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Business Law Section

June 24, 2022

Submitted via email to: rule-comments@sec.gov

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: File No. S7-10-22
Release Nos. 33-11042; 34-94478
The Enhancement and Standardization of Climate-Related
Disclosures for Investors

Dear Ms. Countryman:

This letter is submitted on behalf of the Federal Regulation of Securities Committee (the "**Committee**" or "**we**") of the Business Law Section of the American Bar Association (the "**ABA**"), on the above-referenced proposing release issued by the Securities and Exchange Commission (the "**Commission**") regarding the proposed amendments to its rules to require registrants to provide certain climate-related information in their registration statements and annual reports (the "**Proposing Release**" and the proposed rules contained therein, the "**Proposed Rules**"). We appreciate the opportunity to comment on the Proposed Rules.

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and, therefore, do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Business Law Section of the ABA, nor does it necessarily reflect the views of all members of the Committee or the drafting committee.

I. General Comments

We generally support the Commission's effort to respond to calls for the Commission to address climate change-related disclosure by public companies. In our experience as members of the securities bar, public companies both large and small are being confronted with requests by various stakeholders for information addressing a wide range of private environmental, social and governance ("**ESG**") (and particularly climate change-related) disclosure frameworks. In response, for several years now, companies have voluntarily been producing ESG reports, which vary in the degree to which they follow any

one particular framework. We readily acknowledge that these voluntary reports do not provide a consistent amount of information that can be compared across even peer companies, much less industries or the broader population of all public companies, and we therefore support an effort by the Commission to propose disclosure rules that would ultimately result in comparable, decision-useful ESG information for investors.

However, we believe the Proposed Rules should be revised in some significant ways to ensure that registrants are not unduly burdened by the Commission’s requirements and to ensure that the Commission’s rulemaking in this space is not counterproductive to the goal of providing investors with comparable, decision-useful information. In this section, we offer some general, overarching comments to the Proposed Rules, with the balance of this letter providing more detailed comments on specific elements of the Proposed Rules which either provide examples of our general comments or otherwise raise issues that we believe should be addressed in final rules.

A. Materiality

While the Commission’s rulemaking authority under Section 7 of the Securities Act of 1933 (the “**Securities Act**”) is not limited to only material information – rather, Section 7 authorizes the Commission to require such information “as being necessary or appropriate in the public interest or for the protection of investors”¹ – we strongly believe that the most effective disclosure regime is one that fosters the disclosure of material information by companies. We also note the Commission’s mandate in Section 2(b) of the Securities Act to consider whether any rulemaking action will promote “efficiency, competition, and capital formation,”² and Congress’s directives to the Commission in the JOBS Act and the FAST Act with respect to what has been termed the “Disclosure Effectiveness Initiative.”³ We do not believe a regime requiring extensive disclosures of immaterial information is consistent with the objectives of the Disclosure Effectiveness Initiative or with Section 2(b) of the Securities Act. There are many areas in the Proposed Rules that call for extensive, overly prescriptive disclosures regardless of whether such disclosure would be material to the registrant.

In addition, we believe that the Commission should continue to follow and apply the traditional principles of materiality as articulated by the Supreme Court.⁴ In particular, we are concerned that the Proposing Release suggests a view of materiality that would hold that a registrant should be required to provide certain information not because it is material to the registrant itself, but rather, because such information will “allow[] investors to more effectively evaluate and manage the risk of their entire portfolio.”⁵ In our view, this change in perspective – from the reasonable investor making an investment or voting decision regarding a particular registrant, to the reasonable investor evaluating and managing risk to her entire portfolio – is

¹ 15 U.S.C. § 77g(a)(1).

² 15 U.S.C. § 77b.

³ Jumpstart Our Business Startups Act, Pub. L. No. 112-106 (2012); Fixing America’s Surface Transportation Act, Pub. L. No. 114-94 (2015).

⁴ See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); see also *Basic, Inc. v. Levinson*, 485 U.S. 224, 232-36 (1988).

⁵ Proposing Release, at 348.

novel and changes the legal analysis for materiality. More importantly, such approach is not workable for any registrant, whose securities are held by millions of shareholders, each with its own unique investment portfolio. For a registrant, its only relevant consideration is, and can only be, its own particular facts and circumstances. We respectfully request that the Commission clarify that a registrant need not take into account an investor's portfolio risk when evaluating the materiality of information about such registrant.

Our concern regarding uneven application of materiality standards in the Proposed Rules is particularly acute given the significant amounts of work that the Proposed Rules will require for registrants and third parties (even if elements of the Proposed Rules are further qualified by materiality). For certain of the disclosure elements, registrants will not only need to expend significant internal resources, but will be required to obtain significant amounts of information from third parties to satisfy their obligations under the Proposed Rules and will also be required to engage third-party service providers to help collect, process, analyze and review climate-related information. Throughout this letter, we have identified certain areas where we believe that the final rules should appropriately include a materiality standard, which we believe will both result in more useful disclosure to investors and will appropriately recognize that climate-related risks and effects may vary significantly from registrant to registrant (even within the same industry but particularly across industries).

B. Relationship of the Proposed Rules to Other Frameworks

A number of different ESG and climate change-related disclosure frameworks have been developed over the last several years, and the Commission has highlighted some of these initiatives in the Proposed Rules.⁶ For example, the Commission acknowledges that much of the Proposed Rules are derived from the disclosure framework of the Task Force on Climate-Related Financial Disclosures (“TCFD”).⁷ The Commission also notes the formation of the International Sustainability Standards Board (“ISSB”) and its anticipated development of international climate-specific disclosure standards,⁸ with the ISSB proposing to consolidate and integrate the Value Reporting Foundation (“VRF”), which houses the Integrated Reporting Framework, the Sustainability Accounting Standards Board (“SASB”) Standards, and the Climate Disclosure Standards Board.⁹

When the IFRS Foundation announced the formation of the ISSB in November 2021, it stated that the “intention is for the ISSB to deliver a comprehensive global baseline of sustainability-related disclosure standards that provide investors and other capital market participants with information about companies’ sustainability-related risks and opportunities to help them make informed investment decisions.”¹⁰ The ISSB has received support from the

⁶ Proposing Release, at 28-29.

⁷ Proposing Release, at 34.

⁸ Proposing Release, at 33.

⁹ *IFRS Foundation Announces International Sustainability Standards Board, Consolidation with CDSB and WRF, and Publication of Prototype Disclosure Requirements*, IFRS (Nov. 3, 2021), <https://www.ifrs.org/news-and-events/news/2021/11/ifrs-foundation-announces-issb-consolidation-with-cdsb-vrf-publication-of-prototypes/>.

¹⁰ *About the International Sustainability Standards Board*, IFRS (Nov. 2021), <https://www.ifrs.org/groups/international-sustainability-standards-board/>.

International Organization of Securities Commissions (“**IOSCO**”), the G7 Finance Ministers, and the UK government, which has already noted its intention to incorporate the ISSB standards into sustainability disclosure requirements for UK companies.¹¹

Since the Commission issued its Proposed Rules, the ISSB has published two exposure drafts: International Financial Reporting Standards (“**IFRS**”) S1 sets out general sustainability disclosure requirements,¹² and IFRS S2 sets out climate-related disclosure requirements.¹³ Both exposure drafts build on the recommendations of TCFD as well as other private market initiatives, including those being integrated into the ISSB. Accordingly, we encourage the Commission to consider whether to defer adoption of final climate disclosure rules until the ISSB’s initial climate standards are completed; so doing may result in a greater harmony of disclosure standards and more effective, comparable worldwide disclosures. In addition, we encourage the Commission to permit foreign private issuers (“**FPIs**”) to follow ISSB standards in lieu of the Commission’s disclosure requirements. FPIs may be required to follow ISSB standards pursuant to the local law of the jurisdiction of their incorporation, and we believe it would be appropriate for the Commission to permit FPIs to comply with a single disclosure regime rather than try to navigate the potentially nuanced differences between the Commission’s rules and ISSB rules.

We generally support the Commission’s proposal to look to the TCFD recommendations and the Greenhouse Gas (“**GHG**”) Protocol, as many registrants are already using the TCFD framework (at least in part¹⁴) and the Greenhouse Gas Protocol (“**GHG Protocol**”), and both ISSB exposure drafts build upon these frameworks. However, we believe that the Commission should base its disclosure rules only on the TCFD’s core disclosure recommendations around governance, strategy, risk management and metrics and targets, without also mandating reporting of information derived from the TCFD’s related guidance or suggestions regarding implementation of the guidance – the latter of which would result, in our view, in the disclosure of immaterial information. We note that neither the TCFD framework nor the resulting disclosure recommendations and implementation guidance was prepared in full consideration of the liability standards that attach to disclosures made by registrants in filings made under the Securities Exchange Act of 1934 (the “**Exchange Act**”) and the Securities Act.

¹¹ *Greening Finance: A Roadmap to Sustainable Investing*, HM Government, 12 (Oct. 2021), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031805/CCSO_821102722-006_Green_Finance_Paper_2021_v6_Web_Accessible.pdf.

¹² *[Draft] IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information*, IFRS (Mar. 2022), <https://www.ifrs.org/content/dam/ifrs/project/general-sustainability-related-disclosures/exposure-draft-ifrs-s1-general-requirements-for-disclosure-of-sustainability-related-financial-information.pdf> (“**IFRS S1**”).

¹³ *[Draft] IFRS S2 Climate-related Disclosures*, IFRS (Mar. 2022), <https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-climate-related-disclosures.pdf> (“**IFRS S2**”).

¹⁴ In our experience, many registrants who disclose that they report on a voluntary basis in line with TCFD do not necessarily respond completely to all elements of the TCFD framework (and particularly do not consistently follow all aspects of the TCFD’s implementation guidance) or, if they do respond to all TCFD items, may take a “comply or explain” approach to describe why a specific item is not relevant for the particular company. For this reason, as well as the heightened scrutiny that arises from incorporation of disclosure into filed reports, we believe that even registrants that currently self-report as complying with TCFD would nonetheless likely need to expend significant time and effort to comply with the Proposed Rules.

C. Timing

The Proposed Rules, if adopted, will have significant effects on, among other things, the types of data that companies collect from their own operations and how they store and review that data; the relationships between companies and their suppliers and customers; the number and type of advisors and outside experts engaged by the company (in the case of GHG attestation providers, requiring an entire industry to be significantly expanded and professionalized); and the ways in which accountants and auditors collect and review financial information. In each case, these changes will require significant investments and extensive planning. Accordingly, we strongly encourage the Commission to reassess the deadlines for compliance with final rules, as we believe that once final rules are adopted, it will take significant time and effort for companies (and the market generally) to be prepared for compliance. Because of the significance of the changes in data collection and management required to comply with the Commission's Proposed Rules, we also strongly encourage the Commission to clarify that disclosures will apply prospectively from their phased adoption and disclosure of historical information and processes from prior to effectiveness of the applicable rule will not be required (e.g., as part of a comparative period in a financial statement metric). While we have noted some specific suggested changes to deadlines below, we believe the Commission should generally adopt at least one additional year for each deadline reflected in the Proposed Rules.

