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June 17, 2022

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

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Use SEC's Internet Comment Form: www.sec.gov/rules/submitcomments.htm

Submit Comments by Email: rule-comments@sec.gov

Re: File No. S7-10-22; Securities and Exchange Commission's proposed rule: "The Enhancement and Standardization of Climate-Related Disclosures for Investors," 87 Fed. Reg. 21334, published April 11, 2022 ("Proposed Rule")

Dear Ms. Countryman:

The International Energy Credit Association ("**IECA**") appreciates the opportunity to submit these comments ("**IECA Comments**") to the Securities and Exchange Commission ("**SEC**" and "**Commission**") regarding the SEC's above-captioned proposed rule regarding "*The Enhancement and Standardization of Climate-Related Disclosures for Investors*" ("**Proposed Rule**").

We acknowledge that investors, businesses, employees, regulators and consumers are all increasingly aware of the impact on all businesses, both public companies and privately-held businesses, of climate-related risks, which risks fall into two categories: (A) the risks (and opportunities) to one's business model arising from such business taking affirmative actions to reduce emissions of greenhouse gases ("**GHGs**"), either voluntarily or as mandated by a law or regulation, in order to address climate change and global warming targets or strategies ("**Climate-Transition Risks**") and (ii) risks (as well as opportunities) arising from the costs incurred by businesses as a result of the increasing severity and frequency of extreme weather events (i.e., acute weather events), pro-longed changes (i.e., chronic changes) in weather patterns and other natural events such as flooding and rising sea-levels ("**Climate-Physical Risks**," referred to collectively with Climate-Transition Risks as "**Climate-Related Risks**").

Such Climate-Related Risks are real and have become a major factor in the decision-making process for investors, consumers, business-owners, scientists, regulators, protestors and politicians here in the U.S. and globally. As a result, the number of publicly traded businesses that can afford to not consider Climate-Related Risks in their day-to-day decisionmaking and in their reporting to the SEC is rapidly approaching zero and the quantity and quality of Climate-Related Risk disclosures will likely continue increasing without any encouragement or prodding from the SEC.

However, as investors and consumers seek information from which to assess and compare the Climate-Related Risks facing various businesses and the various strategies proposed to address such risks, the absence of standardization and comparability in terms of the information regarding Climate-Related Risks being provided by public companies, privately-held businesses, scientists, regulators, protestors and politicians is causing confusion and inefficiency.

If the SEC adopts policies and rules that enhance the standardization and comparability of information disclosed about Climate-Related Risks, continues to police securities markets for fraud and manipulation, and avoids stifling genuine climate-related innovation that actually reduces GHG emissions, that will benefit investors and businesses.

A brief review of the technological breakthroughs being made nearly every day shows GHG emission reducing innovations being made in nearly every sector of our economy, all of which support the transition to a cleaner economy with one central motivation, managing and mitigating Climate-Related Risks by reducing GHG emissions.

Those GHG emission reducing innovations include: (i) increasing production and sales of electric vehicles, (ii) methane-leak reductions in wells, pipelines and other fossil fuel infrastructure, (iii) carbon emissions reductions and carbon capture and storage in various heavy industries, (iv) development of renewable energy systems, including battery energy storage systems, solar generation, wind farms, production of biogas from anaerobic digestion of agricultural waste and methane capture from municipal landfills, (v) the production and use of hydrogen, some made from emissions-free (so-called "responsibly sourced") fossil fuel ("blue hydrogen") and some made from electrolysis using power from wind and solar generators ("green hydrogen") as a clean fuel for difficult to decarbonize industries such as cement, steel, aviation and maritime industries, (vi) purchases of carbon offsets by commercial and industrial businesses, such as RECs, RGGIs, LCFS credits, and paying landowners to plant trees and farmers to plant carbon-absorbing plants between growing seasons for cash crops, which carbon offsets provide the additional revenues necessary for the construction of additional solar, wind, battery energy storage systems, and biogas[1] projects all across the U.S. ("Additionality Benefits") and growing additional trees and other CO2 absorbing plants, (vii) the development of GHG emissions-free nuclear power and small modular reactors, and (viii)

[1] Anaerobic digestion of GHG emitting agricultural wastes and methane gas capture and use of GHG emitting municipal landfills.

the increasing flow of capital toward all of the above GHG emissions reducing innovations.

All of the above innovations, including the Additionality Benefits that are the direct result of the purchase of carbon offsets, result in actual reductions in GHG emissions. At a minimum, we urge the SEC to ensure that its Proposed Rule adopts a "technology-neutral" policy with respect to disclosing GHG emissions, disclosing Climate-Related Risks, and describing strategies to manage and mitigate such risks. Doing so will ensure that standardized and comparable information regarding the impacts and benefits of any and all GHG emission reductions are recognized and disclosed to investors and the markets. Armed with such information, the SEC should then allow investors and the markets to choose which approach to Climate-Related Risks is approved and funded.

All the foregoing innovations demonstrate an economy that is rapidly seeking new ways, plus improvements to old ways, to disclose, manage and mitigate Climate-Related Risks by reducing actual GHG emissions from our economy, which is how our economy is intended to identify, manage and mitigate all risks we face in the U.S. and globally.

In that spirit, the IECA offers the following IECA Comments on the Proposed Rule. In Exhibit A attached to these IECA Comments, please also see a Background – Summary of the SEC's Proposed Climate Disclosure Rule, which the IECA has utilized in preparing these IECA Comments.

IECA Comments on SEC's Proposed Climate Disclosure Rule

Outline:

I. The SEC should seek to enhance standardization and comparability of Climate-Related Disclosures to allow investors to make an "apples to apples" comparison of the impacts and risk mitigation strategies of different Public Companies with respect to Climate-Related Risks.

II. The SEC should write its Proposed Rule on a "technology-neutral" basis and should not choose one strategy over another strategy for managing and mitigating Climate-Related Risks. After requiring Registrants to make Climate-Related Risk disclosures on a "technology neutral" basis, which explicitly allows a Registrant to disclose any strategy that results in real and actual reductions in GHG emissions, the SEC should then allow investors and the market to choose which strategies will be used by Registrants to manage and mitigate Climate-Related Risks.

A. A Registrant's purchasing carbon offsets is a bona fide strategy for reducing GHG emissions and should be allowed to be disclosed by such a Registrant.

B. If a Registrant's strategy to address Climate-Related Risk actually reduces GHG emissions from the level of GHG emissions that would have occurred if such Registrant had not pursued such strategy, then, absent fraud or manipulation by

such Registrant, the SEC's Proposed Rule should allow disclosure by such Registrant of its GHG emission reductions and the strategy such Registrant elects to pursue, and then let investors and the market decide whether to invest in that strategy.

C. Allowing Registrants to disclose their pursuit of GHG emission reductions and innovative strategies for addressing Climate-Related Risks and then policing those disclosures for any fraud and manipulation is the SEC's role under the U.S. Securities Laws.

III. A Safe Harbor, Similar to that set forth in proposed Section 229.1504(f) of Regulation S-K for Scope 3 GHG Disclosures, Should Be Provided for Disclosures of Climate-Physical Risks under Proposed Sections 210.14-02(c), (e) and (g) of Regulation S-X and Sections 229.1502 and 229.1504 of Regulation S-K.

IV. The Proposed Rule Should Do No Harm to Important Environmental Markets, Many of which Were Created Under State Laws.

V. The Proposed Rule's Departure from the Middle-of-the-Road on Highly Politicized Issues, from Climate Change to the Power of Administrative Agencies, Makes it a Target for Complete Reversal Either Upon Judicial Review or with a Change in Two Years of the Presidential Administration; If the SEC Seeks to Make a Lasting Change with Any of its Proposals to Address the Long-Term Issues of Climate Change, Taking a Middle-of-the-Road Position Now Will Lower the Risks of such Reversals.

A. Responses to Specific Requests for Comments by the CFTC in its Proposed Rule

B. Comments on the Text of the Proposed Rule

VI. CONCLUSION
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I. The SEC should seek to enhance standardization and comparability of Climate-Related Disclosures to allow investors to make an "apples to apples" comparison of the impacts and risk mitigation strategies of different Public Companies with respect to Climate-Related Risks.

The use of disparate disclosure frameworks, vocabulary, and accounting standards or metrics for making disclosures regarding GHG emissions and Climate-Related Risks prevents would-be investors and decision-makers from easily making "apples to apples" comparisons between (i) the risks facing different public companies registered with the SEC ("Registrants") and (ii) the strategies being proposed by Registrants to manage and mitigate such risks. Enhancing standardization and comparability of Climate-Related Risk disclosures among Registrants will reduce confusion and uncertainty, but there appears to be little certainty that the Proposed Rule will enhance the standardization or comparability of such disclosures.

The IECA does not oppose the SEC's choosing to align its Proposed Rule with the "climate-related reporting framework" developed by the Task Force on Climate-related Financial Disclosures ("TCFD") and for incorporating into the SEC's Proposed Rule the "concepts and vocabulary" developed by the World Resources Institute's Greenhouse Gas Protocol ("GHG Protocol"), a leading accounting and reporting standard globally for GHG emissions. Choosing one taxonomy under the GHG Protocol that will be used both here in the U.S. and by U.S. businesses when they operate in various foreign countries can be a great first step toward standardization and therefore comparability of Climate-Related Risk disclosures.

There is little reason, however, to think that the modifications to the SEC's Regulation S-X and Regulation S-K as set forth in the Proposed Rule will require Registrants to use the TCFD reporting framework or the concepts and vocabulary of the GHG Protocol.

We suspect that the SEC could do more to enhance standardization and comparability of disclosures by Registrants to ensure that investors and decisionmakers can make "apples to apples" comparisons of disclosures by Registrants in similar sectors of the economy.

II. The SEC should write its Proposed Rule on a "technology-neutral" basis and should not choose one strategy over another strategy for managing and mitigating Climate-Related Risks. After requiring Registrants to make Climate-Related Risk disclosures on a "technology neutral" basis, which explicitly allows a Registrant to disclose any strategy that results in real and actual reductions in GHG emissions, the SEC should then allow investors and the market to choose which strategies will be used by Registrants to manage and mitigate Climate-Related Risks.

The SEC's Proposed Rule should be, at a minimum, technology-neutral so that the SEC allows each Registrant to select a strategy that the Registrant concludes is a technologically-feasible and commercially-reasonable means of managing and mitigating

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its exposure to Climate-Related Risks and then such Registrant should be allowed to disclose its chosen strategy to investors and the market. And the SEC should then allow investors and the market to decide which of the various strategies that genuinely reduce GHG emissions are rewarded by continued investment by investors and decisionmakers who have been informed by standardized and comparable disclosures related to Climate-Related Risks.

Absent fraud or manipulation, all Registrants should be allowed to disclose GHG emissions and strategies for managing and mitigating Climate-Related Risks that actually result in a reduction in GHG emissions from that which would have occurred if such Registrant had not pursued its chosen strategy.

A. A Registrant's purchasing carbon offsets is a bona fide strategy for reducing GHG emissions and should be allowed to be disclosed by such a Registrant.

It is not clear to us why the SEC requires a Registrant to omit any carbon setoff when reporting its GHG emissions, but to the extent that eliminating carbon setoff is intended to dismiss purchasing carbon setoffs as "greenwashing" or some other unacceptable approach to managing and mitigating Climate-Related Risks, we offer the following explanation and comment.

A Registrant's purchasing carbon offsets is a bona fide strategy for reducing GHG emissions and, absent fraud or market manipulation, the SEC should neither penalize a Registrant by labelling its purchase of carbon offsets as "greenwashing" nor should a Registrant be prohibited from disclosing to investors and the market a strategy for purchasing carbon offsets as its strategy for reducing GHG emissions and managing and mitigating its exposure to Climate-Related Risks.

A Registrant whose business model includes construction, sales, ownership or operation of renewable energy systems, such as battery energy storage systems, solar photovoltaic electric generation facilities, wind power generation facilities, production of biogas from anaerobic digestion of agricultural waste, or production of bio gas resulting from the capture of methane produced by a municipal landfill, would all score well in the eyes of environmental activists as helping to promote the reduction of GHG emissions.

We submit to the SEC that a Registrant whose business is steel manufacturing or another difficult to decarbonize industry, which will require significant technological innovations before it can decarbonize (i.e., reduce significantly the emission of CO_2 as a GHG from) its steelmaking operations is nevertheless making a valuable contribution to global GHG emissions reduction by purchasing carbon setoffs in the voluntary carbon credits market.

By purchasing carbon credits in a quantity that offsets part or all of a steelmaker's emissions of GHG, such as RECs, RGGI credits, LCFS credits, or paying landowners to plant trees, or farmers to plant carbon-absorbing plants between growing seasons for cash crops, the steelmaker's purchase of such carbon offsets provides the additional revenues necessary for the construction by a third party of additional solar generation, wind

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generation, battery energy storage systems, biogas[2] production projects all across the U.S. ("Additionality Benefits"), that would not have been constructed without the additional revenue stream provided by the steelmaker. As a result of the Registrant's purchase of carbon offsets, electricity that would likely have been generated by an older generation facility that would have significant GHG emissions, has been replaced by an energy source that does not emit GHG. Accordingly, the Additionality Benefit arising from the purchase of carbon offsets has produced a very real reduction in GHG emissions that would not have occurred without the Registrant's election to pursue purchasing carbon offsets as a strategy for managing and mitigating such Registrant's exposure to Climate-Related Risks.

And the same GHG emissions reduction takes place when any other Registrant that operates any other commercial or industrial business, regardless of whether its business is difficult to decarbonize, elects to purchase carbon offsets. Is that enough of a strategy for such a commercial or industrial Registrant to manage and mitigate Climate-Related Risks, we submit that any such Registrant should be allowed to disclose that information to potential investors and decisionmakers and then the investors and the market should be allowed to decide.

B. If a Registrant's strategy to address Climate-Related Risk actually reduces GHG emissions from the level of GHG emissions that would have occurred if such Registrant had not pursued such strategy, then, absent fraud or manipulation by such Registrant, the SEC's Proposed Rule should allow disclosure by such Registrant of its GHG emission reductions and the strategy such Registrant elects to pursue, and then let investors and the market decide whether to invest in that strategy.

If the SEC concludes that (i) climate change and global warming are real, and (ii) the theory that human behavior has contributed adversely to climate change and global warming has not, to date, been proven to be wrong, then the SEC should adopt policies in its Proposed Rule that will allow Registrants to use all tools at their disposal to make changes in their current levels of GHG emissions in order to attempt to reverse those human-caused changes in climate, weather, and global temperatures.

For example, if a Registrant in the fossil fuel industry were to adopt a strategy to clean up its operations and pursue innovations in uses of fossil fuels that substantially reduce (or eliminate) its Scope 1, 2 and 3 emissions of methane and other GHG, then the SEC's Proposed Rule should not impede or prohibit such Registrant's disclosure of its GHG emission reductions and its strategy for managing and mitigating its exposure to Climate-Related Risks.

As the transition to consumers using cleaner electricity and cleaner fuels accelerates, we will likely use far less coal and oil, but we can probably meet the necessary GHG emission targets without eliminating production of natural gas, provided that the industry

[2] Anaerobic digestion of GHG emitting agricultural wastes and methane gas capture and use of GHG emitting municipal landfills.

does what is technologically feasible and dramatically reduces (perhaps eliminates) methane emissions (particularly since every unit of methane that a Registrant does not allow to leak into the atmosphere, is a unit of methane that the Registrant can sell), i.e., its commercial interests can readily be aligned with reducing its GHG emissions.

For example, for many decades, the natural gas industry used pneumatic actuators for valves on pipelines, which used the high pressure natural gas in the pipeline to close a valve, and then vented a small quantity of that natural gas to the atmosphere. Using the pressurized gas (all methane) in the pipeline was cheaper than other means of operating those valves, so the engineers said why do anything differently? But now we are told that in the last 5 to 10 years, nearly all of those pneumatic actuators have been replaced with systems that do not vent methane to the atmosphere. It's not that complicated.

Similarly, it would not take that much for innovative petroleum engineers to find clean ways to use coal and oil, other than burning coal in boilers, burning gasoline and diesel in internal combustion engines, and burning kerosene (jet fuel) in combustion turbines.

A “technology-neutral” policy that encourages all reductions of GHG emissions is the most beneficial approach to addressing human-caused changes in climate, weather and global temperatures and would mitigate both climate impacts and economic impacts to industries that are naturally GHG intensive.

C. Allowing Registrants to disclose their pursuit of GHG emission reductions and innovative strategies for addressing Climate-Related Risks and then policing those disclosures for any fraud and manipulation is the SEC’s role under the U.S. Securities Laws.

All of the above innovations, including the Additionality Benefits that are the direct result of the purchase of carbon offsets, result in actual reductions in GHG emissions. At a minimum, we urge the SEC to ensure that its Proposed Rule adopts a “technology-neutral” policy with respect to disclosing and addressing GHG emissions and Climate-Related Risks so that standardized and comparable the benefits of any and all GHG emission reductions are recognized and disclosed to investors and the markets and then investors and the markets are allowed to choose which approach to Climate-Related Risks is approved.

At the same time, the SEC should police the market for fraud and manipulation, so that investors are guided by standardized and comparable disclosures of reliable information about Climate-Related Risks, rather than lies or deception, whether such lies or deception come from public companies or from (perhaps) well-intended, but misguided protestors or politicians.

Penalizing public companies who strive and succeed in actually reducing GHG emissions, but who do so using a method that is not on the list of one political party’s preferred strategies for reducing GHG emissions, is not a role the SEC should pursue.

