June 17, 2022

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

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

Dear Ms. Countryman:

Ceres, a nonprofit sustainability advocacy organization, respectfully submits this comment letter on the Securities and Exchange Commission (SEC or Commission)'s proposal, *The Enhancement and Standardization of Climate-Related Disclosures* ("the Proposal").

Although we have some suggestions for possible changes, on the whole we strongly support the Proposal. The Commission and its staff have drafted a well-constructed set of rules that protects investors and meets investor demand for better disclosure about climate-change risks.

The investor demand is overwhelming. Ceres makes this statement from the standpoint of an expertise gained through our close working relationships with major investors. The Ceres Investor Network includes more than 200 institutional investors, managing more than $60 trillion in assets. These investors are keenly interested in improved disclosure about climate-change risks so that they can assess those risks before making investment and voting decisions. Our global collaborations with investors include Climate Action 100+, The Investor Agenda, the Paris Aligned Investment Initiative, and the Net Zero Asset Managers initiative. A statement prepared by The Investor Agenda has been signed by 733 investors representing over $52 trillion in assets; that statement asks governments to "[c]ommit to implementing mandatory climate risk disclosure requirements."[1] In the process of drafting this letter we have consulted with dozens of investor members of these networks, and they are strongly supportive of SEC rulemaking on climate disclosure.

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[1] The Investor Agenda, *2021 Global Investor Statement to Governments on the Climate Crisis*, p. 2.

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I. *Summary of Significant Issues:*[2]

Our views include the following:

- *Financial risk:* As a starting point, the basis for the rulemaking initiative – that climate change poses a significant financial risk – is surely clear and unmistakable. The evidence is vast in this regard.

- *Investor support:* It is likewise reasonable for the Commission to conclude that this risk is, or can be, material to investors. This is not a matter of conjecture; investors have repeatedly and emphatically expressed this view. Investors need this information to make informed investment and voting decisions. Making climate risk disclosures part of required financial filings will significantly improve the quality of data for investors and allow them to address material risks across sectors. We expect that investor comments on the Proposal will be strongly supportive, will contain descriptions of how climate information is used by them, and will include specific ideas to refine the proposal.

- *Misinformation:* The Proposal is being made to fix the problem of underreporting, or misreporting, climate-related risks. There are many precedents for SEC disclosure requirements of this nature, that is, disclosures relating to matters that have financial impact and may pose material financial risks but are not traditional financial items. We understand that some commentators believe that the SEC lacks authority to issue rules here, but it is unconvincing to contend that a significant increase in global temperatures, leading to substantial economic and social dislocations and material impacts and risks to companies, is a development for which the SEC must wear blinders and investors remain underinformed or misled.

- *Disclosure location:* Because climate risk is financial risk, the SEC has taken the right approach by requiring that disclosures be made in registration and periodic reports filed with the Commission. Suggestions that the disclosures be "furnished" rather than filed, or instead be made on issuers' websites or elsewhere, misapprehends the financial significance of climate information.

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[2] We note that Ceres submitted to the Commission a detailed comment letter on June 10, 2021, in response to the Commission's Request for Information (RFI), Acting Chair Allison Herren Lee, Statement: Public Input Welcomed on Climate Change Disclosures, March 15, 2021. We supplemented that letter with submissions dated June 11 and December 15, 2021. We appreciate that the Commission considered Ceres' views in the drafting of the Proposal and the accompanying Proposing Release (where Ceres' comment letters are cited 23 times). Our views in this submission largely correspond to those we stated previously, although we have had numerous discussions with investors, issuers and other stakeholders about the Proposal and based on those discussions we have made some modifications.

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- *Proposed disclosure requirements:* The SEC has also taken the correct approach by incorporating many of the elements set forth by the Task Force on Climate-Related Financial Disclosures (TCFD) and by requiring disclosure of GHG emissions, including disclosure (for many companies) of Scope 3 emissions and third-party assurance of Scopes 1 and 2 emissions. These requirements were broadly supported by commenters to last year's Request for Information (RFI) on climate change disclosures. Further, the Commission's proposal to reflect certain climate change developments in a financial statement footnote strikes us as an important step towards improving the quality of climate change information, although we appreciate concerns that we have heard about the practicality of the proposed disclosure and suggest that the Commission consider possible modifications or alternatives.

- *Cost-benefit:* The cost-benefit analysis is thorough and more than complies with requirements that have been imposed by courts in recent years. Among other things, the analysis identifies the market failures that the rule would correct and explains how the rule would remedy these failures, considers reasonable and practicable regulatory alternatives, and provides quantitative estimates of costs/benefits where feasible and, where not, qualitative analyses. Significantly, the proposed disclosures would result in substantial cost savings for investors. Much climate risk information must currently be obtained from a range of data providers, consultants, and others, and that cost could be reduced or avoided.

- *Global issues:* Because many issuers have global operations, sales or supply chains, and many investors have geographically diversified portfolios, the SEC is right to consider the global regulatory environment. Considering climate-related disclosure developments outside of the US allows the SEC to align its requirements with those of other financial regulators, reducing costs to issuers and providing more useful information to investors. Regulators throughout the world have found that climate change creates investment risks. Moreover, as the Proposing Release recognizes, US companies with non-US operations (that is, a large component of the S&P 500) are now, or will likely soon be, required by non-US regulators to make many of the same disclosures that would be imposed by the SEC's proposal. US companies would likely find it harder to raise capital globally and could be at competitive disadvantage if their climate risk disclosures are viewed as subpar.

- *Rule text criticisms:* We have read many of the criticisms already voiced about the Proposal, and we address them below. As a general matter, we note many companies already make disclosures like those the Proposal would require. And a number of companies have told us they expect that their disclosure tasks will become easier, not harder, if there exists one set of expectations and requirements. Thus, having a set of standardized, decision-useful requirements will not only benefit investors but will smooth the path for issuers seeking to meet investor demands. Moreover, the Proposal includes various exemptions, phased-in implementation dates, a new safe harbor, materiality thresholds, and other measures. While we are not supportive of all of these accommodations, we understand that they should facilitate compliance. And we even

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suggest below that one of these accommodations, the liability safe harbor, could be amended to alleviate further issuers' liability concerns. The oft-voiced objection to climate risk disclosure – the fear of US private litigation – should not be used to cudgel badly-needed disclosure rules.

- *Constitutional and Statutory Criticisms:* Some commentators are also making a number of constitutional and statutory arguments against the rule. These arguments largely rest on a distorted view of the rule's purpose and scope. This is a disclosure rule, designed for investor protection. It rests on the text and context of the securities laws passed by Congress in 1933 and 1934. It does not set the nation's climate policy. It does not require companies to change what they are doing with respect to climate risk. It only requires companies to disclose facts, not opinions.

Thus, there are many reasons why in our view the SEC has prepared an extraordinarily thorough, carefully calibrated and thoughtful proposal. There are some fixes that the SEC might reasonably make to address various business concerns, and there are some areas where we think the rule could be strengthened to ensure more effective disclosure. But, overall, we and a broad swath of the investor community stand firmly and squarely behind the SEC's initiative.

II. A Strong Record Already Establishes Investors' Need For Climate Information, A Need That Regulators Worldwide Have Recognized.

A. The SEC has established the need for a rule requiring climate-related disclosures in SEC filings.

1. The Proposing Release fully explains why climate change is a financial risk, and investors are demanding more information about this risk. (Question 1)

The Commission had an unusually comprehensive backdrop for this rulemaking: an in-depth set of comments submitted by a range of stakeholders in response to the RFI. With that information in hand, the SEC has done a thorough job explaining why climate change is a financial risk and why investors have demanded this information. Citing numerous sources, the Commission correctly states in the Proposing Release that "climate-related risks have present financial consequences that investors in public companies consider in making investment and voting decisions."[3]

The vast evidence for this conclusion need not be recited again here. The record already before the SEC is more than sufficient. The evidence of climate change is simply overwhelming. For example, the western United States is experiencing its most severe drought in at least 1,200 years, partially as the result of human-

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[3] *Proposed rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Securities and Exchange Commission, 2022, p. 9.

caused climate change, disrupting major agricultural production.[4] The drought is not an isolated occurrence. The National Oceanic and Atmospheric Administration reports an increasing frequency and severity of extreme weather events. Since 1980, the agency has tracked 232 such events with damage amounting to $1 billion or more.[5] 2020 marked a historic record of billion-dollar weather and climate disasters with a count of 22, followed closely by 2021 with 20 events and a $145 billion price tag.[6]

Investors need to know about the financial risks stemming from these developments. For example, in October 2021, institutional investors owning or managing more than $52 trillion in assets issued a statement calling for governments to commit to more ambitious climate policies, including mandatory climate disclosure.[7] Calls for increased and improved disclosures are also evident in recent shareholder proposals, such as a May 2022 proposal calling for Chevron to issue an analysis on the reliability of its methane disclosures, earning the support of 98% of the company's investors.[8] In parallel, investors continue to commit to net zero targets, as reflected by the Net Zero Asset Managers initiative's growth to 273 asset managers representing over $61.3 trillion in assets under management as of May 2022.[9]

Among other things, investors want to know about the climate risks associated with the economic transformation from a global transition to a net zero economy. Vanguard recently released research assessing the impact of climate change and the transition to a net zero economy, assessing the net impact of climate change on global and national GDP by 2050. In the U.S. and globally, the research found worsening effects on GDP the more temperature rises. Globally, it found losses of 2% to 4% of global GDP for temperature increases up to 2 degrees Celsius, with "the net cost to the economy increase[ing] meaningfully thereafter, with an estimated drag of close to 10% of GDP as temperatures rise above 3 degrees."[10] Thus, Vanguard stated that it "considers climate change – and the evolving global policy responses required to mitigate its impact – to be a material and fundamental risk to companies and to their shareholders' long-term financial success."[11] Enhanced climate disclosure is also essential to address the current

[4] A. Park Williams, Benjamin Cook, and Jason Smerdon, *Rapid intensification of the emerging southwestern North American megadrought in 2020-2021*, Nature Climate Change, March 2022.

[5] *U.S. Billion-Dollar Weather and Climate Disasters*, NOAA National Centers for Environmental Information (NCEI), 2022.

[6] Adam Smith, *2021 U.S. billion-dollar weather and climate disasters in historical context*, NOAA, January 14, 2022.

[7] Karin Rives, *Investors managing over $52 trillion in assets demand an end to coal*, S&P Global Market Intelligence, October 28, 2021.

[8] *Chevron's investors call for improved methane disclosures in a near-unanimous vote*, Ceres, May 25, 2022.

[9] *Net Zero Asset Managers initiative publishes initial targets for 43 signatories as the number of asset managers committing to net zero grows to 273*, IIGCC, May 31, 2022.

[10] Peter Westaway, et al., *The economics of climate change*, Vanguard, April 21, 2022, pp. 16-17.

[11] *Vanguard's Approach to Climate Change*, Vanguard Perspective, April 22, 2022.

information gap preventing investors from understanding and mitigating the transition risks associated with fossil fuel assets that could become stranded. A May 2022 study calculated that global stranded assets "as present value of future lost profits in the upstream oil and gas sector exceed US$1 trillion under plausible changes in expectations about the effects of climate policy", with a majority of the market risk falling on private investors.[12]

Any reasonable investor would want this information.[13]

2. The SEC has also appropriately explained how investors do not currently have adequate and comparable climate risk information and are often misled through greenwashing. (Question 4)

The Proposing Release does a thorough job of explaining the problems with existing climate risk disclosures. The SEC has reviewed voluminous studies, reports and the comment letters submitted in response to the 2021 Request for Information. The overwhelming evidence in this regard is that disclosures lack consistency and comparability. A recent study summarized the problem, stating that "[t]he voluntary and unstandardized nature of this reporting mostly hinders rather than helps investors to differentiate between leaders and laggards in this sector and to make efficient capital allocation decisions accordingly. It also makes it difficult for companies to reap the benefits (e.g., more attractive conditions for accessing capital) of having better sustainability performance as more financial institutions start to make such performance a condition of lending and investment."[14]

Many other recent studies also confirm the existence of this problem. In a review of a sampling of 100 companies from S&P 500 across industries for location disclosure in their 10-K filings, Wellington Management found that over 90% of issuers disclosed insufficient location data for them to fully assess climate risk.[15] A February 2022 report analyzed 25 of the world's largest companies, representing about 5% of global GHG emissions, and assessed the transparency and integrity of the companies' emissions reduction and net-zero targets.[16] It

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[12] Gregor Semieniuk et al., *Stranded Fossil-Fuel Assets Translate to Major Losses for Investors in Advanced Economies*, University of Massachusetts Amherst Political Economy Research Institute, May 27, 2022.

[13] We suggest the SEC refer to a recent issue of The Investor Agenda, Global Investor Support for the SEC Proposed Rule on Mandatory Disclosure, discussing 733 investors with more than US$52 trillion AUM that have called on governments to require corporate climate risk disclosure. See *Global investor momentum on mandated climate disclosure policies*, The Investor Agenda, March 30, 2022.

[14] Hon Xing Wong, et al., *ESG Investing and the US Oil and Gas Industry: An Analysis of Climate Disclosures*, Columbia University, April 2022, p. 24.

[15] Jean M. Hynes, *Re: Request for Input on Climate Change Disclosures*, Wellington Management Company, p. 4.

[16] *Corporate Climate Responsibility Monitor 2022: Assessing the transparency and integrity of companies' emission reduction and net-zero targets*, New Climate Institute & Carbon Market Watch, February 2022, p. 4.

found that 12 provided low or very low levels of transparency, 13 provided reasonable or moderate levels, and none provided high levels.[17]

Among the most troublesome aspects of current disclosure is greenwashing—misleading claims about the extent to which a financial product or service is truly climate-friendly or environmentally sustainable[18]—which the Proposing Release decries.[19] Regulators throughout the world are recognizing this problem. In particular, the European Commission, in adopting sustainability standards under the Sustainable Finance Disclosures Regulation, found that "[c]ompliance with [these] sustainability-related disclosures will contribute to strengthening investor protection and reduce greenwashing."[20] Likewise, the International Organization of Securities Commissions (IOSCO), whose members regulate more than 95% of the world's securities markets in 130 jurisdictions, including the U.S.,[21] prioritized work to address greenwashing in its 2022 work plan, [22] recognizing a clear need to address the challenges associated with the lack of reliability and comparability of data at the corporate issuer level and the ESG data and ratings provided by third-party providers to enable the investment industry to properly evaluate sustainability-related risks and opportunities."[23]

Recent academic analysis has further documented the problem.[24] In April 2022, a study noted that due in part to the lack of U.S. disclosure regulations for ESG issues, the existing ESG landscape "is complex, inconsistent, and awash with unsubstantiated claims of better sustainability/environmental/social performance." The report analyzed 15 publicly traded oil companies and a dozen major oil investors in the U.S. and found that emissions data reported by oil companies was difficult to compare and in some cases, included "questionable claims".[25]

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[17] Id., at 6-9.

[18] Climate-Related Market Risk Subcommittee (2020). *Managing Climate Risk in the U.S. Financial System*. Washington, D.C.: U.S. Commodity Futures Trading Commission, Market Risk Advisory Committee, p. v.

[19] We welcome the Commission's *2022 Examination Priorities* and the inclusion of a focus on greenwashing as it relates to ESG investing, p. 13.

[20] *Regulation on sustainability-related disclosure in the financial services sector*, European Commission. The regulation will be in force by January 1, 2023 and covers "financial market participants (i.e. asset managers, institutional investors, insurance companies, pension funds, etc., all entities offering financial products where they manage clients' money) and financial advisers in all investment processes and for financial products that pursue the objective of sustainable investment."

[21] *IOSCO Fact Sheet*, IOSCO, February 2022, p. 2.

[22] *IOSCO's 2022 Sustainable Finance work plan strengthens the organization's commitment to increasing transparency and mitigating greenwashing,* IOSCO, March 14, 2022.

[23] *Setting regulatory and supervisory expectations for asset managers is fundamental to address greenwashing concerns, says IOSCO*, IOSCO, November 2, 2021, p. 1.

[24] See Adele Peters, *68% of U.S. execs admit their companies are guilty of greenwashing*, Fast Company, April 13, 2022 (survey of 1,491 executives across different industries around the world found that 58% admitted that their companies were guilty of greenwashing and, among leaders in the US, that figure rose to 68%).

[25] Hon Xing Wong, et al., *ESG Investing and the US Oil and Gas Industry: An Analysis of Climate Disclosures, Columbia University'*, April 2022, p. 8. The greenwashing problem lies at the heart of the SEC's rulemaking initiative. We discuss in some depth below the question of the SEC's authority to promulgate this rule. Our basic

Another recent study also found significant greenwashing among oil and gas companies. The peer-reviewed paper published in the journal *PLOS One* examined Exxon, Shell, Chevron and BP in 2009-2020 on the basis of three categories: the use of climate and clean energy-related language in annual reports; pledges and actions in their business strategies; and investments in clean energy versus oil and gas. The researchers found that the oil companies' public statements were "dominated by pledges rather than concrete actions," with "a continuing business model dependence on fossil fuels along with insignificant and opaque spending on clean energy." Thus, they concluded, "[u]ntil actions and investment behavior are brought into alignment with discourse, accusations of greenwashing appear well-founded."[26]

The SEC's mission is to protect investors from being misled. Much greenwashing might consist of half-truths, where a statement that might be true is misleading because it omits necessary information. Though the federal securities laws already prohibit these half-truths,[27] greenwashing continues to run rampant. By standardizing climate-change disclosures, the SEC's rule would make it much harder to get away with greenwashing, and so would go a long way toward putting the kibosh on such misleading conduct.

The problem of inaccurate or incomplete information is central to this rulemaking. Investors are being misled, and securities are being mispriced. And, as we discuss later, it is precisely for this reason that this rulemaking falls squarely within the authority given to the SEC to ensure fair dealing, protect investors and promote market efficiency.

The Proposing Release does a thorough job of explaining the problems with existing climate risk disclosures. The SEC has reviewed voluminous studies, reports and the comment letters submitted in response to the 2021 Request for Information. The overwhelming evidence in this regard is that disclosures lack consistency and comparability. A recent study summarized the problem, stating that "[t]he voluntary and unstandardized nature of this reporting mostly hinders rather than helps investors to differentiate between leaders and laggards in this sector and to make efficient capital allocation decisions accordingly. It also makes it difficult for companies to reap the benefits (e.g., more attractive conditions for accessing capital) of having better sustainability performance as more financial

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point: it cannot reasonably be contended that the SEC's statutory mandate stops short of allowing it to address a "landscape" that is "awash with unsubstantiated claims" relating to climate (and other ESG) issues.

[26] Mei Li, Gregory Trencher, and Jusen Asuka, *The clean energy claims of BP, Chevron, ExxonMobil and Shell: A mismatch between discourse, actions and investments*, February 16, 2022, p. 1.

[27] See, e.g., *Universal Health Servs., Inc. v. United States*, 136 S.Ct. 1989, 2000 (2016) ("half-truths – representations that state the truth only so far as it goes, while omitting critical qualifying information – can be actionable misrepresentations.")

institutions start to make such performance a condition of lending and investment."[28]

Many other recent studies also confirm the existence of this problem. In a review of a sampling of 100 companies from S&P 500 across industries for location disclosure in their 10-K filings, Wellington Management found that over 90% of issuers disclosed insufficient location data for them to fully assess climate risk.[29] A February 2022 report analyzed 25 of the world's largest companies, representing about 5% of global GHG emissions, and assessed the transparency and integrity of the companies' emissions reduction and net-zero targets.[30] It found that 12 provided low or very low levels of transparency, 13 provided reasonable or moderate levels, and none provided high levels.[31]

3. Investors Are Providing the SEC with Considerable Evidence of How They Use this Information (Question 2)

We have had numerous discussions with members of our investor network about the Proposal, and we understand that many of them have submitted or will be submitting comment letters containing descriptions of how they use climate-risk information in their decision-making. Their basic point is that this information is highly significant to them in making investment and voting decisions, and they use the information in various ways.