II. Proposed S-X Rules

We believe the proposed amendments to Regulation S-X ("**Proposed S-X Rules**") are significantly problematic. Relying on its "broad authority to set accounting standards and principles,"¹⁵ the Commission proposes to take the unusual action of directly promulgating a body of substantive accounting standards. This action bypasses the Financial Accounting Standards Board ("**FASB**"), the independent accounting standard-setting body that the Commission has tasked with developing and issuing financial accounting standards for almost fifty years. FASB has well-developed due process standards for considering and promulgating accounting standards.

While the Proposed S-X Rules present the measurement and reporting of climate-related metrics as largely a calculation exercise,¹⁶ in our view, such rules raise numerous substantive questions and are not operational as proposed. Due to the fact that registrants do not currently have systems in place to collect and analyze the extensive information that would be required in order to comply, the Proposed S-X Rules, if adopted, will present substantial, if not insurmountable, implementation issues. Further, we question the value and merits of the information that would be produced in response to the Proposed S-X Rules, especially when weighed against the substantial costs the Proposed S-X Rules would impose. Finally, we believe

¹⁵ Proposing Release, at 111, n.316. While the Commission's authority with respect to accounting standards may be "broad," we do not think that this authority allows the Commission to adopt disclosure rules unrelated to the purpose of financial reporting through the device of requiring that the disclosures be set forth in the notes to financial statements. We believe that, for reasons further explained in this section, the significant measurement issues, unique requirements unlike other financial disclosures and low and unclear materiality threshold will result in disclosures significantly divorced from traditional financial reporting metrics.

¹⁶ See Proposing Release, at 110 (referring to "certain disaggregated climate-related financial statement metrics that are mainly derived from existing financial statement line items").

that encompassing the climate change financial statement metrics within the scope of internal control over financial reporting (“ICFR”) and the external audit is likely to be impractical and cost-prohibitive. In the following sections, we set forth our major concerns about the Proposed S-X Rules as well as our recommendations for going forward.

A. Substantive Concerns with the Proposed S-X Rules

The Proposed S-X Rules create an entirely new, expansive accounting regime for climate-related financial information. The rules are replete with new and likely difficult accounting definitions, rules and concepts. These include:

1. Measurement Issues

Difficulties in Identifying and Quantifying Climate Impacts. The Proposed S-X Rules require registrants to calculate and report climate-related metrics using data from climate-related events that will be difficult to quantify and may often have only an indirect effect on a registrant’s financial condition and results of operations. Even assuming registrants are able to quantify the data, the data often will be available only on a lagging basis. In light of the difficulty of isolating and quantifying climate-related information, combined with the novelty of the systems that will be required to capture and analyze it, we foresee many measurement issues with the Proposed S-X Rules.

Even if there were no ambiguity in the climate-related definitions (which there is, as we discuss below), application of the Proposed S-X Rules would be challenging, given the difficulty in isolating most climate-related events, conditions and activities from other factors influencing an outcome. For example, in most instances, except those that affect a specific asset or individual operations of the registrant itself, severe weather events and other natural conditions tend to have an indirect effect on registrants’ results of operations and financial condition. Given their nature, transition activities similarly have an indirect effect on such items. Thus, in order to isolate such events and activities, registrants would have to develop systems, policies and processes to disaggregate the climate-related aspect or component of an event or transaction from the whole.

More difficult than identifying and isolating climate-related events, conditions, and activities, however, is quantifying such items. While it may be possible to quantify the direct effect that certain severe weather had on a specific part of a registrant’s business (e.g., a wildfire destroyed a particular factory, causing a loss in inventory and future production, as well as costs to rebuild), less determinable is the effect when the causal impact of the weather event is not direct. For example, drought may cause the price of ingredients to rise, but such costs may also be affected by inflation and a labor shortage. Similarly, while it may be possible to quantify the direct effect that certain transition activities had on a specific portion of a registrant’s business (e.g., a registrant incurred additional expense to hire additional staff to track and report ESG matters), less determinable is the effect when the achievement of lower carbon emissions is only one of several reasons for an expenditure.

In light of these uncertainties, other approaches might be better suited for providing meaningful information about the impact of climate-related matters on a registrant’s financial

performance. Proposed Rules 14-02(c) and (d)¹⁷ have analogues to the requirements of Item 303(b) of Regulation S-K, which require the registrant to discuss in Management’s Discussion and Analysis of Financial Condition and Results of Operations (“**MD&A**”) “information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations [including] [w]here the financial statements reflect material changes from period-to-period in one or more line items... the underlying reasons for these material changes in quantitative and qualitative terms.”¹⁸ The resulting MD&A disclosure might *quantify* the amount that a financial statement line item increased or decreased and then *qualitatively* describe the reasons for such change (e.g., revenue increased because of an increase in volumes sold offset by a decrease in price per unit). While a registrant might quantify in its MD&A the change in a financial statement line item due to a *direct* effect (e.g., an increase in revenue due to an increase in volumes sold or prices realized), it would be atypical for a registrant to quantify the change due to an *indirect* effect (e.g., the end of government stimulus payments as it affected demand for products/services). This model – which describes the underlying reasons for period-to-period changes and *allows*, but *does not require*, quantification of the contributing factors – may be a more feasible and practical alternative to the climate-related metrics as currently contemplated by the Proposed S-X Rules.

Third-Party Inputs. It is unclear how a registrant would obtain the external information the Proposed S-X Rules contemplate.¹⁹ In general, third-parties are under no obligation to provide such information and are likely to be reluctant to do so, for competitive, proprietary or other reasons. Even if a third-party was willing to provide climate-related information, it would be a difficult and, in some cases, even subjective exercise for it to determine whether and to what extent a change in a particular cost or input was driven by climate-related events. Furthermore, it would be difficult, if not impossible, for the registrant to document the information provided by a third-party at a level of assurance sufficient for audited financial statements.²⁰ We also question whether it would be reasonably possible to obtain this information on a timely basis.

Lost Revenues. On their face, the Proposed S-X Rules seem to contemplate that a registrant must quantify the loss of revenue that it otherwise would have received but for the impact of the climate event or transition. As the first example of a financial impact of severe weather events and other natural conditions, Proposed S-X Rule 14-02(c)(1) lists “[c]hanges to revenues or costs from disruptions to business operations or supply chains.”²¹ As the first

¹⁷ Proposing Release, at 453-54.

¹⁸ 17 C.F.R. § 229.303(b).

¹⁹ The Proposing Release appears to contemplate that the impacts required to be reported would encompass the impact of climate on the registrant’s suppliers or other third parties, i.e., to the extent that the price of an input has been affected by climate events or transition costs, the amounts attributable to the climate impact must be calculated and included in the financial metrics. For example, the Proposing Release identifies the following climate impact: “Cost of revenue was impacted negatively by Events A and B . . . driven by increased input costs impacted by severe weather events that strained the registrant’s main supplier.” Proposing Release, at 122. Similarly, Proposed S-X Rule 14-02(d)(2) identifies as an impact from transition activities, “Changes to operating, investing, or financing cash flow from changes in upstream costs.” Proposing Release at 124 (emphasis added).

²⁰ We would expect registrants (perhaps required by their external auditors) to put in place requirements to obtain information analogous to a System and Organization Controls (“**SOC**”) Report from their suppliers to verify data collected, which will certainly increase costs for both the supplier and the registrant.

²¹ Proposing Release, at 453.

example of a financial impact related to transition activities, Proposed S-X Rule 14-02(d)(1) lists “[c]hanges to revenue or cost due to new emissions pricing or regulations resulting in the loss of a sales contract.”²²

If a quantification of lost revenues was the intent, we believe this requirement is problematic for several reasons. First, it is inconsistent with a key principle of Generally Accepted Accounting Principles (“GAAP”), which is that revenue can be recognized only when it has been earned, as prescribed in Staff Accounting Bulletin No. 101 (Revenue Recognition in Financial Statements).²³ To allow a registrant to quantify revenue it would have earned but for the occurrence of some intervening event violates that principle and likely would be misleading. For such reason, the Commission Staff does not permit registrants to present unearned revenues in non-GAAP financial measures.²⁴ Second, any effort to identify and quantify “lost revenues” will be inherently subjective, because, by definition, it would turn on predictions as to events that did not occur. Even if it were possible to objectively predict whether revenue would have been obtained but for a climate or transition event, determining the amount of such hypothetical revenue and what portion of it is reasonably attributable to the event, as opposed to other causes, would be exceedingly difficult, if not impossible. In some cases, the only way of obtaining this information would be to ask the customer why she did not purchase the product or service in question, who would not be obligated to answer the question. In short, in no way would this new information be “mainly derived from existing financial statement line items.”²⁵

The Proposed S-X Rules also do not address how registrants are to account for delayed, as distinguished from lost, revenue. Severe weather events and other natural conditions may merely delay certain revenue and related expense, which may be recaptured in a later reporting period. Indeed, given the passage of time, the financial impact may be nothing more than the time value of money or may be impacted by other intervening events unrelated to climate. As a result, the initial disclosure of the financial impact of severe weather events and other natural conditions may mislead investors despite the registrant’s diligent and good faith estimates. Moreover, when the “delayed” revenue is finally earned, would such amount also be included in the Article 14 footnote for that fiscal year?

2. One Percent Reporting Threshold

Proposed S-X Rule 14-02(b) would require disclosure of financial impacts on each line item of the registrant’s financial statements if the sum of the absolute values (i.e., both positive and negative impacts) exceeds one percent of the total line item for the relevant fiscal year.²⁶ It would require disclosure of climate-related expenditures if the amount of such expenditures

²² Proposing Release, at 454.

²³ SEC Staff Accounting Bulletin No. 101, 17 C.F.R. Part 211 (Dec. 3, 1999).

²⁴ See SEC Non-GAAP Financial Measures Compliance and Disclosure Interpretation, Question 100.04 (May 17, 2016).

²⁵ Proposing Release, at 49.

²⁶ Proposing Release, at 452-53.

exceeds one percent of total expenditures expensed or total capitalized costs incurred, respectively, for the relevant fiscal year.²⁷

We are concerned about the one percent threshold for several reasons.

First, one percent is too low a threshold for disclosure. It falls well below the Commission Staff's longstanding rule of thumb of 5% as an initial threshold for assessing quantitative materiality in financial statement items,²⁸ and the Commission provides no reason why a lower threshold would result in more meaningful information being provided to users.²⁹

Second, with respect to the impact on a financial statement line item, we do not understand the rationale for using the sum of absolute values to determine whether the threshold is exceeded, other than to increase the likelihood that the threshold will be met. We doubt that such information would be meaningful to investors.