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Plus, if the Presidential administration changes to the other political party two years from now, then the SEC's Proposed Rule will simply be reversed and the SEC's opportunity to have accomplished real and lasting benefits for our economy and our climate will have been wasted.

In sum, while we support the virtues of enhancing standardized and comparable disclosures regarding Climate-Related Risks, we caution that it is extremely important that the SEC pursue a technology-neutral approach in the Proposed Rule and not favor one Climate-Related Risk mitigation strategy over another strategy if both strategies actually reduce GHG emissions. The SEC should allow investors and the market to decide which Climate-Related Risk mitigation strategies are chosen based on full and fair disclosures by public companies.

III. A Safe Harbor, Similar to that set forth in proposed Section 229.1504(f) of Regulation S-K for Scope 3 GHG Disclosures, Should Be Provided for Disclosures of Climate-Physical Risks under Proposed Sections 210.14-02(c), (e) and (g) of Regulation S-X and Sections 229.1502 and 229.1504 of Regulation S-K.

Section 229.1504(f) of Regulation S-K provides a "safe harbor" from liability for Scope 3 emissions disclosures and says: "(1) **A statement** within the coverage of paragraph (f)(2) of this section that is **made by or on behalf of a registrant is deemed not to be a fraudulent statement** (as defined in paragraph (f)(3) of this section), **unless it is shown that such statement was made** or reaffirmed **without a reasonable basis or was disclosed other than in good faith**." (Emphasis added.)

Measuring and disclosing a Registrant's exposure to Climate-Related Risks from "severe weather events," indicating whether such events will be "acute" or "chronic," and then measuring their impact on a Registrant's business model requires a Registrant to predict the frequency and severity of severe weather events and then quantify the impacts therefrom on the Registrant's business model. Meteorologists are hard-pressed to make such predictions more than two weeks in advance and yet businesses will be required by the SEC's proposed Climate-Related Risks disclosure rules to provide such information with respect to Climate-Physical Risks as much as two or more fiscal years into the future, possibly more.

Doing so will require assumptions (which the SEC or another regulator may call "models") that will attempt to predict the future. Each Registrant's model (or models) will be built upon assumptions about climate change and whether various types of severe weather events are likely to strike at various locations where the Registrant has its business operations, or where its upstream supplier(s) or its downstream customer(s) are located.

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And those models will, to some extent, have to withstand the "fraudulent statement" liability that accompanies reporting under the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act").

Applying such a standard to Climate-Physical Risks disclosures will have the effect of squelching any statements that have the possibility of being penalized as a fraudulent or untrue statement. Applying such a standard simply does not function well when applied to reports arising in a field of study where climate scientists continue to be diligently seeking to use the scientific method to determine what activities humans are undertaking that is actually affecting the weather and then using science to find ways to alter that human behavior and, most important, ways to reduce global warming of the planet Earth.

When a scientist seeks to prove that human behavior contributes to global warming and climate change, she (or he) cannot possibly eliminate many reasonable questions concerning timing and impacts, but she/he is not trying to answer all questions immediately.

A climate scientist observes climate data and historical weather data with respect to weather events, weather patterns, temperatures in various locations, and global average temperatures. She/he looks for trend lines and patterns and then attempts to develop a theory that could explain the physical climate and weather data and the historical weather and temperature trends that she/he has observed. Our climate scientist then conducts experiments (i.e., tests) to see if her/his theory actually and accurately explains the various observed weather events. Armed with the additional data that are the results of these experiments, she/he continuously refines or eliminates different portions of the hypothesis, keeping only those portions of the original hypothesis that have not been proven to be incorrect, and then conducting further experiments.

Over time, many different theories and hypotheses are put forward and then eliminated as the experiments prove various theories and hypotheses to be incorrect. All the while, other scientists and detractors will say that her/his theories and hypotheses are incorrect because of reasonable questions about additional variables that either could not be tested or are not yet fully understood.

That does not mean our climate scientist is wrong, it simply means that reasonable questions can remain even after our climate scientist has produced a robust theory that has survived numerous bona fide experiments and appears to accurately explain past weather, climate and temperature events and, perhaps, may accurately predict the weather, climate, and temperatures our planet Earth will experience in the future.

But untested variables will remain, some of which are simply incapable of being tested based on the latest and greatest technology available to our climate scientist. As a result, reasonable unanswered questions will also remain long after our climate scientist has found an accurate theory.

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That is where we are with climate science today. We appear to have progressed in our study of climate events and potential links to human behavior for many climate scientists to feel comfortable in concluding that: (i) human behavior in the form of emissions of GHGs have contributed significantly to global warming of the Earth, and (ii) if current trends in global warming continue, then failure to take action and reduce human emissions of GHGs now will very likely produce significantly harmful climatic conditions resulting in decreased arability of farmland, decreased habitability of land, and decreased availability of fresh water, including in portions of the Earth that are currently heavily populated with humans.

At the same time, there remain significant reasonable questions about many aspects of current theories that are endorsed by many respected climate scientists. As a result, climate scientists will continue experimenting, observing, and eliminating and refining various parts of their climate theories.

In that context, it is extremely unlikely that any public company will get it right when asked by the SEC to disclose how its business will be affected ten years from now, or even two years from now, by Climate-Physical Risks. We note that the United Nations' TAR5 has 3,000 scientists signing it – but there remain critics raising reasonable questions about the conclusions of those 3,000 scientists.

So how is a Registrant supposed to predict conclusively that current climate changes will lead inevitably to unusually severe droughts, floods, storms, extreme temperatures, and rising sea levels in one location or another on the Earth where a particular business has its operations?

In that environment, the SEC expects public companies to disclose information regarding Climate-Physical Risks.

Unless a "safe harbor" is provided from liability for "fraudulent statement liability" a public company may be advised not to make statements about its future that would be genuinely helpful to investors trying to assess whether to invest in such company, or trying to assess how to vote in response to a proposed plan or strategy for addressing Climate-Physical Risks, if the public company has any doubts about whether a particular statement will be able to withstand all future experimental tests applied to test and refine one or more climate science theories.

For example, SEC Chair Gensler said in his statement before the Investment Advisory Committee on June 9, 2022, that "Our core bargain from the 1930s is that investors get to decide which risks to take, as long as public companies provide full and fair disclosure and are truthful in those disclosures." In that light, consider a public company that intends to purchase carbon offsets for five years until a particular strategy involving battery storage, electric vehicles, carbon capture, hydrogen hubs, or another technology becomes commercially scalable from the currently successful laboratory tests, and that strategy is genuinely and in good faith expected to occur within such five year time period.

However, that strategy is subject to proof of commercial scalability within that five year period, does that make such statements fraudulent if, for completely unexpected reasons, such technology fails to achieve commercial scale and some alternate technology must be adopted?

Was that public company not being "truthful" in disclosing its plans to address a Climate-Physical Risk using a bona fide strategy which it had a "reasonable basis" to believe would work and which it disclosed in "good faith"?

Without a safe harbor, such a public company may be compelled to elect to disclose its exposure to a Climate-Physical Risk, without any mention of its well-reasoned and likely to be successful strategy, for fear of making any statement that would later be judged to be anything but "truthful."

Worse than that, if in fact such public company's strategy turns out to be the prudent and well-reasoned approach that it anticipated it would be and is ultimately successful within that five year period, then investors who never heard about the public company's strategy would have missed an opportunity to "decide which risks to take" (as the SEC Chair remarked) and such public company may have been under-funded and unable to pursue such a strategy all because the SEC's lack of a "safe harbor" for disclosures made with respect to Climate-Physical Risks compelled it to not disclose its strategy for addressing the Climate-Physical Risk to which it was exposed.

Accordingly, we urge the SEC to expand application of the SEC's safe harbor under Section 229.1504(f) of Regulation S-K to provide an additional "safe harbor" from "fraudulent statement" liability for disclosures regarding Climate-Physical Risks made by a Registrant in compliance with proposed Sections 210.14-02(c), (e) and (g) of Regulation S-X and proposed Sections 229.1502 and 229.1504 of Regulation S-K to the extent that: "(1) A statement within the coverage of [Sections 210.14-02(c), (e) and (g) of Regulation S-X and proposed Sections 229.1502 and 229.1504 of Regulation S-K with respect to Climate-Physical Risks] is made by or on behalf of a registrant is deemed not to be a fraudulent statement (as defined in paragraph (f)(3) of this section), unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith." (Emphasis added.)

Not applying such a "safe harbor" will discourage businesses from making all but the most cautious projections about extreme (i.e., "acute") weather events and long-term (i.e., "chronic") Climate-Physical Risks related to changes in longer term weather patterns, if registrants are held to a high standard of accountability for Climate-Physical Risk data and projections that are disclosed by such registrants disclosing bona fide data and projections with respect to Climate-Physical Risks.

Accordingly, absent fraud, negligence or willful misconduct, we submit that climate data, weather event projections, risks to a public company's business model, and potential strategies to address such risks, all as disclosed by a Registrant with respect to Climate-Physical Risks, should not be subject to the same high standards of evidentiary proof for

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"fraudulent statement liability" that other data disclosures to the SEC and to investors by such Registrant are subjected. We urge you to adopt such a safe harbor.

IV. The Proposed Rule Should Do No Harm to Important Environmental Markets, Many of which Were Created Under State Laws.

As discussed in this section, the IECA is concerned that certain aspects of the Proposed Rule could cause significant competitive harm to carbon offset and REC markets, participants in those markets, and beneficial efforts that have helped our transition to a low carbon economy. The Proposed Rule requires companies to disclose whether they use carbon offsets or RECs as part of their climate strategy. Further, companies are required by the Proposed Rule to exclude the impact of any purchased or generated offsets when disclosing Scope 1, 2, and 3 emissions.

We urge the SEC to recognize that in the absence of federal legislation, many State governments have taken significant steps to address Climate-Related Risks within their respective States. Many of these State initiatives have had profoundly beneficial impacts on businesses, investors and consumers in those States seeking to conscientiously and genuinely address Climate-Related Risks by fostering and incentivizing various forms of renewable power generation, development of clean fuels such as biogas from agricultural waste and municipal landfills, developing hydrogen as a clean fuel for various difficult to decarbonize industries, promoting methane leak elimination, and promoting carbon capture and storage and other forms of reducing GHG emissions from existing fossil fuel based operations. In other words, many of these State programs have achieved real, lasting and beneficial reductions of GHG emissions.

Therefore, we urge the SEC to coordinate with State governments to ensure that the Proposed Rule does no harm to the beneficial contributions of various State programs that have been put in place to address Climate-Related Risks.

Carbon markets, including carbon offsets, are a very important tool to reach global climate goals, particularly in the short and medium term, as has been recognized in the Paris Agreement.[3] There is an extensive domestic market and regulatory framework governing carbon offsets, and the requirements of the Proposed Rule could inadvertently undermine the legitimate role that carbon offsets play in the transition to a low carbon economy. Various U.S. regulatory programs (e.g., California's Cap-and-Trade Program[4]

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[3] *See What You Need to Know About Article 6 of the Paris Agreement*, World Bank, (May 17, 2022) https://www.worldbank.org/en/news/feature/2022/05/17/what-you-need-to-know-about-article-6-of-the-paris-agreement ("under Article 6, . . . countries[] will be able to transfer carbon credits earned from the reduction of GHG emissions to help one or more countries meet climate targets. . . . Article 6.2 creates the basis for trading in GHG emission reductions . . . across countries.").

[4] *See, e.g.*, California Air Resources Board, Cap-and-Trade Program, available at https://ww2.arb.ca.gov/our-work/programs/cap-and-trade-program ("[t]he Cap-and-Trade Program is a key element of California's strategy to reduce greenhouse gas emissions. It complements other measures to ensure that California cost-effectively meets its goals for greenhouse gas emissions reductions.").

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and the Regional Greenhouse Gas Initiative ("RGGI")[5]) and international efforts are working to ensure the integrity of these instruments. In some cases, these efforts have been ongoing for many years.

In addition, the Commodity Futures Trading Commission ("CFTC"), a regulator that, unlike the SEC, has regulated energy- and environmental-related products for many years, is becoming more active in carbon-related market oversight. The CFTC recently held a "Voluntary Carbon Markets Convening" on June 2, 2022 "to discuss issues related to the supply and demand for high quality carbon offsets, including product standardization and the data necessary to support the integrity of carbon offsets' greenhouse gas emissions avoidance and reduction claims." The CFTC also recently issued a request for information on climate-related financial risks that address carbon offsets to further its role in the regulation of carbon offsets.

As with carbon offsets, RECs are also a very important tool to reach global climate goals. There are various state renewable portfolio standards and voluntary programs (e.g., Green-e RECs from the Center for Resource Solutions) that are working to ensure the integrity of these instruments. RECs can be sold on a stand-alone basis ("unbundled") or conveyed as part of power purchase agreements ("PPAs") and virtual power purchase agreements ("VPPAs"). In the latter case, the RECs, which are generated by the renewable electricity generator, are contractually conveyed to the customer in the VPPA and entitle the customer to exclusive rights to make claims about using the generator's green power and the associated reductions in Scope 2 emissions. In addition, the FTC has issued guides for the use of Environmental Marketing Claims that cover carbon offsets and RECs.

Accordingly, it is unnecessary for the SEC to mandate disclosure requirements for carbon offsets and RECs. The SEC should allow these markets and regulatory developments to further evolve to ensure that, if necessary in the future, disclosure requirements for carbon offsets and RECs accurately reflect the role of RECs in reducing GHGs and clearly define RECs' benefits and risks for the benefit of investors. If the SEC were to go forward with its disclosure requirements on carbon offsets and RECs, it could inadvertently cause confusion among investors regarding the actual benefits and risks of carbon offsets and RECs and could create unintended negative consequences that would be detrimental to the transition to a low carbon economy.

Excluding carbon offsets from use in calculating Scope 1, 2 and 3 emissions for disclosure under the proposed rule could have a number of detrimental impacts. As a starting point, the EPA has recognized that many of the offsets are created from projects that have a significant positive impact on reducing GHG emissions, such as installing low-N_2O catalyst nitric acid plants or capturing methane from anaerobic digestion of

[5] *See, e.g.*, RGGI, *Elements of RGGI*, available at https://www rggi.org/program-overview-and-design/elements ("[t]he Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort among the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia to cap and reduce power sector CO2 emissions.").

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dairy waste. It is therefore illogical to declare all offsets invalid, as the SEC's Proposed Rule essentially does.

That the SEC is probably inadequately informed about RECs and offsets comes through very clearly in the Proposed Rule. For example, the SEC says:

> "Understanding the role that carbon offsets or RECs play in a registrant's climate-related business strategy can help investors gain useful information about the registrant's strategy, including the potential risks and financial impacts. A registrant that relies on carbon offsets or RECs to meet its goals might incur lower expenses in the short term but could expect to continue to incur the expense of purchasing offsets or RECs over the long term. It also could bear the risk of increased costs of offsets or RECs if increased demand for offsets or RECs creates scarcity and higher costs to acquire them over time. Alternatively, the value of an offset may decrease substantially and suddenly if, for example, the offset represents protected forest land that burns in a wildfire and no longer represents a reduction in GHG emissions. In that case, the registrant may need to write off the offset and purchase a replacement. In other cases, increased demand for, or scarcity of, offsets and RECs may benefit a registrant that produces or generates offsets or RECs to the extent their prices increase. Accordingly, under the proposed rules, a registrant that purchases offsets or RECs to meet its goals as it makes the transition to lower carbon products would need to reflect this additional set of short and long-term costs and risks in its Item 1502 disclosure, including the risk that the availability or value of offsets or RECs might be curtailed by regulation or changes in the market."[6]

The first sentence is only accurate if the use of RECs or offsets is material to the Registrant, which it is very unlikely to be. With respect to the second sentence, the evidence developed by the federal government is compelling that renewable energy contracts decline in cost over time.[7] Additionally, if in the "long term," or short term,[8] RECs or offsets become too expensive as a mitigation strategy, the Registrant can simply change strategies, as it can do with any other supply strategy for any aspect of its business. The fourth and fifth sentences are incorrect, as offsets such as a forest

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[6] Proposed Rule, pp. 83-84.

[7] E.g., U.S. Dept. of Energy, National Renewable Energy Laboratories (NREL), *Declining Renewable Costs Drive Focus on Energy Storage* (Jan. 2, 2020), avail. at ; NREL, *Documenting a Decade of Cost Declines for PV Systems* (Feb. 21, 2021), avail. at https://www nrel.gov/news/program/2021/documenting-a-decade-of-cost-declines-for-pv-systems.html; NREL, *New Reports From NREL Document Continuing PV and PV-Plus-Storage Cost Declines* (Nov. 12, 2021), avail. at https://www.nrel.gov/news/program/2021/new-reports-from-nrel-document-continuing-pv-and-pv-plus-storage-cost-declines.html.

[8] See also Proposed Rule p. 359: "The required disclosure around the role that carbon offsets or RECs play in the registrant's climate-related business strategy could help investors better understand that strategy, including how resilient it is to changes in costs or the availability or value of offsets or RECs over the short, medium and long-term." As noted, the SEC's statement is meaningless, because the registrant can simply change a bad strategy, and, further, it is not appropriate to require registrants to provide information about non-material purchases so that investors who do not even own stock in the registrant can evaluate what it means for their portfolios.

