National Association of Home Builders

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

RE: File Number S7-10-22
RIN 3235-AM87

The Enhancement and Standardization of Climate-Related Disclosures for Investors

Dear Sir or Madam:

On behalf of the more than 140,000 members of the National Association of Home Builders (NAHB) of the United States, I welcome the opportunity to respond to the Securities and Exchange Commission's (SEC or Commission) Proposed Rule on amendments to the Securities Act of 1933 ("Securities Act") and Securities and Exchange Act of 1934 that would require registrants to provide certain climate-related information in their registration statements and annual reports.

NAHB is a Washington DC-based trade association representing, among others, companies involved in the development and construction of for-sale single-family homes, including homes for first-time and low- and moderate-income homebuyers as well as the production and management of affordable multifamily rental housing. The organization's membership includes over 140,000 firms engaged in land development, single and multifamily construction, remodeling, multifamily ownership, building material trades, and commercial and light industrial construction projects. The overwhelming majority of NAHB's members are classified as "small businesses," as defined by the U.S. Small Business Administration (SBA).

As discussed more fully below, NAHB is concerned that SEC's Proposed Rule will adversely impact small businesses like NAHB members, primarily by making it more difficult for them to work with publicly traded companies. The costs and obstacles associated with collecting and providing climate-related data to the publicly traded companies with which NAHB members engage are nearly immeasurable. NAHB urges SEC to consider NAHB's comments as it determines whether and how to proceed with Scope 3 greenhouse gas (GHG) emissions disclosures.

The SEC's Proposal

The SEC's proposal would require all SEC registrants to provide information about climate-related risks that are reasonably likely to have a material impact on its business, results of operations, or financial condition. Registration statements and annual reports would include certain disclosures and information about climate-related risks and would include disclosure of a registrant's GHG emissions. In addition, certain climate-related financial metrics would be required in a registrant's audited financial statements. The SEC states that, in issuing this proposed rule, it is responding to investor requests for more climate-related disclosure in documents submitted and/or filed with SEC to increase the consistency, reliability and usability of available information.

The SEC already requires disclosure of material risks, which potentially would incorporate climate-related risks. To the extent companies provide this information on their websites or in sustainability reports separate from their annual reports and financial reporting, SEC does not believe these actions are fulfilling investors' need to know whether a company's financial disclosures are consistent with its climate-related disclosures. In addition, the information provided outside of SEC filings does not subject a registrant to accountability nor is it reported in a consistent, comparable and reliable manner allowing investors to better evaluate differences between companies and make investment decisions that best meet their objectives.

The SEC's proposed climate-related disclosure framework draws from the work of the Task Force for Climate-Related Financial Disclosures (TCFD) and the Greenhouse Gas Protocol (GHG Protocol). The TCFD is a financial industry-led task force established for the purpose of developing climate-related financial risk disclosures for voluntary use by companies to provide consistent information on their climate-related risk to lenders, insurers, investors and other stakeholders. The GHG Protocol establishes comprehensive global standardized frameworks to measure and manage GHG emissions from private and public sector operations, value chains and mitigation actions.

In particular, the proposed rule would require a registrant to disclose information about:

- The oversight and governance of climate-related risks by the registrant's board and management
- How any climate-related risks identified by the registrant have had or are likely to have a material impact on its business and consolidated financial statements, which may manifest over the short-, medium-, or long-term
- How any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook
- The registrant's processes for identifying, assessing, and managing climate-related risks and whether any such processes are integrated into the registrant's overall risk management system or processes
- The impact of climate-related events (severe weather events and other natural conditions as well as physical risks identified by the registrant) and transition activities (including transition risks identified by the registrant) on the line items of a registrant's consolidated financial statements and related expenditures, and disclosure of financial estimates and assumptions impacted by such climate-related events and transition activities
- Scopes 1 and 2 GHG emissions metrics, separately disclosed
- Scope 3 GHG emissions and intensity, if material[1], or if the registrant has set a GHG emissions reduction target or goal that includes its Scope 3 emissions
- The registrant's climate-related targets or goals, and transition plan, if any

The disclosures would be "filed" rather than "furnished" in order that registrants are incented to provide accurate information.

Specific GHG Emissions Definitions and Disclosure Requirements

The SEC based the proposed GHG emissions disclosure rules on the concept of scopes, which are themselves based on the concepts of direct and indirect emissions, developed by the GHG Protocol. The proposed definitions of Scope 1, Scope 2, and Scope 3 GHG emissions are substantially similar to the corresponding definitions provided by the GHG Protocol. Scope 1 emissions are defined as direct

[1] 87 Fed Reg. 21378 "Consistent with the Commission's definition of ''material'' and Supreme Court precedent, a registrant would be required to disclose its Scope 3 emissions if there is a substantial likelihood that a reasonable investor would consider them important when making an investment or voting decision."

GHG emissions from operations that are owned or controlled by a registrant. Scope 2 emissions are defined as indirect GHG emissions from the generation of purchased or acquired electricity, steam, heat, or cooling that is consumed by operations owned or controlled by a registrant. Scope 3 emissions are defined as all indirect GHG emissions not otherwise included in a registrant's Scope 2 emissions, which occur in the upstream and downstream activities of a registrant's value chain.