Third, applying the threshold will involve significant compliance difficulties; for example, information about *all* climate impacts and expenditures will have to be tracked and developed on an ongoing basis as the year goes on, even though the registrant will not know until year-end whether the reporting threshold as to any line item or expenditure category will have been triggered. Preparers will need to manually evaluate transactions at a threshold much lower than one percent to mitigate the risk that individual amounts, which may otherwise be considered *de minimis* or clearly trivial, will exceed the one percent threshold in aggregate.

Fourth, because the amounts of particular line items vary significantly from others, the disclosure thresholds will be very different for each line item and likely for each company, thereby resulting in uneven and incomplete disclosure about the impact of severe weather events and transition activities. It will not achieve the objective of producing disclosure that is relevant to investors, nor will this disclosure be comparable to any other registrant.

Finally, a disclosure threshold based on a very low percentage may have unintended consequences. The FASB has a technical project on improving the decision usefulness of business entities' income statements through the *disaggregation* of certain expense captions.³⁰ Because the percentage threshold would apply on a line item-by-line item basis, registrants may be incentivized to *aggregate* line items in order to avoid disclosure of climate impacts.

²⁷ Proposing Release, at 453.

²⁸ SEC Staff Accounting Bulletin No. 99, 17 C.F.R. Part 211 (Aug. 12, 1999) (stating that “[one] rule of thumb in particular suggests that the misstatement or omission of an item that falls under a 5% threshold is not material”). In contrast, the one percent threshold noted in the Proposing Release applies specifically to excise taxes and other items cited in the footnote. *See* Proposing Release, at 121, n. 347.

²⁹ In this regard, we agree entirely with the Council of Institutional Investors in its comment letter on the Proposed Rules, which states: “In our view, the SEC has failed to provide sufficient circumstances to justify a 1% threshold for the proposed note On balance . . . we believe . . . a materiality qualifier could strike a better balance between the anticipated benefits to investors, and the cost of collection, reporting, and auditing of the proposed note disclosures.”

³⁰ *Disaggregation—Income Statement Expenses*, FASB (Oct. 6, 2021), <https://www.fasb.org/Page/ProjectPage?metadata=fasb-FinancialPerformanceReporting%E2%80%9494DisaggregationofPerformanceInformation-022820221200>.

If the Commission does adopt financial statement footnote disclosure requirements, we propose that, in lieu of a percentage test, the Commission adopt a materiality standard whereby disclosure would be required by identifiable event (for severe weather events and other natural conditions) and by activity (for transition activities) when the impacts of such an event or activity are material to a registrant's financial statements. We suggest limiting the disclosure to impacts to a registrant that are a direct result of a climate-related event or transition activity and not a result of impacts to or actions taken by any third party. When the impacts of a climate-related event or transition activity are material to a registrant's financial statements, then disclosure could be required for all financial statement line items impacted. This would better align with how registrants track and view impacts internally. In our view, as proposed, disclosure by each line item is not operational because registrants generally do not track climate-related impacts by financial statement line item and doing so is likely not possible under current accounting systems in which revenues and costs lose attribution when recorded, reclassified or allocated across different line items.

3. Prospective Financial Information About Climate-Related Risks

Proposed S-X Rule 14-02(i) provides that the financial metrics “must also include the impact of any climate-related risks...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.”³¹ The rule incorporates the definition of “climate-related risks” in proposed Item 1500(c) of Regulation S-K: “the actual or potential negative impacts of climate-related conditions on a registrant's consolidated financial statements, business operations, or value chains, as a whole.”³² Proposed Item 1502(a) of Regulation S-K requires the registrant to “[d]escribe any climate-related risks reasonably likely to have a material impact on the registrant, including on its business or consolidated financial statements, which may manifest over the short, medium, and long term.”³³

It is difficult to understand exactly what this aspect of the Proposed S-X Rules is asking registrants to do. Proposed Rules 14-02(c) and (d) require registrants to quantify the impact of climate-related risks on *historical* operations,³⁴ but the disclosure of climate-related risks in Proposed Item 1502(a) of Regulation S-K describes *future* risks. Therefore, it appears that Proposed Rule 14-02(i) contemplates that registrants would quantify the impact of climate-related risks (specifically, “physical risks” and “transition risks,” as Item 1500(c) indicates)³⁵ on *future* operations. This, in turn, would require the registrant to develop projections about the financial impacts of possible future events. Such projections would have to be based on numerous assumptions and involve a high degree of management judgment. For such reasons, we believe that the application of Proposed Rule 14-02(i) may be even more impractical and cost-prohibitive than Proposed Rules 14-02(c) and (d) and also present significant potential

³¹ Proposing Release, at 456.

³² Proposing Release, at 457.

³³ Proposing Release, at 463.

³⁴ Proposing Release, at 453-54.

³⁵ Proposing Release, at 457-58.

litigation risk to registrants. Effort and cost aside, it is hard to imagine that such projections, even if they could be developed, would rise to the level of reliability necessary to merit their inclusion in audited financial statements. Given the wide-open nature of these forward-looking determinations, it may be very difficult for auditors to assess the reasonableness of the projections and resulting metrics data.

4. Lack of Guidance

For purposes of calculating the climate-related metrics, the Proposed S-X Rules reference the climate-related definitions in proposed Item 1500 of Regulation S-K.³⁶ These definitions are general in nature, and Proposed S-X Rules 14-02(c) through (j) provide little in the way of methodology or guidance to assist registrants in applying the broad requirements to develop and disclose financial statement metrics.³⁷ For example, there is no definition of “severe weather events and other natural conditions.”³⁸ We contrast such brevity with the specificity provided in Rule 4-10(c) of Regulation S-X (Application of the Full Cost Method of Accounting), one of the few other instances in which the Commission supplanted the FASB’s accounting standard setting function.

The Proposing Release acknowledges that the disclosures “would involve estimation uncertainties that are driven by the application of judgments and assumptions, similar to other financial statement disclosures (*e.g.*, estimated loss contingencies, fair value measurement of certain assets, etc.).”³⁹ Rather than provide more specific standards, Proposed S-X Rule 14-02(a) would require registrants to provide “contextual information” that describes “how each specific metric was derived, including a description of specific inputs and assumptions used, and, if applicable, policy decisions made by the registrant to calculate the specified metrics.”⁴⁰ As noted above, there are various aspects of the Proposed S-X Rules that present substantial uncertainties about their application and how the relevant numbers will be determined, and the lack of guidance will make registrants’ efforts to comply with the Proposed S-X Rules even more difficult.

The Proposed S-X Rules’ requirement for contextual information is unlikely to ameliorate this concern. It leaves registrants to their own devices to develop an accounting methodology – including methods of estimation – for many of the financial metrics. Because of such non-standardization and the liberty in application that the Proposed S-X Rules seem to allow, we are concerned about inconsistency and comparability issues that may arise.

³⁶ Proposing Release, at 457-62.

³⁷ Proposing Release, at 453-56. Proposed S-X Rule 14-01(c) provides that when calculating the financial statement metrics, the registrant, in general, must “use financial information that is consistent with the scope of the rest of its consolidated financial statements included in the filing” and “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.” Proposing Release, at 452. As discussed above, however, many of the concepts set forth in the proposed rules do not appear in, or have close analogues to, GAAP. These clauses therefore provide little aid in applying the climate-related metrics.

³⁸ Proposing Release, at 453.

³⁹ Proposing Release, at 110.

⁴⁰ Proposing Release, at 452.

Depending on the industry and company, the reported metrics might vary greatly, decreasing the validity and usefulness of such information.⁴¹

B. Auditing the Financial Statement Metrics Is Impractical

By including the financial statement metrics in the notes to the financial statements, the Commission would bring that data within the scope of the external audit of the financial statements.⁴² The Proposing Release does not elaborate on how such an audit would work in practice nor does it appear that the Public Company Accounting Oversight Board (“PCAOB”) has weighed in on the subject.

We think that including these metrics within the scope of the external audit is problematic for several reasons. First, the objective of the audit, as applied to the climate-related metrics, is unclear. The Proposing Release does not explain whether the audit is intended to specifically confirm the reported numbers or whether the metrics will be encompassed within the audit of the financial statements as a whole. If it is the latter, then there will be issues under existing audit standards, such as the extent to which the metrics are considered significant accounts and the procedures to be applied, which will be subject to the auditor’s judgment. The auditor will also have to consider the materiality of this information in planning its audit. The result may be that the auditor may not deem it necessary to pay special attention to the climate-related financial statement metrics.

Second, as discussed above, given the many substantive accounting concerns about the metrics, it is at best uncertain whether the information is “auditable.” It is unclear how the auditors will be able to obtain sufficient audit evidence to obtain “reasonable assurance” that the information is free from material misstatement.

Third, even if the audit covers the climate-related metrics, the auditor’s report is unlikely to convey meaningful information about these metrics. The report expresses the auditor’s opinion that “the financial statements, taken as a whole, are presented fairly, in all material respects, in conformity with the applicable financial reporting framework.”⁴³ It does not express an opinion on any specific information in the financial statements. In light of these considerations, an audit of climate-related metrics is unlikely to convey any meaningful assurance to users of the financial statements.

If the Proposed S-X Rules are adopted, then the Commission will have effectively created a new set of accounting standards for climate impacts for which substantial guidance to auditors about how to audit such information likely will be necessary. At a minimum, such guidance is necessary to provide consistency in application of the audit requirement across accounting firms. Therefore, an audit requirement should only be imposed after the PCAOB considers whether

⁴¹ We analogize to the Commission’s XBRL rules, which allow registrants to create custom XBRL tags; such flexibility has reduced the comparability of inter-company financial data and made XBRL data less useful than it might be otherwise. *See U.S. GAAP – XBRL Custom Tags Trend*, U.S. Securities and Exchange Commission (June 29, 2021), https://www.sec.gov/structureddata/gaap_trends_2020#_ftn5.

⁴² Proposing Release, at 144.

⁴³ PCAOB Auditing Standard AS 3101.02, Release No. 2017-001 (June 1, 2017).

new auditing standards or guidance are possible and necessary and, if so, adopts such standards or issues such guidance.

C. Subjecting Climate-Related Metrics to ICFR Is Also Problematic

Inclusion of climate-related financial metrics in the notes to the financial statements would also bring these metrics within the scope of a registrant's ICFR.⁴⁴ Similar to the audit requirement, the Proposing Release does not discuss how it envisions ICFR would operate with respect to the climate-related information.

As with the audit requirement, we believe that making the climate-related metrics subject to ICFR will be problematic. Under the Commission's rules, ICFR is a process that is designed and effected, *inter alia*, "to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles."⁴⁵ Management is required to perform an annual evaluation of the effectiveness of ICFR and, with some exceptions for smaller companies, the registrant's independent auditor is required to audit the effectiveness of ICFR.