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absorbing CO_2 typically have buffer pools that are drawn upon in the case of wildfire.[9] The sixth sentence is meaningless given the inaccuracies of its premises in the preceding sentences. The SEC relied on inaccurate information, and this sadly hobbles all aspects of the Proposed Rule as they relate to RECs and offsets.

Therefore, the disclosures contemplated under the Proposed Rule should not compel material and potentially disruptive changes to the way the markets for RECs and carbon offsets function in order for a Registrant to meet its disclosure requirements. For instance, the Proposed Rule calls for the disclosure of the costs of a REC, which does not take into account that RECs bundled with energy under a PPA or a financial hedge under a VPPA do not price RECs separately under current market practices. The Proposed Rule also calls for the disclosure of the source of carbon offsets and RECs, but does not take into account that various exchanges (some of which are regulated by the CFTC) specify that the integrity of the carbon offsets and RECs sold and purchased under these contracts are verified by a third-party registry or tracking system without specifying the source of the carbon offset or REC.

V. The Proposed Rule's Departure from the Middle-of-the-Road on Highly Politicized Issues, from Climate Change to the Power of Administrative Agencies, Makes it a Target for Complete Reversal Either Upon Judicial Review or with a Change in Two Years of the Presidential Administration; If the SEC Seeks to Make a Lasting Change with Any of its Proposals to Address the Long-Term Issues of Climate Change, Taking a Middle-of-the-Road Position Now Will Lower the Risks of such Reversals.

The SEC proposes to make several major changes to U.S. securities laws through regulation.

Perhaps most consequential is the SEC's new theory that Registrant disclosures are not just for the benefit of the SEC or the Registrant's investors, but also for the benefit of all investors in all companies: "[W]e understand **investors** often employ diversified strategies, and therefore **do 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**, which requires comparable data across registrants."[10] "... [C]limate-related risks and their financial impact could negatively affect the economy as a whole and create systemic risk for the financial system. SEC-reporting companies and their investors are an essential component of this system."[11] "Separate disclosure of climate-related risks could help to provide investors with information to help them more effectively evaluate their **portfolio risk**."[12]

[9] Climate Trust, *California ARB buffer mitigates current wildfire risk to forest carbon projects*, avail. at https://climatetrust.org/california-arb-buffer-mitigates-current-wildfire-risk-to-forest-carbon-projects/.
[10] Proposed Rule, p. 9.
[11] Proposed Rule, pp. 10-11.
[12] Proposed Rule, p. 134.

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It is a departure from law and existing regulation, however, to require Registrants to make disclosures to enable people to evaluate holding securities not issued by the Registrant.[13] As Matt Levine noted in his Bloomberg column: "it is a novel and surprising concession, asking a company to disclose stuff because it is useful to its shareholders *as universal shareholders*, not (just) because it is relevant to the company's own business."[14] The SEC proposes to require Registrant reporting not as part of a regulatory system that protects investors from Registrants, but to protect the financial system as a whole from climate change. The SEC proposes further specific requirements that are logically consistent with its new theory, for example requiring Registrants to develop and provide Carbon Dioxide emissions pricing signals; however all of it is beyond the statutory authority of the SEC.

The SEC also proposes to work at cross-purposes to its stated goal of protecting the system from climate change, by directly hobbling the energy and environmental laws and regulations of the U.S. and the States. Most U.S. States have laws, typically called renewable portfolio standards, that require a minimum percentage of retail customer electricity be served with renewable resources. Some States also have laws and regulations that limit GHG emissions. Some States also have power source disclosure laws and regulations that require serving utilities to tell customers the sources and emissions associated with their consumed electricity. These are the laws, and the regulators, protecting the environment. Yet the SEC proposes to countermand these very programs. Some of these programs use instruments known as RECs[15] and offsets for compliance, and the SEC proposes rules at odds with the programs, as discussed above in Section III of these IECA Comments.

Additionally, the Proposed Rule would dramatically neuter and curtail voluntary corporate climate commitments and strip corporate climate reporting of meaningful information about climate risks. The SEC states that it is currently the law of the land that ESG reporting[16] can be a source of securities laws liability.[17] This alone chills a Registrant's ESG reporting and climate commitments. But the SEC proposes to combine this with its new theory that liability for noncompliance is not just to investors, but to all participants in the U.S. financial system. The SEC also proposes to move ESG reporting away from where it generally currently resides, with individuals at Registrants specializing in environmental reporting, to accountants and lawyers. Even more counterproductive for meaningful ESG reporting, the SEC very specifically prescribes how Registrants should develop climate-related disclosures. All this will ultimately lead

[13] E.g., of existing laws, Securities Exchange Act §13(a)- "... to insure fair dealing in ***the*** security. ... "
[14] Matt Levine, *The SEC Will Regulate Climate*, Bloomberg (Mar. 22, 2022), avail. at https://www.bloomberg.com/opinion/articles/2022-03-22/the-sec-will-regulate-climate.

[15] "RECs" are generally "renewable energy credits" and are, in the words of the CFTC, "intangible commodities" that are often sold separately from the electric energy generated by such renewable energy facilities in order to provide an additional revenue stream as an incentive to build new renewable energy generation facilities in the State that established and recognizes such a REC.
[16] "The term "ESG" refers to environmental, social, and governance matters, of which climate-related disclosures is a part." Proposed Rule, p. 24 fn.54.
[17] Proposed Rule, p. 23 fn. 49.

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to standardized, risk-averse, and vague, rather than bold, quantitative, or useful, disclosures. The result will discourage climate and ESG commitments, strip climate reporting of useful information and turn it into a meaningless bureaucratic form. Four major accounting firms means there will simply be four types of not terribly informative, risk-averse, climate disclosure texts and numbers.

The Proposed Rule also will further divide the country, not just politically, but economically. The SEC's scheme for Scope 3 pressures every Registrant to acquire and disclose emissions information from its suppliers and customers. The SEC suggests companies should stop doing business with companies with high Scope 1 and 2 emissions: "Companies may have indirect control over their Scope 3 emissions through choices they make, for example in selecting suppliers ... ."[18] By these instructions, the SEC is proposing to pressure Registrants to move their business away from contractors, including small businesses, in areas of the country with higher emission power, to businesses in areas of the country with lower emission power. The SEC asks Registrants to either take their business, or pressure manufacturers to move, out of states with high GHG emission intensity electricity such as Wyoming, North Dakota, and West Virginia, into New York, Oregon, California, and other states with low GHG emissions intensity electricity.[19]

The SEC further contemplates "financed emissions" rules. By requiring entities to report the emissions of those to whom they lend money, such rules incentivize lending to those with lower emissions instead of those with higher emissions, even if the borrower can't control those emissions. This means lending to small cities in New York, which use lower emissions power for infrastructure construction, instead of small cities in West Virginia, which use higher emissions power. The contemplated rules would require every government borrower, no matter how small, to perform the required climate disclosures, which the SEC acknowledges is expensive. This would increase the cost of debt issuance and maintenance for the U.S. and every U.S. city, housing authority, road improvement district, and other agency, and thus increase the tax burden on all U.S. citizens to pay these increased costs. The contemplated rule would also amend SEC's rule 15c2-12 without the notice and comment period required under the Administrative Procedure Act.

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[18] Proposed Rule p. 372. Matt Levine notes in his Bloomberg column: "Is the SEC here telling large public companies "you have to pressure your private suppliers to stop emitting so much carbon"? No; that is again beyond its authority. It is just saying, look, you do what you want, but if you don't pressure your suppliers to reduce their emissions, you're gonna have a heck of a hard time reporting your Scope 3 emissions. The disclosure regime effectively deputizes public companies to be climate enforcers: If their suppliers don't start measuring and reducing their emissions, the companies won't be able to do the required disclosure." Matt Levine, *The SEC Will Regulate Climate*, Bloomberg, March 22, 2022, avail. at https://www.bloomberg.com/opinion/articles/2022-03-22/the-sec-will-regulate-climate.

[19] de Chalendara, Taggart, & Benson, *Tracking emissions in the US electricity system,* Proceedings of the National Academy of Sciences (Dec. 2019), avail. at https://www.pnas.org/cgi/doi/10.1073/pnas.1912950116. The SEC even cites an academic study acknowledging the profound divisiveness of the issues involved, at Proposed Rule pp. 336-37, fn. 802, Bernstein, Billings, Gustafson & Lewis, *Partisan Residential Sorting on Climate Change Risk*, National Bureau of Economic Research (Nov. 2021), avail. at https://www nber.org/papers/w27989.

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A. Responses to Various Requests for Comments

Please consider the following responses to several of the SEC's 753 discrete questions that are set forth in the Proposed Rule.

Q 7, 1st q: "Should we permit a registrant to provide certain of the proposed climate-related disclosures in Commission filings other than the annual report or registration statement?"

The SEC says in footnote 49 of the Proposed Rule:

We note that the liability provisions of Section 10(b) and Rule 10b-5 of the Exchange Act can apply to statements made in filings with the SEC or elsewhere, such as in sustainability reports or on company websites. See, e.g., SEC v. Stinson, No. 10-3130, 2011 U.S. Dist. LEXIS 65723, 2011 WL 2462038, at 12 (E.D. Pa. June 20, 2011) (finding defendants liable under Section 10(b) when they communicated material misstatements and omissions in direct solicitations via e-mail, a webinar, and various web sites). As such, Registrants should scrutinize and ensure the accuracy of such statements whether or not filed with the Commission. ...[20]

The SEC says in footnote 842 of the Proposed Rule:

By proposing to treat the proposed required climate-related disclosures as "filed," we are therefore subjecting them to potential liability under Exchange Act Section 18, except for disclosures made on Form 6-K. The proposed filed climate-related disclosures would also be subject to potential Section 11 liability if included in or incorporated by reference into a Securities Act registration statement. See Section II.C.4 (discussions within).[21]

In light of footnote 49, the use of the word "permit" in Q7 1st q seems misleading. Footnote 49 says that the SEC already can "find" that ESG reports "are" securities disclosures provided outside of the Registrant's annual report. The SEC posits in its 2022 Examination Priorities[22] that it can pursue people and companies for "greenwashing."

Footnote 49 seems to mean that ESG reporting has already changed bragging about being a good corporate citizen into potential securities laws liability. Footnote 842[23] seems to mean that the Proposed Rule affirms this. Either way, the SEC will discourage Registrant aspirational green goals by turning them into just one more thing to be sued over.

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[20] Proposed Rule, p. 23, fn. 49.
[21] Proposed Rule, p. 351, fn. 842.
[22] SEC Division of Examinations, 2022 Examination Priorities, pp. 12-13, avail. at https://www.sec.gov/files/2022-exam-priorities.pdf. See also, SEC, *Risk Alert: The Division of Examinations' Review of ESG Investing* (Apr. 9, 2021), avail. at http://www.sec.gov/files/esg-risk-alert.pdf.
[23] As well as, e.g., Proposed Rule p. 155: "... it can be used to evaluate the progress in meeting net-zero commitments ..."

Registrants that are subject to state and federal renewable energy and climate change laws and regulations also would have to worry about their compliance filings becoming (or currently being) a source of securities laws liability. The SEC states that utility Registrant state renewable portfolio standard attainments are reportable under the Proposed Rule.[24] Some of the SEC's disclosure requirements are shorter than those under the state and EPA regulations.[25] The states and EPA went through rulemakings to set those deadlines. The SEC, which is not an environmental regulator or acting under any statute under which those deadlines were set, should not overrule the EPA and the states.

The SEC's new theory of whose benefit the Registrant disclosures are for - "portfolio" investors who do not invest in the Registrant - perhaps means that a Registrant's required environmental filings and until-now voluntary ESG disclosures would become a source of securities laws liability to those who never intended to invest in the Registrant. Liability risks will metastasize through supply chains as suppliers to Registrants begin to understand Scope 3 reporting risks and fret over their potential liability to Registrants who might not even be their direct customers. The result will be more ESG reporting, because it is mandatory, but that ESG reporting will be stripped of useful information in order to avoid liability.

The U.S. already has state and federal laws and enforcement mechanisms against "greenwashing." FTC enforcement actions under its regulations[26] include million dollar fines, injunctions, consent decrees,[27] and reputational damage. Most states have "little

[24] "An electric utilities company might disclose an increase in the amount of electricity generated from less carbon-intensive sources, such as wind turbines, nuclear, hydroelectric, or solar power to meet current or likely regulatory constraints." Proposed Rule, p. 79.

[25] "... energy companies that emit GHGs above a specific threshold must report their annual scope 1 and 2 emissions to [EPA] within the first three months of the following year. But under the SEC's proposal, many energy companies would have to report their scope 1 and 2 emissions, and potentially scope 3 emissions, within 60 or 75 days of the end of their fiscal year ... ." Keith Goldberg, *Energy Cos. Will Bear Brunt Of SEC's Climate Disclosure Rule*, Law360 (Mar. 23, 2022), avail. at https://www.law360.com/articles/1476380/energy-cos-will-bear-brunt-of-sec-s-climate-disclosure-rule.

[26] FTC, *Final Rule, Guides for the Use of Environmental Marketing Claims*, 77 Fed. Reg. 62122 (Oct. 11, 2012) , 16 C.F.R. §260.15; FTC Division of Enforcement Staff Letter dated Feb. 2, 2015, avail. at http://www.ftc.gov/system/files/documents/public_statements/624571/150205gmpletter.pdf.

[27] Example enforcement actions are posted by the FTC at http://www ftc.gov/news-events/media-resources/truth-advertising/green-guides. See, e.g., Linda Goldstein and Randal Shaheen, *The Difficult Art Of Advertising Carbon Reductions*, Law360 (Sept. 23, 2021), avail. at https://www.law360.com/articles/1423089/the-difficult-art-of-advertising-carbon-reductions. The FTC separately has non-preemptive enforcement authority over false or misleading statements in connection with the sale of wholesale crude oil and gasoline. 16 C.F.R. §317; FTC, *Final Rule, Prohibitions on Market Manipulation*, 74 Fed. Reg. 40686 (Aug. 12, 2009).

FTC Acts"[28] and other laws that provide remedies against "greenwashing," all of which are currently being used.[29] There is no vacuum requiring help from the SEC.

Therefore, the SEC should temper its zeal for enforcement against ESG reporting and the undefined but defined "greenwashing,"[30] wait for voluntary participation in such reporting to develop more robust, objective, and widely adopted standards, trust in the abilities and motives of the state and federal regulators and existing civil remedies against corporate statements about environmental attainment, and not turn ESG reporting, environmental compliance filings, and climate commitments into securities fraud risks. The SEC should rather allocate its limited resources into protecting investors from being defrauded by issuers of the securities in which they invest.[31]

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[28] See Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* (Feb. 2009), avail. at http://www.nclc.org/images/pdf/udap/report_50_states.pdf. According to all 50 state attorneys general, these laws apply to green claims in the same manner as the FTC regulations. *National Association of Attorneys General: Environmental Marketing Guidelines for Electricity*, avail. at http://www.naag.org/issues/pdf/Green_Marketing_guidelines.pdf and https://www.epa.gov/sites/production/files/2018-05/documents/naag_0100.pdf.

[29] E.g., Morgan Conlet, *Tribe Accuses Seattle Of 'Greenwashing' Hydro Dams' Impact*, Law360 (Sept. 20, 2021), avail. at https://www.law360.com/articles/1423234/tribe-accuses-seattle-of-greenwashing-hydro-dams-impact; Nick Dolejsi and Kyle Espinola, *Why Climate Plaintiffs Are Filing Securities, Consumer Suits*, Law360 (Mar. 15, 2022), avail. at https://www.law360.com/articles/1472903/print?section=california; Joyce Hanson, *Red Lobster Looks To Drown Customer's Greenwashing Suit*, Law360 (Feb. 9, 2022), avail. at https://www.law360.com/articles/1462944/red-lobster-looks-to-drown-customer-s-greenwashing-suit; Laura Brett, *Ad Rulings Offer Tips For Cos. To Avoid 'Greenwashing'*, Law360 (Nov. 29, 2021), avail. at https://www.law360.com/articles/1443218/ad-rulings-offer-tips-for-cos-to-avoid-greenwashing-.

[30] Proposed Rule, p.351 fn. 844: "A review of several academic papers reveal that there is no universally accepted definition of 'greenwashing.' Though the term 'greenwashing' is often used in industry discussions regarding ESG, the Commission does not define 'greenwashing' in this proposal, rules, or form amendments. Greenwashing is typically described as the set of activities conducted by firms or funds to falsely convey to investors that their investment products or practices are aligned with environmental or other ESG principles."

[31] E.g., S. Hrg. 111-388, Hearing, *Oversight of the Securities and Exchange Commission's Failure to Identify the Bernard L. Madoff Ponzi Scheme and How to Improve SEC Performance* (Sept. 9, 2010), avail. at https://www.gpo.gov/fdsys/pkg/CHRG-111shrg55785/pdf/CHRG-111shrg55785.pdf; SEC, Office of Investigations, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme*, Report No. OIG-509 (Aug. 31, 2009), avail. at https://www.sec.gov/files/oig-509.pdf; SEC, Office of Inspector General, Case OIG-533, *Investigation of the Failure of the SEC's Los Angeles Regional Office to Uncover Fraud in Westridge Capital Management Notwithstanding Investment Adviser Examination Conducted in 2005 and Inappropriate Conduct on the Part of Senior Los Angeles Official* (Oct. 26, 2010), avail. at https://www.sec.gov/about/offices/oig/reports/investigations/2010/oig-533.pdf; SEC, Office of Inspector General, Report of Investigation, Case No. OIG-526, *Investigation of the SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme* (Mar. 31, 2010), avail. at https://www.sec.gov/about/offices/oig/reports/investigations/2010/oig-526.pdf; US Postal Service, *Securities and Exchange Commission Office of Inspector General- Allegations of Misconduct, Report of Investigation*, case 12UIHQ0063GC37SI (2012). See also Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States p. xviii (Jan. 2011), avail. at https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf ("We conclude widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets. The sentries were not at their posts ... we do not accept the view that regulators lacked the power to protect

Q 8, 5th q: "Should we define long-term as 10-20 years, 20-30 years, or 30-50 years?"