The SEC's record establishes that investors use client information in investment and voting decisions.[32] For example, CalPERS brought together asset managers and data providers across all the asset classes in which they invest, finding that some of the most commonly used climate risk metrics they use are Scope 1, 2, and 3 greenhouse gas emissions, revenue from less carbon intensive sources, and proven fossil fuel reserves. The most common use of these metrics "is to evaluate potential transitions risks if company, sector, or industry trends do not change, yet policy and technology evolve to incentivize a transition to a low carbon economy."[33]

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[28] Hon Xing Wong, et al., *ESG Investing and the US Oil and Gas Industry: An Analysis of Climate Disclosures*, Columbia University, April 2022, pp. 8, 14.

[29] Jean M. Hynes, *Wellington Management Company response re: SEC Request for Public Input on Climate-related Financial Disclosure*, Wellington Management Company, p. 4.

[30] *Corporate Climate Responsibility Monitor 2022*, New Climate Institute & Carbon Market Watch, February 2022, p. 4.

[31] Id., at pp. 6-9.

[32] *Proposed rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors*, p. 19, footnotes 38-40 (discussing investor letters to the SEC supporting rulemaking or discussing the significant risks issuers or investors face related to climate change; pp. 19-20, footnote 42 (discussing the inadequacy of voluntary climate risk disclosures); and pp. 318-322 (discussing investors' demands for climate information).

[33] Marcie Frost, *CalPERS response re: SEC Request for Public Input on Climate-related Financial Disclosure*, California Public Employees' Retirement System, p. 7.

The New York State Common Retirement Fund uses emissions data in some of its investment and voting decisions, such as the Fund's $4 billion low emissions equities index, which "excludes or reduces holdings in the worst carbon emitters in the Russell 1000."[34] The Fund also uses information such as capital expenditures toward Paris-aligned transition strategies, GHG reduction targets, use of carbon offsets, and internal GHG emissions pricing for its "minimum standards frameworks to evaluate individual companies' long-term transition risks and opportunities, or 'transition readiness' in the high impact sectors identified by the TCFD."[35] The Los Angeles County Employees Retirement Association noted that only 40% of their public market holdings disclose carbon emissions, but "[e]missions are a critical baseline data point for further investment analysis, such as stress testing and scenario analyses of forward-looking investment risks, including prospective impacts related to a transition to a low-carbon economy and climate-related public policies."[36]

Investors use climate risk information to assess issuer exposure to a range of physical and transition risks. Physical location data of corporate assets that are dependent on fixed asset locations is used by investors to assess the risk of impact of extreme climate-related events and the effectiveness of strategies to ensure resilience against those impacts. For almost all issuers, understanding the location of companies in their supply chain is vital for them to fully understand the climate risks they face and is important for investors to know. A variety of assets face risks, such as municipal utilities and their location in relation to fire and flood risk zones (including potential penalties incurred from possible contributions to fire risk), offshore wind farms and their location in relation to hurricane risks, and textile and clothing companies and the location of direct properties and properties in supply chain host countries.[37]

To reduce financial risks from climate, investors are also creating scenario analyses for their portfolios and developing their own Investor Climate Action Plans (ICAPs) for reducing the climate risks they face by transitioning their portfolios and investment strategies.[38] These plans generally include four elements: investment, corporate engagement, policy advocacy, and investor disclosure. Most recently, the New York State Common fund, one of the largest

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[34] Thomas P. DiNapoli, *NY Office of the State Comptroller response re: SEC Request for Public Input on Climate-related Financial Disclosure*, State of New York, Office of the State Comptroller, June 8, 2021, p. 4.

[35] Id., at pp. 4-5.

[36] Jonathan Grabel, *LACERA response re: Request for Public Input on Climate-related Financial Disclosure*, Los Angeles County Employees Retirement Association, June 10, 2021, p. 2.

[37] See Jean M. Hynes, *Wellington Management Company response re: SEC Request for Input on Climate-related Financial Disclosure*, Wellington Management Company, June 11, 2021, p. 5. According to Wellington Management "[m]any companies disclose that 50% to more than 75% of their production is located in southeast Asia, an area that is associated with climate risks such many companies disclose that 50% tend to omit information.

[38] See The Investor Agenda's ICAP expectations ladder, guidance, and case studies, https://theinvestoragenda.org/icaps/.

public pension funds in the US, and the San Francisco Employees' Retirement System released ICAPs, adding to 10 ICAPs released earlier this year.[39]

Required climate disclosures in financial filings will help ameliorate the uncertainty and expense of using risk models that are based on incomplete and unverified data.

Firms also require improved climate risk disclosure for the increasing number of funds they are offering to retail and institutional investors. Morningstar identified 860 mutual funds and exchange-traded funds with a climate-related mandate at the end of 2021, with a doubling of assets from the previous year to $408 billion. For the third straight year, U.S. climate funds set an annual record for net flows in 2021, reaching $30 billion in assets. Morningstar also provided thirteen examples of how funds have incorporated climate-related factors in various ways, such as limiting climate risk, seeking climate opportunities, targeting climate themes, and assessing impact.[40]

Investors also use climate risk information purchased by third parties in various ways. For example, T. Rowe Price provides carbon footprint data to its institutional clients, by purchasing a set of emissions and intensity data from Sustainalytics for over 11,000 companies. While nearly 75% of these companies have estimated data, it is useful to the clients because "it helps quantify the order of magnitude of carbon emissions for portfolios versus their benchmarks."[41] A new study that surveyed investors regarding their climate-related spending found the most commonly reported area of spend is on external ESG ratings, data providers, and consultants. Thirty-three of 35 investors responding spent an average of $487,000 during the financial year for which they reported.[42] An annual study of the largest asset management firms found that 38 use two or more ESG research and data providers.[43]

4. Disclosure belongs in SEC registration and periodic reports, just like other financial or financially-related information (Question 175)

The SEC has asked whether the proposed climate-related disclosures be required in Exchange Act reports and registration statements. For at least two reasons, the answer to this question is most definitely yes.

[39] See The Investor Agenda, *New case studies aim to generate more investor climate action plans and accelerate the global net-zero transition*, January 12, 2022, discussing case studies from Allianz, Aware Super, CalSTRS, Cathay Financial Holdings, FAMA Investimentos, IFM Investors, Mirae Asset Global Investments, PensionDanmark, Sumitomo Mitsui Trust Asset Management, and UniSuper.

[40] Hortense Bioy, et. al., *Investing in Times of Climate Change 2022*, Morningstar, April 2022, pp. 6, 16, 27-30.

[41] Maria Elena Drew and Gabriela Infante, *T. Rowe Price response Re: Public Input on Climate Change Disclosures*, T. Rowe Price, June 11, 2021, pp. 1-2.

[42] Mark Lee, Emily Brock, and Doug MacNair, *Costs and Benefits of Climate-Related Disclosure Activities by Corporate Issuers and Institutional Investors*, The SustainAbility Institute by ERM, May 2022, p. 10.

[43] *The Playing Field: A Look at the World's 50 Largest Asset Managers*, SquareWell Partners, February 2021, p. 14.

First, as discussed above, climate risk is financial risk; as a corollary, climate change is financial information and therefore belongs in financial filings with the SEC. We do not believe there is any principled explanation of why it should be otherwise. It is also clear the decarbonization of the economy will lead to significant new and expanded opportunities for companies. These are also important for investors to understand as part of their decision-making.

We acknowledge that some issuers are concerned about the liability risk that attaches to information contained in an SEC periodic report, such as a Form 10-K, and these issuers would prefer to disclose climate information elsewhere. We explain below why we think this concern seems overstated and can be addressed through a liability safe harbor.

Moreover, from an investor standpoint, there are significant benefits from including the information in an SEC annual report rather than in other types of publications such as stand-alone sustainability reports or websites. Among other things, Form 10-Ks are subject to a certification made by the company's CEO and CFO that the report is accurate and that the company has effective controls and procedures. Further, companies must establish disclosure controls and procedures for information in a Form 10-K, and the outside auditor must read the report and identify anything that may be inconsistent with the audited financial statements. SEC filings also undergo scrutiny from the company's lawyers. These measures are important for investors to feel confident in the veracity of companies' disclosures.

For these same reasons, we would not support providing the information outside of a periodic filing, such as in Form 8-K with the expectation that the report be considered "furnished" rather than filed. The furnished, not filed, approach was developed so that companies could avoid the Securities Act's onerous liability provisions.[44] But a safe harbor with respect to a Form 10-K or registration statement filing, as is being proposed (and which we suggest could be made stronger), can achieve the same result, and it is a preferable approach for the reasons described above.

B. The Proposed Rule Would Place US Companies on a Footing More Equal to Non-US Companies (Question 1)

It is important to recognize the global movement towards mandatory climate risk disclosure. These developments are too numerous to describe in depth; a thorough compilation of climate disclosure regulations globally is available from the UN PRI.[45] Most significantly, the International Financial Reporting Standards Foundation (IFRS)

[44] See David B. H. Martin and Graham Robinson, *To Be Or Not Be Filed*, Covington & Burling LLP, September 2003.
[45] *Regulation Database*, Principles for Responsible Investment, August 2021.

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has established the International Sustainability Standards Board (ISSB) to develop a comprehensive global baseline of sustainability disclosure standards. In March 2022, the ISSB published exposure drafts proposing two standards, including one focused on climate.[46] The ISSB climate disclosure standard is similar in many respects to the SEC's proposal, covering climate-related disclosures, metrics and targets disclosures, greenhouse gas (GHG) emissions, internal carbon price, and offsets, among others.[47] Also, the European Commission's European Financial Reporting Advisory Group (EFRAG) is developing mandatory European Sustainability Reporting Standards, and a final EU Corporate Sustainability Reporting Directive is expected soon.[48]

In 2020, the SEC's Investor Advisory Committee warned that, without action by the SEC, US companies will become subject to the requirements imposed on them by the EU or other non-US regulators.[49] That is even more the case now than in 2020, and the SEC is appropriately *making*, not *taking*, the rules for US companies. Moreover, by acting now, the SEC can influence rules being developed elsewhere, such as at the ISSB.[50] In this regard, we note that the SEC is, in fact, working with an IFRS advisory council to coordinate and share information with other jurisdictions.[51]

III. The Specific Requirements Of The Proposal Are Reasonable, Although Some Changes Might Appropriately Be Made

Having established that there is a need for an SEC rule requiring climate disclosures in an SEC registration statement or annual report, we turn now to the specific elements of the Proposal. There are three principal components: *first,* a set of rules relating to narrative discussions based on the TCFD; *second,* requirements regarding the quantitative disclosure of GHG emissions, also required by the TCFD; and *third,* a new financial statement note that would address climate risk.

A. The SEC Is Wisely Basing The Narrative Requirements On The TCFD Framework

1. The TCFD disclosure framework is viewed globally as an appropriate framework for disclosure (Question 3)

[46] On March 31, 2022, the ISSB released Exposure Draft IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information, and Exposure Draft IFRS S2 Climate-related Disclosures.

[47] Janine Guillot, *VRF response Re: Public Input on Climate Change Disclosures*, Value Reporting Foundation, May 6, 2022, pp. 4-5, 6-7.

[48] Mark Segal, *EFRAG Releases Proposed European Sustainability Reporting Standards*, ESG Today, May 2, 2022; *EFRAG Launches a Public Consultation on the Draft ESRS EDS*, EFRAG, April 29, 2022.

[49] *Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure*, Securities and Exchange Commission, as of May 14, 2020.

[50] *Exposure Draft IFRS S1 General Requirements for Disclosure of Sustainability-related Financial Information*, ISSB, March 2022; *Exposure Draft IFRS S2 Climate-related Disclosures*, March 2022, ISSB.

[51] *Statement of the IFRS Foundation Monitoring Board on the IFRS Foundation's announcement of the International Sustainability Standards Board*, IFRS Foundation Monitoring Board, November 3, 2021.

The Proposal is, to a considerable extent, based on the TCFD narrative disclosure recommendations. We believe this is the correct approach. Currently, over 3,400 companies and institutional investors in 95 jurisdictions have publicly endorsed the TCFD recommendations.[52] Securities regulators in seven countries and the European Union have officially announced they are aligning their reporting requirements with the TCFD.[53] Further, the ISSB proposed climate disclosure standard is aligned with the TCFD; currently 144 jurisdictions require the use of the IFRS' accounting standards and are positioned to adopt the ISSB's standards.[54] In the US, the National Association of Insurance Commissioners (NAIC) voted to require new climate disclosures based on the TCFD for insurers that operating in 15 states. These filings will reflect 80% of the insurance market and will significantly add to TCFD adoption in the U.S.[55] (Question 3). In other words, the TCFD is "widely accepted" on a voluntary basis[56] and is the appropriate model for the SEC's rule.

2. The SEC correctly includes specific details from the narrative portion of the TCFD framework, but some disclosures need enhancement

The narrative TCFD discussion consists of three sections – governance; strategy, business model and outlook; and risk management. We discuss each of these sections below.

a) Governance Disclosure, Item 1502 (Question 34)

Proposed Item 1501(a) of Regulation S-K would require disclosure of the identity of those directors or board committees responsible for the oversight of climate-related risks; whether any directors have expertise in climate-related risks; the processes and frequency by which the board – or any board committees – discusses climate-related risks, including how the board is informed about climate-related risks; whether – and how – the board (or any board committees) considers climate-related risks as part of its business strategy, risk management, and financial oversight; and whether – and how – the board sets climate-related targets or goals and how it oversees progress against those targets or goals.

We believe that these are important aspects of the overall proposal. Board systems, education, and target/goal-setting and oversight are critical elements of

[52] *Support the TCFD*, Task Force on Climate-related Financial Disclosures.

[53] *Task Force on Climate-related Financial Disclosures: 2021 Status Report*, Task Force on Climate-related Financial Disclosures, October 2021, p. 5.

[54] See *Who uses IFRS Standards?*, IFRS Foundation; *Why global accounting standards?* IFRS Foundation, stating, "Our research shows that 144 jurisdictions now require the use of IFRS Standards for all or most publicly listed companies, whilst a further 12 jurisdictions permit its use."

[55] *U.S. Insurance Commissioners Endorse Internationally Recognized Climate Risk Disclosure Standard for Insurance Companies*, National Association of Insurance Commissioners, April 8, 2022.

[56] *The SEC wants me to disclose what? The SEC's climate disclosure proposal*, PwC Viewpoint, April 7, 2022, p. 12.

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assessing and managing climate risks, and therefore are a focus of Ceres' climate governance reports and our executive education course.[57] In 2018, Ceres conducted a detailed study of climate governance, board systems for climate oversight, the fluency of directors on climate issues, and executive compensation.[58] In that report, Ceres made a number of recommendations for climate competent boards, with a particular focus on board education. Recently, Ceres expanded upon these recommendations, providing guidance for boards on identifying and focusing the company on climate risk priorities and integrating climate into compensation.[59] [60] The ISSB, examining similar investor demands and the market risk posed by climate change, came to conclusions about governance disclosure that align with the SEC's proposal. [61]

We do, however, have reservations about some elements of the proposal. In particular, we have doubts about the proposed disclosure of whether boards have any directors with expertise in climate-related risks, including disclosure "in such detail as necessary to fully describe the nature of the expertise." Our view is that responsibility for, and expertise in, climate risk is something that should be borne by the board as a whole.

In addition, the proposal that the company disclose how the board discusses and considers climate risk goes beyond what the SEC has traditionally required with respect to board activities, including imposition of significant new recordkeeping requirements. We suggest the SEC consider carefully the comments received on this proposal; we would not be opposed to having it modified in the final rule.

b) Strategy, Business Model and Outlook, Item 1502 (Question 19)

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[57] See *ESG: Navigating the Board's Role*, Berkley Law Executive Education and Ceres. The online course pinpoints how corporate board members, whose legal duties and strategic roles are distinct from management, can embed environmental, social and governance (ESG) considerations into board strategy and risk oversight.

[58] Veena Ramani et al., *Systems Rule: How Board Governance Can Drive Sustainability Performance*, Ceres and KKS Advisors, 2018.

[59] Melissa Paschall et al., *A Board's Guide to ESG And Incentives: Effectively Identifying Top ESG Priorities*, Corporate Board Member, January 2022.

[60] Steven Rothstein and Yamika Ketu, *A Board's Guide to ESG And Incentives: Integration Of ESG Into Compensation*, Ceres, May 3, 2022.

[61] The ISSB's proposed climate risk disclosure standard would require disclosure of "how the body ensures that the appropriate skills and competencies are available to oversee strategies designed to respond to climate-related risks and opportunities", which is a broad requirement that could encompass board training and education, appointing board members with climate expertise, or other strategies. The ISSB would also require disclosure of "how and how often the body and its committees (audit, risk or other committees) are informed about climate-related risks and opportunities." The ISSB skills and competencies requirement is derived from the Climate Disclosure Standards Board (CDSB), which expects disclosure of CEO, senior executives, and Board committees' climate expertise or access to climate expertise. The second ISSB requirement is derived from the TCFD, which recommends disclosure of processes and frequency for informing the board/board committees informed about climate-related issues, See *Exposure Draft: IFRS Sustainability Disclosure Standard [Draft] IFRS S2 Climate-related Disclosures*, IFRS, March 2022, p. 33.

(1) Materiality: Item 1502 requires disclosure of material climate-related risks. We are concerned about application of the materiality threshold in the Strategy, Business Model and Outlook provision of the Proposal. This section of the Proposal requires disclosure of "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." This is a central component of the proposal, and we are concerned that the materiality threshold might result in dampening the number of disclosing companies.

Currently, despite the importance of strategy disclosure, it is under-disclosed. The TCFD has noted that strategy is one of the two most challenging areas of climate risk disclosure, according to a survey of companies.[62] The TCFD analyzed 2020 company disclosures, including the percentage of companies that disclosed information aligned with the three TCFD strategy recommendations. For risks and opportunities, only 52% of companies provided TCFD-aligned disclosures, and only 39% for climate's impact on the organization.[63] For arguably the most important strategy disclosure to investors, resilience of the company's climate change strategy (which includes scenario analysis), only 13% of companies had TCFD-aligned disclosures.[64]

For these reasons, we recommend the SEC provide additional guidance as to the materiality of climate risk. We believe that for the vast majority of industries, climate risk is material. We reach this conclusion based in large part on the work performed by the Sustainability Accounting Standards Board (SASB), now known as the Value Reporting Foundation (VRF). In its multi-year analysis,[65] VRF found that climate change risk is material to 72 of the 79 industries that it studied.[66] We recommend that this be accorded considerable weight and should be referred to as important guidance in the SEC's final rule release.

Also, it is important that the SEC emphasize that the materiality assessment be reasonably long-term in its approach. We note that many jurisdictions have adopted a range of long-term climate-related policies that will create risks and opportunities that will be material to many issuers. These include, for example,

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[62] *2021 Status Report*, Task Force on Climate-related Financial Disclosures, p. 10.

[63] Id., at p. 30.

