid adding high costs and paperwork burdens to an already costly initial public offering process.⁶⁷ Moreover, such a transition period would avoid incentivizing companies to postpone plans to undertake an initial public offering because they need more time to establish novel climate-related financial metrics in their financial statements, for example. Finally, a transition period for newly public companies would provide such companies more time to fine-tune

⁶³ See, e.g., Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (Release No. IA-5955; File No. S7-03-22) (February 9, 2022), and Revisions to the Definition of Securities Held of Record (RIN 3235-AN05) (SEC Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions) (June 11, 2021).

⁶⁴ Request for Comment #179, Proposing Release at 279.

⁶⁵ See Pitchbook, *PE-backed exits saw record value in 2021* (January 10, 2022), available at: <https://pitchbook.com/news/articles/2021-pe-exits-record-ipo-value> (stating that total PE-backed IPOs accounted for more than 42% of private equity exit value in the third quarter of 2021); and Bain & Company, *The Private Equity Market in 2021: The Allure of Growth* (March 7, 2022), available at: <https://www.bain.com/insights/private-equity-market-in-2021-global-private-equity-report-2022> (describing the strength of the private equity exit market in 2021, including that IPOs “grew rapidly, adding \$112 billion in volume, up from \$67 billion in 2020”).

⁶⁶ “While there are many factors that drive the decision of whether to be a public company, increased disclosure and other burdens may render alternatives for raising capital, such as the private markets, increasingly attractive to companies that only a decade ago would have been all but certain candidates for the public markets... Regardless of the cause, the reduction in the number of U.S.-listed public companies is a serious issue for our markets and the country more generally.” SEC Chairman Jay Clayton, *Remarks at the Economic Club of New York* (July 12, 2017), available at: <https://www.sec.gov/news/speech/remarks-economic-club-new-york>.

⁶⁷ The IPO process costs \$9.5 million - \$13.1 million, based on a PWC study costs taken from SEC filings for 829 U.S. IPOs on major exchanges from 2015-2020 (excluding IPOs that were best efforts, under \$25 million, special purpose acquisition companies (SPACs), dual listings or domestic market uplistings, and excluding Health Services IPOs due to sample size as well as other bank offerings, min-max offerings). PwC. *Considering an IPO? First, understand the costs*, available at: <https://www.pwc.com/us/en/services/deals/library/cost-of-an-ipo.html>.

governance structures and practices, such as those relating to the board's oversight of climate-related risks, and management's role in assessing and managing those risks, before having to disclose them. This is particularly critical given that the Proposed Climate Rule requires the disclosure of many different types of forward-looking statements and forward-looking statements made in connection with an initial public offering that are excluded from the protections afforded by the Private Securities Litigation Reform Act.⁶⁸

IV. SEC's Dual Oversight of Publicly Traded Private Fund Managers

In addition to the challenges and complexities described above for private fund managers that are publicly traded, the proposal fails to address the implications and intersection of the proposed climate-related disclosure requirements and the SEC's existing authority and oversight of publicly traded private fund managers that are concurrently registered with the SEC as investment advisers directly or through subsidiaries that are SEC-registered investment advisers. As a result of this dual track of substantively different SEC regulation and oversight, one regarding public companies under the Securities Act and the Exchange Act and the other under the Investment Advisers Act, publicly traded private fund managers have a unique set of challenges and concerns as compared to those issuers whose nexus to SEC oversight is solely through the securities registration and periodic reporting process. The SEC should adopt targeted revisions to Investment Advisers Act rules, as described below, to address the disparate treatment of those managers that are registered under the Investment Advisers Act and will be subject the Proposed Climate Rule.⁶⁹

Publicly traded private fund managers may operate a variety of investment funds, portfolios, and strategies, and the manager's investment advisory activities typically are subject to the Investment Advisers Act. As a result, publicly traded private fund managers are functionally regulated by the SEC as investment advisers under the Investment Advisers Act. Registration with the SEC as an investment adviser requires publicly traded private fund managers to submit to the SEC for its review additional forms tailored to the asset management business and to comply with the law and rules for investment advisers, including the filing of Form ADV. Importantly, and a key distinction from publicly traded companies that have registered securities but are not registered in a functional capacity, the SEC has the authority to routinely inspect investment advisers and it has dedicated its second largest Division, the Division of Examinations, to examine SEC-registered investment adviser operations and compliance with the federal securities laws.

Annually the SEC conducts over 2,200 examinations of SEC-registered investment advisers.⁷⁰ The Investment Advisers Act provides the SEC with broad authority to examine

⁶⁸ Pub. Law 104-67, 109 Stat. 737.

⁶⁹ In addition, the SEC proposed new rules and amendments under the Investment Advisers Act on May 25, 2022 that are designed specifically to address ESG and climate-related matters in a bespoke manner for private fund managers. This specialized reporting proposal, if adopted, should be the remit of the examination program and not examination for compliance with the Proposed Climate Rule.

⁷⁰ See SEC Division of Examinations, *SEC 2022 Examination Priorities* (March 30, 2022), at 3, available at: <https://www.sec.gov/files/2022-exam-priorities.pdf>.

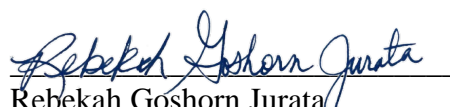
AMERICAN INVESTMENT COUNCIL

records,⁷¹ which the staff regularly exercises on examinations through comprehensive requests for thousands of records of an investment adviser’s operations. In addition, the SEC’s staff has prioritized the examination of SEC-registered investment adviser disclosures regarding ESG matters over the past several years, including climate-related disclosures.⁷² Moreover, with the understanding that there will be SEC oversight through routine adviser examinations and the complex analyses and materiality judgments required by the proposed enhancements to Regulations S-K and S-X, publicly traded private fund managers will build out substantially more comprehensive controls and processes surrounding the proposed disclosures in anticipation of the document requests likely to come in the course of an SEC examination.

To address the disparate treatment of publicly traded private fund managers and to promote comparable information across registrants, the SEC should provide a level playing field for all public companies with respect to the proposed disclosures. For example, the SEC could explicitly carve out from the definition of “record” under the Investment Advisers Act all documentation an investment adviser or its affiliates may have related to the development and support of the climate-related provisions in securities registration statements and annual reports. Such an exclusion would put a publicly traded private fund manager on par with other issuers where these records are not subject to routine examination, but rather could be provided voluntarily by request or produced in response to a subpoena. In addition, the SEC should also clarify that information provided in securities registration statements and annual reports is not subject to the Investment Advisers Act or its rules to address concerns regarding heightened liability for these potentially required climate-related statements. The SEC has taken an analogous approach by carving out “required filings” from the new Investment Advisers Act Marketing Rule.⁷³

The AIC appreciates the ability to highlight its views on these issues and would be pleased to answer any questions that you might have concerning our views.

Respectfully Submitted,


Rebekah Goshorn Jurata
General Counsel

⁷¹ See Section 204(a) of the Investment Advisers Act [“All records (as so defined) of such investment advisers are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors.”].

⁷² See, e.g., SEC Division of Examination Priorities for 2020, 2021, and 2022. See also The Division of Examinations’ Review of ESG Investing (Risk Alert) (April 9, 2021).

⁷³ See Investment Advisers Act Rule 206(4)-1(e)(1) (“Advertisement means...but does not include...(B) Information contained in a statutory or regulatory notice, filing, or other required communication, provided that such information is reasonably designed to satisfy the requirements of such notice, filing, or other required communication; or”).