No. Additionally, requirements of "long-term" disclosures of "10-20 years, 20-30 years, or 30-50 years" should be consistent with what, if any, other long-term business plans Registrants are currently required to disclose, which is not likely to include speculations on entering or exiting a business line in 50 years or even as little as 10 years.

Q 17, 3rd q: "Are there any upstream or downstream activities included in the proposed definition of value chain that we should exclude or revise?"

Yes, exclude Scope 3 emissions for the reasons set forth in the answers to question 98. Emissions attributable to employee commuting and other activities of employees should be excluded for the reasons set forth in the answers to questions 100 and 182 below.

Q 24, 1st q: "If a registrant has used carbon offsets or RECs, should we require the registrant to disclose the role that the offsets or RECs play in its overall strategy to reduce its net carbon emissions, as proposed?"

No. The SEC should not require any disclosures concerning carbon offsets or RECs that are not material to the Registrant. However, if the SEC continues to exclude carbon offsets or RECs when a Registrant is submitting its GHG emissions under Scopes 1, 2 or 3, then such a Registrant must be given the ability to explain how it uses such carbon offsets or RECs to set-off against its own GHG emissions. In addition, if a Registrant's business model involves operations that are part of a difficult to decarbonize industry, then such Registrant must be given the opportunity to demonstrate that its current cost of reducing or eliminating GHG emissions is much higher than the cost of procuring carbon offsets or is otherwise commercially unreasonable as a strategy for mitigating such Climate-Related Risks. Such a Registrant must also be given the opportunity to explain if and when its longer-term strategy for addressing Climate-Related Risks includes utilizing technology yet to be developed which will enable such Registrant to actually reduce or eliminate its GHG emissions if and when a commercially reasonable technology for reducing its GHG emissions becomes available at a commercially reasonable cost.

According to the SEC, "The concept of materiality has been described as 'the cornerstone' of the disclosure system established by the federal securities laws."[32] But here, the SEC is proposing to implement anti-REC and anti-offset rules even if the REC and offset purchases aren't material to the Registrant and irrespective of whether the RECs or offsets are being used under or for compliance with a state or federal program. In proposing to deviate from its own "cornerstone" in order to administratively burden

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the financial system. They had ample power in many arenas and they chose not to use it. To give just three examples: the Securities and Exchange Commission could have required more capital and halted risky practices at the big investment banks. It did not.").

[32] SEC, Concept Release, *Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23916 at 23924 (Apr. 22, 2016). Cf. Proposed Rule p. 69 fn. 209.

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immaterial use of RECs and offsets, the SEC betrays a strong and unjustified prejudice against RECs and offsets. This prejudice likely comes from being inadequately informed.

With its perhaps inadvertent attempt to defeat or control existing and future State and Federal environmental and climate change mitigation, the SEC effectively increases its jurisdiction, adding itself to: (i) the Federal Energy Regulatory Commission ("FERC"), the Environmental Protection Agency ("EPA"), the Department of Agriculture ("USDA"), and the States as a regulator of renewable energy supply and climate change mitigation, (ii) the EPA, FERC, USDA, the Federal Trade Commission ("FTC"), and the States as a regulator of environmental commodities, (iii) the FTC and the States as a regulator of environmental claims, (iv) the Commodity Futures Trading Commission ("CFTC") and the States as a regulator of transactions in environmental commodities, and (v) the EPA and the States as a regulator of retail electric service customer power source disclosure. There has been no relevant legislative modification, so the SEC is increasing the SEC's jurisdiction over subject matter jurisdiction areas that have previously been designated for other Federal and State authorities.

California's AB32 program allows regulated entities to use either allowances or offsets to satisfy its obligations thereunder. The SEC is proposing to denigrate use of offsets. Many States have rules concerning the role of RECs in power source (i.e., customer Scope 2) disclosures. The utilities subject to those rules report as required, which reports will differ from what the SEC proposes. Different reporting would result in confusion and delegitimization of both sets of reports. The SEC's misinformation, and proposed mandatory reporting of immaterial information concerning RECs, would inhibit the lawful purposes of the Federal and State programs that allow or otherwise advance the use of RECs and offsets.

The SEC's proposed safe harbor for non-material non-disclosures of Scope 3 emissions data should be expanded to disclosures concerning disclosures of RECs and offsets that are not material to the Registrant, especially if the RECs and offsets are offsetting Scope 3 emissions. If Scope 3 emission disclosures are safe harbored, then strategies to mitigate Scope 3 emissions should also similarly be safe harbored. Registrants shouldn't be required to provide "long-term", i.e. in the SEC's own words in Q8, "10-20 years, 20-30 years, or 30-50 years" disclosures about RECs and offsets if they are not material to its business, just like a business that uses computers wouldn't be expected to predict the price, or even availability, of computers or silicon chips in 50 years. A compelled Registrant statement concerning the availability or prices of RECs or offsets in 50 years, or even in three years, would not provide useful information about the Registrant's securities.

The SEC's anti-offset agenda is at cross-purposes to existing programs and legislation. For example, the Food, Conservation, and Energy Act of 2008 directed the USDA to facilitate the participation of American farmers, ranchers, and forest landowners in environmental markets encouraging environmental commodities[33]. Additionally, the Growing Climate Solutions Act of 2021, which passed the Senate in a thunderously bipartisan 92-8 vote,[34] encourages farmers and ranchers to participate in and supply carbon offset markets.[35] Congress passed this law after hearing the same opposition to offsets[36] that now seems to be persuading the SEC that the use of carbon offsets is somehow disingenuous greenwashing. The SEC should not substitute its own judgment on offset use for Congress's judgement that the use of carbon offsets produces a stream of additional revenues that are used to incentivize energy usage or generation that results in actual reductions of GHG emissions.

Q 24, 2nd q: "Should the proposed definitions of carbon offsets and RECs be clarified or expanded in any way?"

Proposed 229.1500(a) definition of Carbon offset is "Carbon offsets represents an emissions reduction or removal of greenhouse gases ("GHG") in a manner calculated and traced for the purpose of offsetting an entity's GHG emissions."

Proposed 229.1500(n) definition of REC is "Renewable energy credit or certificate ("REC") means a credit or certificate representing each megawatt-hour (1 MWh or 1,000 kilowatt-hours) of renewable electricity generated and delivered to a power grid."

No, the SEC should not seek to define offsets or RECs.

With respect to its proposed definition of offsets, the SEC uses words not used in other definitions of offsets, such as "traced," rather than words that are commonly used, such as "monitored, measured, and verified." See, for example, the elaborate definitional apparatus for offsets in the California cap and trade program, not one sentence of which uses the word "traced" in the sense used by the SEC.[37] The SEC's proposed definition is

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[33] USDA, *About the Office of Environmental Markets*, avail. at https://www.usda.gov/oce/energy-and-environment/markets/about.
[34] Politico, *In rare bipartisan move, Senate approves bill to help farmers profit on climate action* (Jun. 24, 2021), avail. at https://www.politico.com/news/2021/06/24/senate-farmers-carbon-agriculture-496029.
[35] See Prof. David Aiken, *The Growing Climate Solutions Act of 2021* (Aug. 11, 2011), avail. at https://agecon.unl.edu/cornhusker-economics/2021/8-11%20DA.pdf; Purdue University, Agricultural Economics, *Understanding the Growing Climate Solutions Act* (Feb. 2, 2022), avail. at https://ag.purdue.edu/commercialag/home/paer-article/understanding-the-growing-climate-solutions-act/; National Agriculture Law Center, *Senate Advances Carbon Market Bill* (Apr. 22, 2021) avail. at https://nationalaglawcenter.org/senate-advances-carbon-market-bill/.
[36] E.g., Friends of the Earth, Greenpeace USA, The Corner House, et al., *Oppose Carbon Offset Scams Like the Growing Climate Solutions Act* (Apr. 14, 2021), avail. at https://www.foodandwaterwatch.org/wp-content/uploads/2021/04/Oppose-GCSA-2021_Final-2.pdf. In its rulemaking implementing the California Cap and Trade program, the California Air Resources Board rejected as factually inaccurate the objections to offsets made by Friends of the Earth. CARB, California's Cap-and-Trade Program, *Final Statement of Reasons*, pp. 1404-05 (Oct. 2011).
[37] 17 CCR §§ 95801-96022. The California definition of offset is: ""ARB Offset Credit" means a tradable compliance instrument issued by ARB that represents a GHG reduction or GHG removal enhancement of one metric ton of CO2e. The GHG reduction or GHG removal enhancement must be real, additional, quantifiable, permanent, verifiable, and enforceable. ARB offset credits may only be issued for GHG

an outlier that would not help the duly tasked Federal regulators, namely the USDA and the EPA.

The EPA has stated in rulemakings that, "The legal basis for RECs is established by state statutes and administrative rules."[38] Many State and Federal regulators have defined offsets and RECs for their particular compliance programs. Offsets come in many varieties. The SEC's proposed definitions are deficient because they conflict with the definitions already enacted by State legislatures and State and Federal energy and environmental regulators. Even in the text of its Proposed Rule, in eschewing both RECs and offsets, the SEC refers to an "energy credit" as an "offset emissions" expense.[39] The SEC's proposed REC definition would exclude behind the meter and rooftop solar RECs, even though an applicable Federal regulator, the FTC, clearly includes rooftop solar within its meaning of RECs.[40] The SEC confuses the role of RECs in Scope 2 reporting.[41] The SEC has set a quantity for RECs of a megawatt-hour, while there are some programs, like Nevada's Portfolio Energy Credits, that are measured in KWh.[42] In contrast, for GHGs, the SEC expresses CO2e simply as a "unit,"[43] as opposed to metric tonnes, which is a measure as common in CO2e as RECs in MWh.

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emission reductions or GHG removal enhancements that occur during a "Reporting Period," as defined in this section."

[38] EPA, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule*, 80 Fed. Reg. 64662 at 64806 (Oct. 23, 2015).

[39] Proposed Rule §270.14-02(f). Perhaps the SEC meant "REC" rather than "energy credit." RECs and offsets are different instruments.

[40] See, e.g., FTC, *Guides for the Use of Environmental Marketing Claims; Final Rule*, 77 Fed. Reg. 62122 at 62131 col. 3: "Example 5: A toy manufacturer places solar panels on the roof of its plant to generate power, and advertises that its plant is '100% solar-powered.' The manufacturer, however, sells renewable energy certificates based on the renewable attributes of all the power it generates. Even if the manufacturer uses the electricity generated by the solar panels, it has, by selling renewable energy certificates, transferred the right to characterize that electricity as renewable. The manufacturer's claim is therefore deceptive."

[41] See, e.g., Proposed Rule, p. 204: "There are two common methods for calculating Scope 2 emissions for purchased electricity: the market-based method and the location-based method. Pursuant to the market-based method, a registrant would calculate its Scope 2 emissions based on emission factors and other data provided by the generator of electricity from which the registrant has contracted to purchase the electricity and which are included in the contractual instruments. Pursuant to the location-based method, a registrant would calculate its Scope 2 emissions based on average energy generation emission factors for grids located in defined geographic locations, including local, subnational, or national boundaries. A registrant could use either of these methods, both methods, a combination, or another method as long as it identifies the method used and its source." It's not clear what the "contractual instruments" by which a utility customer purchases power; this is typically pursuant to what is known as a "tariff." An electric utility delivers energy to customers, it may or may not have "generated"; in most of the country the utility delivering the energy will have purchased it at wholesale in organized electricity markets regulated by FERC and not generated it. Further, Scope 2 emissions are not just grid averages but account for RECs. Some utility customers participate in green customer choice programs.

[42] State of Nevada Public Utilities Commission, *PEC Trading Program*, https://puc.nv.gov/Renewable_Energy/RPS/PEC_Trading_Program/.

[43] Proposed 229.1500(d) Carbon dioxide equivalent ("CO2e") means the common unit of measurement to indicate the global warming potential ("GWP") of each greenhouse gas, expressed in terms of the GWP of one unit of carbon dioxide ("CO2").

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RECs are not a uniform instrument. A "REC" can mean one or more of a number of different agglomerations of the characteristics of the underlying electricity and its displacement of generation from other sources. State and Federal programs typically have their own definitions of RECs.[44] The graphic below illustrates that in different contexts, greater or fewer environmental attributes of the generation might be included in the definition of a REC.

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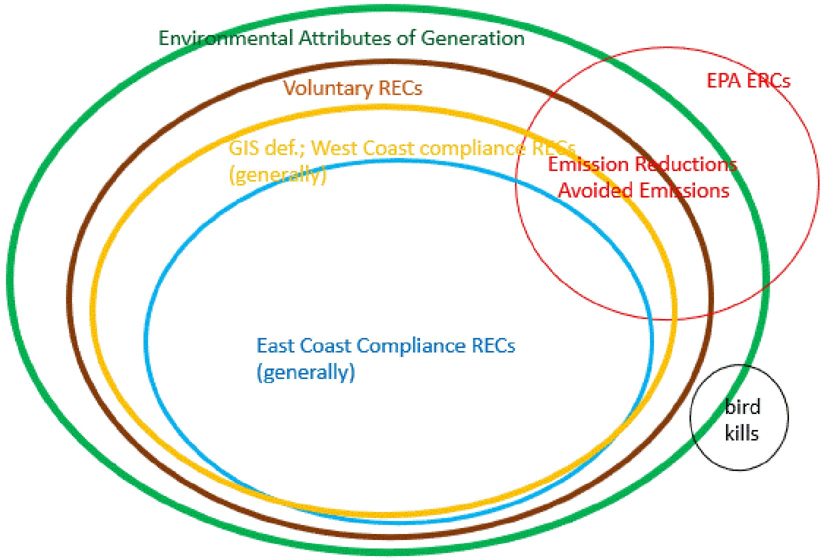
[44] E.g., from the California Public Utilities Commission in its *Decision On Definition And Attributes Of Renewable Energy Credits For Compliance With The California Renewables Portfolio Standard*, D. 08-08-028: "Green Attributes" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Project, and its avoided emission of pollutants. Green Attributes include but are not limited to Renewable Energy Credits, as well as: (1) any avoided emission of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO2), methane (CH4), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change, or otherwise by law, to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere;[1][[1] Avoided emissions may or may not have any value for GHG compliance purposes. Although avoided emissions are included in the list of Green Attributes, this inclusion does not create any right to use those avoided emissions to comply with any GHG regulatory program.] (3) the reporting rights to these avoided emissions, such as Green Tag Reporting Rights. Green Tag Reporting Rights are the right of a Green Tag Purchaser to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other party at the Green Tag Purchaser's discretion, and include without limitation those Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Green Tags are accumulated on a MWh basis and one Green Tag represents the Green Attributes associated with one (1) MWh of Energy. Green Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Project, (ii) production tax credits associated with the construction or operation of the Project and other financial incentives in the form of credits, reductions, or allowances associated with the project that are applicable to a state or federal income taxation obligation, (iii) fuel-related subsidies or "tipping fees" that may be paid to Seller to accept certain fuels, or local subsidies received by the generator for the destruction of particular preexisting pollutants or the promotion of local environmental benefits, or (iv) emission reduction credits encumbered or used by the Project for compliance with local, state, or federal operating and/or air quality permits. If the Project is a biomass or biogas facility and Seller receives any tradable Green Attributes based on the greenhouse gas reduction benefits or other emission offsets attributed to its fuel usage, it shall provide Buyer with sufficient Green Attributes to ensure that there are zero net emissions associated with the production of electricity from the Project. CPUC, *Decision On Definition And Attributes Of Renewable Energy Credits For Compliance With The California Renewables Portfolio Standard*, D. 08-08-028 App. B (Aug. 21, 2008).



The large green circle is the universe of what could be called attributes of renewable generation- from the characteristics of the generation, to avoided emissions, to all, positive or negative, environmental characteristics. East coast state regulatory definitions of the attributes included are generally narrower than what is included in west coast States. There are many systems that track and certificate renewable energy generation; these are called Generation Information Systems (GIS), and their definitions vary. Contracting parties write their own, potentially further expansive definitions of RECs. Under its Clean Power Plan, the EPA provided interpretations of the Clean Air Act and proposed a new environmental commodity that bit some of the attributes out of the RECs. See also an article[45] that provides further information concerning the definitional, property, and other characteristics of RECs.

Plus REC programs under State laws can change dramatically as the objectives of the State legislature and the State public utility commission that gives rise to such RPS and REC programs changes. See, for example, the State of New York's program, which now incorporates a Distributed Energy Resource ("DER") for solar generation facilities and a "Value Stack" as an alternative means of calculating the Value of Distributed Energy Resources (the "VDER Value Stack"), which changed from a net energy metering compensation system pursuant to an order issued by the New York Public Service Commission on March 9, 2017, but was intended to nurture the growth of New York's distributed generation industry, particularly solar photovoltaic generation.