[64] Id.

[65] VRF SASB Standards, *Climate Risk - Technical Bulletin*, April 12, 2021.

[66] Jean Rogers, *Supporting the Work of the TCFD*, VRF SASB Standards, June 29, 2017.

requirements to cut or neutralize emissions by certain sectors or across the jurisdiction's economy, or tax subsidy provisions and special government funding vehicles aimed at incentivizing capital expenditure on projects that reduce emissions. At least 16 states and Puerto Rico have enacted legislation establishing GHG emissions reduction requirements with binding statutory targets. The target dates range from 2020 to 2050, with many states having multiple target dates.[67] Thirty states, Washington, D.C., and two territories have active renewable or clean energy requirements, with target dates generally earlier than the emissions reduction requirements.[68]

(2) Offsets: We agree with the commission that carbon offsets, along with renewable energy credits (RECs) "represent commonly used GHG mitigation options for companies."[69] Carbon offsets are currently traded in both mandatory and voluntary carbon markets that have existed for some time[70], and are also increasingly a common feature of corporate net zero strategies emerging to respond to regulatory and market risk.

Market demand for carbon offsets is increasing both as a mechanism to manage emissions and as a corporate revenue opportunity.[71] In this context, it is no surprise that carbon markets are projected to grow dramatically. However, well-documented problems with the credibility and reliability of carbon offsets have led to investor and company calls for increased disclosure and standardization. Indeed, the CFTC recently held a meeting on carbon markets and launched a Request for Information to gather information to explore the potential of further regulation and standardization of this market.

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[67] Laura Shields, *Greenhouse Gas Emissions Reduction Targets and Market-based Policies*, National Conference of State Legislators, September 22, 2021.

[68] *State Renewable Portfolio Standards and Goals*, National Conference of State Legislators, August 13, 2021.

[69] *Proposed rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors*, p. 77.

[70] J.P. Morgan Asset Management, *The global carbon market: How offsets, regulations and new standards may catalyze lower emissions and create new opportunities*, October 2021. See also, International Swaps and Derivatives Association (ISDA), *Legal Implications of Voluntary Carbon Credits*, p. 7 ("The EU Emission Trading System (EU ETS) was established in 2005 in response to the 1997 Kyoto Protocol which set targets for adhering countries to reduce their emissions. It is currently the largest mandatory carbon market in the world and has influenced the design of other mandatory carbon markets. For example, the UK ETS replaced the EU ETS in the UK in January 2021 and follows a near-identical structure. There are similar schemes in China, Japan, Mexico, South Africa, South Korea, the US and nearly 70 other jurisdictions around the world.") See also, Federal Aviation Administration, *Carbon Offsetting and Reduction Scheme for International Aviation*.

[71] *Climate Change and Carbon Offsets*, Dentons. (Finding that their clients' "products and services represent an untapped revenue source—the opportunity to contribute to the global drive to mitigate the effects of climate change, including through: […] [s]ales, donations or deductions of commodities, such as offset credits, [s]ponsoring of nature-based solutions to store carbon in soils, forests and through other means")

Given this context, the commission's proposed offset disclosures are both timely and strategic, but they require modification to meet market and investor needs. It is common, accepted practice and expectation on emissions management that firms 'reduce first, mitigate second' reserving the use of carbon offsets for difficult to abate emissions. This market expectation is reflected in the Ceres' Roadmap 2030 which sets out expectations regarding corporate disclosure of GHG emissions reduction, carbon removal, and target setting. This includes an expectation that companies "will prioritize strategies that reduce absolute emissions, invest in carbon removal, and use credible carbon offsets only as an ancillary solution".[72]

Offset disclosure is important for investor protection against misleading information and climate-related risk, as such, we agree with the SEC's proposed carbon offsets disclosure provisions, although we have suggested modifications (Question 24, Question 101, and Question 173).

We agree with the SEC's inclusion of carbon offsets within the "Strategy, business model, and outlook" and "Targets and goals" provisions. Regarding the "Targets and goals" provisions, we agree that issuers should disclose the role that carbon offsets play in the overall climate strategy if they are used (Question 24). To strengthen the proposal, we recommend that the SEC add a discussion about the financial risk of relying on carbon offsets in place of reducing emissions and slightly revise the disclosure requirements.

Specifically, issuers that rely on offsetting rather than reducing emissions delay or avoid climate action and compromise our ability to limit warming to 1.5°C. This would further expose issuers and their investors to the climate-related risks outlined by the SEC.[73] In addition, corporate commitments are under increasing public scrutiny, and issuers that rely on carbon offsets without reducing emissions may face reputational risks from accusations of greenwashing.[74]

To understand these risks, investors want to see disclosure about carbon offsets. In February 2022, BlackRock provided

[72] *GHG Emissions Reduction and Carbon Removal*, Ceres Roadmap 2030, October 2020.

[73] See Ceres, *Evaluating the Use of Carbon Credits*, pg. 4 for a deeper discussion on the risks that investors face when companies inappropriately use carbon offsets.

[74] Id.

recommendations on two issues: the purpose of offsets ("[v]oluntary carbon markets and instruments should not replace or disincentivize efforts to rigorously reduce emissions") and offsets disclosure ("…companies and their investors will benefit from adequate disclosures of how these projects or carbon credits are evaluated and assessed for their permanence and additionality, as well as for leakage and double counting"). BlackRock stated, "This helps assure investors and other stakeholders that [investments in offsets] are achieving their stated purpose."[75]

Thirty-eight investors managing $8.5 trillion in assets (including the New York State Common Retirement Fund) are using the Net Zero Investment Framework[76] and have adopted a similar position: "investors should not allow the use of ... offsets as a significant long-term strategy for achievement of decarbonisation goals by assets in their portfolios, except where there is no technologically or financially viable solution."[77]

We agree that issuers should disclose specific information about carbon offset if they are used (Question 173). Our position is that issuers should only rely on carbon offset from carbon dioxide removals to neutralize any residual emissions that are unfeasible to abate. As issuers transition to lower carbon operations, they can counterbalance their GHG emissions, but offsetting should not replace their efforts to decarbonize and reduce emissions throughout their value chains. To address these and investors' concerns, the SEC's proposal could be strengthened by requiring disclosure that distinguishes between carbon offsets from emission reductions and carbon removals. We recommend the SEC consider adding the following language to the proposed Item 1506: Targets and goals, paragraph (d):

- Disclose the volume of carbon offsets from carbon dioxide removals purchased to neutralize residual emissions (emissions that are unfeasible to abate)
- Disclose the volume of carbon offsets from carbon dioxide removals or emissions reductions, purchased to counterbalance GHG emissions.

[75] *Climate risk and the global energy transition*, BlackRock, February 2022, p. 9

[76] *Global framework for investors to achieve net zero emissions alignment launched - $8 trillion investors put it into practice*, IIGCC, March 10, 2021.

[77] *Net Zero Investment Framework Implementation Guide*, Paris Aligned Investment Initiative, March 2021, p. 25.

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To ensure that these expected disclosures are clear, we recommend adding the following to the proposed Item 1500*: Definitions:*

- An "emission reduction" occurs when emissions are avoided or reduced.[78]
- A "carbon removal" occurs when carbon dioxide is drawn out of the atmosphere and sequestered.[79]

Also, in addition to the SEC's proposal to require disclosure of "any registries or other authentication of the offsets", we recommend the SEC require disclosure of "the name and identification number of the underlying projects", which provides more useful information to investors. Including the name and identification number of the underlying project will allow an investor, or other financial market participants, to find information about the underlying projects, which are publicly listed by the registries.

Finally, we support the SEC's proposed exclusion of the impact of any purchased or generated offsets from the issuer's reported emissions within the "GHG emissions metrics" provision of the proposal (Question 101). We recommend that issuers be required to disclose their total GHG emissions without carbon offsets and separately disclose the amount of carbon offsets purchased as outlined above. This follows best practice guidance set out by the Science Based Targets Initiative (SBTi), in which companies cannot use carbon offsets to reach their science-based targets and thus cannot "net" any non-residual emissions to reach these targets.

Our recommendations align with the IFRS' climate-related disclosure draft standard which also raises similar concerns.[80] We recommend that the SEC review the IFRS draft standard's provisions about offsets because they would result in disclosures that shed light on the use and credibility of offsets that issuers use. At a high level, the IFRS states, "An entity's reliance on carbon offsets, how the offsets it uses are generated, and the credibility and integrity of the scheme from which the entity obtains the offsets have implications for the entity's enterprise value over the

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[78] *Evaluating the Use of Carbon Credits*, Ceres, p. 5.
[79] Id.
[80] *Sustainability Disclosure Standard, Exposure Draft, IFRS S2 Climate-related Disclosures*, IFRS, March 2022.

short, medium and long term."[81] Specifically, the IFRS' required offsets disclosures cover important issues including:

> (iii) the intended use of carbon offsets in achieving emissions targets. In explaining the intended use of carbon offsets the entity shall disclose information including:
>
> > (1) the extent to which the targets rely on the use of carbon offsets;
> >
> > (2) whether the offsets will be subject to a third-party offset verification or certification scheme (certified carbon offset), and if so, which scheme, or schemes;
> >
> > (3) the type of carbon offset, including whether the offset will be nature-based or based on technological carbon removals and whether the amount intended to be achieved is through carbon removal or emission avoidance; and
> >
> > (4) any other significant factors necessary for users to understand the credibility and integrity of offsets intended to be used by the entity (for example, assumptions regarding the permanence of the carbon offset).[82]

(3) Carbon Pricing: (Question 26)

Item 1502(e) would require carbon price disclosure if an internal carbon price is used. Information about where the price is set, and how it is used, informs investors of the quality of a company's response to climate change. It also helps companies and investors reduce climate-related risk. As we argued in our 2021 RFI response, an internal carbon price can assist companies in steering capital expenditures, research and design, and other financing decisions toward projects with reduced emissions. It can also be an effective tool to create incentives to reduce GHG emissions, by charging projects and groups within a company for their emissions. Internal pricing helps companies take long-run, climate-related

[81] Id., at p. 13.

[82] *Sustainability Disclosure Standard, Exposure Draft, IFRS S2 Climate-related Disclosures*, IFRS, March 2022, pp. 35-36.

risks into account in decisions that otherwise might naturally focus on short-term returns.[83]

An S&P/Trucost report analyzed the climate risk management and disclosure of 2,500 of the world's largest companies, assessing carbon pricing risk management and other key factors. The report illustrates the importance of better investor access to comparable information because of SEC rulemaking. For the North American companies analyzed, 8% used an internal carbon price in a tangible way, such as in business decision-making or to set science-based targets; another 9% already used an internal carbon price; and 17% planned to implement a carbon price within the next two years.[84]

(4) Scenario Analysis: (Question 30)

We agree with proposed Item 1502(f) which would require that scenario analysis, if used, should be required to be disclosed. The TCFD recommends that companies in all industries undertake some form of scenario analysis, which is leading to the practice becoming more common. A 2021 report analyzed climate risk disclosure by 1,127 of the largest public companies in high-risk sectors in 16 markets, finding that 41% conducted scenario analysis.[85]

One clear sign of strong investor demand for scenario analysis comes from the work of the Climate Action 100+ initiative. This is a global investor-led initiative to ensure the world's largest corporate greenhouse gas emitters take necessary action on climate change, involving 700 investors with $68 trillion in assets influencing 166 companies that represent over 80% of global industrial emissions.[86] The initiative's Net Zero Company Benchmark assesses the performance of focus companies against three high-level goals: emissions reduction, governance, and disclosure.[87]

Investors have expressed particular interest in scenario analyses because, while they should be useful, they are often poorly done, as shown by evidence from the Climate Action 100+ and the TCFD. Indicator 10.2 in the Climate Action 100+ Benchmark, scenario analysis, assesses whether a company employs climate-

[83] Mindy Lubber, *Ceres response Re: Public Input on Climate Change Disclosures*, June 10, 2021, pp. 10-11.
[84] *Best Practices in Corporate Climate Disclosure*, Trucost ESG Analysis & S&P Global, April 15, 2019, pp. 2-3, 7.
[85] *Global Climate Risk Disclosure Barometer*, EY, June 2021, pp. 19, 33-34.
[86] *Initiative Snapshot*, Climate Action 100+.
[87] *Net Zero Company Benchmark*, Climate Action 100+.

scenario planning to test its strategic and operational resilience, covering whether a scenario analysis including quantitative elements has been disclosed, and whether the quantitative scenario analysis explicitly includes a 1.5° Celsius scenario, covers the entire company, discloses key assumptions and variables used, and reports on the key risks and opportunities identified.[88] The initiative found that companies' scenario analyses leave much room for improvement/ specifically, that "only a small number of companies are using 1.5°C scenario analysis".[89]

The TCFD, in October 2021, found the same: "Disclosure of the resilience of companies' strategies under different climate-related scenarios (Strategy c), although still the least reported recommended disclosure, encouragingly increased from 5% of companies in 2018 to 13% in 2020."[90] We believe that if companies are required to disclose analyses that they have performed then investors will have better insights into the quality of the issuers' work.

One concern that has been raised by issuers is that scenario analyses involve confidential business information whose disclosure will be harmful. We look forward to reading submissions explaining why this might be the case, because it is not apparent to us. Scenario analysis is essentially an alternative version of financial results and position in light of a stated set of assumed conditions. This should not raise confidential or proprietary information concerns.

(5) Water usage (Question 14)

We support the SEC's inclusion of water risks as a matter that under certain circumstances must be disclosed (Items 1502(a)(1)(B), 1503, and 1506(a)(1), and we recommend enhancing the definition of water risks to better meet investor information needs.

Extensive research has examined water risks faced by issuers and how they are exacerbated by climate change. One report found that the beverage, textiles/apparel/luxury goods, oil and gas, and battery industries face severe and systemic water impacts

[88] *Net Zero Company Benchmark v1.1: Disclosure Framework – Assessment Methodology*, Climate Action 100+, March 2022, p. 26.
[89] *Net Zero Company Benchmark, Summary of company assessments*, Climate Action 100+, March 2022, p. 26.
[90] *Task Force on Climate-related Financial Disclosures 2021 Status Report*, TCFD, October 2021, p. 31.

throughout their value chain.[91] Research has highlighted an elevated risk of stranded assets in the oil and gas, coal, metals and mining, and electric utilities sectors due to water risk.[92] Other sectors with notable water risks in their value chains include agriculture (especially the meat industry),[93] real estate investment trusts,[94] and information and communications technology.[95] Financial institutions face exposure to water risks from their lending. In 2021, Moody's found that more than $2 trillion in rated debt globally is highly exposed to water management risks in eight key sectors.[96]

The Commission can also consider investors' recognition of the materiality of water risks. This is evident from investors' research, proxy voting, policies, statements, and investment strategies. BlackRock analyzed water risks facing about 84,000 REIT properties owned by 590 issuers. It found roughly 60% of the properties will experience high water stress by 2030, more than double the current number.[97] J.P. Morgan noted that when assessing climate risk, "it is important to factor in the extent of the company's dependency on natural capital, such as palm oil, water, forest and fossil fuels."[98]

Investors are expending resources on proxy voting and other activities to increase water risk disclosure. More than 40 investment firms explicitly reference water in their proxy voting guidelines.[99] Filings of water-related shareholder proposals have increased over the past five years, focusing on topics such as water pollution in supply chains[100] and climate-related water risks.[101] The

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[91] *Global Assessment of Private Sector Impacts on Water*, Ceres, April 11, 2022, p. 18.

[92] *High and Dry: How Water Issues are Stranding Assets*, CDP, May 2022, p. 9.

[93] *Financial Implications of Addressing Water-Related Externalities in the Meat Sector*, Ceres, December 2021.

[94] *Troubled Waters: Water Stress Risks to Portfolios*, BlackRock, July 2020, pp. 3, 5.

[95] *Water Risk in the ICT Sector: The Case for Action*, Alliance for Water Stewardship, 2021.

[96] *Sector In-Depth: Environmental Risks – Asia: Water stress poses the most direct credit risks for coal, mining and power sectors*, Moody's Investors Service, September 2021, p. 4. ("This exposure derives from risks associated with water access, infrastructure for water extraction and treatment, competition with other users, or risks associated with the byproducts of water use, including downstream pollution and recycling.")

[97] BlackRock, *Troubled Waters: Water Stress Risks to Portfolios*, July 2020, pp. 2, 3.

[98] J.P. Morgan Asset Management, *Assessing climate change risk: Water stress*, 2022.

[99] Investor Water Toolkit, *Proxy voting guidelines data set*, Ceres.

[100] See, e.g., Mercy Investment Services, proposal to Pilgrim's Pride, *Provide a report regarding the reduction of water pollution*, 2021; Mercy Investment Services, proposal to the Kraft Heinz Company, *Provide a report regarding the assessment of water quality and potential risks in agricultural supply chain operations*, 2022.

[101] See, e.g., As You Sow, proposal to Alphabet, Inc., *Report on policies and practices to reduce climate-related water risk*, December 27, 2021; As You Sow, proposal to Tesla, Inc., *Report on policies and practices to reduce climate-related water risk*, April 28, 2022.

Valuing Water Finance Taskforce, comprised of 13 asset owners with a total of $2.5 trillion asset under management, is focused on driving corporate understanding of and action to reduce water-related financial risks. The annual CDP water security disclosure request is sent on behalf of 528 investors representing $96 trillion in assets to companies worldwide.

Investors have also demonstrated their views of water risk as a material issue through water risk policies, statements, reports and investment strategies. Ceres provides a summary of over 70 firms with investment statements on water,[102] which recognize water as a material issue and discuss how the issue is integrated into their decision-making. BlackRock and Franklin Templeton have published reports on their research and strategies regarding location-based water risks.[103] The investment firm ACTIAM published a report on the risks and opportunities of addressing the freshwater crisis, which includes a water risk assessment of its investment portfolio and an investment goal for achieving a water-neutral portfolio by 2030.[104]

Based on investors' interest in improved water risk disclosure, Ceres supports the proposed requirements that issuers disclose the location and value of assets which are in regions of high or extremely high water stress, as well as the percentage of a registrant's total water usage withdrawn in high or extremely high water stressed regions. This information, as well as the specific asset's book value as a percentage of total assets, are important to investors. Information about the geographic location of water risks enables investors to understand localized water risks and assess portfolio risks in a more accurate fashion. A case study from the Florida State Board of Administration highlights the utility of this type of data when assessing water risk based on regional context.[105]

Also, investor-supported voluntary reporting platforms currently request disclosure of this information. CDP's water disclosure questionnaire asks for geolocation data for all site facilities and estimated financial impacts.[106] The Global Reporting Initiative

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[102] *Investor Water Toolkit*, Toolkit Compendium of Investment Belief and Policy Statements That Integrate Water Database, Ceres.

[103] *Troubled waters: Water stress risks to portfolios*, BlackRock Investment Institute, July 2020; Julie Moret, *Water Disruption: Investment Risk from Multiple Angles*, Franklin Templeton, October 28, 2020.

[104] ACTIAM, *The freshwater crisis: ACTIAM's investor perspective on how to address water risks and opportunities*, October 2021, pp. 19-24.

[105] Ceres, Investor Water Toolkit, *Case Study: Water Risk Analysis Across a Large Pension Fund*.

[106] *CDP Water Security 2022 Questionnaire*, questions W4.1b, W4.1c, W4.2.