Substantial effort and expense are likely to be incurred in designing and implementing an ICFR system that will allow management to satisfy the "reasonable assurance" standard with respect to climate-related financial metrics included in the financial statements. Registrants will have to design, implement and test new controls that govern each of the categories of data specified in Proposed S-X Rule 14-02, as well as controls that govern matters such as determining the events that must be reflected in the metrics, identifying relevant transactions and making judgments and estimates. The controls will have to include appropriate management review for these determinations as well as documentation of the determinations. Management will then have to consider these metrics in evaluating the effectiveness of ICFR. The required external audit of ICFR will involve similar issues as those described in the previous section discussing the audit of financial metrics.

D. Need for Input by the FASB

In our view, substantial additional vetting and analysis would be necessary for the Commission to adopt requirements that financial statements include climate-related metrics. We believe that consideration of new accounting rules of this scope and complexity is not something that should be undertaken by the Commission in a single round of notice-and-comment rulemaking, especially on a compressed timetable. To the extent the Commission believes that climate-related financial data should be included in financial statements, we believe that the FASB is better suited for the task of developing the standards for such data. For almost 50 years, the Commission has looked to the FASB, an independent expert body, to determine GAAP. In 2003, the Commission formally recognized the FASB as the standard-setter for GAAP pursuant

⁴⁴ Proposing Release, at 41.

⁴⁵ 17 C.F.R. § 13a-15(f).

to Section 19(b) of the Securities Act.⁴⁶ The Commission retains overall authority over accounting standards for financial statements filed with the Commission, which it has exercised from time-to-time by promulgating new or amended accounting rules via Regulation S-X or releasing accounting guidance that is incorporated into GAAP. In practice, however, FASB has been entrusted by Congress and the Commission with considering the need for new or revised accounting standards and considering and adopting appropriate standards after a comprehensive process.

We believe that FASB's rigorous standard-setting process should be followed in a proposal of this magnitude, and all stakeholders would benefit from the FASB's input. FASB's due process procedures include a rigorous cost-benefit analysis.⁴⁷ FASB has the technical expertise to consider how climate-related financial data relates to existing accounting principles and how to integrate such data into existing standards. In addition, FASB can consider whether proposed new standards are "operational" and "auditable." FASB also provides a meaningful forum for these issues to be fully considered based on input from relevant stakeholders. Further, FASB is well versed in considering and addressing interpretation and implementation issues that arise under new accounting standards.

E. Need for More Assessment of the Benefits and Costs of the Proposal

The Proposing Release contains little economic analysis of the impact of the Proposed S-X Rules. While the Proposing Release's cost/benefit discussion contains a lengthy, though generalized, discussion of the benefits of such disclosures,⁴⁸ it does not discuss the costs that registrants are likely to incur to implement the requirements of the Proposed S-X Rules. We believe these costs are likely to include substantial expenses for development and implementation of new systems and controls to identify and quantify the new climate-related impact information. The closest the Proposing Release comes to a discussion of costs is an estimate that preparation of the financial statement metrics would add 70 additional burden hours per filing.⁴⁹ This estimate, besides seeming low on its face, does not appear to satisfy the applicable standards for the Commission to consider the economic impact of its proposed regulation.⁵⁰

The Proposing Release estimates that the incremental cost of auditing the new note pertaining to the climate-related financial statement metrics and associated disclosures would be

⁴⁶ SEC Policy Statement: Reaffirming the Status of the FASB as a Designated Private-Sector Standard Setter, Release Nos. 33-8221, 34-47743 (Apr. 25, 2003).

⁴⁷ *Cost-Benefit Analysis*, FASB (2014), <https://www.fasb.org/Page/PageContent?pageId=%2Fabout-us%2Fstandardsettingprocess%2Fcba.html>.

⁴⁸ Proposing Release, at 346-51.

⁴⁹ Proposing Release, at 428. Notably, the Proposing Release extensively discusses the costs related to GHG disclosures and related attestation requirement. See Proposing Release, at 379-83. There is no corresponding discussion of costs related to Proposed S-X Rules.

⁵⁰ See Division of Economic and Risk Analysis and the Office of the General Counsel, *Current Guidance on Economic Analysis in SEC Rulemaking*, SEC (Mar. 16, 2012), https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf; see also *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

\$15,000.⁵¹ We believe that this estimate is unrealistically low. The estimate appears to be premised on the assumption that the financial statement metrics simply involve “disaggregation of information” and are analogous to segment reporting and disaggregation of revenue.⁵² As we discuss above, we do not believe this is the case. We believe that an audit of the climate note, if feasible at all, will involve considerably more work and expense by the auditor than merely reviewing a disaggregation of data. Among other things, the auditor will have to assess the reasonableness of the registrant’s potentially subjective determinations regarding what costs are attributable to climate-related activities and the methods of estimation that the Commission acknowledges will underlie many of the reported metrics.⁵³

F. Recommendations

In light of the foregoing, we have the following recommendations:

- The Commission should consider withdrawing the proposal to incorporate climate-related financial metrics into the notes to the audited financial statements. As discussed above, casting climate metrics as accounting standards in the form set forth in the Proposed S-X Rules presents extensive substantive and implementation difficulties and raises questions about the necessity and feasibility of subjecting such information to the external audit and ICFR.
- To the extent it concludes that some form of financial metrics would be useful to investors, the Commission should consider whether to include the information elsewhere in the applicable report. One alternative would be to include disclosure of specified climate-related metrics in MD&A or a similar discussion in a new Climate-Related Disclosure section. Such a discussion could include some quantitative data and also a qualitative discussion of changes in the data from period-to-period. Like other discussion in MD&A, the information would not be audited or part of ICFR, and, therefore, the concerns about requiring an audit and assessing related ICFR would be mitigated. Another alternative would be to include climate-related financial metrics in a supplemental schedule that would not be audited.
- The Commission should carefully examine whether any of the proposed financial statement metrics will in fact provide information that will have value to investors and should perform a full cost/benefit analysis specifically focused on Proposed Article 14 of Regulation S-X.

⁵¹ Proposing Release, at 428.

⁵² Proposing Release, at 428, n.1043.

⁵³ The Proposing Release does recognize at another point that “subjecting these climate-related disclosures to reasonable assurance pursuant to an audit would require the auditor to assess the risk of material misstatement related to the estimates and judgments, including through evaluation of the method of measurement and reasonableness of the assumptions used, and to understand management’s risk management processes, including the accuracy of the proposed disclosure, thereby alleviating possible concerns about the data’s reliability and comparability.” Proposing Release, at 350.

- In any event, the Commission should include in the financial statements only identifiable direct costs and capital expenditures that are incurred for the express purpose of addressing climate events and transition issues. Such measures could be produced and audited with a level of certainty and comparability that is consistent with GAAP financial statements.
- If the Commission believes that climate-related accounting standards should be considered, it should refer to FASB the question of whether accounting standards should be adopted to incorporate climate-related financial statement metrics in the notes to the financial statements, and, if so, what metrics should be adopted.
- Any requirement for financial statement disclosure of climate-related metrics should be phased-in over reasonable periods of time to reflect the substantial implementation steps that will be necessary for a registrant to be able to provide reliable data.

III. Proposal to Amend Regulation S-K

We generally support the Commission’s decision to broadly align the definitions used in the Proposed Rules with those of TCFD framework and the GHG Protocol. We offer the following comments to each of the proposed Regulation S-K items.

A. Item 1500 – Definitions

First, we note that the definitions in proposed Item 1500 do not fully correspond to the definitions in (i) the glossary of the TCFD’s October 2021 updating report,⁵⁴ which are mostly unchanged from the TCFD’s October 2017 report;⁵⁵ (ii) Appendix A of IFRS S1;⁵⁶ or (iii) Appendix A of IFRS S2.⁵⁷ We believe that the variance in definitions will pose potentially significant challenges for public companies that already reference the TCFD framework and the GHG Protocol and expect to reference the ISSB standards, once adopted. We believe the Commission should endeavor to align any disclosure requirements, including defined terms, it seeks to promulgate with those issued by the ISSB.

Second, as noted above, we do not believe the Item 1500 definitions⁵⁸ are sufficiently precise to enable the quantified disclosures called for by the Proposed S-X Rules. We believe this will result in companies needing to adopt accounting policies to interpret the Item 1500 definitions for purposes of the climate-related financial disclosures footnote, which could result in information that is not comparable across different registrants.

⁵⁴ Proposing Release, at 457-62; *Task Force on Climate-related Disclosures 2021 Status Report*, TCFD, 102-02 (Oct. 14, 2021), <https://www.fsb.org/wp-content/uploads/P141021-1.pdf>.

⁵⁵ *Recommendations of the Task Force on Climate-related Financial Disclosures*, TCFD, 62-64 (June 2017), <https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf> (“**TCFD Guidelines**”).

⁵⁶ IFRS S1, at 40-41.

⁵⁷ IFRS S2, at 44-48.

⁵⁸ Proposing Release, at 457-62.

Finally, with respect to disclosures in the new “Climate-Related Disclosure” section, we believe that the Item 1500 definitions are in some cases overly prescriptive and in other cases insufficiently precise to provide useful guidance for disclosures. As an example of the former, we believe that defining “location” with reference to ZIP codes or the equivalent⁵⁹ is unnecessarily prescriptive and will not necessarily lead to companies providing the most useful information as to the location of properties subject to physical risks (if such information is ultimately required). Registrants with extensive land holdings of a particular type or in a particular area may be required to provide a number of different ZIP codes to comply with the Proposed Rules, while a less prescriptive definition would allow for a qualitative description of the types of properties owned, which may be more useful to provide an investor an understanding of climate-related issues. As an example of the latter, we believe the definition of “Scope 3 emissions”⁶⁰ may not be sufficient to enable registrants to calculate Scope 3 emissions (if such disclosures are required). The GHG Protocol, on which we believe this definition is based, provides pages of descriptions of each applicable category.⁶¹ We believe more information of this type would be necessary to be able to actually calculate Scope 3 emissions, if required.

B. Item 1501 – Governance

1. General Comments

We support the Commission’s proposal to base the governance disclosure on the TCFD framework. As noted in the Proposing Release, among the reasons for basing the proposals on the TCFD framework is that it would require less effort to comply for the many registrants who are already attempting to adhere to the TCFD framework.⁶² To best realize the compliance efficiencies offered by use of the TCFD framework, we encourage the Commission to minimize the number of departures and variations from that framework and, in particular, to limit the more prescriptive disclosures called for by the Proposing Release. For example, the TCFD disclosure item related to board oversight is concisely stated: “Describe the board’s oversight of climate-related risks and opportunities.”⁶³ The TCFD disclosure item related to management is similarly concisely stated: “Describe management’s role in assessing and managing climate-related risks and opportunities.”⁶⁴ In contrast, the Commission’s proposal is much more prescriptive.

While we note many of the Commission’s more detailed requirements are derived from TCFD implementation guidance, we believe a more effective rule would be to follow the principles-based approach of the core TCFD recommendations. We believe this approach recognizes the wide variety of registrants that have their own governance structures, vary in size and capabilities, and have different climate-related issues. The TCFD principles-based approach

⁵⁹ Proposing Release, at 459.