State renewable energy and climate programs need and use robust definitions of RECs and offsets in order to obtain high quality compliance. The SEC has proposed weak and incorrect definitions in order to advance the agenda of those disparaging their use. Many

[45] Jeremy Weinstein, *What Are Renewable Energy Certificates?*, 41 Futures and Derivatives Law Report (Jan. 2021), avail. at http://bit.ly/WeinsteinRECsArticle.

commenters that now ask the SEC to disparage use of offsets and RECs in State and Federal environmental programs were heard during the applicable State and Federal legislative and administrative processes in promulgating the laws and regulations for those programs. A non-energy, non-environmental Federal regulator that has not been granted the authority to do so by Congress should not administratively overturn those laws and regulations. Farmers and ranchers are to develop offsets under the Growing Climate Solutions Act of 2021, under regulations to be promulgated by the USDA, not by the SEC.

The current SEC Chairman was previously Chairman of another federal regulator, the CFTC, when it sought to regulate RECs and offsets as swaps under the Dodd-Frank Act,[46] so one can understand the SEC's new interest, now that it is under this same individual, in seeking redress for having been thwarted earlier. However, the SEC should not be the keeper of a Federal definition of RECs or offsets. It should not try to replace its judgment for the judgment of 25 years of other State and Federal regulators. The SEC should not work at cross-purposes to other programs that are constructively seeking to implement use of renewable energy and mitigate climate change. An SEC definition will sow confusion and weaken State and Federal compliance programs unnecessarily, with unnecessary costs to Registrants, environmental harm and without any benefit.

If the SEC needs definitions, the only safe approach for the environment that the actually lawfully tasked regulators are seeking to protect would be the following:
Carbon offset means an offset, reduction or removal of greenhouse gases as defined by an applicable law, regulation, program, protocol, regulator or registry.

[46] The CFTC under Chairman Gensler sought to regulate new environmental markets in credits for renewable energy and Carbon. After a bill that would have established a Carbon market under CFTC jurisdiction (H.R. 2454, the American Clean Energy and Security Act of 2009 (Waxman-Markey) Title III, Subtitles D and E) failed to pass, the CFTC made advances on environmental markets in CFTC, *Notice of Intent ..., To Undertake a Determination Whether the Carbon Financial Instrument Contract Offered for Trading on the Chicago Climate Exchange, Inc., Performs a Significant Price Discovery Function*,, 74 Fed. Reg. 42052 (Aug. 20, 2009); CFTC, *Order Finding That the Carbon Financial Instrument Contract Offered for Trading ... Does Not Perform a Significant Price Discovery Function*, 75 Fed. Reg. 23686 (April 28, 2010). The Dodd-Frank Act included many provisions rooted in Waxman-Markey, but did not give the CFTC "swaps" jurisdiction over Carbon or other environmental markets; rather Section 750 of the Dodd-Frank Act merely established a study group, although that did not hinder the CFTC from proposing to regulate environmental commodities, for example by changing the definition of "physical" in the sense of a "physically settling a commodity" to mean corporeal, reasoning that the word "physical" was used to mean something corporeal in a different handicapped persons access regulation. CFTC, *Notice of Proposed Rulemaking, Adaptation of Regulations to Incorporate Swaps,* 76 Fed. Reg. 33066 at 33069 (Jun 7, 2011). These attempts would have brought under CFTC regulation as swaps all intangible property along with RECs and offsets, including intellectual property and hunting licenses. Had it regulated RECs as swaps subject to mandatory clearing with resulting massive collateral posting requirements, as it proposed, the CFTC would have killed off renewable energy in the US. Fortunately, EPA staff and others pressed this point and the CFTC backed off. CFTC & SEC, *Joint Final Rule; Interpretations; Request for Comment on an Interpretation, Further Definition of "Swap," ...*, 77 Fed. Reg. 48208 at 48233-35 (Aug. 13, 2012); CFTC, *Final Rule, Adaptation of Regulations to Incorporate Swaps*, 77 Fed. Reg. 66288 at 66293-94 (Nov. 2, 2012). Likewise, the SEC's zeal in the Proposed Rule to combat "greenwashing," might result in rules that kill off meaningful ESG and climate reporting.

REC means a certificate, credit or other indicia of ownership relating to renewable energy as defined by an applicable law, regulation, program, regulator or registry.

Q 24, 3rd q: "Are there specific considerations about the use of carbon offsets or RECs that we should require to be disclosed in a registrant's discussion regarding how climate-related factors have impacted its strategy, business model, and outlook?"

No. Please see answers immediately above.

Q 26, 1st q: "Should we require registrants to disclose information about an internal carbon price if they maintain one, as proposed?"

No. Please see answer to Q 29.

Q 29, 1st q: "Should we require all registrants to disclose an internal carbon price and prescribe a methodology for determining that price?" and
Q 29, 4th q: "Would a different metric better elicit disclosure that would monetize emissions?"

No to both. The SEC has no legal authority to prescribe rules that "monetize emissions" and shouldn't be compelling Registrant disclosures to set a price of Carbon for the benefit of the financial system. Registrants are to disclose material information about the Registrant for the benefit of investors in the Registrant, not material or immaterial information for the benefit of any and all investors in anything and everything.

Further, a Registrant's internal calculation of the cost of Carbon to it, especially if developed by spending money, should be proprietary to that Registrant, and not a common property to be used by "investors," especially in the SEC's larger senses of investors not just in the Registrant but in "portfolios" and "the financial system." Registrants should not be compelled to spend their own money to develop a pricing signal for the benefit those who are not even considering investing in the Registrant, just so the system as a whole can "monetize emissions." To the contrary, most State laws treat emission calculation data (as opposed to the data of actual emissions emitted) as highly proprietary and confidential information; even California's public record act protects them as confidential.[47] Similarly, the Federal energy regulator, FERC, has a stated policy concerning Carbon pricing in organized wholesale electricity markets.[48]

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[47] California Air Resource Board (CARB) website guidance on confidentiality of material submitted to CARB references California Public Records Act (Gov't Code §6254.7) and states: "[A]ir pollution emission data are always public records, even if the data comes within the definition of trade secrets. On the other hand, the information used to calculate air pollution emissions may be withheld from the public if the information is a trade secret." https://www.arb.ca.gov/regact/confid.htm. Gov't Code § 6254.7(e) says: "Notwithstanding any other provision of law, all air pollution emission data, including those emission data which constitute trade secrets as defined in subdivision (d), are public records. Data used to calculate emission data are not emission data for the purposes of this subdivision and data which constitute trade secrets and which are used to calculate emission data are not public records."

[48] FERC, *Notice of Policy Statement, Carbon Pricing in Organized Wholesale Electricity Markets*, 86 Fed. Reg. 24714 (Apr. 23, 2021).

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Offset pricing is complicated and highly variable based on many factors. There are privately owned offset price reporting services from which interested parties can purchase all the data they need to “monetize emissions.”[49] Coupled with the SEC’s new expansions to securities law liability, the Proposed Rule would create liability for Registrants that “negligently” price carbon, even to those with no intent to invest in the Registrant.

If the Federal government wants to create a public pricing signal for the price of Carbon, it can, as California has done, pass a law limiting Carbon emissions with an allowance allocation and auction and cap and trade mechanism. This would lead to prices at which those allowances trade. There is no other commodity that the SEC requires all Registrants to publicly price for the benefit of all “investors”, irrespective of whether these “investors” are investing in the Registrant, and irrespective of whether that commodity is material to the Registrant.

Q 30, 6th q: “Should we require a registrant providing scenario analysis disclosure to include the scenarios considered (e.g., an increase of global temperature of no greater than 3 º, 2 º, or 1.5 ºC above pre-industrial levels), the parameters, assumptions, and analytical choices, and the projected principal financial impacts on the registrant’s business strategy under each scenario, as proposed?”

Please see answer to Q43. .

Q 43, 1st q: “... should we require a registrant to disclose ... as proposed: How the registrant determines the relative significance of climate-related risks compared to other risks?”

No. The SEC proposes that “the registrant would be required to disclose, as applicable: How it determines the relative significance of climate-related risks compared to other risks ... .”[50] This seems to be mandating company management to think about climate change, one coming disaster, in preference to all other coming or potential disasters over the long term. The Proposed Rule requires Registrants to think about climate change and use their resources to educate themselves and all participants in the financial system about climate change. Registrants should be allowed to continue to determine for themselves which of the many potential long-term change scenarios are most material to the success of the Registrant.[51] Mandatory Section 12(g) reporting probably does require Registrants to speculate on how future risks from artificial intelligence, collapse of the dollar as a reserve currency, or rising crime could be material to their businesses, but Registrants should not be compelled to have their mind made up for them that one particular long-term risk deserves the most resources for speculation.

[49] E.g., the non-profit Ecosystem Marketplace, avail. at https://data.ecosystemmarketplace.com/; California Carbon.info, avail. at https://www.californiacarbon.info/.
[50] Proposed Rule, p. 107, first bullet.
[51] Cf. Proposed Rule p. 69 fn. 211.

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Moreover, in questions 30 and 43, the SEC is asking a public company to predict the different potential impacts on a public company's business model from a 3 degrees rise, a 2 degrees rise, or a 1.5 degrees rise in global temperatures, presumably by the year 2050, which requires quantitatively "guessing" about the globally average future under each of such degree rise circumstances and then projecting the impacts of such a macro-event guess down to how it would affect the business model of a specific public company. Not only is that likely to be statistically and scientifically impossible to predict, the SEC will be treating as simple scientific fact the occurrence of events that no climate scientist can accurately predict, because of the impact of an absurd number of variables that are not fully understood by any climate scientist.

What's worse is that if any public company were to attempt to do the impossible and answer the SEC's question about climate impacts in 2050, with particular focus on a specific public company and its operations in the specific locations where it is located, and then if the public company gets it wrong, which is essentially a certainty, the SEC may seek to impose "fraudulent statement" liability on that public company under the U.S. Securities Laws for making an "untruthful" disclosure.

In 2023, a Registrant is going to make projections about whether events in 2050 based on three different scenarios that the Registrant can't even guess at, that 3000 climate scientists signing the TAR can't predict to the level of certainty the SEC proposes to require of registrants. And for that disclosure, the Registrant will face securities law liability, possibly not even from its own shareholders based on the SEC's new market participant theory of liability, if the Registrant happens to be wrong with its attempt to answer the SEC's question.

The SEC remains intellectually honest throughout the Proposed Rule in following its new theory that Registrant disclosures are for the benefit of all participants in the financial system. However, Registrant disclosures are for the benefit of investors in the Registrant,[52] not for the benefit of all participants in the financial system, which participants include the Registrant's competitors, whom a Registrant should not be compelled to assist. Understanding the risks from climate change, which include policy, legislation, politics, and climate change itself is incredibly complicated and specialized. See, for example, the long list of risks to be considered in the excerpts from the Perihelion Insurance Report.[53] Companies focus on running their own businesses, and on the risks that they identify as threatening their businesses. The ones that do it well survive. The ones that don't, do not. The ones that do it well should not have to educate their competitors.

[52] E.g., Securities Exchange Act §13(a)- "... to insure fair dealing in ***the*** security. ... "
[53] Parhelion Underwriting Ltd. and Standard & Poor's, *Can Capital Markets Bridge the Climate Change Financing Gap?* avail. at https://www.environmental-finance.com/assets/files/Parhelion_Climate_Financing_Risk_Mapping_Report_2010.pdf; see also Bob Buhr, *What is Climate Risk? A Field Guide for Investors, Lenders, and Regulators* Imperial College Business School Centre for Climate Finance & Investment (Feb. 2022), avail. at https://www.imperial.ac.uk/business-school/faculty-research/research-centres/centre-climate-finance-investment/research/what-climate-risk-field-guide-investors-lenders-and-regulators/.

Q 44, 3rd q: "... should we require a registrant to disclose ... as proposed: How it determines to mitigate a high priority risk?"

No. The SEC has prescribed incredibly detailed requirements for Registrants, in an area unfamiliar to many Registrants, to talk about risks to which most Registrants are not exposed beyond the shared existential doom of anthropogenic warming. Registrants will have to rely on external third-party advisors. The more prescriptive and in depth the mandated analysis into areas in which the companies are not familiar, the less useful will be the reported information. The SEC will get formulaic answers written to avoid liability rather than to provide useful information.[54]

Moreover, climate science, which has sufficiently alarmed most of the world to the point of action, is not so precise that a public company can make predictions with any more certainty of the impacts that will occur in 10, 20, or 30 years from now, than the local weather forecaster can tell you whether it will be raining or sunny on June 17, 2023, one year from today.

As another example, can the SEC direct the American public to the climate scientist that predicted, at least five years ago, that global warming from climate change would result in the extremely high temperatures that were experienced in the Summer 2021 in northeastern Siberia? Could a public company with operations in northeastern Siberia have predicted that same weather event ten years ago? Not likely. And does the SEC think that by imposing potential "fraudulent statement" liability on any public company making any such prediction will make that prediction any more accurate today than it would have been ten years prior to the Summer of 2021?

All of this suggests that the SEC may have strayed outside of its expertise and should perhaps seek the advice of the EPA or the National Science Foundation before compelling Registrants to seek and obtain that advice themselves in order to answer questions about the impacts of climate change 10, 20 or 30 years from now that nobody at the SEC could possibly answer with any degree of accuracy.

Q 60, 1st q: "Would the impact from climate-related events and transition activities yield decision-useful information for investors?"

The SEC says "for investors" rather than "investors in the registrant." Registrants should only be required to provide information material for investors in the Registrant.

[54] "Compliance with the U.S. Securities and Exchange Commission's proposed new rules requiring corporate disclosures of activities and risks associated with climate change will be performative. These rules will fail at their primary purpose: giving investors or stakeholders actionable information. Destined to be audited, analyzed and wordsmithed by teams of accountants and lawyers, the disclosures will likely lack qualitative insights and perspective from company leadership." Nir Kossovsky and Denise Williamee, *SEC's Climate Rules Promote Compliance, Not Real Change*, Law360 (Apr. 27, 2022), avail. at https://steelcityre.com/wp-content/uploads/2022/04/Law360-SECs-Climate-Rules-Promote-Compliance-Not-Real-Change.pdf.

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Q 69, 1st q: "Should we require a registrant to disclose changes to the cost of capital resulting from the climate-related events?"

No. This is not a risk that can be "disclosed," it is only a risk that can be guessed at. The SEC should not require all Registrants to hire economists to explain the effects of climate change on long-term interest rates. There are academic papers available to interested "investors,"[55] the SEC should not require all Registrants to write and disclose more and subject themselves to "fraudulent statement" liability for attempting to make such a disclosure and being wrong.

Q 88, 2nd q: For example, should a "consolidated climate statement" be created in addition to the consolidated balance sheets, statements of comprehensive income, cash flows, and other traditional financial statements?

No. The SEC notes low penetration of standards, uniform or not, for GHG reporting.[56] And the standards are far from uniform.[57] Mandating disclosures before frameworks have fully matured and broadly standardized will push companies not toward the "best" framework, but to the easiest and cheapest[58] that output the lowest GHG. GHG reporting is new. It is not dollars and cents reporting to accounting standards that have been around for five thousand years.[59] Some concepts in Scope 3 reporting are the opposite of traditional accounting; e.g., capital goods have Scope 3 emissions determined for the year of acquisition and are not amortized.[60] The standards for GHG reporting do not have the exactitude, history, foundation, immutability,[61] or, absent continuous emissions

[55] E.g., Sveriges Riksbank, Emma Bylund and Magnus Jonsson, *How does climate change affect the long-run real interest rate?*, Economic Commentaries, (Nov. 26, 2020), avail. at https://www.riksbank.se/globalassets/media/rapporter/ekonomiska-kommentarer/engelska/2020/how-does-climate-change-affect-the-long-run-real-interest-rate.pdf.
[56] "Among the firms reviewed, 41 firms (51%) provided some form of voluntary sustainability disclosure on their websites. Further, only nine of those 41 firms indicated the reporting standards with which they aligned their reporting, with the majority of the nine companies not following any one set of standards completely. Additionally, six firms followed the GRI, while three firms stated that they follow both the TCFD and SASB." Proposed Rule, p. 328 fn. 776.
[57] See, e.g., analysis on some aspects of Scope 2 reporting under the dozens of available standards in Center for Resource Solutions, *Recognition of Standard Delivery Renewable Energy in Different Programs and Standards* (Mar. 15, 2021), avail. at https://resource-solutions.org/document/03152102/.
[58] E.g., "I do think in a future state there will be a TurboTax for climate reporting for small businesses. Like, that will happen," said a member of the SEC's small business capital formation committee. Law360, *SEC Committee Mulls 'TurboTax-Like' Fix For Climate Reports* (May 6, 2022), avail. at https://www.lw.com/mediaCoverage/SEC-mulls-fix-for-climate-reports.
[59] Richard Mattessich, *Recent insights into Mesopotamian accounting of the 3rd millennium B.C. -- Successor to token accounting*, 25 Accounting Historians Journal (Jun. 1998), avail. at https://core.ac.uk/download/pdf/288025155.pdf; Tim Harford, *How the world's first accountants counted on cuneiform*, BBC World Service, 50 Things That Made the Modern Economy (June 12, 2017), avail. at https://www.bbc.com/news/business-39870485.
[60] and therefore "emissions from capital goods may fluctuate significantly from year to year." Scope 3 Guidance Box 5.4 p. 39.
[61] GWP changes for all GHGs other than CO2 in each UN climate assessment plan. See, e.g., Greenhouse Gas Protocol, *Global Warming Potential Values*, avail. at https://www.ghgprotocol.org/sites/default/files/ghgp/Global-Warming-Potential-Values%20%28Feb%2016%202016%29_1.pdf; EFTC, *Selecting and Using GWPs for refrigerants* (Sept.