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(GRI) requests disclosure of the location of water withdrawal, consumption, and discharge; and specifically recommends organizations break down withdrawals by megaton in areas facing water stress.[107] SASB also requests disclosure of asset exposure to high stress water regions for 25 industries.[108]

Requiring disclosure of the percentage of total water withdrawn and consumed, and wastewater discharged in high or extremely water stressed regions, (Item 1502(A)(1)(i)(B)) will also aid investors. It helps investors to conduct comparisons within an industry. Investors use information on water usage to inform risk calculations and measure progress on investment or corporate water goals. For example, PGGM utilizes this information to calculate companies' volumetric improvements against the firm's water performance goals.[109]

We support the inclusion of definitions of "high water stressed region" and "extremely high water stressed region" in the Proposal, and we recommend the Commission include water quality as a factor, given the material nature of the reliance on freshwater by many sectors. Regarding the definitions of "high water stressed region" and "extremely high water stressed region", we support WRI's definitions of these terms as a baseline. WRI's methodology is widely acknowledged as an industry standard for identifying water stress. Their baseline water stress indicator is the most widely used indicator of water risk by the private sector, financial data providers (e.g., Bloomberg, MSCI, and S&P Global) and reporting initiatives and standards (e.g., GRI, CDP, TCFD, and CDSB). Furthermore, WRI's threshold for what constitutes a "high water stressed region" has been used widely as an approximate threshold of "high" or "severe" water stress by a consortium of United Nations organizations, the World Water Council, and the scientific and academic community.[110] [111] [112] [113]

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[107] *GRI 303: Water and Effluents*, Global Reporting Initiative, 2018, p. 9.

[108] Gail Glazerman, *Water Risk Flows Across Industries and Through Value Chains*, Value Reporting Foundation SASB Standards, May 10, 2021.

[109] Hugh Brown, *Case Study: Scientifically Assessing the Water Performance of Investments*, Ceres Investor Water Toolkit, November 30, 2018.

[110] Paul Raskin, et al., *Water futures: assessment of long-range patterns and problems. Comprehensive assessment of the freshwater resources of the world*, Stockholm Environment Institute, 1997.

[111] Joseph Alcamo, et al., *World water in 2025—global modeling scenarios for the World Commission on Water for the 21st Century*, Centre for Environmental Systems Research, University of Kassel, 2000.

[112] William Cosgrove and Frank Rijsberman, *World Water Vision: Making Water Everybody's Business*, World Water Council, 2000.

[113] CJ Vörösmarty, et al., *Global water resources: vulnerability from climate change and population growth*, Science 289, 284–288.

However, we recommend that the Commission expand its definition of water stressed regions to include water quality as a factor. Impaired water quality can be a material risk, accelerated and exacerbated by climate change. Water quality can impact a registrant's direct operations and/or supplier productivity and thus should be accounted for in disclosures. For example, industries which rely on access to high-quality freshwater resources, including food products and semiconductor production, face significant risks. Unilever disclosed that its production of consumer products is at risk due to impaired water quality in the Mississippi River Basin, and it spent approximately $1-2 million on environmental impact assessments in the region to mitigate risks.[114] One report found that 68% of the ICT (information and communications technology) sector's sites which were analyzed were exposed to very high or high risk due to water quality.[115]

Additionally, an issuer's impacts on water quality can pose material risks that should be accounted for in disclosures. For example: fossil fuel discharges during storage or transportation can have significant impacts. This includes discharges of chemicals used in the drilling process and oil spills, which have impacted water quality, ecosystem health, and regional economies. Overall, in the U.S., from 2001 to 2020, there have been 5,750 significant pipeline incidents, resulting in over $10 billion in damages. Two notable examples are infrastructure failures at Anglo American and Vale's mining operations, which cost the companies $0.6 and $4.7 billion respectively in fines, delayed operations, and cleanup costs.[116]

Water quality risks and impacts are also at play in the consumer staples sector. For example, Smithfield Foods has faced legal challenges and community backlash due to manure pollution from their North Carolina operations. Since 1999, when Hurricane Floyd led to polluted waters from hog waste lagoons, the company has faced heightened regulation causing increased spending on waste management and resulting in damages estimated at $500 million.[117] In a report examining the packaged meat products and apparel industries, the cost of action to mitigate water risks, were

[114] CDP Global Water Report 2019, *Cleaning up their Act*, p. 14.

[115] Alliance for Water Stewardship, *Water Risk in the ICT Sector: The Case for Action*, 2021, p. 5.

[116] CDP Global Water Report 2019, *Cleaning up their Act*, p. 14.

[117] Charles Bethea, *Could Smithfield Foods Have Prevented The "Rivers of Hog Waste" in North Carolina After Florence?*, The New Yorker, September 30, 2018.

estimated to be as high as $301 million and $1.77 billion annually for the companies evaluated.[118] [119]

(6) We would support disclosure of land use-related climate risks (Question 104 and Question 168)

At several points in the Proposing Release the SEC asks about the disclosure of climate risks related to land use issues. We support improved requirements in this area.

Land use issues are relevant in a number of areas. As a general matter, more erratic weather patterns attributed to climate change have led to unexpected production, supply, and price disruptions for commodities from coffee[120] to corn,[121] making upstream activities particularly relevant related to this discussion around land use.

Also, land use that supports issuers' operations or supply chain operations or carbon projects where Indigenous, traditional, or customary rights are not respected have resulted in land conflicts or disputes with Indigenous Peoples and local communities. Investors are increasing attention to ensure that issuers implement processes and measures to prevent undesirable outcomes and ensure Indigenous Peoples, local communities, and Afro-descendant Peoples are at the center of these climate solutions.[122] Ongoing and future land disputes present added risk related to an issuer's social license to operate that underscore the need to address upstream activities related to a registrant's operations.

In this regard, land use is relevant for purposes of disclosures relating to use of carbon offsets. Many companies are using carbon credits from Natural Climate Solutions (NCS) or Agriculture, Forestry and Other Land Use (AFOLU) projects in their climate strategy.[123] However, the lack of secure land

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[118] *Financial Implications of Addressing Water-Related Externalities in the Meat Sector*, Ceres, Dec. 2021, p. 5.

[119] *Financial implications of addressing water-related externalities in the apparel sector*, Ceres, December 2021, p. 5.

[120] Royce Kurmelovs, *Coffee bean price spike just a taste of what's to come with climate change,* The Guardian, September 30, 2021. The Guardian, September 30, 2021.

[121] Shannon Gupta, *Climate change is hurting U.S. corn farmers -- and your wallet*, CNN Money, April 21, 2017; Bloomberg News, *World's Food Supplies Get Slammed by Drought, Floods and Frost*, July 24, 2021.

[122] *Evaluating the Use of Carbon Credits*, Ceres, March 1, 2022.

[123] See Verra's categorization of types of projects, including Afforestation, Reforestation and Revegetation (ARR), Agricultural Land Management (ALM), Improved Forest Management (IFM), Reduced Emissions from Deforestation and Degradation (REDD), Avoided Conversion of Grasslands and Shrublands (ACoGS) and Wetlands Restoration and Conservation (WRC).

tenure—especially the trend of indigenous groups reclaiming sovereign land rights under international and other laws—threatens the credibility of these projects. This issue is relevant to some issuers, such as forest products companies, as well as any issuer that develops, finances, or buys carbon offsets from these projects.

Issuers and investors have indicated their concern about these issues in various ways. Wells Fargo is one example of an issuer that has created a statement discussing their approach to finance and Indigenous Peoples. It discusses the company's due diligence process, a heightened focus on potentially impacted indigenous communities, and the application of the IFC Performance Standard 7 on Indigenous Peoples to projects that may potentially impact them.[124] A group of 80 investors representing over $200 billion in assets released a statement of support for the BankTrack Human Rights Benchmark. Among other things, it calls on evaluated banks to "[e]stablish and disclose indicators on the number and type of actual or potential human rights risks and impacts that the bank has identified through its own due diligence, as well as risks and impacts brought to the bank's attention by communities or other external stakeholders."[125]

Likewise, as to Item 1506, Targets and Goals, and in response to the question, "Should we also require a registrant to disclose whether it has set any other climate-related target or goal, e.g., regarding energy usage, water usage, conservation or ecosystem restoration?", we recommend required disclosure for deforestation-related commitments. (Question 168). Specifically, Ceres recommends that the disclosure of no-deforestation and related commitments be required because they are an important component of climate risk. Deforestation, agriculture and land use change is the second largest global source of emissions after fossil fuel use[126] and is of concern to investors.[127] Disclosure around deforestation is common with over 687 companies reporting on deforestation via the CDP Forests Program. In a May 2022 report,

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[124] *Indigenous Peoples Statement*, Wells Fargo, March 2017.

[125] *Investor statement of support: BankTrack Human Rights Benchmark*, Investor Alliance for Human Rights: An Initiative of ICCR; Investor Alliance for Human Rights, *Investors with over US$200b support BankTrack Human Rights Benchmark*.

[126] *Global Greenhouse Gas Emissions Data*, US EPA.

[127] *Our approach to engagement with the palm oil industry*, BlackRock Investment Stewardship (BIS), February 2022. BIS states that they assess public disclosures of management of environmental risks and opportunities including, "[d]emonstrated procedures and programs in alignment to its NDPE [no deforestation, peat, or exploitation] policy – including commitments to established standards and practices, for instance zero burning, no conversion of High Conservation Value (HCV) and High Carbon Stock (HCS) forests, and no planting on peatlands", p. 3.

CDP and AFi found that 221 companies disclosing through CDP identified forest-related risks with a potential financial impact worth over US$79.2 billion, however the complete cost of responding to identified risk was estimated at only US$6.7 billion.[128]

Land use is also relevant for purposes of the Scopes 1, 2 and 3 emissions disclosures. In this regard, the Proposing Release asks at Question 104, "Would it be useful to allow registrants to add categories that are particularly significant to them or their industry, such as Scope 3 emissions from land use change, which is not currently included in the Greenhouse Gas Protocol's Scope 3 categories?" Given the importance of land use, our answer is yes. For food companies and companies in particular, emissions from land use can be their largest source of emissions.[129] [130] If Scope 3 emissions from land use are not disclosed, companies may be significantly undercounting and underreporting their emissions. A February 2022 report examining climate risks facing 25 major multinational corporations found emissions from land use and deforestation are reported inconsistently and could be a source of major under-reporting for issuers.[131]

c) We agree with the requirement for Risk Management Disclosure, Item 1503 (Question 46)

We support proposed Item 1503, Risk management. Regarding the transition plans provision of Item 1503, we believe transition plans, if adopted, should be disclosed. Investors need to know about the plan and how the company intends to implement the plan.

Investors have long advocated that companies put in place plans to transition their businesses to thrive in a net zero economy. However, some companies have been slow to create and disclose these plans. A CDP report found that in 2021, 4,002 organizations, or one-third of organizations disclosing climate change information to CDP, reported that they have developed a low-carbon transition plan.[132]

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[128] Accountability Framework and CDP, *From Commitments to Action at Scale: Critical steps to achieve deforestation-free supply chains*, CDP. May 2022, p. 19.
[129] *Goodness In Action 2020 Sustainability Report*, Hershey, 2020, pp. 46-47, stating, "Over 90 percent of our carbon emissions are from Scope 3 emissions in our extended value chain."; and 41.5% of total emissions are from land use change.
[130] Marjolein Hanssen, *Deadline 2030: Slashing Value Chain GHG Emissions by a Third,* RaboBank, September 2021.
[131] New Climate Initiative and Carbon Market Watch, *Corporate Climate Responsibility Monitor 2022,* February 2022, p. 19.
[132] *Are Companies Being Transparent in their Transition: 2021 Climate Transition Plan Disclosure*, CDP, March 2022, p. 4.

In March 2022, the Investor Group on Climate Change released *Corporate Climate Transition Plans: A guide to investor expectations.* The report lays out five investor expectations for transition plans related to setting science-based emissions targets, outlining a strategy to deliver them, making commitments aligned with a 1.5 °C decarbonization pathway, aligning capital expenditures with targets, and committing to disclosure and external verification.[133] The Climate Action 100+ net zero benchmark has many similar expectations of companies. The SEC's requirement that disclosure includes relevant metrics and targets will help investors obtain the information they need to manage these risks.

d) We agree with the requirement for Targets and Goals Disclosure, Item 1506 (Question 168)

Ceres supports the SEC's "Targets and goals" provision, Item 1506, which would require disclosure if the issuer has set GHG reduction targets/goals or "any other climate-related target or goal (e.g., regarding energy usage, water usage, conservation or ecosystem restoration, or revenues from low-carbon products)". The proposal would require disclosure of the time horizon of the targets any interim targets the company has set, and progress towards meeting the targets, each of which are important to investors.

Investors have demonstrated a strong interest in targets disclosures, and many companies disclose this information. Investors encourage companies to set and disclose targets through major global initiatives. For example, through the Climate Action 100+ initiative, 700 investors representing $68 trillion in AUM encourage targets disclosure by 166 companies representing over 80% of global industrial emissions.[134] The CDP climate change questionnaire, sent out annually to companies worldwide, includes questions focused on targets.[135] In March 2022, investors managing $130 trillion in AUM signed on to the CDP questionnaire, which was sent to 10,400 companies.[136] MSCI reports that 398 companies, about 60% of the MSI USA Investable Market Index (IMI) have reported "target-related information consistent with the SEC proposal on base greenhouse-gas (GHG) emissions, target carbon-reduction values and emission scopes covered, among others."[137]

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[133] *Corporate Climate Transition Plans: A guide to investor Expectations*, Investor Group on Climate Change, March 2022, pp. 6-16.

[134] *See* Climate Action 100+; see also *Climate Action 100+ Net Zero Company Benchmark*, which analyzes and publicly discloses companies' long, medium and short-term GHG reduction targets, and closely related issues including decarbonization and capital allocation strategies.

[135] The *CDP Climate Change 2022 Questionnaire* includes questions about GHG reduction targets (absolute and intensity-based), net-zero targets, and other climate-related targets.

[136] Simon Jessop, *Investors push 10,000 companies to disclose environmental data to CDP,* Reuters, March 14, 2022.

[137] Antonios Panagiotopoulos and Kenji Watanabe, MSCI, *SEC Climate Disclosure: Targeting Standardization*, May 17, 2022.

However, many problems exist with existing voluntary disclosure around targets, which makes clear the need for targets to be included in the SEC rulemaking. Many companies do not respond to disclosure requests; for example, more than 4,000 companies failed to respond to the CDP climate change questionnaire last year.[138] Many companies disclose inadequate information about their targets. Of the world's largest GHG emitters (166 companies covered by the Climate Action 100+ initiative), 31% did not disclose net zero targets, 27% did not disclose long-term targets, and 22% did not disclose medium-term targets.[139] The initiative also found an absence of detailed disclosures on delivering these targets: only 49% of companies disclose short-term targets across at least one scope of emissions, and only 5% of companies disclose commitments to align their capital expenditure plans with long-term targets or to phase out expenditures in carbon intensive assets/products.[140]

Investors have emphasized that disclosure of targets is fundamental to reducing climate risks in their investments. In March 2022, BlackRock stated, "We are better able to assess the long-term performance of our clients' investments, when companies define short -, medium-, and long-term science-based emissions targets,* where available for their sector, and disclose how these targets will affect the long-term economic interests of shareholders."[141] Targets disclosure affects the firm's support for companies' boards of directors: "[If] a company has not provided scope 1 and 2 emissions disclosures and meaningful short-, medium-, and long-term targets, we are unlikely to support director(s) considered responsible for climate risk oversight."[142]

Investors can also use targets to assess the risks of financial impacts related to climate change. This assessment can be based on an issuer's or an investor's risk management practices. For example, a 2021 TCFD report discusses a hypothetical automaker with a target to expand electric vehicle sales to 50% of total sales by 2030 who analyzes different climate scenarios and their future impacts on its financial position.[143] Automakers have set similar EV targets or are implementing plans to increase their products of EVs.[144] The TCFD also discusses an issuer that sets a target to upgrade transmission lines to reduce wildfire risk, which may reduce the future costs of business interruptions.[145]

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[138] Simon Jessop, *Investors push 10,000 companies to disclose environmental data to CDP*, Reuters, March 14, 2022.

[139] *Climate Action 100+ Net Zero Company Benchmark Summary of company assessments*, March 2022, p. 13.

[140] *Climate Action 100+ Net Zero Company Benchmark Summary of company assessments*, March 2022, p. 13.

[141] *Climate risk and the global energy transition*, BlackRock Investment Stewardship, February 2022, p. 2.

[142] Id., at pp. 2, 4.

[143] *Guidance on Metrics, Targets, and Transition Plans*, TCFD, October 2021, pp. 48-49.

[144] CNBC, *Ford ups EV investments, targets 40% electric car sales by 2030 under latest turnaround plan,* May 26, 2021; Reuters, *Honda aims for 100% electric vehicles by 2040, says new CEO, April 21, 2021*

[145] Michael Wayland, *Ford ups EV investments, targets 40% electric car sales by 2030 under latest turnaround plan*, CNBC, May 26, 2021.

Overall, the fact that so many public companies have set targets and goals confirms the importance of this rulemaking and the materiality of the proposed rules. Professor Coates makes this point well in his comment letter:

> Sixty percent of the Fortune 500 have announced climate targets, typically stated with reference to emissions data, including 17% with net-zero targets, yet 72% of investors lack confidence companies are serious about these targets. If those emissions targets are serious, they will matter to investors by leading to major changes in corporate strategy and investment policy, and in the financial risks and returns companies will generate for investors. If those targets are simply greenwashing, the proposed rules will reduce their potential to harm investors caused by fraud or misleading disclosure short of fraud.[146]

B. The Proposed GHG Disclosures Are Essential, And the SEC Appropriately Bases These Disclosures on the GHG Protocol

1. Investors routinely use GHG information in their investment and voting decision-making (Question 93)

Ceres supports the SEC's inclusion of a GHG emissions reporting requirement in its proposal because this information is critical to investors' understanding of the quality of a company's earnings in the face of climate change and the energy transition, as well as to an understanding of a company's liquidity and capital resources, especially in light of the climate commitments of financial institutions to restrict financing of emissions-intensive sectors. Investors make use of the existing GHG information available for a wide range of applications:

a. *Transition risk analysis:* GHG information serves as the starting point for transition risk analysis because it is quantifiable and comparable across companies and industries. For example, the New York State Comptroller has discussed the New York State Common Retirement Fund's usage of GHG information for transition assessment, evaluating individual companies' long-term transition risks and opportunities, and informing the Fund's engagements, proxy voting, and investment analyses.[147]

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[146] Professor John Coates, John F. Cogan Professor of Law and Economics, Harvard Law School, *Professor John Coates response re: Enhancement and Standardization of Climate-Related Disclosures for Investors*, June 2, 2022.

[147] See Thomas P. DiNapoli, *New York State Comptroller letter to SEC re: Request for Public Input – Comments on Climate Change Disclosures*, June 8, 2021, pp. 4-5; *Compilation of Resources on Investors, Issuers and GHG Emissions*, Ceres

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b. *Portfolio management:* GHG emissions are currently used by investors for portfolio construction and risk management. For example, CalSTRS finds GHG emissions metrics to be "enduringly valuable" and supports disclosure rules that require all companies to disclose all GHG emissions scopes to "meet [their] goals for total portfolio emissions measurement." They ask for "comparable information for U.S. and non-U.S. issuers across all market capitalizations, as well as issuers of debt and privately or closely held companies" in order to understand "each asset's current climate risk exposure and contribution to our total portfolio climate risk budget."[148]

c. *Active management:* Morgan Stanley Investment Management investment teams "regularly engage with investee companies on climate change risks and opportunities including a company's emissions profile, controls and preparedness to manage climate-related risks."[149]

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[148] Kirsty Jenkinson and Aeisha Mastagni, *CalSTRS response re: SEC Request for Public Input on Climate-related Financial Disclosure*, California State Teachers' Retirement System, June 4, 2021, pp. 6-7.
[149] *2020 Morgan Stanley CDP Report*, Morgan Stanley, p. 11.