⁶⁰ Proposing Release, at 460-61.

⁶¹ *Technical Guidance for Calculating Scope 3 Emissions*, Greenhouse Gas Protocol (2013), https://ghgprotocol.org/sites/default/files/standards/Scope3_Calculation_Guidance_0.pdf.

⁶² Proposing Release, at 34-35.

⁶³ TCFD Guidelines, at 14.

⁶⁴ TCFD Guidelines, at 14.

would thus allow registrants to tailor disclosure to their unique circumstances rather than having to include the detailed items required to be disclosed by the Proposed Rules. In addition, private market guidance on climate-related disclosure, including with respect to governance matters, is continuing to evolve and an approach consistent with the TCFD framework would provide flexibility and better accommodate the further development of that disclosure.

We believe that requiring disclosure in the detail called for by the Proposed Rules would likely result in disclosures that often would be duplicative and otherwise not material or useful to investors. To the extent that any of the detailed information might in some circumstances be useful, that information could be elicited with instructions to Item 1501(a) identifying matters for registrants to consider to the extent they are applicable and material. In short, closer adherence to the principles-based approach of the TCFD framework would achieve the Commission's stated objective of expanded climate-related governance disclosure by public companies and would do so in a way that is consistent with disclosure of governance of other financially material matters.

In addition, we believe that disclosure about policies and procedures pertaining to boards and management, as disclosure about corporate governance, should be included in Item 407 or another item in the 400 series of Regulation S-K rather than as Item 1501. In this way, this information, like other Item 407 disclosures, would be included in a registrant's proxy statement on Schedule 14A or information statement on Schedule 14C. We believe that investors are most likely to consider these board and management governance disclosures in connection with voting decisions, and to use that disclosure to encourage socially-responsible corporate behavior. By including climate-related governance together with other governance disclosures, bifurcation of similar governance disclosures would be avoided, and investors would have more informative and useful disclosures for voting and investment decisions.

We note that Item 407(h) already elicits comparable disclosure: "In addition, disclose the extent of the board's role in risk oversight of the registrant, such as how the board administers its oversight function, and the effect that this has on the board's leadership structure."⁶⁵ We also note that, in its proposal on cybersecurity disclosure, the Commission proposed to include part of the governance disclosure in Item 407. We note that the proposed rules requiring the disclosure of cybersecurity expertise include an express safe harbor confirming that a person determined to have expertise in cybersecurity will not by virtue of such determination be deemed an expert for purposes of Securities Act liability or impose any additional duties, obligations or liability greater than in the absence of such designation. We strongly encourage the Commission to include a similar safe harbor for any disclosure provisions requiring identification of climate-related expertise as well.

2. Specific Comments

In addition to the foregoing, we have the following comments on the specific information requirements of proposed Item 1501:

⁶⁵ 17 C.F.R. § 229.407.

- Climate-related expertise. Requiring disclosure of whether any board member has expertise in climate-related risks⁶⁶ would not, based on our experience, provide meaningful information to investors but instead could give a misleading impression that such expertise on the part of a board member is necessary for a registrant to have an effective climate-risk management system when that is not the case. Not all public companies present climate-related challenges that would make having a board member with expertise in climate-related risks a necessary advantage. In addition, we are concerned that requiring disclosure of such board member expertise would encourage populating boards with individuals having specialized expertise in discrete areas in contrast to those with broad business experience and judgment, which would be to the detriment of effective corporate governance. We believe the most desirable composition for a board of directors should be left to the particular company and its stockholders.

We believe that Items 401(e)(1) and 407(c)(2)(v) already elicit sufficient disclosure related to the background and capabilities of board members and management. Registrants also would be free, as part of their overall climate-risk governance disclosure, to identify climate-related risk expertise they considered informative for investors. We also note that requiring disclosure of climate-related expertise would raise the issue of the need for guidance as to what constitutes “climate-related expertise” (similar to the guidance provided by Item 407(d)(5)(ii) for an “audit committee financial expert” and Item 407(d)(5)(iii) as to how a board member would acquire such expertise) and whether a safe harbor analogous to that provided by Item 407(d)(5)(iv) would be necessary (which the Commission has offered in connection with the proposed cybersecurity disclosure rules).

If the Commission nevertheless concludes that some description of board capabilities should be required, we believe it would be preferable, and avoid issues as to what constitutes climate-related expertise, if the item read as follows: “Whether any member of the board of directors, in the judgment of the board, has relevant qualifications or experience in regard to climate-related risks, with disclosure in such detail as necessary to describe the nature of such qualifications or experience.”

At the management level, requiring detail of the expertise of particular individuals could be challenging because staffing can change frequently. Further, the expertise of any individual does not necessarily reflect the registrant’s collective expertise, both from internal and external resources. Therefore, we believe that it would be preferable to call for a general description, with instructions identifying factors a registrant might want to consider to the extent applicable and material.

- Frequency of discussion. We believe that requiring disclosure of the processes and frequency by which boards and board committees discuss climate-related risk⁶⁷ would be too detailed to provide useful information and would not take into account the

⁶⁶ Proposing Release, at 462.

⁶⁷ Proposing Release, at 462.

significant variability that likely would result, based upon changing circumstances. Instead, a registrant could be instructed to discuss any standing policies under which climate-related risks are brought to the attention of and discussed by the board and board committees to the extent relevant to investors. We note that the current disclosure requirements already provide relevant information as follows:

- Item 407(b)(1) requires disclosure of the total number of board meetings during the year (without disclosure of subject matter covered);
- Item 407(b)(3) requires disclosure of the total number of committee meetings during the year (without disclosure of subject matter covered thereby);
- Item 407(d)(3) requires disclosure of whether the audit committee has covered certain topics; and
- Item 407(e)(5) requires disclosure of whether the compensation committee (or other board committee performing equivalent functions or, in the absence of any such committee, the entire board) has taken certain actions.

Similarly, we do not support requiring disclosure of how frequently there is reporting to the board.⁶⁸ We believe this requirement is unlikely to provide investors with meaningful information and does not take into account how variable such reporting is likely to be, based upon changing circumstances.

- Redundancy with Item 1503. We consider a requirement to disclose whether and how a board or board committee considers climate-related risks as part of its business strategy, risk management, and financial oversight (in Item 1501(a)(iv))⁶⁹ to be adequately covered by the core disclosure required under the TCFD principles-based framework and the proposed risk management disclosure under Item 1503 (including the first sentence of Item 1503(b)).⁷⁰ To the extent the Commission believes more detailed disclosure will be useful, that information could be elicited with instructions to Item 1501(a) identifying matters for registrants to consider to the extent they are applicable and material.

As a governance matter, with respect to Item 1501(a)(v), boards do not typically set climate-related targets or goals.⁷¹ Rather, in the board's oversight role, a board may approve and usually oversees implementation of the targets and goals developed by management. This topic is better left to the core discussion of the board's oversight role and to overall registrant-oriented discussion of climate-risk management under Item 1503 and in MD&A.

⁶⁸ Proposing Release, at 463.

⁶⁹ Proposing Release, at 462.

⁷⁰ Proposing Release, at 467.

⁷¹ Proposing Release, at 462.

- Compensation. We agree with the Commission’s position outlined in the Proposing Release that the existing rules “requiring a compensation discussion and analysis should already provide a framework for disclosure of any connection between executive remuneration and achieving progress in addressing climate-related risks.”⁷²

C. Item 1502 – Strategy, Business Model, and Outlook

As noted in our general comments above, we do not believe prescriptive requirements aligned with the significantly more detailed TCFD implementation guidance are necessary or appropriate. Proposed Item 1502 would elicit a volume of detailed disclosures that, for most public companies, would not be material to investors. For example, we believe that the requirements to disclose locations of all properties that are subject to physical risk will result in extensive disclosure requirements, especially for registrants with extensive property holdings and, as noted above, particularly if location requires ZIP-code level detail.⁷³ We do not believe information of this granularity will provide significantly more relevant information for investors than a requirement to disclose in line with TCFD’s overarching disclosure recommendation, which requires disclosure of “the actual and potential impacts of climate-related risks and opportunities on the organization’s businesses, strategy and financial planning, where such information is material.”⁷⁴ Indeed, by proposing highly prescriptive disclosure requirements, such as those based on flood hazard areas or assets of “high or extremely high water stress,”⁷⁵ the Commission may potentially narrow disclosures related to the full range of environmental or climate issues that are materially relevant to a registrant’s business and strategy. We believe a principles-based approach would be clear, concise and allow registrants to tailor disclosure to their specific circumstances.

We also believe the proposed climate-related disclosures relevant to strategy, business model and outlook may result in more climate-related disclosures on these topics than other external material risks facing registrants. We note that registrants (and all other business organizations) must address a multitude of external issues beyond climate-related issues in developing and adapting their business strategy, such as geopolitical issues; global, country and regional economic issues; societal changes; politics; human capital management matters; other ESG issues (including as they rapidly evolve and expand); technology and related matters (such as cybersecurity, ongoing digitization (including Web 3), technical and ethical issues around artificial intelligence, etc.); market conditions; and legal and regulatory matters, among others. Calling for registrants to provide highly prescriptive disclosures on climate-related risks but not on other matters directly relevant to their strategy, business model and outlook puts undue emphasis on climate-related risks vis-à-vis other critical risks. This in turn may indirectly impose on registrants the potential need to disclose corresponding information on other key issues and risks impacting their strategy, business model and outlook to maintain appropriate balance with climate-related disclosures and to avoid materially misleading disclosure.

⁷² Proposing Release, at 97-98.

⁷³ Proposing Release, at 463.

⁷⁴ TCFD Guidelines, at 14.

⁷⁵ Proposing Release, at 464.

If the Commission believes a highly prescriptive set of disclosure requirements along the lines of Item 1502 is necessary, we would encourage a more thorough alignment of the proposed Item 1502 disclosures with existing disclosure requirements. For example, the Proposed Rules require an analysis of the effects in the “short-, medium-, and long-term time horizons” and require each registrant to explain its own definition of short-, medium-, and long-term.⁷⁶ We believe that climate-related matters should be addressed within the same time short- and long-term time frames used in MD&A.

We also do not believe all registrants have strategies with clear short-, medium- and long-term time horizons, and even those that do often do not clearly disclose those time horizons, including because (i) they are intentionally flexible to enable nimble strategic and crises-related planning and (ii) doing so could result in disclosure that may cause competitive harm. We do not believe the Commission has previously required registrants to specifically define or make disclosures of such time horizons in the critical areas of MD&A or the description of business, and to introduce that concept now in the relatively narrow area of climate-related risk and opportunity seems overly prescriptive, can pose meaningful challenges to management as they seek to adapt their strategies and can result in misalignment of climate-related disclosures with other, potentially more critical strategically-relevant disclosure issues, including the financial statements and MD&A.