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monitoring on smokestacks or direct application of stoichiometry for Scope 1, accuracy, to make them "accounting standards."[62] The SEC is building a highly prescriptive superstructure on quicksand.

Q 98, 1st q: "Should we require a registrant to disclose its Scope 3 emissions for the fiscal year if material, as proposed?"

The SEC's scheme for Scope 3 is highly problematic. Every Registrant will have to acquire and disclose information from third parties and make public data and business plans that are proprietary, for the benefit of investors in companies and assets other than the Registrant. Scope 3 emissions are based on other companies' often private Scope 1 and 2 data. In the Proposed Rule,[63] in the context of getting that data, the SEC suggests companies should stop doing business with companies with high Scope 1 and 2 emissions. The SEC conflates the privacy of data with what the data shows. The SEC suggests "Companies may have indirect control over their Scope 3 emissions through choices they make, for example in selecting suppliers ... ."[64] These instructions from the SEC go far beyond the SEC's legal authority. The SEC is also proposing that Registrants discriminate against small business customers and vendors who lack the resources to measure and disclose their Scope 3 emissions. Registrants and their customers and suppliers will feel pressure to drive down their Scope 3 emissions by firing employees who have long commutes because they can only afford housing in areas further outlying major metropolitan areas. All this also is beyond the SEC's statutory authority.

Scope 3 GHG emissions do not disclose the entire risk profile of the "transition" to a low carbon economy.[65] Rare earth mineral sourcing for electrification may have monstrous environmental and security impacts.[66] Scope 3 disclosures will provide an incomplete picture, and yet be so huge, duplicative, shifting (see answer to question 88 above), incomplete, and overlapping as to lose meaning as a metric.

Q 100, 1st q: "Should Scope 3 emissions disclosure be voluntary?"

2021), avail. at https://www fluorocarbons.org/wp-content/uploads/2020/08/2021-10-08-Learn-About_Selecting-and-Using-GWP-values-for-Refrigerants.pdf. GWP is presented by the EPA as ranges, for example the EPA says 28 to 36 for methane and 265 to 295 for nitrous oxide. EPA, *Understanding Global Warming Potentials*, avail. at https://www.epa.gov/ghgemissions/understanding-global-warming-potentials#Learn%20why.

[62] Contra Proposed Rule, p. 118, fn. 316.

[63] "Although a registrant may not own or control the operational activities in its value chain that produce Scope 3 emissions, it nevertheless may influence those activities, for example, by working with its suppliers and downstream distributors to take steps to reduce those entities' Scopes 1 and 2 emissions (and thus help reduce the registrant's Scope 3 emissions) and any attendant risks. As such, a registrant may be able to mitigate the challenges of collecting the data required for Scope 3 disclosure." Proposed Rule, p. 169.

[64] Proposed Rule p. 372.

[65] See, e.g., Earthworks, *Responsible minerals sourcing for renewable energy* (Apr. 17, 2019), avail. at https://earthworks.org/publications/responsible-minerals-sourcing-for-renewable-energy/.

[66] E.g., Isabeau van Halm, *Concerns for mineral supply chain amid booming EV sales*, Mining Technology (Feb. 10, 2022), avail. at https://www.mining-technology.com/analysis/concerns-for-mineral-supply-chain-amid-booming-ev-sales/.

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Yes. Mandatory Scope 3 reporting may lead to perverse outcomes as noted in the answers to questions 7 and 98.

Q 101, 1st q: "Should we require a registrant to exclude any use of purchased or generated offsets when disclosing its Scope 1, Scope 2, and Scope 3 emissions, as proposed?"

Q 101, 2nd q: "Should we require a registrant to disclose both a total amount with, and a total amount without, the use of offsets for each scope of emissions?"

No to both. The voluntary offset market has long gravitated toward robust structures.[67] Carbon offsets that are validated pursuant to good rules, such as the California protocols or other recognized protocols from States in the U.S. are completely valid. For example, the solar or wind-powered generation facilities, that generated electric energy without emitting any GHGs, would not have been built if the offset purchaser had not purchased such offsets in the form of RECs, and instead all the energy generated by that renewable energy facility would have been generated by the fossil fuel-fired generating facilities that were able to be retired after construction of the wind and solar facilities from whom such offsets were purchased. In other words, the purchase of such offsets actually resulted in a reduction in GHG emissions.

Key elements for validity can be assessed by the marketplace.[68] Offsets are present, and serve an extremely beneficial purpose, in U.S. climate policy and programs, including California's AB32.[69] California's AB32 program, after notice and comment periods that heard the same NGOs now opposing offsets before the SEC, allows either allowances or offsets.

Under the SEC's proposed rule, by requiring dueling net GHG emission calculations, public companies that use carbon offsets to comply with California's AB32 would be required to report to the SEC that they have net emissions which are in excess of California's caps, even though they are in compliance with California's regulations. The SEC seeks to streamline climate reporting, but by denigrating use of the California program's offsets it is further confusing concepts, Registrants and investors.

[67] See the excellent studies tracking voluntary carbon markets each year for the past 15 years, available from the non-profit Ecosystem Marketplace, avail. at https://www.ecosystemmarketplace.com/. See also, e.g., Talitha Haller and Gabriel Thoumi, *Financial Accounting for Forestry Carbon Offsets* (2009) avail. at https://www.ecosystemmarketplace.com/wp-content/uploads/archive/documents/Doc_65.pdf.

[68] E.g., the failure of the Chicago climate exchange when was shown publicly that their offset contracts lacked the key element of additionality which is essential for carbon offsets. CFTC¸ *Notice of Intent ... To Undertake a Determination Whether the Carbon Financial Instrument Contract Offered for Trading on the Chicago Climate Exchange, Inc., Performs a Significant Price Discovery Function*, 74 Fed. Reg. 42052 (Aug. 20, 2009). CFTC, *Order Finding That the Carbon Financial Instrument Contract Offered for Trading ... Does Not Perform a Significant Price Discovery Function*, 75 Fed. Reg. 23686 (April 28, 2010).

[69] 17 CCR §95970 et seq.

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The SEC has no legal authority, or technical expertise, to determine that offsets don't work. Please also see answers to questions 24 and 29 above.

Q 105, 1st q: "Should we require the calculation of a registrant's Scope 1, Scope 2, and/or Scope 3 emissions to be as of its fiscal year end, as proposed?"

No. REC and offset vintage periods under the State and Federal energy and environmental compliance programs referenced in questions 24, 29, and 101 above could vary from a Registrant's fiscal year, especially if not a calendar year. RECs can be used for RPS compliance by energy companies and the SEC's reporting periods differ from utility rate recovery periods and banking periods that permit RECs acquired in one calendar year to be used in future calendar years.[70] California's RPS compliance period is a three-year period. Additionally, a Registrant's Scope 2 emissions change if the serving utility sells the RECs from the renewable energy,[71] which a Registrant might not know about by its fiscal year end. Requiring Registrants to use their fiscal year for emissions disclosures would create dueling compliance obligations which would confuse Registrants and investors, frustrating the climate reporting harmony the SEC is seeking to improve.

Q 106, 4th q: "For purposes of our disclosure requirement, should we exclude or prohibit the use of any of the proposed specified data sources when calculating Scope 3 emissions and, if so, which ones?"

Yes. The SEC should prohibit use of data in breach of confidentiality agreements. Disclosure required by law is often an exception to confidentiality in non-disclosure agreements ("NDAs"). A Registrant's need for the Scope 3 data in reporting generally would not be a mandatory disclosure required by law, especially if Scope 3 reporting is voluntary.

Q 125, 5th q: "Should we permit a domestic registrant to report any such material difference [in GHG emissions date] in a Form 8-K if such form is filed (rather than furnished) with the Commission? Should any such reasonable estimate be subject to conditions to help ensure accuracy and comparability?"

Contemplating climate data reports on Form 8-Ks seems contrary to climate science, which tells of gradual and inexorable changes to the climate over many years, rather than between calendar quarters. "Form 8-K is the 'current report' companies must file with the SEC to announce major events that shareholders should know about."[72] The SEC could help by stating whether, for example, it expects an aluminum company to file an 8-

[70] E.g., North Carolina Utilities Commission R8-67(d).

[71] According to the EPA, "Electricity cannot be considered renewable without a REC to substantiate its renewableness." EPA Green Power Partnership, *Offsets and RECs: What's the Difference* (Feb. 2018), avail.

at https://www.epa.gov/sites/production/files/2018-03/documents/gpp_guide_recs_offsets.pdf.

[72] SEC, *Fast Answer: Form 8-K*, avail. at https://www.sec.gov/fast-answers/answersform8khtm html.

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K if (i) a smelter's local nuclear power plant shuts down and its Scope 2 zero emission energy is replaced with a fossil-fuel intensive system mix; or (ii) it shuts down a smelter that is immaterial to earnings but had high emissions.

Q 129, 1st q: "When determining the materiality of its Scope 3 emissions, or when disclosing those emissions, should a registrant be required to include GHG emissions from outsourced activities that it previously conducted as part of its own operations, as reflected in the financial statements for the periods covered in the filing, in addition to emissions from activities in its value chain, as proposed?"

Yes, to avoid incentivizing outsourcing as a way for a Registrant to avoid having to account for its GHG emissions.

Q 131, 1st q: "Should we permit a registrant to present its Scope 3 emissions in terms of a range as long as it discloses its reasons for using the range and the underlying assumptions, as proposed?"

Yes. GHG emissions measured by anything other than continuous emissions monitors on smokestacks or direct application of stoichiometry are not quantifiable like dollars and cents in bank accounts. They are especially less so in corporate supply chains that run through third parties. Given the need to rely on third party data, the uncertainty and likely unavailability of Scope 3 emissions data as acknowledged by the SEC,[73] the relative uncertainty of the metrics, and shifting global warming potential (GWP) values, Scope 3 emissions can only be expressed as a range. The EPA presents GWP in ranges, for example 28 to 36 for methane and 265 to 295 for nitrous oxide.[74] GWP changes for all GHGs other than CO2 in each UN climate assessment report.[75] Additionally, third party data used in Scope 3 reporting might be wrong for reasons that are completely outside the Registrant's control, such as innocent or intentional[76] misreporting by a company in the supply chain.

Q132, 2nd q: "For example, should we require a registrant in the financial industry to follow PCAF's Global GHG Accounting & Reporting Standard for the Financial Industry when calculating its financed emissions within the "Investments" category of Scope 3 emissions?"

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[73] e.g., Proposed Rule, p. 218 fn. 543; see also text at Proposed Rule, p. 223 fn. 559.

[74] EPA, *Understanding Global Warming Potentials*, avail. at https://www.epa.gov/ghgemissions/understanding-global-warming-potentials#Learn%20why.

[75] See, e.g., Greenhouse Gas Protocol, *Global Warming Potential Values*, avail. at https://www.ghgprotocol.org/sites/default/files/ghgp/Global-Warming-Potential-Values%20%28Feb%2016%202016%29_1.pdf; EFTC, *Selecting and Using GWPs for refrigerants* (Sept. 2021), avail. at https://www fluorocarbons.org/wp-content/uploads/2020/08/2021-10-08-Learn-About_Selecting-and-Using-GWP-values-for-Refrigerants.pdf.

[76] E.g., Clark Mindock, *Schnitzer Steel To Pay $3.25M Over Refrigerant Emissions*, Law360 (Apr. 22, 2022), avail. at https://www.law360.com/articles/1486303/schnitzer-steel-to-pay-3-25m-over-refrigerant-emissions.

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No. "Financed emissions"[77] rules requiring entities to report the emissions of those to whom they lend money, incentivize lending to those with lower emissions instead of lending to those with higher emissions. The SEC suggests companies should stop doing business with entities with high Scope 1 and 2 emissions: "Companies may have indirect control over their Scope 3 emissions through choices they make, for example in selecting suppliers,"[78] and in the case of "financed emissions," borrowers. By these instructions, the SEC proposes to pressure Registrants to move their business away from entities that would increase their Scope 3 emissions. This would mean, for example, that a small city in New York, which can use lower emissions power for infrastructure construction, would have an easier time attracting capital than a small city in West Virginia, which would use higher emissions power for infrastructure construction.[79]

Every government borrower, no matter how small, would have to perform the required climate disclosures, which the SEC acknowledges are expensive. This would increase the cost of debt issuance and maintenance for every U.S. county, city, housing authority, road improvement district, and other agency, and thus increase the tax burden on all U.S. citizens to pay these increased costs. State agencies and municipalities in higher emission intensity parts of the country, like the small city in West Virginia, or that fail to provide the very extensive and expensive disclosures, will see their debt become less desirable, and will have to offer higher interest rates in order to attract investors.[80] These

[77] "Financed emissions, which can be one component of Scope 3 emissions for certain financial institutions, can be described as the emissions generated by companies in which a financial institution invests or to which it otherwise has exposure." Proposed Rule, p. 399. "See, e.g., letters from ... Sens. Schatz and Whitehouse (recommending requiring Scope 3 disclosure for financed emissions)." Proposed Rule, p. 164 fn. 423. Downstream activities from which Scope 3 emissions might result include: ... Investments by a registrant.[464] [464] ... The "investments" category would capture what are commonly referred to as "financed emissions." Proposed Rule, pp. 179-180. "A financial registrant's Scope 3 emissions disclosures would likely include the emissions from companies that the registrant provides debt or equity financing to ('financed emissions')." Proposed Rule, p. 206. "A key principle is that the GHG emissions from a client's activities financed by loans or investments attributable to the reporting financial institution should be allocated to that institution based on its proportional share of lending or investment in the borrower or investee through the application of an 'attribution factor.'" Proposed Rule, p. 205, fn. 528.

[78] Proposed Rule p. 372. Matt Levine notes in his Bloomberg column: "Is the SEC here telling large public companies "you have to pressure your private suppliers to stop emitting so much carbon"? No; that is again beyond its authority. It is just saying, look, you do what you want, but if you don't pressure your suppliers to reduce their emissions, you're gonna have a heck of a hard time reporting your Scope 3 emissions. The disclosure regime effectively deputizes public companies to be climate enforcers: If their suppliers don't start measuring and reducing their emissions, the companies won't be able to do the required disclosure." Matt Levine, *The SEC Will Regulate Climate*, Bloomberg, March 22, 2022, avail. at https://www.bloomberg.com/opinion/articles/2022-03-22/the-sec-will-regulate-climate.

[79] de Chalendara, Taggart, & Benson, *Tracking emissions in the US electricity system,* Proceedings of the National Academy of Sciences (Dec. 2019), avail. at https://www.pnas.org/cgi/doi/10.1073/pnas.1912950116. The SEC even cites an academic study acknowledging the profound divisiveness of the issues involved, at pp. 336-37, fn. 802, Bernstein, Billings, Gustafson & Lewis, *Partisan Residential Sorting on Climate Change Risk*, National Bureau of Economic Research (Nov. 2021), avail. at https://www nber.org/papers/w27989.

[80] "One can imagine that some climate-conscious investors might not purchase a company's debt if the investors do not approve of the firms that the target investment company contracts with. That is, in a but-for world where all investors would be able to know the extent of a company's Scope 3 emissions, some

will increase costs for essential municipal infrastructure and services, and those costs will be felt directly by their taxpayers.

The SEC's proposed "financed emissions" rule effectively requires issuers of debt to disclose their emissions. Such issuers include the U.S. federal government and U.S. state and municipal agencies. According to the SEC, "Federal laws prohibit the Commission from requiring a municipal issuer to file any application, document, or report with the Commission before the sale of the issuer's securities."[81] The Securities Act and Exchange Act exempt government securities from SEC disclosure requirements of the type the SEC now seeks to impose.[82] Requiring government issuers to make disclosures in order to attract capital by a "financed emissions" rule amends SEC Rule 15c2-12.[83] The Administrative Procedure Act defines "rule making" as "agency process for … amending … a rule;"[84] and requires notice of proposed rule making to be published in the Federal Register,[85] and yet the SEC provided no notice that it was amending Rule 15c2-12 because the Proposed Rule does not even mention Rule 15c2-12. The SEC has not provided the requisite notice and comment period required under the Administrative Procedure Act in order to implement a "financed emissions" rule.

Separately, the methodologies for calculating "financed emissions" are not clear.[86] Those on which the SEC shows reliance are confused; for example the SEC says,

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investors might decide not to invest in the company in the first place. Such a reduction in demand for the company's debt could lead to higher interest rates on the company's debt in the but-for world. If a company's interest rate on its — for the sake of this example, its one and only — debt issuance is 3%, the interest rate on the debt instrument might be higher — say, 4% in the but-for world had the company disclosed the extent of their Scope 3 emissions. In this case, the company's lower interest rate on its debt relative to what it would have paid in a but-for world constitutes a direct benefit to the company, as the company would have a lower debt expense than it would have incurred in the but-for world." Mark Kaplan, *Economic Analysis May Play Larger Role In SEC Enforcement*, Law360 (Jan. 4, 2022).

[81] SEC, Investor Bulletin: The Municipal Securities Market, Feb. 1, 2018, avail. at https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_munibondsmarket (entre quote is bold-faced in original). "In the absence of a statutory scheme for municipal securities registration and on-going reporting requirements, the Commission's investor protection efforts in the municipal securities market have been accomplished through the antifraud provisions of the federal securities laws and regulation of broker-dealers and municipal securities dealers, including through Exchange Act Rule 15c2-12 ("Rule 15c2-12"), which facilitates annual and event-based disclosures for the benefit of municipal investors." SEC, Statement of the Chairman of the SEC and the Director of Office of Municipal Securities, May 4, 2020, fn. 11, avail. at https://www.sec.gov/news/public-statement/statement-clayton-olsen-2020-05-04.