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d. *Index fund use and construction:* GHG emissions performance is routinely included in a range of existing index funds used by institutional and retail investors. These include, for example, JP Morgan Asset Management[150], TIAA CREF[151], and CalSTRS[152]. These indices are constructed based on GHG emissions data reported by issuers, or if this data is not publicly reported, indices are constructed using estimates produced by third-party data providers. T. Rowe Price[153] and Wellington[154] provided the Commission with tables explaining the proportion of GHG emissions data that is reported or estimated in indices they currently use for investment analysis, and documented their concerns regarding the need for a higher proportion of these indices to be based on reported rather than estimated data. Wellington finds that "without a firm disclosure framework, there is currently significant differentiation in the data we receive about issuers, depending upon the sources" and that "the amount of adjusted and estimated information varies considerably from vendor to vendor, which impacts the accuracy and reliability of this data. *Ideally, each vendor would be providing 100% of their data based on information disclosed directly from issuers"* (emphasis added).

150 *JP Morgan Carbon Transition U.S. Equity Index Methodology*, JP Morgan Asset Management.

151 *TIAA-CREF Social Choice Low Carbon Equity Fund Prospectus*, Nuveen, p. 4. (In addition to the overall ESG performance evaluation, the Fund favors companies that (1) demonstrate leadership in managing and mitigating their current carbon emissions and (2) have limited exposure to oil, gas, and coal (i.e., fossil fuel) reserves. The determination of leadership criteria takes into consideration company carbon emissions both in absolute terms (e.g., tons of carbon emitted directly into the atmosphere) and in relative terms (e.g., tons of carbon emitted per unit of economic output such as sales).

152 Kirsty Jenkinson, and Aeisha Mastagni, *CalSTRS response Re: Public Input on Climate Change Disclosures*, CalSTRS, June 4, 2021, p. 2. ("[O]ur low-carbon index-like investments exceed $3.5 billion…CalSTRS recently funded a $1 billion low-carbon transition readiness equity strategy.") p.2. ("[O]ur low-carbon index-like investments exceed $3.5 billion…CalSTRS recently funded a $1 billion low-carbon transition readiness equity strategy.")

153 Maria Elena Drew and Gabriela Infante, *T. Rowe Price response Re: Public Input on Climate Change Disclosures*, T. Rowe Price, June 11, 2021.

154 Jean Hynes, *Wellington Management Company LLP response Re: Public Input on Climate Change Disclosures*, June 11, 2021, pp. 5-6.

e. *Voting:* As of June 15, 2022, Ceres found investors have filed a record 227 climate change-related shareholder resolutions this year.[155] As of February 2022, Goldman Sachs found there have been 110 climate change resolutions in the current proxy season, with 92% focused on GHG emissions, specifically proposing a transition to net-zero by 2050.[156] In 2019, Morgan Stanley Investment Management "supported 90% of shareholder proposals for enhanced climate change reporting from U.S.-based companies and 64% of proposals urging companies to adopt greenhouse gas emission reduction targets."[157]

We have read some of the industry comment letters submitted thus far addressing GHG emissions and arguing that, despite investor use of GHG information, it is not a valid risk metric. Some of these assertions are puzzling. For example, the Electric Power Research Institute (EPRI) states: "there are many ways to manage emissions (e.g., changing inputs, changing operations, changing technologies, purchasing emissions offsets, purchasing emissions allowances) that need to be accommodated; however, emissions cannot capture these factors and the potential and uncertain opportunities for managing a low-carbon transition."[158] It seems to us that if a company decides to change its operations and technologies in order to reduce GHG emissions then information about how and how much its emissions decreased would be something highly significant to investors.

2. The SEC appropriately based the proposed GHG emissions disclosures on the GHG Protocol

The Proposal notes that the GHG Protocol (GHGP) has developed concepts and a vocabulary that are commonly used by companies when providing climate-related disclosures, and the proposed rules incorporate some of these concepts and vocabulary, which are familiar to many issuers and investors. The SEC also states that many commenters recommended that it base any GHG emissions disclosure requirement on the GHGP and commented that it has become the most widely-used global greenhouse gas accounting standard. We agree with the SEC's decision to base the "proposed GHG emissions disclosure requirement primarily on the GHG Protocol's concept of scopes and related methodology."

The GHG Protocol's standards creation processes are also relevant to the SEC's decision to base its emissions disclosure rules primarily on the Protocol. It is "a multi-stakeholder partnership of businesses, non-governmental organizations,

[155] *As 2022 proxy season begins, record numbers of climate resolutions and agreements bode well for action*, Ceres, April 27, 2022.
[156] *ESG regulations: US SEC proposes major new climate disclosure requirements*, Goldman Sachs Equity Research, March 21, 2022, p. 7.
[157] *Morgan Stanley 2020 CDP Climate Change Submission*, Morgan Stanley Investment Management, p.11.
[158] Electric Power Research Institute (EPRI), *EPRI response re: Enhancement and Standardization of Climate-Related Disclosures for Investors,* June 7, 2022, p. 7.

governments, and others."[159] Standards are created with a transparent process including all interested parties.[160] The process typically begins with conducting a global market survey, and the rules are subject to peer-review, road-testing, and revision.[161] The expertise of the participants and the commitment to deliberation and revision ensures that all views are adequately considered and that the end product does not favor the interests of any one group over the other.[162]

3. We support the Scope 3 disclosure requirement because Scope 3 information is essential to investors (Question 98)

We endorse the Scope 3 disclosure requirement, as this is important for investors to assess risk in their portfolios. However, we recommend that Scope 3 disclosure be mandatory for all issuers and encourage the SEC to rethink its position. As the SEC recognized, many commenters have argued that Scope 3 disclosure should be required from all issuers.[163]

As we discussed in our December 15, 2021 letter to the Commission, market signals from investors, financial regulators, the IFRS Foundation and the TCFD demonstrate that GHG Scope 3 emissions assessment and disclosure is rapidly emerging as a standard expectation for all market participants.[164] Ceres found in 2021, of Ceres Investor Network members who submitted responses to the SEC climate change request for information, 71.4% called for mandatory SEC Scopes 1-3 emissions disclosure. The Climate Change Report of the Financial Stability Oversight Council found that companies should conduct emissions inventories, including Scope 3, to assess transition risks. Current TCFD guidance strongly encourages Scope 3 disclosure, calling it an "essential component" of climate risk analysis. The increased demand for Scope 3 is also evident in the growing number of companies that have set targets. The Science Based Targets initiative (SBTi) reports that 78 percent of companies aligned with the initiative have established targets covering Scope 3 emissions.[165]

Scope 3 is an obviously large factor in some energy sector industries. GHG emissions from fossil fuel extraction and refining are small compared to those generated by their combustion. For example, Carbon Tracker found that "[f]or fossil fuels, by far the majority of their lifecycle emissions – 85% or more for a

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[159] Jessica F. Green, *Private Standards in the Climate Regime: The Greenhouse Gas Protocol*, Business and Politics, Volume 12, Issue 3, 2010, Private Regulation in the Global Economy, Case Western Reserve University, 2010, p. 7.
[160] Id., at p. 32.
[161] Id.
[162] Id., at pp. 6-7, 9-10.
[163] *Proposed rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors,* Securities and Exchange Commission, 2022, p. 153, footnote 412.
[164] Mindy Lubber, *Ceres response Re: Public Input on Climate Change Disclosures*, June 10, 2021, pp. 1-5.
[165] James Beech, *Companies worth $38 tn now have science-based climate targets*, Corporate Secretary, May 12, 2022.

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barrel of oil – are incurred when they are burned, which is categorised as scope 3."[166]

But the importance of Scope 3 is much broader. The EPA recognizes that Scope 3 emission "often represent the majority of an organization's total GHG emissions."[167] Kepler-Cheuvreux analyzed 24 GICS industry groups, finding that 21 industry groups had indirect GHG emissions (Scope 3 GHG emissions upstream and downstream and Scope 2 upstream GHG emissions) greater than 50% of their overall carbon emissions. CDP evaluated over 8,000 suppliers, finding that upstream Scope 3 GHG emissions are on average 11.4 times higher than operational emissions across sectors.[168]

Industries that highlight the importance of Scope 3 disclosures are agriculture and food, where the great majority of GHG emissions occur upstream in value chains. Recent research from RaboBank shows "Scope 3 emissions account for more than 90% of total emissions for an average packaged food company."[169] Emissions in these industries come from land use or land use change, including deforestation or conversion of native vegetation to cropland, the release of carbon from soils, the application of fertilizers that are both fossil fuel-derived and which generate GHG emissions upon application, and the emissions connected to farming equipment. For example, in 2020 the Hershey Company noted that, "Over 90 percent of our carbon emissions are from Scope 3 emissions in our extended value chain," and "[a]round 42 percent of our baseline Scope 3 emissions are due to land-use change from the farm-level production of our ingredients."[170] This distribution highlights that investors in food companies would be disadvantaged by a significant knowledge gap should Scope 3 emissions be left out of the picture.

We have heard industry objections to disclosures to a Scope 3 disclosure mandate but we do not believe they are persuasive. One objection is that Scope 3 emissions are too uncertain and depend too heavily on estimates. But there is nothing novel about disclosure of estimates; SEC filings are filled with them, both within and outside the financial statements. For example, the SEC in its 2003 MD&A release[171] about critical accounting estimates, stating: "Many estimates and assumptions involved in the application of GAAP have a material impact on reported financial condition and operating performance and on the comparability of such reported information over different reporting periods." Estimates are useful as long as uncertainty regarding the estimate is disclosed. Indeed, just last

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[166] Robert Schuwerk, *The missing link – bridging the gap between emission targets and fossil fuel output*, Carbon Tracker Initiative, February 22, 2019.

[167] *Scope 3 Inventory Guidance*, United States Environmental Protection Agency.

[168] *Guidance on Metrics, Targets, and Transition Plans*, TCFD, October 2021, p. 55, footnote 88, p. 56.

[169] Marjolein Hanssen, *Deadline 2030: Slashing Value Chain GHG Emissions by a Third*, RaboBank, September 2021.

[170] *Goodness In Action 2020 Sustainability Report*, Hershey, pp. 46-47.

[171] *Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations - FR-72*, Securities and Exchange Commission, 2003.

year an SEC rule became effective requiring additional disclosures surrounding critical accounting estimates, requiring more "qualitative and quantitative information necessary to understand the estimation uncertainty . . ." And, of course, financial statement auditors deal with estimates all of the time,[172] and a PCAOB standard specifically covers how to audit estimates.

Issuers can put investors on notice of the uncertain nature of Scope 3 disclosures, just as they do for other uncertainties discussed in the MD&A. The fact that Scope 3 disclosures are based on estimates is not a reasonable basis for shying away from making these disclosures.

A related objection is that companies must rely on third parties to obtain the information and that this can be uncertain and difficult. The concern in this area seems to stem from a concern about liability; this can be addressed through a strong safe harbor and through reassurance by the SEC that it will not hold issuers responsible for errors if they have made good faith efforts by issuers to gather accurate third-party information.[173]

4. We believe that the Proposed Thresholds for Scope 3 Disclosure – Either Materiality or the Setting of Scope 3 Emissions Targets or Goals – Should be Revised. (Question 129)

We appreciate the Commission's effort to achieve a balanced approach to a Scope 3 disclosure requirement – that is, a recognition of the uncertainties and obstacles to reliable Scope 3 disclosures balanced against the investor demand for and importance of Scope 3 information. Thus, the Proposal would not require across-the-board Scope 3 disclosure but would, instead, include thresholds relating to materiality and emissions goals and targets. But we do think the thresholds need clarifications and changes.

For one thing, the materiality threshold needs to be made much clearer to be useful. As John Coffee, the prominent securities law professor at Columbia University Law School, recently wrote, "What seems relatively clear . . . is that any disclosure standard left as vague as [the SEC's Rule Release] leaves the materiality of Scope 3 will cause many companies to simply decide that the Scope 3 emissions of those persons upstream or downstream to them in their value

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[172] *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Information*, Securities and Exchange Commission, 86 Fed Reg 2080 (effective February 20, 2021).

[173] See Maria Elena Drew and Gabriela Infante, *T. Rowe Price response Re: Public Input on Climate Change Disclosures*, T. Rowe Price, June 11, 2021, p. 5. The letter recommends that the SEC consider providing a temporary safe harbor for issuers working in good faith to reply to new SEC climate risk disclosure requirements. It also argues that this would "serve to facilitate more substantive disclosures, discourage the use of 'boilerplate' language, and address issuer liability concerns."

chains are not material to them."[174] To the investors with whom we work closely, that would be an unacceptable outcome.

Second, we have heard from many companies and others that the additional disclosure trigger – the setting of emissions goals and targets – might, in the short term, have the unfortunate side effect of discouraging some companies from setting goals/targets. In addition, there are some uncertainties associated with this proposed threshold. One such uncertainty is the meaning of the word "set" a target, since some companies may have internal, unofficial, interim, or unannounced goals. Another is whether a company that sets a target for one of the 15 Scope 3 categories – say, for instance, business travel – would be sufficient to trigger the broader Scope 3 disclosure.

Accordingly, we recommend the SEC amend the proposal. In particular, the SEC should provide guidance to make the materiality determination clearer. The Commission asks in question 98, "Should we use a quantitative threshold, such as a percentage of total GHG emissions (e.g., 25%, 40%, 50%) to require the disclosure of Scope 3 emissions?"[175] The Science-Based Targets Initiative provides criteria for GHG target setting by member companies: "[i]f a company's relevant scope 3 emissions are 40% or more of total scope 1, 2, and 3 emissions, a scope 3 target is required."[176] The SEC could state in the final Rule Release that the 40% threshold can be used by companies to determine materiality: any result greater than 40% should be presumptively material.

The SEC should also point to other factors relevant to this materiality assessment. A particularly important factor is whether the issuer has set a Scope 3 target. Similarly significant is whether the issuer has begun to allocate capital towards reducing these emissions. The reduction of Scope 3 emissions is for most companies a multi-year endeavor, and disclosures in this area can be analogized to those in other areas that involve long term efforts. One particularly relevant example is research and development expenses. In the pharmaceutical industry in particular, the SEC staff has insisted that issuers make detailed disclosures of R&D costs by each major product or project category.[177] Similarly, if an issuer is making expenditures to reduce its Scope 3 emissions investors can reasonably expect disclosures regarding the nature of the costs.

The materiality analysis might also take into account the degree to which the issuer has performed an assessment of its Scope 3 emissions, whether there is

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[174] John C. Coffee, Jr., *Unpacking the SEC's Climate-Related Disclosures: A Quick Tour of the Issues*, The CLS Blue Sky Blog, March 29, 2022.
[175] *Proposed rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Securities and Exchange Commission, 2022, p. 176.
[176] *SBTi Criteria and Recommendations*, Science Based Targets, October 2021, p. 5.
[177] *Pharmaceutical and Life Sciences Quarterly Insights: Q1 2022,* PwC, 2022.

relevant industry guidance for determining materiality, and whether there are matters that are individualized or particular to the issuer. This mixture of a range of factors for making a materiality determination would not be unusual. Issuers go through this type of analysis with respect to all types of disclosures. The SEC staff in Staff Accounting Bulletin No. 99, "Materiality", made clear that, in applying GAAP, an issuer must consider the "total mix" of information, which includes a range of both quantitative and qualitative factors. This is not a "formulaic approach"; instead, it "takes into account all the relevant factors."

There are some benefits in taking this approach. It would eliminate the separate target-setting trigger for disclosure and would thereby likely reduce the potential of a "chilling effect" impact of that the proposed disclosure triggers. Also, the ISSB's Exposure Draft has a materiality test for Scope 3 emissions (as well as for Scopes 1 and 2), so our suggested approach would be in line. Materiality is, of course, a standard basis for many disclosure rules, so this approach would be very much in keeping with traditional SEC disclosure rulemaking.

5. We do not object to the inclusion of the Scope 3 safe harbor (and, in fact, we would support making it more effective) and the Scope Exemption for SRCs, but we would include a sunset date for both (Question 133 and Question 134)

We understand that disclosures about Scope 3 emissions may be difficult for many companies – in particular, smaller reporting companies (SRCs) -- to make and may be speculative in nature. We are sympathetic to these concerns, and accordingly do not object, in principle, to the proposed safe harbor and exemption for SRCs. We also support the references made throughout the Release to the application of the existing safe harbors, established by Congress in the Public Securities Litigation Reform Act of 1995, for forward-looking information. Further, we understand that the safe harbor in the Proposal is not as protective as the PSLRA safe harbor and we would support its strengthening, including a limit on liability under Section 11 of the Securities Act and Section 18 of the Exchange Act.

Importantly, however, we believe all of these measures should be temporary. Over the next several years, we expect that information about Scope 3 emissions will be easier to obtain and more reliable, because of increasing investor expectations for this disclosure and improve in disclosure frameworks. There will be no basis for treating Scope 3 emissions differently from other climate risk information. Moreover, the exemption for SRCs will deprive investors of information that they need to evaluate portfolio risk. The SEC has previously imposed time limits on liability protections[178] and should do the same here. After

[178] See *Inline XBRL*, Securities and Exchange Commission, 2018. In 2018 the SEC required that issuers provide financial statement information in an interactive data format known as XBRL. Securities and Exchange

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all, if a small company's business model is dependent on raw materials or selling products associated with high emissions, it faces climate-related financial risk that investors will need to understand in order to make investment decisions. The same is true for investments in small cap index funds. The requirement to disclosure should really turn on financial risk to investors, not impact of the company on global emissions.

6. We endorse the attestation requirement for Scopes 1 and 2, but the requirements for non-regulated consulting and engineering firms should be strengthened (Question 135).

We support the Proposal's requirement that issuers obtain attestation reports for their disclosures of Scopes 1 and 2. This is important to make much more likely the provision of accurate information.

The SEC is proposing that issuers begin with "limited assurance" and move on from there to "reasonable assurance." Although we have no doubt that reasonable assurance is needed in this area, we also do not object to the SEC's approach, which will give both issuers and their auditors (or other consultants) more time to prepare for the more comprehensive reasonable assurance process.[179]

We support allowing non-regulated consulting and engineering firms to do this work but want to be sure there are the appropriate protections. We are sympathetic to cost concerns, as these firms are likely to charge less for their services than major accounting firms, and we support having competition in the provision of this service. But accounting firms are strictly regulated by the Public Company Accounting Oversight Board. Among other things, these firms must comply with a comprehensive set of independence standards, are subject to PCAOB inspections, must adhere to a set of quality controls, and can be disciplined for misconduct by the PCAOB. Accounting firms are accustomed to issuing assurance reports on information contained in SEC filings. None of this applies to non-accounting firms that might provide attest reports. The Proposal does seek to impose some conditions on non-accounting firms, but the independence requirements are quite general in nature (e.g., the firm cannot be an "advocate" for its client) and it is uncertain how these principles might apply in the non-accounting firm context.