Similarly, we would encourage the Commission to omit the terms “business model” and “outlook” from the title and body of the final rules.⁷⁷ We note that “business model” is a term that is not used elsewhere in Regulation S-K. We are not aware of any public companies that disclose their “business model” in Commission filings, and we believe the inclusion of this disclosure requirement would operate to create a perceived requirement that registrants develop a “business model” relevant to public disclosures. We believe the Commission can achieve its goals of eliciting material information related to a registrant’s strategy and outlook without introducing a new concept of Commission-required disclosure around a registrant’s “business model.” Similarly, instead of “outlook,” we believe the Commission should instead refer to known trends, demands, commitments, events or uncertainties, consistent with MD&A requirements.

Finally, while we generally support the Commission’s proposal to require greater disclosure of the analytical tools used by management related to climate change, we would encourage the proposed Item 1502(f) to be combined with paragraph (c) and would encourage the Commission to limit the scope of the proposed requirements related to scenario analysis. We read proposed Item 1502(c) as implicitly capturing the disclosure sought under the first sentence of proposed Item 1502(f).⁷⁸ If Item 1502(f) remains a standalone disclosure requirement as proposed, we do not believe it is likely to provide decision-useful or material information for investors and will be very burdensome to prepare for registrants.

⁷⁶ Proposing Release, at 464.

⁷⁷ Proposing Release, at 463-66.

⁷⁸ Proposing Release, at 465-66.

We believe registrants should not be required to disclose the “scenarios considered”⁷⁹ unless the scenario analysis is conducted and used by senior management and reflects an expected *material* impact on the registrant’s business strategy, financial planning and capital raising, in which case only the material drivers and impacts should be disclosed – not all scenarios considered. We respectfully submit that the Commission is casting too broad a net to propose that registrants disclose the “parameters, assumptions, and analytical choices, and the projected principal financial impacts on the registrant’s business strategy under each scenario considered.”⁸⁰ Based on our experience, we can envision multiple pages of disclosure with charts or tables, all dedicated to hypothetical data and projections and accompanied by paragraphs of disclaimers and other statements needed to come within the safe harbor for forward-looking statements. We believe such detailed and, to varying degrees disclaimed, disclosure would not be material to investors in view of its necessarily speculative nature; could be misleading and or confusing, especially if registrants use multiple scenarios; and would be very challenging for registrants to provide in view of litigation risks. We are aware that other commenters have suggested that registrants may avoid conducting scenario analysis if the result would trigger the disclosures proposed. We believe this concern has considerable merit.

D. Item 1503 – Risk Management

We are supportive of the Commission’s efforts to elicit public company disclosure about how climate-related risks and opportunities are identified, assessed and managed.⁸¹ We acknowledge the Commission’s previous statements that existing rules and regulations under Regulation S-K should be read to capture and elicit material climate-related risks and opportunities and that, nevertheless, public company disclosures have not satisfied investors generally or addressed concerns of the Commission and the staff of the Division of Corporation Finance.

However, similar to our comments on proposed Item 1502, we believe that much of the proposed regulatory text in Item 1503 is overly prescriptive. We therefore respectfully request, as noted in our earlier comments, that the Commission retain those elements of the Proposed Rules that are based on the TCFD’s principles-based disclosure recommendations but not mandate reporting requirements based on the more specific suggested implementation guidance that accompanies those recommendations.

We note in this regard that the TCFD’s overarching disclosure recommendation related to risk management is concisely stated as follows: “Disclose how the organization identifies, assesses, and manages climate-related risks.”⁸² This principles-based approach is clear, concise and allows registrants to tailor disclosure to their specific circumstances. If the Commission declines to adopt such an approach, we believe the proposed Item 1503 should be revised to limit disclosures more to information the registrants has determined to be material and reduce excessively prescriptive disclosures that are the least likely to provide decision-useful

⁷⁹ Proposing Release, at 466.

⁸⁰ Proposing Release, at 466.

⁸¹ Proposing Release, at 466.

⁸² TCFD Guidelines, at 14.

information to investors. For example, disclosures on processes for identifying, assessing and managing climate-related risks should be limited to *material* processes and *material* risks.

We support generally the proposal in Item 1503(c) that registrants disclose whether they have adopted a transition plan as part of their climate-related risk management strategy.⁸³ Climate-related transition plans are rapidly developing and evolving. We would encourage the Commission to apply concepts of materiality to the description of the plan, the relevant metrics and targets used and the actions taken during the year to achieve the goals, and omit the overly prescriptive list of risk topics. We believe less prescriptive requirements would foster better disclosure on these topics.

The Commission has not required public companies to disclose details about their risk management programs in any provision under Regulation S-K. Many public companies provide disclosure – typically in their proxy statements – that explains how management addresses and the board oversees their company’s risks and their identification, assessment and management. In some cases, companies disclose the specific functions or members of management with responsibility for risk management and how such persons report to the board and its committees.

Not only is the current proposal highly prescriptive and detailed, it also largely fails to require climate-related risks to be presented in the context of other risks that the registrant must also address. The sole exception is the reference in Item 1503(a)(1)(i) calling for registrants to disclose how they “[determine] the relative significance of climate-related risks to other risks,”⁸⁴ and this provision does not call for registrants to disclose those “other risks,” which we believe would be important to investors and the markets (to the extent material). Only with this additional context would the proposed more detailed disclosures provide investors and the public markets with clearer information about how public company management and their boards are managing and overseeing material public company risks.

E. Item 1504 – Scope 1 and 2 Emissions

All registrants would be required to disclose their Scope 1 and 2 emissions, regardless of materiality of those emissions to the registrant.⁸⁵ For some sectors, Scope 1 and 2 emissions may be *de minimis*, and the burden and cost to registrants of not only calculating those emissions, but also developing and operating disclosure controls and procedures around the related disclosures, as well as engaging a third-party attestation provider, may significantly outweigh the benefit to investors. At a minimum, we recommend that the Commission limit the requirement to disclose Scope 1 and 2 emissions to only those registrants where disclosure of such emissions is material to the registrant. We also recommend that the Commission make additional modifications in the final rules to help ease the burden of the disclosure requirements, while at the same time furthering the Commission’s goals of increased consistency, comparability and reliability of climate-related disclosures. These suggested modifications are below.

⁸³ Proposing Release, at 468.

⁸⁴ Proposing Release, at 467.

⁸⁵ Proposing Release, at 469.

Eliminate the requirement to disclose emissions on a gas by gas basis. The Proposed Rules would require registrants to disclose their Scope 1 and 2 and, if required, Scope 3, emissions data on both an aggregated and disaggregated, or gas by gas, basis.⁸⁶ The requirement to disaggregate emissions data on a constituent GHG basis would apply regardless of the level or materiality of the particular gas. And although, as the Commission notes, registrants will need to collect this data to determine their overall emissions, the disaggregated disclosure requirement will add, in our view, unnecessary burdens on registrants. We recommend that the Commission eliminate this requirement or, in the alternative, limit the requirement to a materiality standard – either (1) to the extent material to an understanding of the registrant’s overall emissions disclosures, or (2) only those individual gas emissions that comprise over a specified percentage of the registrants’ overall emissions.

Eliminate the requirement to disclose intensity-based emissions. Under the Proposed Rules, registrants would be required to disclose GHG intensity in terms of metric tons of CO₂e per unit of total revenue *and* on a per unit of production basis.⁸⁷ Given the overall increased burden on registrants as a result of the Proposed Rules, we suggest that the intensity disclosure could be eliminated without adversely impacting the overall information provided to investors. Intensity per unit of total revenue will be readily calculable by investors by taking the proposed Scope 1 and 2 emissions disclosure and dividing by the registrant’s total revenue; accordingly, requiring this disclosure does not add any new information. As for per unit of production, there may be many different units of production that can be used by registrants, with the Proposing Release suggesting only a few.⁸⁸ Given the wide variety of units of production that could be possible and the fact that a registrant may have many different potential units of production in its business, a unit of production provided by a registrant may not be easily compared against other registrants, whether in the same industry or in different industries. If a registrant has different business lines, it is unclear from the Proposing Release whether a registrant would need to allocate emissions across business lines and have multiple units of production or, if not, how it would determine which unit of production to use. We believe intensity-based emissions are unlikely to result in comparable, decision-useful disclosure for investors.

Adjust the organizational boundary for equity investees, proportionately consolidated companies and newly acquired companies. As registrants work to calculate their Scope 1, 2 and 3 emissions, significant work will need to be done to establish the organizational boundary.⁸⁹ Whereas an organizational boundary that mirrors a registrant’s financial statements may be useful, we believe that applying that same standard for emissions calculations could have significant unintended consequences for both public companies as well as private companies, many of which are small and lack the resources necessary to provide public reporting companies with the information they will need.

Under the Proposed Rules, a registrant would need to include its proportionate share of emissions from entities that are either accounted for on the equity method or with respect to

⁸⁶ Proposing Release, at 469.

⁸⁷ Proposing Release, at 470.

⁸⁸ Proposing Release, at 181.

⁸⁹ Proposing Release, at 472.

which the registrant consolidates on a proportionate basis.⁹⁰ As a result, for each such entity, a registrant would be required to obtain Scope 1 and 2 emissions information and potentially, Scope 3 information (in order to determine whether Scope 3 emissions are material or if the registrant is including Scope 3 emissions in its targets or goals). This requirement could present a number of challenges for registrants and also result in burdens throughout the value chain. For example, registrants may not have the ability, contractual or otherwise, to obtain this information from investee companies. Even if a registrant does have such an ability, either the registrant or the investee will need to expend resources, which could be significant, to calculate its emissions disclosures, even if the disclosures are immaterial to the registrant as a whole. This would result in a significant burden for numerous private companies that have public company investors, and on a go-forward basis, this could make public reporting companies significantly less attractive investors than other investors who do not require such information from their investees. The rules further lack accommodations for companies that are simply not able to obtain this information from their investees, or are unable to obtain it on a timely basis.

For these reasons, we recommend that the Commission limit application to equity investees and proportionately consolidated entities in some manner, with possibilities including (1) eliminating the requirement altogether, (2) limiting the requirement only to those entities for which the allocable share of emissions represents more than 25% of the registrant's total disclosed Scope 1, 2 or 3 emissions, as applicable or (3) providing an accommodation for entities for which the information is not readily available (e.g., for entities in specific jurisdictions and/or in locales facing extenuating circumstances, whether legal or otherwise, that may prevent the collection of the requisite data).