[82] SEC, Statement of the Commission Regarding Disclosure Obligations of Municipal Issuers and Others, 59 Fed. Reg. 12748 at 12749 (Mar. 17, 1994).

[83] Specifically 17 C.F.R. §240.15c2-12(b)(5) and (d)(3). See Municipal Securities Rulemaking Board, Education Center, SEC Rule 15c2-12: Continuing Disclosure (2019), avail. at http://www.msrb.org/msrb1/pdfs/SECRule15c2-12.pdf. when promulgating its most recent amendments to Rule 15c1-12, the SEC stated that it considered, and rejected, voluntary disclosure as "unrealistic" and lacking in "timeliness and informativeness." SEC, Amendments to Municipal Securities Disclosure, Final Rule, 83 Fed. Reg. 44700 at 44740 (Aug. 31, 2018).

[84] 5 §U.S.C. 551(5).

[85] 5 §U.S.C. 553(b).

[86] As noted in the Report of the Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission, Mitigating Climate Risk in the U.S. Financial System, "In addition, design issues specific to financed emissions raise challenges, particularly around allocating emissions to the wide range of financial activities. Financed emissions from owning 1

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"frameworks like the PCAF to measure financed emissions would allow financial institutions to compute proxies for the emissions of their clients in a systematic and comparable manner even in the absence of actual emissions data."[87] The framework is wrong if it makes that claim, since it is not possible to meaningfully compute emissions in the absence of actual emissions data. The Task Force on Climate-Related Financial Disclosures ("TCFD"), cited extensively by the SEC, has no methodology for the measurement of sovereign, i.e., U.S., debt.[88]

It is not the function of the SEC to create disincentives for the purchase and holding of federal, state, and municipal government debt. A bad alternative would be to exclude government debt from a "financed emissions" rule, or treat it as zero emission, which would drive investment money into government debt and away from private debt, which again is not the role of the SEC.

Q 133, 2nd q: "Is the scope of the proposed [Scope 3] safe harbor clear and appropriate?"

The SEC's proposed safe harbor for non-material non-disclosures of Scope 3 should be expanded to disclosures concerning of RECs and offsets that are not material to the Registrant, especially if the RECs and offsets are offsetting Scope 3 emissions. If Scope 3 emission disclosures are safe harbored, then strategies to mitigate Scope 3 emissions should also be safe harbored. See also answers to questions 24 and 29 above.

In addition, as discussed in Section II of these IECA Comments, the SEC should consider expanding the safe harbor proposed for Scope 3 emissions disclosure to include a comparable safe harbor for disclosures with respect to the impacts of Climate-Physical Risks.

Q 141: "Under prevailing attestation standards, "limited assurance" and "reasonable assurance" are defined terms that we believe are generally understood in the marketplace, both by those seeking and those engaged to provide such assurance. As a result, we have

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percent of a company might include 1 percent of that company's emissions; a portfolio can rapidly double count if aggregate financed emissions include each underlying company's own Scope 3 upstream and downstream emissions. The calculation becomes significantly more complex with other activities, such as when a financial institution serves as a counterparty or is one of multiple underwriters of a financing. There is no agreed standard for financed emissions and little consistency or comparability to date, but a wide range of methodologies are being developed. Existing estimation methods present significant challenges and regulators should encourage the market to develop a more consistent way of measuring and reporting Scope 3 emissions across sectors where they are material and relevant." Report, p. 62 (Sept. 2020), avail. at https://www.cftc.gov/PressRoom/PressReleases/8234-20.

[87] Proposed Rule, p. 422-23.

[88] Portfolio Alignment Team, *Measuring Portfolio Alignment: Technical Considerations*, pp. 42, 57 (2021) avail. at https://www.tcfdhub.org/wp-content/uploads/2021/10/PAT_Measuring_Portfolio_Alignment_Technical_Considerations.pdf. Perhaps the "financed emissions of the US" would be calculated by dividing the U.S. national GHG inventory by national debt, multiplied by the dollar amount of the Treasuries on hand. As the EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks, avail. at https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks, shows 5.2 billion metric tons net CO2e, and the national debt is $30.5 trillion, this methodology would yield 170.5 tonnes of "financed emissions" for every million dollars in Treasury instruments held.

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not proposed definitions of those terms. Should we define "limited assurance" and "reasonable assurance" and, if so, how should we define them?"

Yes, please define them. It is not clear what those terms mean in this context, nor how they relate to the standard GHG terms of "measured," "monitored", and "verified."

Q 143(ii)(d,) 1st q: "What are the costs and benefits of employing registered public accounting firms to perform audits of GHG emissions disclosure and related attestation of internal controls?"

Q 143(ii)(d), 6th q: "What are the costs and benefits of such approach?"

Costs would include liability for mistakes by CPAs who hitherto have not been in the business of understanding, much less auditing, GHG emissions. Auditors are not set up to audit all aspects of a company's equipment usage, including type and age, and this information can lead to discovering very material emissions. For example, an EPA report found 3,407 pounds of SF6 leakage across a few companies from old circuit breakers,[89] and since SF6 has a GWP of 23,500,[90] this represented more than 40,000 tCo2e in Scope 1 emissions, about double the Scope 2 emissions from 100,000 MWh/yr in manufacturing operations from typical grid electricity.

Costs would also include costs to Registrants of business operation interruptions, safety and injury risks, and compromising of confidential information and trade secrets, resulting from requiring third party accountants unfamiliar with client operations to crawl over their operations and offices, to assess and measure GHG effects and leakage from operations, and circuit breakers, to air conditioners.

Q 154, 1st q: "Should we require the attestation engagement and related attestation report to be provided pursuant to standards that are publicly available at no cost and are established by a body or group that has followed due process procedures, including the broad distribution of the framework for public comment, as proposed?"

Yes, especially the no cost part, if such attestation reports are required.

Q 161, 1st q: "Should we require the registrant to disclose whether the attestation provider has a license from any licensing or accreditation body to provide assurance, and if so, the identity of the licensing or accreditation body, and whether the attestation provider is a member in good standing of that licensing or accreditation body, as proposed?"

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89 Blackman, Averyt & Taylor, *SF6 Leak Rates from High Voltage Circuit Breakers - U.S. EPA Investigates Potential Greenhouse Gas Emissions Source*, avail. at https://www.epa.gov/sites/default/files/2016-02/documents/leakrates_circuitbreakers.pdf.
90 Greenhouse Gas Protocol, *Global Warming Potential Values*, avail. at https://www.ghgprotocol.org/sites/default/files/ghgp/Global-Warming-Potential-Values%20%28Feb%2016%202016%29_1.pdf.

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It would be helpful if the SEC would advise which existing licensing or accrediting bodies meet SEC standards under the Proposed Rules.

Q 164, 4th q: "Should we specify parameters or include guidance on when the services provided by a third-party would be considered "assurance" or "verification" and thus require disclosure pursuant to the proposed rules?"

It would be helpful if the SEC could explain the difference between an "assurance" and a "verification."

Q166, 3rd q: "Is it clear what 'any oversight inspection program' would include?"

No.

Q173, 1st q: "If a registrant has used carbon offsets or RECs, should we require the registrant to disclose the amount of carbon reduction represented by the offsets or the amount of generated renewable energy represented by the RECS, the source of the offsets or RECs, the nature and location of the underlying projects, any registries or other authentication of the offsets or RECs, and the cost of the offsets or RECs, as proposed?" and
Q173, 2nd q: "Are there other items of information about carbon offsets or RECs that we should specifically require to be disclosed when a registrant describes its targets or goals and the related use of offsets or RECs?"

No to both. Please see answers to questions 29, 101 and 133. Any disclosure requirement should be limited to information that is material to investors in the Registrant. Buyers and sellers engaging in private transactions should be entitled to keep the terms of their transactions, including pricing, confidential. The SEC is not authorized by Congress to use the disclosure apparatus to force public disclosures of immaterial private contract terms in order to provide REC and offset pricing signals.

Q173, 3rd q: "Are there proposed items of information that we should exclude from the required disclosure about offsets and RECs?"

Yes. Anything that is not material to the Registrant. Registrants are not required to disclose the brands of machine tools or cleaning solvents that they buy if those disclosures are not material to the Registrant. A Registrant not buying good cleaning solvents may have employees get sick; perhaps Registrants not buying "good" offsets or RECs won't meet their climate goals. In each of these cases it is for the Registrant's management to decide if brands purchased will achieve the company's objectives and to change brands if they don't. See also answers to questions 24 and 29.

Q182, 1st q: "The proposed rules would not apply to asset-backed issuers. The Commission and staff are continuing to evaluate climate-related disclosures with respect to asset-backed securities. Should we require asset-backed issuers to provide some or all of the disclosures under proposed Subpart 1500 of Regulation S-K?"

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No. Doing so would result in disproportionate and negative impacts on low-income communities. ABS securitizations are essential for making home mortgages and car loans available to Americans. The people who have to commute furthest to work by car typically are the poorest.[91] Cars sold to people in low-income communities who have to commute farther to get to the city would lead to higher Scope 3 emissions for the ABS.[92] An ABS would be motivated to exclude such loans, because such loans would increase the ABS's "financed emissions" [93] that the SEC contemplates requiring Registrant financial institutions, and potentially corporate treasury departments, to disclose,[94] and therefore makes the ABS less desirable. ABS's including loans to low-income car buyers who have to commute further burdened by a Carbon cost would sell for less, thus increasing the interest rates for loans for low-income car owners. This would also apply to home mortgage ABS, which would be incentivized by a Carbon cost to exclude mortgages to Americans living in poorer areas with older energy generation supply, without electric vehicle charging infrastructure. Residents of low-income areas would become disadvantaged from being able to obtain home and car finance.

Regulations that require measurements of environmental effects, the implementation of which would disproportionately harm low-income populations, would be inconsistent with the SEC's obligations under Executive Order 12898.[95] It would also divide the country economically. Areas of the country with higher emission power such as

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[91] Anzhelika Antipova, *Analysis of Commuting Distances of Low-Income Workers in Memphis Metropolitan Area, TN* (Feb. 7, 2020), avail. at https://www mdpi.com/2071-1050/12/3/1209/pdf; U.S. Dept. of Transportation, Bureau of Transportation Statistics, *Commuting Expenses: Disparity for the Working Poor*, avail. at https://www.bts.gov/archive/publications/special_reports_and_issue_briefs/issue_briefs/number_01/entire; CBS News, *How long commutes worsen inequality* (Mar. 27, 2015), avail. at https://www.cbsnews.com/news/how-long-commutes-worsen-inequality/; The Seattle Times, *Low pay and long, pricey commute often go hand in hand* (Aug. 31, 2015), avail. at https://www.seattletimes.com/business/economy/low-pay-long-pricey-commute-often-go-hand-in-hand/.

[92] It would also lead to higher Scope 3 emissions for car company registrants that sell cars to low-income people.

[93] Downstream activities from which Scope 3 emissions might result include: ... Investments by a registrant.[464] [464] ... The "investments" category would capture what are commonly referred to as "financed emissions." Proposed Rule, pp. 179-180. "A financial registrant's Scope 3 emissions disclosures would likely include the emissions from companies that the registrant provides debt or equity financing to ('financed emissions')." Proposed Rule, p. 206. "A key principle is that the GHG emissions from a client's activities financed by loans or investments attributable to the reporting financial institution should be allocated to that institution based on its proportional share of lending or investment in the borrower or investee through the application of an 'attribution factor.'" Proposed Rule, p. 205, fn. 528.

[94] "Financed emissions, which can be one component of Scope 3 emissions for certain financial institutions, can be described as the emissions generated by companies in which a financial institution invests or to which it otherwise has exposure." Proposed Rule, p. 399. "See, e.g., letters from ... Sens. Schatz and Whitehouse (recommending requiring Scope 3 disclosure for financed emissions)." Proposed Rule, p. 164 fn. 423.

[95] "To the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States … ." Executive Order 12898 of Feb. 11, 1994, §1-101.

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Wyoming, North Dakota, and West Virginia, would have additions to housing costs, because of the discounting of conforming mortgage securitizations, not suffered by areas with lower GHG intensity, such as New York, Oregon, and California,[96] further fracturing an already divided polity.[97]

Separately, adding friction to ABS issuance by requiring mandatory GHG measurements would add costs to and delay these critical instruments for American car and home finance. ABS issuances are already highly regulated and markets for ABS will not benefit from further politicization of existing regulation.[98]

Q 201: Are there other phase-ins or exemptions regarding any or all of the proposed rules that we should provide?

The phase-in period is just a cloak for SEC having no idea how the Proposed Rule is going to work or be implemented by Registrants. Regulators should figure out how the regulated will perform requirements before imposing them. ESG and GHG reporting should be allowed to play out further in the voluntary space in order for the better development of more commonly adopted standards.

B. Comments on the Text of the Proposed Rule

Shown below are a few additional comments on the SEC's Proposed Rule regulatory text that correlate to a fraction of the above responses to requests for comments, and that note some further issues with the Proposed Rule.

§210.14-01(c)(2): *When calculating the metrics in this Article ..., a registrant must: ... apply the same accounting principles that it is required to apply in preparation of the rest of its consolidated financial statements included in the filing.*

This would be impossible for any Registrant. See answer to question 88 above.

§210.14-02(c)(4): *Disclose the impact of severe weather events and other natural conditions, such as flooding, drought, wildfires, extreme temperatures, and sea level rise on any relevant line items in the registrant's consolidated financial statements during the*

[96] de Chalendara, Taggart, & Benson, *Tracking emissions in the US electricity system,* Proceedings of the National Academy of Sciences (Dec. 2019), avail. at https://www.pnas.org/cgi/doi/10.1073/pnas.1912950116.

[97] The SEC even cites an academic study acknowledging the profound divisiveness of the issues involved, at Proposed Rule pp. 336-37, fn. 802, Bernstein, Billings, Gustafson & Lewis, *Partisan Residential Sorting on Climate Change Risk*, National Bureau of Economic Research (Nov. 2021), avail. at https://www.nber.org/papers/w27989.

[98] See, e.g., Comments of Jeremy D. Weinstein and Geoffrey F. Heffernan on SEC Chairman's Statement on Asset-Level Disclosure Requirements for Residential Mortgage-Backed Securities (Dec. 17, 2019), avail. at https://www.sec.gov/comments/rmbs/cll8-6587839-201849.pdf; Comments of Jeremy D. Weinstein on RIN 3064-AF09: Federal Deposit Insurance Corporation, Notice of Proposed Rulemaking, Securitization Safe Harbor Rule, 84 Fed. Reg. 43732, avail. at http://www.fdic.gov/resources/regulations/federal-register-publications/2019/2019-securitization-safe-harbor-rule-3064-af09-c-001.pdf (Sept. 20, 2019).

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fiscal years presented ... Changes to total expected insured losses due to flooding or wildfire patterns.

It is not clear what the "patterns" at the end means. Insured losses would be due to actual flooding and actual wildfire, not "patterns" thereof.

§210.14-02(f): *Disclose separately the aggregate amount of expenditure expensed and the aggregate amount of capitalized costs incurred during the fiscal years presented to reduce GHG emissions or otherwise mitigate exposure to transition risks. For example, a registrant may be required to disclose the amount of expense or capitalized costs, as applicable, related to research and development of new technologies, purchase of assets, infrastructure, or products that are intended to reduce GHG emissions, increase energy efficiency, offset emissions (purchase of energy credits), or improve other resource efficiency.*

This disclosure should only be required if actually material to the actual Registrant, for the reasons set forth in responses to questions 29 and 43 above. The regulatory text has further problems as noted in our response to question 24 above.

§229.1500(a): *Carbon offsets represents an emissions reduction or removal of greenhouse gases ("GHG") in a manner calculated and traced for the purpose of offsetting an entity's GHG emissions.*

This should be deleted, or replaced with "Carbon offset means an offset, reduction or removal of greenhouse gases as defined by an applicable law, regulation, program, protocol, regulator or registry", for the reasons set forth in our response to question 24 above.

§229.1500(g): *Greenhouse gases ("GHG") means carbon dioxide (CO2), methane ("CH4"), nitrous oxide ("N2O"), nitrogen trifluoride ("NF3"), hydrofluorocarbons ("HFCs"), perfluorocarbons ("PFCs"), and sulfur hexafluoride ("SF6").*

Why are all the gases other than CO2 in quotes?

§229.1500(n): *Renewable energy credit or certificate ("REC") means a credit or certificate representing each megawatt-hour (1 MWh or 1,000 kilowatt-hours) of renewable electricity generated and delivered to a power grid.*

This should be deleted, or replaced with "REC means a certificate, credit or other indicia of ownership relating to renewable energy as defined by an applicable law, regulation, program, regulator or registry," for the reasons set forth in the response to question 24 above.

§229.1502(e): (1) If a registrant maintains an internal carbon price, disclose: (i) The price in units of the registrant's reporting currency per metric ton of CO2e; (ii) The total price, including how the total price is estimated to change over time, if applicable; ... (2)

Describe how the registrant uses any internal carbon price ... to evaluate and manage climate-related risks. (3) If a registrant uses more than one internal carbon price, it must provide the disclosures required by this section for each internal carbon price, and disclose its reasons for using different prices.