Accordingly, we recommend that the SEC go forward and permit non-accounting to provide attestation services but should establish a process for staff oversight of these firms' work. There is a precedent in this regard. Prior to 2007, when

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Commission, Final rule, *Inline XBRL Filing of Tagged Data*, Release Nos. 33-10514; 34-83551, June 28, 2018. XBRL reports were relieved for certain liability provisions by being deemed furnished, not filed, but only for the first 24 months of the rule's effectiveness.

[179] However, we would recommend that the SEC provide more explanation in the rule release of the differences between limited and reasonable assurance, and the importance of reasonable assurance with regards to climate risk.

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Congress gave the Commission new statutory powers in this area, the Commission staff would apply several criteria in response to no-action letter requests to determine whether rating agencies qualified as "nationally recognized" securities rating organizations. These criteria included such factors as the organizational structure of the firm, its financial resources, the size and quality of its staff, its independence from the companies being rated, and the credibility of its internal procedures.[180] The Commission could establish a similar review process here, requiring companies to submit information on these various aspects of their qualification to do this work.

C. Investors Need Better Financial Statement Information About Climate Change, but We have Concerns About Whether the Proposed Footnote Disclosure Is the Best Approach (Question 52)

We commend the SEC for considering the need for improved financial statement information on climate change. This has been a concern expressed by investors and others for quite some time.

For example, last year Ceres issued a report, *Lifting the Veil*.[181] The report discussed the lack of financial statement information relating to climate change, particularly among oil and gas companies, stating: "The extreme uncertainty and disruption of climate. Change, and global efforts to arrest it, call historic estimates and estimation processes into question in a way that demands transparency about the assumptions and estimates that underlie accounts." The report cited various items in the financial statements as to which adequate disclosure seems lacking. Also, a report issued last year by Carbon Tracker, *Flying blind: The glaring absence of climate risks in financial reporting*, found that over 70% of the reviewed 107 public companies failed to disclose climate-related risks in their audited financial statements.[182]

We are aware that some commenters have opposed the specific financial statement metrics proposed. As the Commission considers comments, we believe any adjustments should ensure that corporate financial statements reflect the financial impact of climate

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[180] See SEC, *Report on the Role and Function of Credit Rating Agencies in the Operation of the Securities Markets, As Required by Section 702(b) of the Sarbanes-Oxley Act of 2002*, Securities and Exchange Commission, January 2003, pp. 9 – 10, 13. The factors were: "(1) national recognition (*i.e.,* whether the rating organization is recognized as an issuer of credible and reliable ratings by the predominant users of securities ratings in the United States); (2) adequate staffing, financial resources, and organizational structure to ensure that it can issue credible and reliable ratings of the debt of issuers, including the ability to operate independently of economic pressures or control by companies it rates and a sufficient number of staff members qualified in terms of education and experience to thoroughly and competently evaluate an issuer's credit; (3) use of systematic rating procedures that are designed to ensure credible and accurate ratings; (4) extent of contacts with the management of issuers, including access to senior level management of the issuers; and (5) internal procedures to prevent misuse of nonpublic information and compliance with these procedures."

[181] *Lifting the Veil: Investor Expectations for Paris-aligned Financial Reporting at Oil and Gas Companies*, June 17, 2021.

[182] *Flying blind: The glaring absence of climate risks in financial reporting*, Carbon Tracker Initiative, September 16, 2021.

risks, both physical and transition. We also encourage the Commission to find ways to address any negative unintended consequences. For example, some commenters have suggested that some companies could react to a line item disclosure requirement by using discretion to reduce the number of line-items, and extent of disaggregated detail, they provide in their financial statements (and thereby reduce the extent of their obligation to provide footnote disclosures on the role of climate risks in those line items), at the expense of the overall informativeness of the financial statements. Nevertheless, we continue to believe that financial statement disclosure is important for investor protection, both to understand the impact of climate risks on the financial statements and the quality of earnings and the balance sheet as well as to have the benefit of the financial statement auditor's objective check on management bias. In this regard, we note that in addition to the sources cited above, in connection with a study of financial disclosure across sectors, Moody's has reported that "[v]ariations in disclosure within and between sectors mask hidden climate-related financial risks. In some key instances company-level disclosures do not fully reflect the true level of exposure."[183]

In our comment letter last year in response to the RFI, we suggested an amendment to Regulation S-X to require companies to disclose a breakdown of current period and planned capital expenditures in a note to their financial statements, to show the portion of investments attributable to addressing (a) transition risks and opportunities, and (b) adaptation to and/or mitigation of physical risks associated with climate change. We continue to believe that disclosure would help validate companies' investments in net zero and other climate mitigation strategies and to help investors discern opportunities that can efficiently steer capital toward the most promising and innovative solutions to the climate crisis.

Moreover, as Moody's findings indicate, the financial statement impact of climate change clearly varies substantially among industries. Accordingly, we urge the Commission to amend its industry guides for the oil and gas industry, and perhaps the mining industry as well, to require better disclosure.[184] We made this proposal in our 2021 comment letter, and we are reiterating it here. Items 1200-1207 of Regulation S-K require specific disclosure by registrants engaged in oil and gas producing activities. Item 1202 requires the standardized table on proved reserves discussed above. This requirement was adopted in 2008 in order to "provide a mechanism for oil and gas companies to seek more favorable financing terms through more disclosure and increased transparency." Given that many reserves may not be economically producible in future years given the transition in energy sources, the schedule should be updated to mandate inclusion of the

[183] *Ready or Not? Sector Performance in a Zero-Carbon World*, Moody's, November 2021, p. 4.

[184] We also recommend the Commission consider whether its Industry Guides for banks holding companies, real estate limited partnerships, and property-casualty insurance underwriters should be expanded to cover the financial statement impacts of climate change in each of these industries.

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sensitivity of reserve levels to future price projection scenarios, including a net zero scenario, and estimated emissions embedded in the reserves.

The existing rule already permits companies to include an optional disclosure of oil and gas reserves' sensitivity to different future price scenarios to improve access to financing through enhanced transparency. Importantly, it also requires companies to disclose assumptions used if they provide the optional reserves sensitivity analysis table. But the rule is inherently lopsided in that it allows companies to disclose forecasts of good news in periods of rising prices but withhold forecasts of bad news in periods of falling prices. Transparency in falling markets is as or more important to investor protection and confidence in our capital markets. The Commission should correct this imbalance and require clear disclosure about the effect of climate change and the energy transition on the value of oil and gas reserves. Historical prices are unlikely to be appropriate measures of whether such reserves are "economically producible." These are also metrics that SASB has called for in its standard on Oil & Gas – Exploration & Production (Version 2018-10). These should be reviewed in this process.

We understand that some commenters are encouraging the SEC to delegate disclosure about climate-related financial information in the financial statements to FASB. We welcome a direction that FASB consider ways its standards might result in better disclosure about the financial impacts of climate risks. If the Commission does so, we ask that it direct the SEC staff to closely monitor such efforts in order to move this forward quickly in light of the significant gaps in disclosure that investors face today. It is important that there be clear public milestones because the FASB has not been active in this area. But we also do not believe FASB taking up such a project replaces the need for appropriate requirements in Regulation S-X as discussed above, and we note that the Commission has long and effectively managed overlapping mechanisms for articulating the form and contents of financial statements. For example, as recently as 2018, the Commission updated Regulation S-X to eliminate redundancy, notably leaving in place overlapping requirements where Regulation S-X's provisions continue to be informative to investors.[185]

IV. Other Issues Raised by the Proposal

A. We Agree with the Concept of Phase-in Dates for the New Requirements, Although We Think They Are Too Relaxed (Question 197, Question 198, Question 199, Question 200, Question 201)

The Commission has proposed different compliance dates for large accelerated filers, accelerated filers, non-accelerated filers, and SRCs. As a general matter, we have no objection to such a phase-in approach, but we question whether companies might not be able to comply more quickly with some of the requirements. (We also note that the SEC's phase-in approach undercuts suggestions made by critics that the SEC is actually trying to solve the climate crisis rather than help investors; climate activists believe that

[185] *Final Rule: Disclosure Update and Simplification*, Securities and Exchange Commission, Nov. 5, 2018.

the climate crisis is dire and paramount, yet the SEC is proposing a less aggressive approach, with full implementation postponed until 2028).

Investors have been asking for—and have needed—this information for a very long time. Eighteen investors and other organizations submitted a Petition for Interpretive Guidance on Climate Risk Disclosures in 2007,[186] and the SEC issued its climate change guidance in 2010, or twelve years ago. In fact, we have located notes taken by a Ceres staff member describing a meeting that took place with SEC staff members to discuss the need for SEC guidance on climate change disclosure. The year of that meeting? 2003, nearly 20 years ago.

Accordingly, we support moving up all of the reporting requirements for 2026 (FY 2025) by one year, to 2025 (FY 2024). Our review of these requirements is that companies should be able to meet this deadline. Such a change would mean that requirements for 2027 (FY 2026) and 2028 (FY 2027) would also be moved up by one year. At the very least, companies should be able to comply more rapidly with Items 1501 (Governance) and 1503 (Risk Management), which are more traditional disclosure requirements.

B. The SEC's Cost-Benefit Analysis Fully Satisfies Relevant Requirements

1. The Cost-Benefit Analysis Is Thorough and Convincing, and recent studies provide opportunities for refinement

We believe that the cost-benefit analysis is thorough and more than complies with requirements that have been imposed by courts in recent years. An excellent summary of those requirements was recently prepared by the New York University School of Law Institute for Policy Integrity, as follows:

"Notably, nothing in relevant case law suggests that the SEC must support every assumption in its cost-benefit analysis with empirical evidence, quantify all of the rule's significant impacts, or demonstrate that aggregate quantified benefits outweigh aggregate quantified costs. Instead, the Commission need only provide a reasoned explanation for its assumptions (taking into account reasonably available empirical evidence), make a good-faith effort to quantify impacts when possible and, when quantification is not possible, explain why. Furthermore, the Commission may reasonably rely on purely qualitative assessments of some effects to support a conclusion that a climate risk disclosure rule is cost-benefit justified."[187]

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[186] California Public Employees' Retirement System, et. al., *Petition: Request for interpretive guidance on Climate Risk Disclosure*, CalPERS Sep. 18, 2007.

[187] Jack Lienke and Alexander Song, *Assessing the Costs and Benefits of Mandatory Climate Risk Disclosure*, NYU School of Law Institute for Policy Integrity, January 2022, p. 2.

The SEC's economic analysis meets these requirements for a "reasoned explanation for its assumptions," a "good faith effort to quantify impacts," and a reasonable reliance on "purely qualitative assessments" where necessary.

2. New research provides more accurate data on investor and issuer status quo costs the Commission can employ to refine its economic justification. (Questions in section G. Request for Comment, pp. 418-419)

Earlier this year (prior to the release of the Proposal) Ceres and Persefoni engaged the Sustainability Institute of the consulting firm ERM to do a survey of companies and investors on the costs they are currently incurring for climate-related disclosure, analysis, and other activities and their perceived benefits in doing so. The response rate was high—39 corporate issuers (i.e., companies) and 35 investors. Results were published in "Costs and Benefits of Climate-Related Disclosure Activities by Corporate Issuers and Institutional Investors" by Mark Lee, Emily K. Brock, and Doug MacNair." by Mark Lee, Emily K. Brock, and Doug MacNair.[188]

The survey provides evidence to the SEC of the current costs investors and issuers spend on climate risk disclosure. This includes costs related to key metrics the SEC proposal requires.

Key findings related to quantitative issuer costs include (emphasis added):

- Average annual issuer costs: **"The SEC's estimated annual costs after the first year of compliance are generally comparable to corporate issuers' current average spend as reflected by the ERM survey.** The SEC estimated an annual cost of $530,000 to comply with its proposed rule a year after implementation. The ERM survey's corporate issuer respondents reported current combined average cost of $533,000 per year based on four ERM survey categories that are similarly defined as – but not identical to – the three cost elements used by the SEC in its calculations of predicted costs. The ERM survey categories were: GHG analysis and/or disclosures; climate scenario analysis and/or disclosures; internal climate risk management controls; and assurance/audits related to climate."[189]

- GHG analysis and/or disclosures: **"[C]orporate issuer respondents to the ERM survey reported spending an average of $237,000 annually on GHG analysis and/or disclosures.** This survey category included all costs related to developing GHG inventories, including analysis and disclosure of Scope 1, Scope 2, and/or Scope 3 GHG emissions. This category also included preparation of GHG data for inclusion in public reporting, any analysis related to setting science-based targets,

[188] Mark Lee, Emily Brock, and Doug MacNair, *Costs and Benefits of Climate-Related Disclosure Activities by Corporate Issuers and Institutional Investors*, The SustainAbility Institute by ERM, May 2022.
[189] Id., at p. 5.

and other similar efforts to understand GHG emissions." The study also found that 90% of issuer respondents issued a report on GHG emissions.[190]

- Scenario analysis: **"Climate scenario analysis and/or disclosure spend averaging $154,000 annually was reported by 31 of the 39 issuer respondents, nearly 80 percent.** This survey cost category includes all costs to a company related to conducting assessments of the impact of climate in the short, medium, or long term using scenario analysis as well as TCFD/CDP disclosure of risks and opportunities."[191]

- Assurance: **"28 issuer respondents, over 70 percent, reported current annual costs of $82,000 related to third-party full or partial assurance or audit related to climate."** ERM found that the "survey finding that 72 percent of issuer respondents already obtain some level of climate-related audit/assurance is broadly in line with the SEC's supposition that many issuers are already obtaining assurance for their climate-related disclosures."[192]

- Integration of climate risk into business processes: **"Twenty-seven issuers, almost 70 percent of respondents, noted costs averaging $148,000 annually related to integrating climate risk into business processes.** This category included costs for internal climate risk management controls, namely the costs related to integrating climate risk into enterprise risk management, oversight at the board level, strategic planning, internal audit, and other fundamental business processes. In addition, this category included issuer costs related to climate-related data collection and aggregation, including IT costs and staff time; internal review of climate-related data collection by management, committees, and board; in-house counsel drafting; and review by outside counsel."[193]

Key findings related to quantitative investor costs include (emphasis added):

- Average annual investor costs: **"[I]nstitutional investor respondents spend an average of $1,372,000 annually to collect, analyze, and report climate data to inform their investment decisions."[194]**

- External ESG ratings, data providers, and consultants: **"33 of 35 investors, 94 percent of respondents, indicat[ed] average spend of $487,000 during the financial year for which they reported.** This category includes all costs for

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[190] Mark Lee, Emily Brock, and Doug MacNair, *Costs and Benefits of Climate-Related Disclosure Activities by Corporate Issuers and Institutional Investors*, The SustainAbility Institute by ERM, May 2022., p. 6.
[191] Id.
[192] Id.
[193] Id.
[194] Id., at p. 10.

external consultants as well as services investors use to acquire information related to ESG ratings, data providers, and analytical services…"[195]

- Collecting climate data related to assets: **"Twenty-nine of the 35 investor respondents, or almost 83 percent, reported spending an average of $257,000 per year on collecting climate data related to assets.** This category included all costs associated with collecting and ensuring the accuracy of climate-related data for analysis related to any managed or owned assets, including that associated with internal staff time and external consultants to ensure accuracy of climate-related data."[196]

- Internal climate-related analysis: "**Twenty-eight investors, or 80 percent of respondents, reported average spending of $357,000 per year on internal climate-related investment analysis, including all costs associated with managing and analyzing data collected from assets.** This survey category includes the management of databases, data aggregation, and/or normalization for the purposes of managing and analyzing climate-related data."[197]

3. We would not support any of the alternative rulemaking approaches listed in the Proposal, with one possible exception (Questions in section *G. Request for Comment*, pp. 418-419)

The Release discusses 14 alternatives that could affect the cost-benefit analysis. Some of these alternatives would impose more burdens on companies (e.g., removing the safe harbor for Scope 3 emissions), while others would require fewer (e.g., requiring limited rather than reasonable assurance). With the exception of global mutual recognition, discussed below, we do not believe they should be pursued. As discussed, we believe the rule as drafted reflects the appropriate balance between investor interests and issuer concerns.

C. We would support global mutual recognition (Question 183)

One of the 14 alternative rulemaking approaches set forth in the Proposal is reliance allowing foreign private issuers to use their home country standards. We would support taking this approach where rules are substantially similar to those the SEC adopts.

FPIs in the European Union, the United Kingdom and Japan are currently subject to climate disclosure rules in their home jurisdictions. In addition, as noted above, the ISSB has released its proposed standards for TCFD-aligned climate disclosures.

[195] Mark Lee, Emily Brock, and Doug MacNair, *Costs and Benefits of Climate-Related Disclosure Activities by Corporate Issuers and Institutional Investors*, The SustainAbility Institute by ERM, May 2022, p. 10.
[196] Id.
[197] Id.

The Proposal would require FPIs (with the exception of Canadian issuers filing on Form 40-F) to comply with the same rules applicable to US companies. In other areas, the SEC has allowed FPIs to comply with their home country rules rather than similar US rules; the most significant example is that FPIs are allowed to compile financial statements using IFRS rather than US GAAP.

We would support a similar approach being taken here. The SEC would need to determine whether rules in foreign jurisdictions are substantially similar to the rules that the SEC adopts. If they are substantially similar, we do not think it advisable to impose an additional set of obligations on FPIs. The ultimate objective of both US and non-US regulators should be cross-jurisdictional regulatory consistency. Mutual recognition – a fundamental principle of international law – would we believe facilitate such consistency.

D. We Support Structured Data Requirements (Question 190, Question 191, Question 192, and Question 193)

Ceres supports the SEC's proposal that issuers be required to electronically tag both narrative and quantitative climate-related disclosures in Inline XBRL. We agree with the Commission that this requirement builds on existing SEC XBRL disclosure requirements, benefits investors and market participants by making the disclosures more readily available and easily accessible, and would not be difficult for issuers to comply with.[198]

Ceres recommends that the SEC provide a single XBRL-based standard for issuers' quantitative and narrative climate risk disclosure. We recommend basing this on the ISSB's work, which would further global alignment of disclosure standards. The ISSB has been working on an XBRL climate risk disclosure taxonomy from the time of its formation, and they released a Sustainability Disclosure Taxonomy for public comment on May 25, 2022.[199]

Using an XBRL taxonomy for climate risk disclosure also furthers the integration of traditional financial reporting with disclosure of climate-related financial risks, which is a goal of many investors. That not only includes aligned timeframes for disclosing these issues, but also the integration of tagged data. As XBRL US has stated, "If public company ESG or climate-related data is developed in the same structured data format [i.e., XBRL], investors and analysts would be able to use the same database and analytical applications with both climate and financial data. That would reduce the need for issuers to learn new applications and keep the cost of data extraction and analysis low, providing an easy on-ramp for financial data users that wish to consume climate or ESG data in addition to financial data."[200]

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[198] *Proposed rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Securities and Exchange Commission, 2022, pp. 283-285.
[199] *Staff request for feedback to inform future development of the IFRS Sustainability Disclosure Taxonomy for digital reporting*, IFRS, May 25, 2022.
[200] *Supporting ESG Data with Standards*, XBRL US, April 2022, p. 14.

In addition, Ceres recommends an SEC approach to XBRL that recognizes investors' need for data in a timely fashion while supporting issuers' efforts to tag climate risk data. This includes providing a phase-in and/or grace period, allowing some experimentation with custom standards, assisting issuers in preparing good quality data, and providing guidance and validation to confirm a submitted report is correct.