In addition, unlike certain of the Commission's rules, the Proposed Rules do not contain an accommodation for newly acquired companies. If, for example, a registrant makes an acquisition in the last month of its fiscal year, as proposed, it seems the registrant will need to include the proportionate share of the emissions from the acquired company on a post-acquisition basis. If this is correct, this could have a chilling effect on acquisition activity as some target companies may not be in the position, due to lack of resources or otherwise, to collect their emissions data in a timely manner in order to avoid the acquirer being late in its annual report and associated emissions disclosures, or could lead to significant changes in deal dynamics in an acquisition as timing and responsibility for collection of GHG emissions are negotiated. In addition to having the resources to collect the information, the acquirer would also need to ensure that it has the appropriate controls and procedures to assess the quality of the information, and also make sure that the information is being collected and measured on a basis consistent with the emissions calculations from other parts of its organization. Depending on the timing of the acquisition, the industry in which the target company operates and the existing controls and procedures in place, if any, it may be extremely difficult for the acquiring company to comply with its obligations in a timely manner, even with significant resources. We strongly recommend that the Commission include accommodations for newly acquired companies in the final rules. For example, the final rules could permit registrants to exclude newly acquired companies until the second full fiscal year after which the newly acquired company has been owned by the registrant.

⁹⁰ Proposing Release, at 188-89.

Eliminate the requirement to provide emissions disclosures on an historical basis. Under the Proposed Rules, emissions and other data would need to be provided on an historical basis, unless the information is not reasonably available.⁹¹ Given the scope of the required disclosures and the amount of work that will be required to include this information on a go-forward basis, we believe that the requirement to provide historical information should be eliminated, not only for existing reporting companies, but also for IPO and other registrants filing for the first time. We also believe that the Proposed Rules as drafted open registrants to the risk of having their determination as to whether information is reasonably available second-guessed.

Provide additional time for registrants to prepare their emissions disclosures. The Commission acknowledges in the Proposing Release that commenters have noted it may be difficult for a registrant to complete its emissions calculations for the fiscal year by the deadline for the annual report and accordingly, if actual data is not reasonably available for a fourth quarter, a registrant may use a reasonable estimate for the fourth quarter.⁹² We have concerns that the process of devising and validating an estimation methodology may be time-consuming, particularly in the context of having to satisfy attestation procedures. In particular, a registrant may have to expend significant resources to demonstrate the reasonableness of the estimate to the attestation provider.

As an alternative, we suggest that the Commission consider permitting the annual emissions disclosures to be included in a registrant's first quarter Form 10-Q (or, in the case of FPIs, in a separate Form 6-K furnished within the filing deadlines for quarterly reports on Form 10-Q). With this accommodation, registrants would not need to expend additional resources in devising estimation methodologies and working through those methodologies with the attestation provider. In addition, investors would receive complete emissions calculations, rather than estimates that are subject to updating later in the year.

F. Item 1504 – Scope 3 Emissions

We have significant concerns regarding the requirement for registrants to provide Scope 3 emissions disclosures in their annual reports and registration statements.⁹³ Although the Commission has provided a safe harbor from liability for these disclosures,⁹⁴ we do not believe that the safe harbor will have the effect of lessening the significant burden posed on registrants by the Scope 3 requirements.

First, although a safe harbor from liability is helpful to address some of the inherent uncertainties in the reporting of Scope 3 emissions, as drafted, the safe harbor is overly narrow in

⁹¹ Proposing Release, at 469.

⁹² Proposing Release, at 472.

⁹³ Proposing Release, at 470.

⁹⁴ Proposing Release, at 210.

scope and would only protect registrants in the case of liability under Sections 11 and 12 of the Securities Act, which impose strict liability on the registrant.⁹⁵

Second, in our experience, registrants typically apply the same standards of rigor to the accuracy of disclosure included in a Form 10-K, without regard to whether any “safe harbor” applies to such disclosure. This means the safe harbor will not reduce any disclosure burden, a key concern with respect to the proposed Scope 3 emissions requirement.

Third, although the disclosure is required only if material or if Scope 3 emissions are included in targets and goals,⁹⁶ these two limitations may be of little benefit in practice. A registrant may need to do a significant amount of work regarding calculation of Scope 3 emissions to determine whether such emissions are material in the first place. Because Scope 3 emissions include entities and activities throughout the value chain, even the work of performing a preliminary estimate will be significant. We note that statements in the Proposing Release suggest that the materiality standard should be measured by the proportion of Scope 3 emissions for a registrant to that registrant’s total GHG emissions, which the Commission notes for many industries, could be significant.⁹⁷ This view of materiality seems not to reference the viewpoint of the reasonable investor, the touchstone of materiality.

Even if the Scope 3 emissions are not material, registrants would still need to provide Scope 3 data if it includes such data in its own targets and goals, *even if* those targets and goals are not publicly disclosed.⁹⁸ We note that many companies have established and published targets and goals that include *a limited set* of categories of Scope 3 emissions – for example, employee commuting or business travel. If a registrant includes certain Scope 3 emissions in its targets and goals, will it now have to calculate and disclose *all* categories of Scope 3 emissions? If so, the Proposed Rules could disincentivize registrants from creating any Scope 3 targets and goals if they have not done so already, out of concern that any such targets and goals will then require them to calculate the entirety of their Scope 3 emissions, as well as prepare extensive disclosures, many of which will require third-party involvement.

We further note that, as the Commission observes, the possible universe of Scope 3 emissions is significant, and any calculation throughout the value chain will necessarily be highly dependent on estimates and assumptions.⁹⁹ As the Commission further notes, some quantitative guideposts and estimation sources have been developed for certain activities and industries, but these do not yet exist across all industries, and therefore any attempt to fully calculate and estimate Scope 3 emissions will effectively be estimates of estimates.¹⁰⁰ We agree with the conjecture that the challenges with Scope 3 data collection may recede over time

⁹⁵ Proposing Release, at 210-12.

⁹⁶ Proposing Release, at 470.

⁹⁷ See Proposing Release, at 165 (“When assessing the materiality of Scope 3 emissions, registrants should consider whether Scope 3 emissions make up a relatively significant portion of their overall GHG emissions.”).

⁹⁸ Proposing Release, at 470.

⁹⁹ Proposing Release, at 208.

¹⁰⁰ Proposing Release, at 201-02.

(particularly if the Commission adopts Scope 3 emissions disclosure rules), but it is unclear what costs may be required for that to occur and on what timeline.

Further, reliance on estimations and assumptions by registrants will likely result in inconsistent reporting, and therefore investors will not be able to make informed investment or voting decisions based on Scope 3 reporting. Indeed, we are concerned that the requirement to disclose Scope 3 data may lead investors to believe that the calculation is more precise than it is. Although some of these concerns can be addressed through disclosure of the assumptions made and the nature of the estimates, given how extensive the value chain is, from suppliers to end of life treatment of products, and use of products by customers and beyond, the scope of that disclosure will be voluminous and may not be meaningful to investors, particularly when they seek to compare one company to another.

For these reasons, we encourage the Commission to make certain clarifications and carveouts described below.

Limit Scope 3 emissions data to situations in which such disclosures are material, and clarify the concept of materiality. Under the Proposed Rules, a registrant would be required to disclose its total Scope 3 emissions if they are material.¹⁰¹ We request that the Commission clarify that the materiality standard is measured with respect to the registrant and from the viewpoint of the reasonable investor, rather than with respect to the relative proportion of Scope 3 emissions to a registrant's total emissions. For example, it could be the case that a registrant's overall emissions are very small, but that nearly all of its emissions are Scope 3. In this situation, which we believe occurs frequently in low-emissions industries, Scope 3 emissions disclosure would not be material to the company, but would seem to be nonetheless required when materiality is assessed by reference to total emissions, and the work required to calculate or estimate the Scope 3 emissions may significantly outweigh the benefits of the disclosure.

Even if Scope 3 emissions are not material, a registrant would nevertheless be required to disclose its Scope 3 emissions if it has set a GHG emissions reduction target or goal that includes its Scope 3 emissions.¹⁰² This would be the case *even if* the registrant has not publicly disclosed those targets or goals. As noted, we believe requiring such disclosures could disincentivize registrants to include Scope 3 emissions from its targets and goals and encourage registrants to strongly resist any investor pressure to do so.

In addition, as discussed, many companies already include certain categories of Scope 3 emissions in their targets and goals. A determination to include such emissions should not then result in a registrant having to calculate Scope 3 from its *entire value chain*,¹⁰³ which could be dozens, if not more, of interrelated processes across all of the different categories of Scope 3 emissions. Instead, inclusion of categories of Scope 3 emissions in a registrant's targets or goals should simply oblige the registrant to follow the Commission's guidance with respect to the portion of their Scope 3 emissions included in their target or goals. This would serve to increase

¹⁰¹ Proposing Release, at 470.

¹⁰² Proposing Release, at 470.

¹⁰³ Proposing Release, at 470.

comparability of such reporting across different registrants for investors to assess their investment decisions (since each registrant’s reporting of Scope 3 emissions would align with that registrant’s goals), without discouraging a registrant from disclosing Scope 3 emissions data for fear of exposing themselves to the full obligation of calculating Scope 3 from its entire value chain.

We urge the Commission to limit the requirements for Scope 3 disclosure to situations in which the disclosure would be material to investors.

Limit Scope 3 to certain more easily quantifiable or estimable categories. Across industries, the concept of the Scope 3 “value chain” is wide-ranging, and measuring emissions throughout the value chain necessarily involves estimates for virtually all, if not all, Scope 3 emissions categories. In many areas, deriving such estimates will require registrants to turn to a variety of third-party sources that in turn have devised a series of estimates for particular industries. We recognize that third-party data providers and standards are beginning to emerge to calculate such information, but this information can be expensive to obtain, is necessarily based on very high level estimates and may inadvertently give investors the impression that there is precision in data where such precision does not exist for most industries.

The Proposed Rules appear to require a calculation of emissions from *all* upstream and downstream activities (and would require a registrant to identify and disclose all upstream and downstream activities) in all instances without regard to the materiality of the activity or the emissions from the activity, or the proximity of the registrant to that particular portion of the value chain (i.e., the further proximity the more speculative a calculation of emissions disclosure is).¹⁰⁴ We do not believe it is feasible for a registrant to identify all such activities (particularly using only the definitions in the Proposed Rules, as noted above), nor can it be expected that a registrant will be able to calculate all such Scope 3 emissions, let alone with any degree of accuracy. The GHG Protocol also acknowledges that a comprehensive Scope 3 emissions calculation is not feasible, and instead is constructed around the idea that companies will select certain categories to evaluate and provide emissions disclosures in those areas.¹⁰⁵ Accordingly, we encourage the Commission to allow companies to limit the reporting of their Scope 3 emissions to certain types of categories where estimates may be more readily obtained (e.g., employee commuting or business travel). Doing so will encourage more registrants to begin reporting Scope 3 emissions information voluntarily, and such a requirement would allow registrants to update such disclosure as more accurate Scope 3 emissions information becomes available.

In addition, we recommend that the Commission omit from the final rules the requirement to provide Scope 3 emissions data by significant upstream or downstream activity.¹⁰⁶ Although a registrant will likely have this disaggregated information, the requirement to include additional granular disclosure will put further prominence on information that may not necessarily be material for investors (or comparable across different registrants’ reporting) and

¹⁰⁴ Proposing Release, at 355.