This should be deleted to the reasons set forth in the answer to question 29 above.

§229.1503(a)(1): *When describing any processes for identifying and assessing climate-related risks, disclose, as applicable, how the registrant: (i) Determines the relative significance of climate-related risks compared to other risks; (ii) Considers existing or likely regulatory requirements or policies, such as GHG emissions limits, when identifying climate-related risks; (iii) Considers shifts in customer or counterparty preferences, technological changes, or changes in market prices in assessing potential transition risks; and (iv) Determines the materiality of climate-related risks, including how it assesses the potential scope and impact of an identified climate-related risk, such as the risks identified in response to § 229.1502.*

This should be deleted for the reasons set forth in our response to question 43 above.

§229.1503(a)(2): *When describing any processes for managing climate-related risks, disclose, as applicable, how the registrant: (i) Decides whether to mitigate, accept, or adapt to a particular risk; (ii) Prioritizes whether to address climate-related risks; and (iii) Determines how to mitigate any high priority risks.*

This should be deleted for the reasons set forth in our response to question 44 above.

§229.1503(b): *Disclose whether and how any processes described in response to paragraph (a) of this section are integrated into the registrant's overall risk management system or processes. If a separate board or management committee is responsible for assessing and managing climate-related risks, a registrant should disclose how that committee interacts with the registrant's board or management committee governing risks.*

This should be deleted in conjunction with the deletion of §§229.1503(a)(1) and (2).

§229.1503(c)(2)(ii)(C): *... discuss ... Changing demands or preferences of consumers, investors, employees, and business counterparties.*

A company's successful response to consumer tastes and demands, and ability to keep employees, is how a company survives in the free enterprise system. Registrant disclosures are public; once made, anyone can read them. In the free enterprise system, companies are not required to educate their competitors on how to beat them, but that is what the SEC proposes to require Registrants to do. This is beyond the SEC's statutory authority. It is also not apparent how this proposed rule is about climate change or the risks presented to investors thereby.

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§229.1504(a)(2): *When disclosing a registrant's Scopes 1, 2, and 3 emissions, exclude the impact of any purchased or generated offsets.*

This should be deleted for the reasons set forth in our response to questions 24 and 101 above.

§229.1504(c): *Scope 3 emissions ...*

This should be deleted for the reasons set forth in our response to question 98 above.

§229.1506(d): *If carbon offsets or RECs have been used as part of a registrant's plan to achieve climate-related targets or goals, disclose the amount of carbon reduction represented by the offsets or the amount of generated renewable energy represented by the RECS, the source of the offsets or RECs, a description and location of the underlying projects, any registries or other authentication of the offsets or RECs, and the cost of the offsets or RECs.*

This should be deleted for the reasons set forth in our response to questions 101 and 105 above.

The Proposed Rule's departure from the middle-of-the-road on highly politicized issues, from climate change to the power of administrative agencies, makes it a target for complete reversal with a change in Administration.[99] In addition, the likelihood of a court of appeals finding that various rule changes were not accomplished in accordance with the statutory authority of the SEC will make it likely that a judicial appeal of the SEC's Proposed Rule could set aside any Final Rule issued by the SEC in reliance on this Proposed Rule.

If the SEC would like to see any of its proposals for the long-term issue of climate change survive in the long term, taking a middle-of-the-road position now will lower the risks of such reversals.

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[99] E.g., a complete prohibition of climate change considerations in lending by the Office of the Comptroller of the Currency in the previous administration. OCC, Docket ID OCC–2020–0042, RIN 1557–AF05, *Fair Access to Financial Services*, 85 Fed. Reg. 75261 (Nov. 25, 2020) (See comment letter of Jeremy Weinstein, which can be found at https://www regulations.gov/comment/OCC-2020-0042-3496); the rule became final (https://web.archive.org/web/20210114133722/https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8.html) but was not published in the Federal Register. See also the complete flip flop of the Dept. of Labor on plan fiduciary considerations of ESG factors, from prohibition under the Trump Administration to encouragement under the Biden Administration. See William Pollak, *Despite DOL Proposed Rule, ESG Investing Faces Barriers*, Law360 (Dec. 14, 2021), avail. at https://www.law360.com/articles/1447811/despite-dol-proposed-rule-esg-investing-faces-barriers. The SEC even cites an academic study acknowledging the profound divisiveness of the issues involved, at Proposed Rule pp. 336-37, fn. 802, Bernstein, Billings, Gustafson & Lewis, *Partisan Residential Sorting on Climate Change Risk*, National Bureau of Economic Research (Nov. 2021), avail. at https://www.nber.org/papers/w27989. See also, e.g., *10 Companies Allegedly Boycotting Fossil Fuels Have Not Responded to Texas Comptroller's Inquiry*, The Texan (May 23, 2022), avail. at https://thetexan news/12-companies-allegedly-boycotting-fossil-fuels-have-not-responded-to-texas-comptrollers-inquiry/.

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VI. CONCLUSION.

The IECA suggests that the SEC's mandate with regard to disclosures regarding Climate-Related Risks should be to enhance the standardization and comparability of such disclosures, avoid impeding the pursuit of any strategy for addressing Climate-Related Risks by U.S. businesses that actually result in reductions in GHG emissions, avoid impeding the flow of capital from investors to any of such innovations, and protect legitimate investors and businesses from fraud and manipulation by those who would violate U.S. Securities Laws.

The IECA appreciates the opportunity to submit these comments to the SEC. We welcome the opportunity to discuss these comments further should you require any additional information.

Yours truly,
INTERNATIONAL ENERGY CREDIT ASSOCIATION

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EXHIBIT A

Background - Summary of the SEC's Proposed Climate Disclosure Rule.

Please see below a brief summary of the SEC's Proposed Rule, which we have used in drafting these IECA Comments. Inclusion of this summary in the IECA's comments is not intended to indicate the IECA's agreement with any portion of the SEC's Proposed Rule described in this summary.

The SEC's Proposed Rule contains proposed edits to the SEC's form and content requirements for a public company's financial statements under Sections 210.14-01 and 210.14-02 of Article 14, Climate-Related Disclosure, of 17 CFR Part 210 ("**Regulation S-X**"), and proposed edits to the SEC's disclosure requirements for various reports to be filed by public companies under Sections 229.1500, Climate-Related Disclosure (Items 229.1500 through 229.1507), of 17 CFR Part 229 ("**Regulation S-K**").

Climate Financial Risks. This connection of the Climate-Related Risks disclosure requirements for a public company's financial statements with the Climate-Related Risks disclosure requirements for that public company's various reports submitted to the SEC creates a Climate-Related Risks disclosure scheme in which the SEC requires (Proposed Rule, at p.193):

> "a registrant to provide its GHG emissions data for the same number of years as it is required to provide data on its income statement and cash flow statement, to the extent such emissions data is reasonably available. For example, a registrant that is required to include income statements and cash flow statements at the end of its three most recent fiscal years would be required to disclose three years of its Scope 1, Scope 2 and, if material to the registrant or if it has set a GHG emissions target or goal that includes its Scope 3 emissions, its Scope 3 emissions, expressed both in absolute terms and in terms of intensity.481 If the registrant is a SRC, only two years of Scopes 1 and 2 emissions metrics would be required.482"

This connection of a public company's Climate-Related Risk disclosure requirements in both its financial statements and its various reports submitted to the SEC is intended to ensure that investors are able to assess a public company's exposure to Climate-Related "financial" risks. For example, if a Registrant discloses a significantly high level of GHG emissions in year 1 followed by successive reductions in GHG emissions over the following years, but shows no transition costs on its financial statements from either (i) purchasing carbon offsets to reduce its carbon footprint to "net zero" emissions of GHG, or (ii) incurring the capital expenditures necessary to alter its business model to actually reduce its GHG emissions over time to actual zero emissions of GHG, a prudent investor may want to ask additional questions before investing.

Disclosure of Climate-Physical Risks Separately from Climate-Transition Risks. In both Regulation S-X and Regulation S-K, the SEC has also drawn a clear line between

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disclosure obligations related to a public company's exposure to Climate-Transition Risks and its exposure to Climate-Physical Risks.

So, for example, proposed Sections 210.14-02(c), (e) and (g) of Regulation S-X address Climate-Physical Risks in the form of: "(c) Financial impacts of severe weather events and other natural conditions," (e) Expenditure to mitigate risks of severe weather events and other natural conditions," and "(g) Financial estimates and assumptions impacted by severe weather events and other natural conditions."

On the other hand, proposed Sections 210.14-02(d), (f) and (h) of Regulation S-X address Climate-Transition Risks in the form of: "(d) Financial impacts related to transition activities," "(f) Expenditure related to transition activities," and "(h) Financial estimates and assumptions impacted by transition activities."

Similarly, proposed Sections 229.1502, Strategy, Business Model, and Outlook, and 229.1503, Risk Management, of Regulation S-K, asks Registrants to specify in their various reports submitted to the SEC whether their disclosures of any Climate-Related Risk involve a "physical" risk (which is further divided into "acute" or "chronic" physical risks) or a "transition" risk.

Proposed Section 229.1500, Definitions, then provides the following definition of "Climate-related risks," which notifies Registrants and investors of the SEC's distinctions between "Physical" risks, which risks are divided between "acute" physical risks and "chronic" physical risks, and "transition" risks, as follows:

> "(c) *Climate-related risks* means the actual or potential negative impacts of climate-related conditions and events on a registrant's consolidated financial statements, business operations, or value chains, as a whole. Climate-related risks include the following:
> (1) Physical risks include both acute risks and chronic risks to the registrant's business operations or the operations of those with whom it does business.
> (2) Acute risks are event-driven and may relate to shorter term extreme weather events, such as hurricanes, floods, and tornadoes, among other events.
> (3) Chronic risks relate to longer term weather patterns and related effects, such as sustained higher temperatures, sea level rise, drought, and increased wildfires, as well as related effects such as decreased arability of farmland, decreased habitability of land, and decreased availability of fresh water.
> (4) Transition risks are the actual or potential negative impacts on a registrant's consolidated financial statements, business operations, or value chains attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate-related risks, such as increased costs attributable to changes in law or policy, reduced market demand for carbon-intensive products leading to decreased prices or profits for such products, the devaluation or abandonment of assets, risk of legal liability and litigation defense costs, competitive pressures associated with the adoption of new technologies, 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." (Emphasis added.)

The SEC's proposed new Sections 210.14-02(i) and (j) of Regulation S-X conclude with the requirement that:

> "(i) *Impact of identified climate-related risks*. A registrant <u>must</u> also <u>include the impact of any climate-related risks</u> (separately by physical risks and transition risks, as defined in §229.1500(c)), identified by the registrant pursuant to § 229.1502(a), on any of the financial statement metrics disclosed pursuant to paragraphs (c) through (h) of this section; [and]
>
> (j) *Impact of climate-related opportunities*. A registrant <u>may</u> also <u>include the impact of any opportunities arising from severe weather events and other natural conditions, any impact of efforts to pursue climate-related opportunities associated with transition activities, and the impact of any other climate-related opportunities</u>, including those identified by the registrant pursuant to § 229.1502(a), on any of the financial statement metrics disclosed pursuant to paragraphs (c) through (h) of this section. If a registrant makes a policy decision to disclose the impact of an opportunity, it must do so consistently for the fiscal years presented, including for each financial statement line item and all relevant opportunities identified by the registrant." (Emphasis added.)

<u>GHG Emissions Disclosures</u>. Proposed Section 229.1504(a) of Regulation S-K requires a Registrant to disclose its "GHG emissions … for its most recently completed fiscal year, and for the historical fiscal years included in its consolidated financial statements in the filing, to the extent such historical GHG emissions data is reasonably available."

§229.1500(g) of Regulation S-K includes the following definition: "Greenhouse gases ("GHG") means carbon dioxide (CO2), methane ("CH4"), nitrous oxide ("N2O"), nitrogen trifluoride ("NF3"), hydrofluorocarbons ("HFCs"), perfluorocarbons ("PFCs"), and sulfur hexafluoride ("SF6")."

A Registrant's disclosure of Scopes 1, 2 and 3 emissions of GHG are required by proposed Section 229.1504(a)(1) of Regulation S-K to be disclosed "both disaggregated by each constituent greenhouse gas, … and in the aggregate, expressed in terms of CO2e" (carbon dioxide equivalent). <u>Proposed Section 229.1504(a)(2) also requires a Registrant, when disclosing its Scopes 1, 2 and 3 emissions, to "exclude the impact of any purchased or generated offsets</u>."

Proposed Section 229.1500 of Regulation S-K provides definitions of Scope 1, Scope 2 and Scope 3 emissions of GHGs. Section 229.1500(p) defines "Scope 1 emissions" as "direct GHG emissions from operations that are owned or controlled by a registrant." Section 229.1500(q) defines "Scope 2 emissions" as "indirect GHG emissions from the generation of purchased or acquired electricity, steam, heat, or cooling that is consumed by operations owned or controlled by a registrant."

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Proposed Section 229.1504(b) of Regulation S-K requires Registrants to disclose its "total Scope 1 emissions and total Scope 2 emissions separately after calculating them from all sources that are included in the Registrant's organizational and operational boundaries."

Scope 3 Emissions Disclosure. Proposed Section 229.1504(c) of Regulation S-K requires a Registrant to disclose its Scope 3 emissions (i) "if material" or (ii) if a Registrant "has set a GHG emissions reduction target or goal that includes its Scope 3 emissions." Note that the SEC has said that under the applicable "materiality" standard, "a registrant would be required to disclose its Scope 3 emissions if there is a substantial likelihood that a reasonable investor would consider them important when making an investment or voting decision." (See Proposed Rule at p. 170).

Note that proposed Section 229.1504(c)(3) provides an exemption from the obligation to report Scope 3 emissions saying: "(3) A smaller reporting company, as defined by §§ 229.10(f)(1), 230.405, and 240.12b-2 of this chapter, is exempt from, and need not comply with, the disclosure requirements of this paragraph (c)."

As defined in proposed Section 229.1500(r) of Regulation S-K, "Scope 3 emissions are all indirect GHG emissions not otherwise included in a registrant's Scope 2 emissions, which occur in the upstream and downstream activities of a registrant's value chain." (Emphasis added.) Section 229.1500(r) then provides examples of upstream and downstream activities in which Scope 3 emissions might occur.

As explained in proposed Section 229.1504(c) of Regulation S-K, a Registrant required to report its Scope 3 emissions will have to obtain Scope 3 emissions information from the Registrant's upstream and/or downstream counterparties physically involved in such Registrant's value chain (e.g., suppliers of feedstocks required by the Registrant's business or purchasers of good or services provided by the Registrant) or the Registrant may utilize "data derived from economic studies, published databases, government statistics, industry associations, or other third-party sources outside of a registrant's value chain, including industry averages of emissions, activities or economic data."

Proposed Section 229.1504(d) of Regulation S-K requires a Registrant to "disclose GHG intensity in terms of metric tons of CO_2e per unit of total revenue … and per unit of production." And the Registrant is required to report its GHG intensity for its Scope 1 and 2 emissions, and separately report its GHG intensity using Scope 3 emissions only.

Safe Harbor from Fraudulent Statement Liability. Proposed Section 229.1504(f) of Regulation S-K provides a "safe harbor" from liability for Scope 3 emissions disclosures and says: "(1) A statement within the coverage of paragraph (f)(2) of this section that is made by or on behalf of a registrant is deemed not to be a fraudulent statement (as defined in paragraph (f)(3) of this section), unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith."

<u>Attestation of Scope 1 and Scope 2 Emissions Disclosure</u>. Proposed Section 229.1505(a)(1) of Regulation S-K requires an attestation by an independent third-party attestation provider for Scope 1 and Scope 2 emissions as follows:

> "(1) A registrant that is required to provide Scope 1 and Scope 2 emissions disclosure pursuant to § 229.1504 and that is an accelerated filer or a large accelerated filer must include an attestation report covering such disclosure in the relevant filing. For filings made by an accelerated filer or a large accelerated filer for the second and third fiscal years after the compliance date for § 229.1504, the attestation engagement must, at a minimum, be at a limited assurance level and cover the registrant's Scope 1 and Scope 2 emissions disclosure. For filings made by an accelerated filer or large accelerated filer for the fourth fiscal year after the compliance date for § 229.1504 and thereafter, the attestation engagement must be at a reasonable assurance level and, at a minimum, cover the registrant's Scope 1 and Scope 2 emissions disclosures."

Finally, proposed Section 229.1506 of Regulation S-K obligates a Registrant to disclose any targets or goals related to reducing its GHG emissions, saying:

> "(a)(1) A Registrant must provide disclosure pursuant to this section if it has set any targets or goals related to the reduction of GHG emissions, or any other climate-related target or goal (e.g., regarding energy usage, water usage, conservation or ecosystem restoration, or revenues from low-carbon products) such as actual or anticipated regulatory requirements, market constraints, or other goals established by a climate-related treaty, law, regulation, policy, or organization."

<u>Carbon Offsets or RECs</u>. Note too that in proposed Section 229.1506(d) of Regulation S-K, the SEC requires the following disclosure with respect to "carbon offsets or RECs," saying:

> "(d) If carbon offsets or RECs have been used as part of a Registrant's plan to achieve climate-related targets or goals, disclose the amount of carbon reduction represented by the offsets or the amount of generated renewable energy represented by the RECS, the source of the offsets or RECs, a description and location of the underlying projects, any registries or other authentication of the offsets or RECs, and the cost of the offsets or RECs."

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