For its Inline XBRL reporting rules, the SEC has provided 3-year phase-ins and a 30-day grace period.[201] We recommend that the SEC consider a shorter phase-in period and a 30-day grace period for the XBRL reporting provision of the climate risk disclosure rulemaking.

We recommend that the SEC allow issuers to use custom XBRL tags that are an appropriate fit for their business in cases where the issuers believe an existing XBRL tag is not fit for purpose. This creates a positive feedback loop: some issuers create custom XBRL tags, then the SEC reviews disclosure within an industry to improve and refine its XBRL taxonomy. This is similar to FASB's practices, with its annual releases of revisions to the GAAP XBRL taxonomy.

We also recommend that the SEC assist issuers in preparing good quality tagged data, by providing the XBRL taxonomy as far in advance as possible, providing samples of XBRL-tagged climate risk disclosure, and offering technical guidance. We also support beta testing, where companies are permitted to submit data to the SEC and test its validity before the compliance date.

V. Criticisms of the Proposal Lack Merit

A number of attacks on the Proposal have already been made; indeed, many criticisms were voiced well before the Proposal was issued. We offer brief responses to several of them.

1. One of the most frequent criticisms is that the real reason for the Proposal is to address societal concern about climate change, not to serve investor needs. As one commenter, a former SEC senior staff person, has written: "The truth is that the aim of climate-change disclosures is predominately [sic] the policy goal of combating the causes of climate change and reducing fossil fuel emissions."[202] How these commenters have divined their belief that this is the SEC's true policy goal is left unsaid, since it appears nowhere in the Release itself, either directly or impliedly.

This criticism misdescribes the SEC's intent. Institutional investors, many of whom have expressed strong support for the SEC's initiative, have the goal of making money for their clients. If they do not perform well in that regard, they will lose business. They have quite clearly recognized that climate change is a financial risk for which better information is needed.

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[201] *Press Release – SEC Adopts Inline XBRL for Tagged Data*, Securities and Exchange Commission, 2018; *Interactive Data*, Securities and Exchange Commission, last updates August 20, 2019.
[202] Andrew Vollmer, *Mandatory disclosure rules on climate change are a job for Congress, not the SEC,* The Hill, July 2021.

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One piece of evidence in this regard: Ceres drafted a "Statement of Essential Principles," which states that "disclosure of the material and systemic risks of climate change will help companies and investors to understand, price, and manage climate risks and opportunities," something that is "at the core of efficient securities markets." The Statement has been signed by over 200 institutional investors with over $4 trillion in assets under management and ownership.[203]

It is surely the case that the proposed disclosures are being applauded by climate change activists, and it may well be that the disclosures will lead companies to refine their climate change policies. But there is nothing wrong with, or unprecedented about, an SEC rule that has impact beyond investors. Professor George Georgiev of Emory University Law School is very much on point when he writes:

> Since climate change has society-wide implications, information about it will inevitably resonate beyond the boundaries of the disclosing firm and the capital markets, even when the focus is on financially-material disclosure relying on investor- and issuer-generated disclosure frameworks (as is the case here). The social resonance of climate-related disclosure can drown out its clear-cut financial relevance, render any proposed disclosure rule suspect, and lead to a situation that, when we stop and think about it, is quite illogical: A subject matter's relevance to one audience (stakeholders) is used as an argument to cancel out the well-established relevance of that same subject matter to another audience (investors).[204]

As Prof. Georgiev also notes, much of the Proposal is based on the TCFD, and environmental activists were absent from that effort – instead, the Task Force was comprised of persons from banks, investment companies, insurance companies, rating agencies, accounting firms, and others.

2. It has also been stated that the Proposal lacks "[a] credible rationale for such a prescriptive framework when our existing disclosure requirements already capture material risks relating to climate change."[205] The evidence contained in the Rule Release (see pages 28-33, 319-323) and included in submissions in connection with the RFI is deep and persuasive, showing that the climate risk information currently available to investors is deficient.

This same argument – that existing disclosure requirements are adequate, and new rulemaking is unnecessary – has been voiced before in response to SEC rulemaking proposals and has often

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[203] See *Statement of Essential Principles for SEC Climate Change Disclosure Rulemaking*, which includes lists of North American and global investor signatories, as well as lists of company, foundation, religious organization and nonprofit organization signatories.

[204] George S. Georgiev, *The SEC's Climate Disclosure Proposal: Critiquing the Critics*, Emory Legal Studies Research Paper, March 27, 2022, pp. 22-28.

[205] SEC Commissioner Hester M. Peirce, *We are Not the Securities and Environment Commission - At Least Not Yet*, March 21, 2022.

been rejected. Indeed, as recently as 2020, the SEC under Chair Clayton responded to such an argument made by commenters in connection with several proposed new disclosures contained in the SEC's Release, *Modernization of Regulation S-K, Items 101, 103, and 105*.[206] The Commission proposed requiring disclosure of the material impact of compliance with material governmental regulations, not just environmental laws as Item 101(c) then provided. The Release said that certain commenters thought this rule change was unnecessary: "All of these commenters stated that registrants are already required to disclose the material impact of compliance with material governmental regulations in their MD&A, risk factor, or financial statement disclosure." The SEC rejected that plaint, stating that the proposed disclosure would "elicit broader disclosure", in large part because "disclosure in a registrant's MD&A or financial statements may focus more narrowly on the specific impact on a registrant's financial results, liquidity and capital resources or balance sheet."[207] Precisely the same analysis applies here. The existing rules relating to MD&A and other disclosures simply have not, and will not, result in the kind of climate risk disclosure that is essential for informed investment and voting decision making.

3. Another often voiced objection is that this information is immaterial because, if it were not, companies would already have been making these disclosures. But this statement is at odds with basic securities law principles. There is no general, overarching requirement that companies disclose everything that is material. Unless there is a disclosure requirement, either prescriptive or principles-based, or a need to correct a prior disclosure, a company need not disclose. Of course, there are existing principles-based requirements, in particular Items 101, 103, and 105 (description of business, MD&A, and risk factors), and companies often do say something about climate change in response to these rules, but the disclosures are largely boilerplate and unhelpful to investors. There is no doubt that principles-based rules often lead to such inadequacies; indeed, the latest example of this happening is the SEC's human capital disclosure rule, a principles-based requirement adopted in 2020 which, according to many analyses, has failed to result in meaningful disclosures (and, accordingly, is set to be revised soon by the Commission).[208]

Critics make other allegations with respect to lack of materiality, saying that the SEC's rule will not withstand judicial scrutiny. We think Professor Coffee's brief refutation summarizes why these criticisms lack merit: "Because a substantial majority of the stock in public corporations is now held by institutional investors (most of which are vocal in their desire for more climate-related disclosures), it would be myopic for a court to ignore their strong preferences. If the majority of the market wants the information, it presumptively should be material."

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[206] *Final Rule: Modernization of Regulation S-K Items 101, 103, and 105*, Securities and Exchange Commission, 2020.
[207] Id.
[208] Ganesh M. Pandit, *First Look at the Human Capital Disclosures on Form 10-K*, The CPA Journal, October 2021; Gibson Dunn, *Discussing Human Capital: A Survey of the S&P 500's Compliance with the New SEC Disclosure Requirement One Year After Adoption*, November 10, 2021; Parker Bosltad et al. *Flying blind: What do investors really know about climate change risks in the U.S. equity and municipal debt markets?* Brookings, September 2020.

4. Another criticism is that the information is not the type of information that the SEC has typically required, because SEC rules traditionally involve subjects such as "financial statements, core business information, directors and management, and a description of the securities being sold."[209] But there are, in fact, many rules or guidance relating to risks and uncertainties much like what the SEC is proposing here. For example, as Professor Coates has noted, the SEC provided guidance for disclosure about asbestos risk.[210] Cybersecurity is another example, with the SEC staff stating in 2020 that "[t]he SEC has focused on cybersecurity issues for many years, with particular attention to market systems, customer data protection, *disclosure of material cybersecurity risks and incidents*, and compliance with legal and regulatory obligations under the federal securities laws."[211] (Emphasis added.) And there have been rules relating to environmental disclosures for decades. Thus, it is also wrong for a critic to suggest that the SEC is heading down the road of having to rename itself the "Securities and Environment Commission."[212] The SEC is not the Securities and Tax Commission, even though it has requirements regarding tax disclosures;[213] it is not the Securities and Employment Commission, even though in 2020 (under Chair Clayton) it mandated disclosures relating to human capital;[214] and it is not the Securities and Geological Commission, even though it has long required mining companies to provide a wide range of mining information.[215] A list of similarly lampoonish SEC name-changes could go on much longer, but the point should be clear.

5. In the same vein, it is being asserted that climate risk information is too speculative or imprecise. But the speculative or imprecise nature of information does not mean it is not worthy of mandatory disclosure. And the SEC has been down this road before, most particularly with respect to forward-looking or "soft" information. Before 1972, the Commission generally prohibited inclusion of projections in filings under the 1933 and 1934 Acts. One of the main reasons for this position was that projections were viewed as inherently unreliable because they did not involve "facts" and were thought to be "per se misleading."[216] Over time, the

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[209] Andrew Vollmer, *Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?*, Mercatus Center, August 19, 2021.

[210] See John Coates, *ESG Disclosure – Keeping Pace with Developments Affecting Investors, Public Companies and the Capital Markets*, Securities and Exchange Commission, March 11, 2021 ("For years, asbestos-related risks were invisible, and information about asbestos would likely have been called 'non-financial.' Over time, those risks went from invisible to visible to extremely clear, and clearly financial. Not surprisingly, disclosure about these risks did not initially show up in SEC filings, but there too they went from invisible to increasingly disclosed.")

[211] *Cybersecurity and Resiliency Observations*, SEC Office of Compliance Inspections and Examinations, January 27, 2020.

[212] SEC Commissioner Hester M. Peirce, *We are Not the Securities and Environment Commission - At Least Not Yet*, March 21, 2022.

[213] See, e.g. *Staff Accounting Bulletin No. 118* Securities and Exchange Commission, Feb. 27, 2018.

[214] *Final Rule: Modernization of Regulation S-K Items 101, 103, and 105*, Securities and Exchange Commission, 2020.

[215] *Industry Guide 7,* Securities and Exchange Commission.

[216] Joel Seligman, *The SEC's Unfinished Soft Information Revolution*, Fordham Law Review, 1995, citing Harry Heller, *Disclosure Requirements Under Federal Securities Regulation*, Bus. Law, 1961.

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Commission moved away from this position, ending up in the opposite camp: forward-looking information became mandatory for inclusion in the MD&A and elsewhere. The importance of disclosure of "soft" information was also recognized by Congress when it passed the safe harbor for forward-looking information as part of the PSLRA in 1995. There is no reason why the speculative or imprecise nature of some climate risk information should be viewed any differently. It may indeed consist in part of forward-looking or "soft" information, but that is by no means a basis for exempting it from mandatory disclosure.

6. Other critics have expressed concern about litigation risks accompanying the proposed disclosures. However, much of the disclosures are forward-looking and, as discussed above, subject to the existing litigation safe harbors; indeed, we commend the SEC for noting in the Release on multiple occasions where these safe harbors could apply.[217] Further, the proposed safe harbor will protect issuers in disclosure of Scope 3 emissions information. Moreover, it has often been observed that alleging securities fraud based on risk and risk management is difficult under existing law.[218]

A thorough assessment of ESG-related liability concerns was undertaken by a group of leading securities lawyers at a 2017 legal symposium sponsored by the SASB.[219] The general view was that better disclosure of ESG risks would not inexorably lead to greater liability exposure. First, there is the general principle under the federal securities laws that silence is not an option if there is a duty to disclose. Thus, disclosure may be required if the information is material and is mandated by, for instance, Item 303 (MD&A) because it constitutes a "known trend or uncertainty" that is "reasonably likely" to impact a company's operating performance or financial condition. A company can be sued for nondisclosure of material information, particularly if it makes more expansive disclosure outside an SEC filing.

Second, liability under the federal securities laws can arise no matter where a false or misleading statement is made, as long as it is material and the plaintiff can show causation, reliance, or scienter on the part of the defendants, and damages. Much sustainability information is currently disclosed outside of SEC filings—in stand-alone sustainability reports, on websites, or elsewhere—and is also disclosed as boilerplate in SEC filings. When such statements are made in the loosely controlled environment of sustainability reports, they can more easily backfire. Also, there can be liability for a "half-truth," in which securities fraud liability can arise if an issuer fails to provide all the information necessary to make a statement not misleading.

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[217] See, e.g., the Proposal's discussion of the application of the existing forward-looking statement safe harbors to the proposed climate-related disclosures, Sections II.C.3-4, II.E, II.G.1, and II.I.

[218] Virginia Harper Ho, *Modernizing ESG Disclosure*, University of Illinois Law Review, January 2022, p. 308.

[219] *Report of the Legal Roundtable on Emerging Issues Related to Sustainability Disclosure* (held at the Harvard Law School), Sustainability Accounting Standards Board, June 19, 2017. See also Tom Riesenberg and Elisse Walter, *Sustainability and Liability Risk*, Harvard Law School Forum on Corporate Governance, February 18, 2018., Harvard Law School Forum on Corporate Governance, February 18, 2018.

Third, liability risk can actually be reduced by putting climate and other ESG information through the rigor of the traditional financial reporting process, which reduces risk by using accounting standards, effective internal controls, sound data governance, well-established regulatory oversight, and external audits or reviews. At a Harvard Legal Roundtable, one prominent former SEC regulator wondered why companies are not "petrified" when they release sustainability information in reports or on websites without the benefit of the scrutiny that goes into a 10-K filing.[220]

7. A group of 22 securities law professors has levelled another type of attack on the proposal – that it focuses solely on the demands of institutional investors and not on individual investors. The professors urge the SEC to ask institutions whether they have polled their individual clients on the need for this information.[221] We have no objection to such a question being asked, but we believe we already know the answer. There has been polling done on this question, and the polling found that 87% of Americans agree that large companies should be required to publicly disclose climate risks.[222] Also, a nationwide survey commissioned by Americans for Financial Reform Education Fund and Public Citizen found that investors "care about climate-related risks and opportunities of public companies, support the SEC requiring climate-related disclosures with third-party audit, and would factor the information disclosed into their investment practices."[223] Seventy percent of surveyed investors support the SEC requiring all public corporations to disclose standardized information about climate-related financial risks.[224]

8. We are particularly puzzled by an argument that GHG emissions disclosures are improper because they "look outward, not inward,"[225] that is, they have effect on the environment outside of the company and not on the company itself. But the same commenter who states this case also summarizes the Proposal's explanation for emissions disclosure as follows: "The Proposal argues that GHG emissions information is important to investment decisions because it can be useful in conducting transition risk analysis. Transition risk is an actual or potential negative effect on the business or financial statement items of a company from regulatory, technological, or market changes addressing the mitigation of or adaptation to climate changes, such as changes

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[220] SASB Legal Roundtable on Emerging Issues Related to Sustainability Disclosure, Harvard Law School, 2017.

[221] Lawrence Cunningham et al., *Comment Letter on SEC Climate Disclosure Proposal by 22 Law and Finance Professors*, May 17, 2022.

[222] *Americans overwhelmingly support mandatory climate disclosure for U.S. companies*, Ceres, February 17, 2022, discussing results of a survey developed by research provider JUST Capital in consultation with survey and market research provider SSRS, which interviewed a representative sample size of more than 1,100 U.S. adults from a diverse and probability-based web panel nationwide.

[223] *Results of a nationwide survey: Retail investors' support for the SEC mandating climate-related financial disclosures from public companies*, Americans for Financial Reform Education Fund and Public Citizen, April 28, 2022, p. 1.

[224] Id., at p. 4.

[225] Andrew Vollmer, *The SEC Lacks Legal Authority to Adopt Climate-Change Disclosure Rules*, Mercatus Center – George Mason University, April 2022, p. 15.

in law or policy or reduced market demand for a product."[226] How can information about the "actual or potential negative effect" of climate change on a company's business or financial statements be "outward" and not "inward"- looking? Such information is innermost, at the very core of a company's current and future prospects.

9. We also disagree with the argument that a final rule is so certain to meet with disapproval by a court of appeals or the Supreme Court on a petition for review that the SEC should consider taking a very different rulemaking path, relying on the Environmental Protection Agency as the primary GHG emissions disclosure actor.[227] We think the premise of this argument is wrong; as discussed below, the Proposal stands on a solid constitutional and statutory foundation and would withstand court review, and no doubt the final rule would as well. But, in addition, the EPA-reliance approach is misguided. The EPA is not an investor protection agency, and its existing GHG disclosure requirements do not mesh with investor needs and demands. Among other things, the EPA focuses solely on US emissions from major point sources and suppliers, failing to capture the full range of direct and indirect emissions. Nor does the EPA have expertise in issues relating to market efficiency or fair dealing. Moreover, taking this approach would set the SEC's climate disclosure initiative back by many months, as a reproposal and new comment period would be necessary. The SEC need not go down this path now.

VI. The Proposal Is Constitutionally and Statutorily Sound

A. The SEC Has Statutory Authority to Promulgate the Proposed Rule

The proposed rule falls squarely within the SEC's established statutory authority. As confirmed by the text, purpose, and history of the securities laws, Congress invested the SEC with authority to require disclosures that protect investors or serve the public interest. The proposed rule does not purport to mandate any conduct beyond financial issuer disclosures—the traditional realm of SEC regulation—and the disclosures required under the proposed rule are tailored to serve these Congressionally-defined goals.

The Securities Act of 1933 and the Securities Exchange Act of 1934 expressly authorize the SEC to require disclosures as necessary or appropriate for investor protection or to serve the public interest. Both acts authorize the SEC to mandate such disclosures in registration statements: Section 7 of the 1933 Act requires that registration statements contain "such other information" that the SEC "may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 77g(a)(1). Section 12(b) of the 1934 Act likewise provides that the SEC "may by rules and regulations require" that applications for registering a class of securities disclose "[s]uch information, in such detail," respecting the issuer's organization, financial structure, business, and financial statements as the SEC considers "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78*l*(b)(1).

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[226] Andrew Vollmer, *The SEC Lacks Legal Authority to Adopt Climate-Change Disclosure Rules*, Mercatus Center – George Mason University, April 2022, p. 16.
[227] Joseph A. Grundfest, *The SEC is Heading Toward a Climate Train Wreck*, Bloomberg, April 5, 2022.

The 1934 Act also grants the SEC abundant discretion to require disclosures in periodic reports. Section 13(a) of the 1934 Act provides that issuers of a registered security "shall file" periodic reports with the SEC "in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security." 15 U.S.C. § 78m(a). Those periodic reports must include "such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration" of a security. *Id.* § 78m(a)(1). And they must also include "such annual reports . . . and such quarterly reports . . . as the Commission may prescribe." *Id.* § 78m(a)(2).