¹⁰⁵ See GHG Protocol 6.1, at 59-60 and GHG Protocol 7.3, at 74-75 *et seq.*

¹⁰⁶ Proposing Release, at 470.

may be heavily, if not entirely, based on estimates. We also believe identification of categories of upstream and downstream activities may require significant additional disclosures with limited benefit to investors. Finally, we also encourage the Commission to provide greater clarity as to how “significance” of a particular category should be understood and revise this requirement to reduce the likelihood of disclosure of immaterial information. If the registrant’s Scope 3 emissions are concentrated in one particular category but are not material in the aggregate (but reporting on Scope 3 emissions is nonetheless required because the registrant has adopted an emissions target which incorporates Scope 3 emissions), the Proposing Release seems to suggest that the particular category’s Scope 3 emissions must be reported specifically. We do not believe that in this situation disclosure of a particular subset of immaterial emissions will provide investors with useful information.

Do not require disclosure of data sources for Scope 3 emissions. We have several concerns with the requirement to disclose data sources used for Scope 3 emissions.¹⁰⁷ First, the specific parties in a registrant’s value chain, such as suppliers or customers, may be confidential, and therefore requiring specific disclosure regarding those sources (even on an anonymized basis) could cause competitive harm, result in breaches of confidentiality agreements or result in additional cost as registrants seek consent for disclosure and preview any disclosure with the applicable third parties. This will add a significant additional process burden to a registrant’s annual report process, particularly in the case where there are multiple third parties in the value chain (as will be the case with almost all companies), many of whom may insist that they review any proposed disclosure prior to filing. In addition, these data providers may have concerns about expertized status under the federal securities laws and may even increase their pricing as a result of a perceived additional risk associated with providing their information. In turn, registrants may need to indemnify such third parties with respect to their information.

As a result, we believe the Commission should not require the disclosure of the names of sources of Scope 3 emissions information, nor should the Commission require the disclosure of the process the registrant undertook to obtain and assess such data.

Do not require disclosure of methodologies and related instructions. The requirement to disclose detailed aspects of the registrant’s methodology, significant inputs, and significant assumptions will require extensive disclosure of information that is unlikely to be material to investors and will require significant additional work by registrants. Many of the proposed disclosures are not qualified by materiality. For example, the methodology must include a disclosure of *any* emissions factors used and the source of any emission factors, as well as disclosure of *any* calculation tools used to calculate GHG emissions.¹⁰⁸ For some registrants, there could be numerous emissions factors used, particularly in the case of Scope 3 emissions or for companies with numerous sources of Scope 1 or 2 emissions, or where they have numerous subsidiaries or equity investees. In addition, many companies may find it more cost-effective to apply emissions factors rather than engaging in extensive data measurement and collection, and the disclosure of each factor could be voluminous without adding significant value to investors. The Proposed Rules provide a registrant may use reasonable estimates when disclosing its GHG

¹⁰⁷ Proposing Release, at 470.

¹⁰⁸ Proposing Release, at 471.

emissions but only so long as it describes the assumptions underlying, and its reasons for using, the estimates.¹⁰⁹ We urge the Commission to limit any required disclosure only to estimates of *material* emissions and only the *material* assumptions made. Without these changes, for complex entities with multiple sources of GHG emissions, we have concerns that the disclosure under these rules could very quickly become significantly longer and more detailed than other portions of the annual report or registration statement. We are also concerned that the time and resources that will be required to prepare and apply controls to this disclosure could be significant, with a disproportionate effect on smaller companies.

G. Item 1505 – Attestation Requirements

We encourage the Commission to defer action on implementing an attestation requirement for GHG emissions at this time. There are widely varying stages of development of U.S. and global standards in measuring emissions data.¹¹⁰ The lack of coherent and generally accepted emissions calculation and attestation standards is in stark contrast to the well-defined accounting standards provided by U.S. GAAP and IFRS and auditing standards provided by the PCAOB. Although standards are beginning to emerge and are being continually refined, and although the Commission recognizes PCAOB, the American Institute of Certified Public Accountants (“AICPA”) and the International Auditing and Assurance Standards Board (“IAASB”) as accepted attestation standards,¹¹¹ without a complete reporting framework for calculating emissions data, it will be difficult for attestation engagements to be completed consistently. We also believe that the PCAOB should address whether GHG emissions-specific attestation guidance is necessary or appropriate to promote consistency in the conduct of these engagements. Finally, we are also concerned about whether there is a sufficient number of qualified attestation providers that are able to conduct these engagements for all public companies. Given the lack of a strong consensus on the emissions reporting standards, as well as attestation standards, we urge the Commission to omit at this time any requirement to attest to registrants’ emissions reporting. As the reporting and attestation standards develop further, a single standards-setting body emerges as the clear leader, and third parties begin to become qualified under these standards, the Commission can then assess whether an attestation standard is appropriate. Before then, however, we are concerned that registrants will be left without sufficient guidance as to the Proposed Rules’ application, as well as a lack of sufficient supply of attestation providers, which will only serve to further increase the burden of the Proposed Rules on registrants.

If the attestation requirement remains in the final rules, we urge the Commission to consider certain implementation and other issues outlined below.

¹⁰⁹ Proposing Release, at 472-73.

¹¹⁰ We note the statement in the Proposing Release that many companies already seek some level of assurance over a portion of their emissions. However, we note this data only speaks to a narrow range of the very largest companies. For many registrants, the burden and cost of compliance with these rules will be significant, and the burden of compliance as standards that may shift as they are developed, rather than being fixed and established, will make compliance more costly, as registrants may be required to re-perform work or adjust methodologies.

¹¹¹ Proposing Release, at 249.

Registrants should not be responsible for the description of the attestation provider’s qualifications. Item 1505(d) would require registrants (rather than attestation providers) to disclose a number of details regarding the attestation provider, including whether the provider is licensed, whether the provider is in good standing, whether the engagement is subject to an inspection program and whether the attestation provider is subject to record-keeping requirements.¹¹² We do not believe that these are appropriate determinations to be made by registrants and instead believe that this disclosure, if retained, should be included in the attestation provider’s report itself. In the absence of a universal certification or credential, registrants will seemingly bear the risk and burden of making a determination regarding the qualifications of an appropriate provider and disclosing these qualifications, and many registrants may lack the expertise to make such a determination or disclosure.

The final rules should permit entities other than registered public accounting firms (“RPAs”) to serve as attestation providers. The Proposing Release poses the question of whether attestation providers should be limited to RPAs.¹¹³ We recommend that qualified attestation providers not be limited to RPAs. Such a limitation would unnecessarily constrict the supply of providers and ignores the fact that other types of enterprises, such as engineering and consulting firms, have expertise in the measurement of GHG emissions and could conduct attestation engagements. Registrants today are using non-RPAs to provide assurance, and requiring them to switch to RPAs would impose an unnecessary burden.¹¹⁴

The Commission should provide additional guidance regarding attestation standards. The Proposing Release compares the new attestation to financial statement audits,¹¹⁵ but such audits differ significantly from the GHG attestation. Financial statement audit practice is so well established that it predates the federal securities laws and the formation of the Commission in 1934.¹¹⁶ We believe attestation providers will need additional guidance on the performance of the GHG attestation.¹¹⁷ In addition, while definitions of limited and reasonable assurance are not necessary, additional guidance as to what is required could be provided. Such guidance for limited assurance could include the following points:

- A limited assurance engagement does not require any testing or sampling of underlying data or documents.

¹¹² Proposing Release, at 478-79.

¹¹³ Proposing Release, at 238.

¹¹⁴ See International Federation of Accountants (“IFAC”), *The State of Play in Sustainability Assurance*, (June 23, 2021) <https://www.ifac.org/system/files/publications/files/IFAC-Benchmarking-Global-Practice-Sustainability-Assurance.pdf> (“**IFAC Assurance Report**”) (noting that 37% of companies use non-audit firms for sustainability assurance).

¹¹⁵ Proposing Release, at 220-22.

¹¹⁶ See Howard B. Levy, *History of the Auditing World, Part 1*, The CPA Journal (Nov. 2020), <https://www.cpajournal.com/2020/11/25/history-of-the-auditing-world-part-1/> (noting auditing textbooks published in 1892 and 1912; the AICPA was established in 1897).

¹¹⁷ See IFAC Assurance Report, (noting the lack of consistent standards for sustainability assurance; among other topics, guidance will be needed on the consistent application of the concept of materiality in the context of attesting on GHGs).

- To provide limited assurance, the attester should perform procedures similar to those for a negative assurance under current attestation standards, which generally include making inquiries of and receiving representations from management, performing analytical review procedures, reviewing results for reasonableness and reviewing the presentation of the data.
- The attestation report should include a description of the nature of the limited assurance.

Such guidance for reasonable assurance could include the following points:

- A reasonable assurance engagement does require testing or sampling of underlying data or documents.
- The level of testing and sampling is a matter of professional judgment but should be sufficient to provide the attester of reasonable assurance of the correctness of the disclosure.
- Unlike financial statement audits, there is not a history of registrants being required to maintain a certain level of internal controls of GHG recordkeeping, so the final rules should state that the attester is not required to rely on or report on such controls.
- Registrants should be encouraged but not required to develop such systems of internal control.

Smaller reporting companies should be excluded from the attestation requirement. We support the Commission’s proposal to exclude non-accelerated filers from the attestation requirement.¹¹⁸ In light of the potential significant burden associated with the attestation requirement, we urge the Commission to similarly exclude smaller reporting companies (“SRCs”) from this requirement as well. We believe that very few SRCs have developed GHG reporting and will already need to spend significant amounts to comply with the other disclosure requirements in the Proposed Rules. The cost of engaging a third party to attest to the disclosure could be significant, and we respectfully believe that SRCs should be excluded from the requirement in light of their potential limited resources.

H. Item 1506 – Targets and Goals

Similar to the other proposed Regulation S-K Items, we believe Item 1506 is far too prescriptive in requiring the disclosure of “any targets or goals related to the reduction of GHG emissions, or any other climate-related target or goal” (emphasis added).¹¹⁹ In our view, disclosure of targets or goals should be required only if material to the registrant and only if the registrant has publicly announced such targets or goals. The requirements of Item 1506(b) should be revised to serve as a non-exclusive list of the types of information that registrants may choose to provide, if such information is material. Otherwise, to take but one example, a

¹¹⁸ Proposing Release, at 474.


¹¹⁹ Proposing Release, at 480.

requirement to identify whether a time horizon for a particular target is consistent with one or more goals established by a “climate-related treaty, law, regulation, policy, or organization”¹²⁰ is unnecessarily detailed and significantly out of sync with the other disclosure requirements of Regulation S-K.

* * *

We appreciate the opportunity to participate in this process and respectfully request that the Commission consider our recommendations and suggestions. We are available to meet and discuss these comments or any questions the Commission and its staff may have, which may be directed to the individuals listed below.

Very truly yours,



Jay H. Knight
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¹²⁰ Proposing Release, at 480