The purpose, history, and subsequent interpretation of these statutes confirm that they convey broad discretion to the SEC. Congress enacted the 1934 Act and created the SEC in the aftermath of the Great Depression, and was focused on the "national public interest" implicated by securities transactions. 15 U.S.C. § 78b. Because "transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are effected with a national public interest," it was "necessary to provide for regulation and control of such transactions and of practices and matters related thereto," including by "requir[ing] appropriate reports." *Id.* Both the House and Senate Committee Reports for the 1934 Act emphasize that the SEC was granted broad, flexible regulatory powers. The House Report explained that the 1934 Act covers "a field where practices constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means," making "broad discretionary powers in the administrative agency . . . practically essential." H.R. Rep. No. 1383, 73d Cong., 2d Sess. 6–7 (1934). As it was "inadvisable" to put specific "solutions in the form of statutory enactments that could not be changed in case of need without Congressional action," the 1934 Act instead "singles out" several "problems as matters appropriate to be subject to restrictive rules and regulations but leaves to the administrative agencies the determination of the most appropriate form of rule or regulation to be enforced." *Id.*

The Senate Committee Report stressed the same point, explaining that "so delicate a mechanism as the modern stock exchange cannot be regulated efficiently under a rigid statutory program." S. Rep. No. 792, 73d Cong., 2d Sess. 5 (1934). "Unless considerable latitude is allowed for the exercise of administrative discretion, it is impossible to avoid, on the one hand, unworkable 'strait-jacket' regulation and, on the other, loopholes which may be penetrated by slight variations in the method of doing business." *Id.* Indeed, on the subject of requiring disclosures in periodic reports, the Senate Committee Report emphasized that the SEC "is given complete discretion . . . to require in corporate reports only such information as it deems necessary or appropriate in the public interest or to protect investors." *Id.* at 10.

In the decades following the passage of the securities laws, federal courts have repeatedly reaffirmed this understanding. In *Natural Resources Defense Council, Inc. v. Securities and Exchange Commission*, the D.C. Circuit considered the SEC's authority to require corporations "to disclose comprehensive information about their environmental and equal

employment policies," and concluded that the SEC had "broad discretionary powers to promulgate (or not to promulgate) rules requiring disclosure of information beyond that specifically required by statute." 606 F.2d 1031, 1036, 1045 (D.C. Cir. 1979). Citing the *in the public interest* or *for the protection of investors* language from the 1933 and 1934 Acts, the Court explained that Congress's decision "to delegate broad rulemaking authority to the SEC" was "evident from the language in the various statutory grants." *Id.* at 1050. The Second Circuit has echoed this finding, explaining that "[w]hen Congress created the SEC in the 1934 Exchange Act, it was its intention to give the Commission 'complete discretion to require in corporate reports only such information as it deems necessary or appropriate in the public interest or to protect investors.'" *United States v. Matthews*, 787 F.2d 38, 47 (2d Cir. 1986) (quoting S. Rep. No. 792, 73d Cong., 2d Sess. 5).

The SEC's proposed rule on climate disclosures serves both of the twin goals underpinning the SEC's statutory authorization.

1. Investor Protection

The proposed disclosures would protect investors in several ways. For starters, they would help to counteract "greenwashing"—disclosures that convey the false or misleading impression that a reporting entity has successfully addressed ESG related risks and opportunities. The current lack of comparable, consistent, and reliable reporting on climate risks has allowed greenwashing to flourish. *See supra at II.A.2*. The disclosure regime required by the proposed rule would give investors "access to more comparable, consistent, and reliable disclosures with respect to registrants' climate-related risks." Proposed Rule at 334. It thus would make greenwashing more difficult and reduce the volume of false and misleading information confronting investors.

In addition to counteracting otherwise false and misleading information, the proposed disclosures would enable investors to better analyze the potential financial impacts of climate change on a company's value.[228] Investors have repeatedly expressed the need for clear and measurable information in order to assess climate related- risks and opportunities. Creating consistent disclosures for SEC registrants will allow investors to access and compare climate-related risks and opportunities, and thus conduct financial analyses that are currently

[228] See, e.g., *2021 Global Investor Statement to Governments on the Climate Crisis*, The Investor Agenda, September 14, 2021, (statement "signed by 733 investors representing over USD $52 trillion in assets" calling on governments to "[c]ommit to implementing mandatory climate risk disclosure requirements aligned with the Task Force on Climate-related Financial Disclosures (TCFD) recommendations, ensuring comprehensive disclosures that are consistent, comparable, and decision-useful"); Chris Flood, *Heavyweight investors demand more disclosure of environmental risks*, Financial Times, Financial Times, June 21, 2021, (describing how "168 asset managers and financial institutions from 28 countries, which together represent more than $17tn in combined assets" are "demanding that 1,320 companies should make clearer disclosures about environmental risks").June 21, 2021, (describing how "168 asset managers and financial institutions from 28 countries, which together represent more than $17tn in combined assets" are "demanding that 1,320 companies should make clearer disclosures about environmental risks").

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unavailable given the inconsistent – and often absent – climate-related disclosures currently provided by companies.

2. Public Interest

To determine whether disclosure would be "necessary or appropriate in the public interest," the SEC considers whether it would "promote efficiency, competition, and capital formation." 15 U.S.C. § 77b(b) (1933 Act); *see also id.* § 78c(f) (1934 Act). Consistent, comparable, and reliable disclosures about a company's climate related risks and opportunities would promote all three interests.

The proposed rule would promote both allocative and informational efficiency. Timely, comparable information about each company's climate related risks and opportunities would improve informational efficiency, leading to more accurate valuation. In much the same way, the proposed disclosures would help allocate capital to its risk-adjusted highest-value use, allowing investors to redistribute capital from companies with previously undisclosed climate-related risks toward companies with previously undisclosed climate related opportunities.

Relatedly, these disclosures would encourage competition both within the United States and globally. With increased transparency and access to information, investors will be better placed to identify and accurately value those registrants who have strong approaches to climate risks and opportunities. These disclosures would also foster competition by aligning the United States disclosure regime with measures currently being discussed and implemented in other countries.[229] By requiring registrants to disclose climate-related information under an established framework, the proposed rule ensures that United States companies will remain globally competitive while protecting companies otherwise disadvantaged by a purely voluntary disclosure regime.

Lastly, the proposed rule would promote capital formation by reducing information asymmetries and increasing investors' confidence in the capital markets. Standardized reporting requirements and formats will allow a greater number of investors to accurately assess climate-related factors, thereby increasing the potential pool of investors. Mandated disclosures would also help close knowledge between a company and potential investors, reducing investor uncertainty and encouraging otherwise reluctant investors to contribute capital to the markets.

B. Critics of the Proposed Rule Misconstrue the Legal Regime Governing SEC Rules

[229] See, e.g., *Task Force on Climate-related Financial Disclosures: 2021 Status Report*, Task Force on Climate-related Financial Disclosures, October 2021, p. 5 ("Brazil, the European Union, Hong Kong, Japan, New Zealand, Singapore, Switzerland, and the United Kingdom have announced requirements for domestic organizations to report in alignment with the TCFD recommendations").

Although the proposed rule straightforwardly fits within the SEC's statutory authority, as established by the 1933 and 1934 Acts, some commentators have suggested that the rule nevertheless exceeds the bounds of the SEC's authorization, citing statutory context, non-delegation doctrine, or the absence of a universal materiality limitation. These contentions mischaracterize the proposed rule and the scope of the SEC's authority.

1. Statutory Interpretation

Some opponents of the proposed rule contend that the SEC lacks statutory authorization, based on purportedly implicit limitations in the 1933 Act and 1934 Act and the legislative history of those statutes. *See, e.g.*, Letter from Andrew N. Vollmer to SEC 4–5 (Apr. 12, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20123525-279742.pdf ("Vollmer Letter"). While they recognize that the 1933 Act and the 1934 Act authorize the SEC to promulgate disclosures that serve either investor protection or public interest purposes, they suggest that the federal securities laws contain implicit "subject-matter boundaries" that preclude the SEC from requiring disclosures about certain subjects—*even if* those disclosures would protect investors or serve a valid public interest. This argument is fundamentally misplaced.

First, it ignores statutory text. Indeed, one critic recognizes that "[t]he statutory language allowing the SEC to issue rules for periodic reports of companies has *no subject-matter restriction*." *Id.* at 9 (emphasis added). Even so, some critics urge that "statutory context" reveals *implicit* subject matter limitations on that *explicit* statutory authorization. But when statutory text is clear, statutory context plays no role. *See, e.g.*, *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019) ("If the words of a statute are unambiguous, this first step of the interpretive inquiry is our last."). Here, the relevant provisions expressly empower the SEC to promulgate disclosure rules "as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security." 15 U.S.C. § 78m(a). These provisions contain nothing cabining that authority to certain narrow subject matters. Because the text clearly authorizes the proposed rule, statutory context—whatever it might say—is irrelevant.

Second, and at any rate, statutory context merely confirms the SEC's authority to promulgate climate disclosure rules. To begin, the securities laws do not, as some suggest, restrict the SEC's regulatory authority to "information closely related to the disclosing company's value and prospects for financial success." Vollmer Letter at 6. Instead, as the D.C. Circuit held, statutory context shows that the SEC "was necessarily given very broad discretion to promulgate rules governing corporate disclosure." *Natural Res. Def. Council*, 606 F.2d at 1050. The proposed rule fits well within that broad mandate.

Moreover, even if statutory context were to restrict the SEC's regulatory authority to "information closely related to the disclosing company's value and prospects for financial success," Vollmer Letter at 6, climate related disclosures would fall squarely within that subject. Companies face transition risks arising from an

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evolution to a lower carbon economy and physical risks arising from climate change itself. *See supra at II.A.1*. Those risks, which will affect earnings, balance sheets, and cash flows, closely relate to a company's financial prospects and financial value. Thus, as one critic has explained elsewhere: "Disclosure rules about the effects of climate trends on individual companies could be written to fall within the subject headings Congress has spelled out for disclosures in public filings, such as the need for capital, the effects on financial statement line items, or risk factors." Andrew N. Vollmer, *Does the SEC Have Legal Authority to Adopt Climate Change Disclosure Rules?* (Aug. 19, 2021), at 11, https://ssrn.com/abstract=3908560. The proposed rule does exactly that. So even under a cramped view of SEC authority, the SEC has firm footing here.

Third, it is wrong to suggest that climate related disclosures exceed the SEC's authority by having "a subject and objective different from the disclosures Congress *requires* under the federal securities laws." Vollmer Letter at 12 (emphasis added). The question is not whether Congress has *required* the SEC to promulgate climate related disclosure rules; the question is whether Congress has *authorized* the SEC to do so. What Congress has said the SEC *must* do does not determine what the SEC *may* do. Indeed, Congress intended *not* to confine the SEC's rulemaking authority to small boxes bounded by bright lines. Rather, as the House and Senate Reports confirm, Congress envisioned—and expressly created—a nimble, flexible, responsive SEC that could respond to new threats to investors with new regulatory solutions. For decades the SEC has fulfilled that mandate, providing detailed guidance for disclosures about asbestos related risks, climate change, and other environmental disclosures.[230] *See supra at V*. In that regard, the proposed rule follows a well-worn trail.

Finally, the functionalist argument that implicit subject matter limits are necessary to constrain the SEC's authority is also misplaced. That argument contends that without implicit subject matter limits, the SEC's "ability to require disclosures is nearly limitless," and the SEC "could approve a rule ordering filing companies to disclose the locations of dog parks near corporate properties or the average number of sunny days each year at corporate offices." Vollmer Letter at 4. But that supposed parade of horribles is less horrible than it sounds. The SEC could approve a disclosure rule about dog parks or sunny days *only if* that rule were necessary to protect investors or if, after considering efficiency, competition, and capital formation, that rule was to serve the public interest. In addition, the SEC would have to find facts supporting those conclusions, satisfy the Administrative Procedure Act's procedural and substantive requirements, and survive judicial scrutiny. So the SEC could not, as critics imagine, simply rest on "the claim that more information is better for investors." *Id.*

[230] See, e.g., *Commission Guidance Regarding Disclosure Related to Climate Change*, Securities and Exchange Commission, February 8, 2010.

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Put simply, the SEC has the statutory authority to impose disclosure obligations that satisfy the organic statutes and the Administrative Procedure Act—no more, no less. There is nothing remarkable about that.

2. Non-Delegation and Separation of Powers

In addition to fitting under the language of the SEC's authorizing statutes, the proposed rule also falls well within established constitutional bounds. The non-delegation doctrine is a constitutional doctrine stemming from the Constitution's protection of the separation of powers. Because "[t]he Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States'," "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (quoting U.S. Const. art. I, § 1). Accordingly, "when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.'" *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) (alteration adopted) (emphasis in original).

The non-delegation doctrine has also been addressed in connection with the so-called major questions doctrine, which posits that courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air Regul. Grp. v. EPA.*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). The Supreme Court has invoked that principle in a handful of recent cases, explaining that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" the Court "typically greet[s] its announcement with a measure of skepticism." *Utility Air*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159).

The proposed rule implicates none of these concerns. First and foremost, the 1933 Act and 1934 Act expressly provide "intelligible principles" governing the SEC's exercise of authority by limiting the SEC's authority to rulemaking in service of the "public interest or for the protection of investors." These are precisely the sort of "intelligible principles" that courts have traditionally looked for in assessing the scope and constitutionality of Congressional delegations. *See, e.g., Gundy v. United States,* 139 S. Ct. 2116, 2129 (2019) (plurality opinion) (noting that the Supreme Court has repeatedly "approved delegations to various agencies to regulate in the 'public interest'" and collecting cases); *Whitman*, 531 U.S. at 472 (upholding delegation to EPA to impose air quality standards "requisite to protect the public health").

Second, the proposed rule does not seek to impose sweeping economic or political rules impacting a wide swath of the American economy. To the contrary, it simply requires registrants to submit financial disclosures—a quintessential

exercise of SEC authority. In promulgating this rule, the SEC is not suggesting that it has authority over climate-change mitigation, or imposing non-traditional, invasive obligations on registrants. The proposed rule, which does not require *any* actions besides disclosures, does not raise the sort of "major question" that causes courts concern.

Comparing the proposed rule with recently-challenged regulations illustrates the difference, and highlights the truly limited mandate of the proposed rule. For instance, in *Utility Air*, the Supreme Court reviewed EPA regulations seeking to limit greenhouse gas emissions. The Court concluded that the EPA had the authority to regulate large polluters that were already required to obtain permits to emit conventional pollutants, but held that the agency could not apply this rule to millions of small-scale sources, explaining that "[t]he power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text." *Utility Air*, 573 U.S. at 324. In *Alabama Association of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021) (per curiam), the Supreme Court considered a challenge to the eviction moratorium imposed by the CDC in response to the Covid-19 pandemic, and concluded that the challenge was likely to succeed on the merits, as "[e]ven if the text were ambiguous, the sheer scope of the CDC's claimed authority under § 361(a) would counsel against the Government's interpretation." *Id.* at 2489. Similarly, the Supreme Court concluded that a challenge to OSHA's proposed vaccine mandate was likely to succeed, explaining that the rule posed a "significant encroachment into the lives—and health—of a vast number of employees," and that the Occupational Safety and Health Act did not "plainly authorize[] the Secretary's mandate." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 665 (2022).

The disclosures required under the SEC's proposed rule are qualitatively different from the sweeping measures invalidated in these cases. Regulations seeking to impose emission permits on millions of small source polluters, imposing a nationwide eviction moratorium, and requiring the vast majority of American workers to receive a vaccine are significantly more consequential and invasive than a regulation that simply mandates the inclusion of additional information in existing financial disclosures. Despite hyperbolic criticism to the contrary, the SEC does not purport to regulate climate change mitigation, or to require SEC issuers to take *any* action beyond submitting disclosures. And while the content of the required disclosures may be new, the obligation to submit financial disclosures certainly is not. A proposed rule drawing on the most traditional form of agency power does not pose non-delegation or major questions issues.

3. Materiality

Some critics of the proposed rule have contended that the rule should be limited, in its entirety, by a materiality provision. *See, e.g.*, Hester Peirce, "We Are Not the Securities and Environment Commission – At Least Not Yet," Mar. 21, 2022,

https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321 (the proposed rule's "approaches to determining what information should be disclosed are problematic because they depart from the generally applicable, time-tested materiality constraint on required disclosures"); American Petroleum Institute, June 11, 2021 Letter, https://www.sec.gov/comments/climate-disclosure/cll12-8907327-244228.pdf (contending that climate disclosures should be limited to "information that is considered material by the issuer and its shareholders"). But while these commenters have attempted to cast materiality as a statutory or constitutional limitation on the SEC's rulemaking authority, this claim lacks any legal grounding. The SEC is not required to limit disclosures to "material" information, and the proposed rule's reasoned utilization of materiality in certain provisions, and exclusion from others, falls squarely within the SEC's rulemaking authority.

The SEC's authorizing statutes do not require the SEC to embed a materiality limitation in required disclosures. The "materiality" concept stems from the SEC's anti-fraud rules, which generally limit fraud liability to "misrepresentation of material information" or omission of "any material fact." SEC Rule 10b-5; SEC Rule 14a-9. While materiality serves an important role in protecting corporations from being "subjected to liability for insignificant omissions or misstatements," and, correspondingly, in protecting shareholders from being buried in an "avalanche of trivial information" from corporate management out of fear of liability for small omissions, *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448 (1976), it is not a limitation on the SEC's statutory power. *See, e.g.*, 17 C.F.R. § 229.103(c)(3) (2020) (requiring disclosure of certain administrative or judicial proceedings related to the environment, regardless of materiality); 17 C.F.R. § 229.402 (2019) (requiring disclosure of compensation for executive officers, with no materiality limitation).

Instead, the touchstone for the SEC is investor protection and public interest. *See supra at II.A.3 and 4*. When the SEC determines that bright-line disclosure obligations will serve investors or the public better than obligations subject to materiality determinations by corporate management, there is no statutory obstacle to such regulation. *See, e.g.*, 15 U.S.C. § 77aa (1933 Act, Schedule A) (listing 32 categories of information required in registration statements, of which only two are qualified by materiality). As Professor George Georgiev has explained, "the federal securities statutes do not impose a materiality constraint on SEC disclosure rulemaking," and while the "general materiality of a given subject matter" may inform the SEC in deciding whether to adopt new rules, the SEC has discretion to determine which requirements will best ensure "the consistency, comparability, and reliability of public companies' disclosures in that area." *See* Letter from George S. Georgiev to SEC 4–6 (Mar. 28, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20121510-273502.pdf. The SEC has done just that by including a materiality element for some, but not all, of the disclosures in it required under the proposed rule.

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4. The SEC Should Evaluate Severability

The SEC's authority to promulgate this rule is clear. But if a court were to conclude otherwise, not all is lost. The court still would consider whether the rule is severable from the offending provision. A rule is severable if "the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001). When a rule is severable, the court may set aside the offending provision *only*, not the entire rule.

An agency's intent factors heavily in a court's severability analysis. *See id.* As a result, the SEC should evaluate whether the rule could be severable from particular provisions and that the SEC "would have adopted" the rule "on its own" without those provisions. *ACA Int'l v. FCC*, 885 F.3d 687, 708 (D.C. Cir. 2018) (quoting *Am. Petroleum Inst. v. EPA*, 862 F.3d 50, 71 (D.C. Cir. 2017) (per curiam)). If the SEC concludes that the rule is severable from those provisions or any others, it should explain why and include in the final rule an "express severability provision," which "plainly demonstrates the agency's actual intent regarding partial invalidation." *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. Nat'l Lab. Rels. Bd.*, 466 F. Supp. 3d 68, 98 (D.D.C.) (2020), order amended on reconsideration, 471 F. Supp. 3d 228 (D.D.C. 2020).

* * *

Thank you in advance for your consideration of our comments. We welcome the opportunity to provide additional background and resources if it would be useful. If you would like further information, please contact me at lubber@ceres.org.

Sincerely,

Mindy S. Lubber
CEO and President
Ceres, Inc.

cc: Chair Gary Gensler
cc: Commissioner Hester M. Peirce
cc: Commissioner Allison Herren Lee
cc: Commissioner Caroline A. Crenshaw

APPENDIX 1: SEC Questions

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