For each of its Scopes 1, 2, and 3 emissions, the proposed rules would require a registrant to disclose the emissions both disaggregated by each constituent GHG (e.g., by carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), nitrogen trifluoride (NF3), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF6)) and in the aggregate.

The SEC has proposed Scope 3 GHG emissions for a registrant would include those from upstream and downstream activities in its value chain if material or if the registrant has set a GHG emissions target or goal that includes Scope 3 emissions. Upstream emissions include GHG emissions attributable to goods and services that the registrant acquires, the transportation of goods (for example, to the registrant), and employee business travel and commuting. Downstream emissions include the use of the registrant's products, transportation of products (for example, to the registrant's customers), end of life treatment of sold products, and investments made by the registrant.

Exemption for Smaller Reporting Companies (SRC)

The proposal includes an exemption from the Scope 3 emissions disclosure requirement for a registrant meeting the definition of a smaller reporting company (''SRC''). The Commission's rules define a smaller reporting company to mean an issuer that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (1) had a public float of less than $250 million; or (2) had annual revenues of less than $100 million and either: (i) no public float; or (ii) a public float of less than $700 million. The SEC believes that exempting SRCs from the proposed Scope 3 emissions disclosure requirement would be appropriate in light of the proportionately higher costs they could incur, compared to non-SRCs, to engage in the data gathering, verification, and other actions associated with Scope 3 emissions reporting, many of which may have fixed cost components.

NAHB Comments

Prevalence of Small Businesses in the Home Building Industry

Home building activity spans a broad spectrum of activities done by small businesses that are privately held. In fact, the majority of single-family homes are constructed by small, private home building companies and many companies involved in multifamily development and management are not publicly traded.

The majority of NAHB's builder members are small businesses with annual dollar volumes of less than $5 million. NAHB's builder members are engaged in single-family home building, multifamily building, residential or commercial remodeling, commercial building, land development, or manufacturing of modular/panelized/log homes. Every year, NAHB conducts a census of its members and publishes the results in a special study. In the results of the latest census, conducted at the end of 2020, 17 percent of the builder members reported a dollar volume of less than $500,000, 16 percent reported between $500,000 and $999,999, 41 percent between $1.0 million and $4.9 million, 11 percent between $5.0 million and $9.9 million, 4 percent between $10.0 million and $14.9 million, and 9 percent reported their dollar volume at $15.0 million or more in 2020.

The NAHB census also asks builder members to report the number of homes they start each year. In 2020, 21 percent started 2 or 3 homes, 9 percent started one, 15 percent started four or five, 16 percent started six to ten, 14 percent started eleven to twenty-five, 16 percent started 26 to 499, and only 2 percent started 500 homes or more. About 6 percent of NAHB's builder members did not start any homes in 2020.

Due to their status as small businesses and frequent reliance on subcontractors, many builders carry relatively few employees on their payrolls. In NAHB's 2020 member census, the builder members reported a median of 5 employees (including employees in both construction and non-construction jobs). The median varies by the company's primary activity. Among manufacturers of modular/panelized/log homes, the median number of paid employees in 2020 was 20, compared to 3 among land developers, 4 among single-family builders, 4 among residential remodelers, 7 among commercial remodelers, and 10 among multifamily builders and commercial builders.

Most of NAHB's small business members are not equipped to deal with complex paperwork and reporting obligations. They are family-operated businesses that generally lack in-house counsel or compliance experts. Currently, the home building industry is not required to calculate GHG emissions from construction activities, nor is it uniformly obligated to calculate GHG emissions from the homes it builds. Adding these obligations to an already tight regulatory regime will add costs and inefficiencies to the home building process that will increase home prices and rents to home buyers, homeowners, and renters.

Expansive Reach of Proposed Rule to Small Businesses

As SEC's proposed disclosure rule applies only to publicly owned companies, few NAHB members will be directly subject to SEC's proposed requirement for registrants to include climate-related risks and opportunities in financial disclosures and file Scope 1, Scope 2 and Scope 3 GHG disclosures. However, NAHB is concerned with the far-reaching impact this rule will have beyond SEC registrants. As proposed, we believe non-SEC registrants doing business with publicly owned companies (i.e., providing products and services to publicly owned companies, or obtaining financing from publicly owned banks or other publicly owned financing sources) will be subject to providing their Scope 1, 2, and 3 emissions data to SEC registrants. As a result of the reporting requirements, NAHB has concerns about the potential consequences of this proposal and the expansive scope of these data collection and reporting requirements.

For instance, under the proposed disclosure framework, publicly owned banks will be required to file disclosures covering the bank's direct emissions, which relate to the bank's own activities, and financed emissions, which relate to the activities of the bank's clients. These banks also will be required to report Scope 3 GHG emissions from upstream and downstream activities in their value chain if these activities are determined to be material or if the company has set a GHG emissions target or goal that includes Scope 3 emissions. The emissions from a home builder or developer that has obtained financing from a publicly traded bank would be considered Scope 3 emissions for that bank. Therefore, in order for the bank to collect data on Scope 3 emissions, it would have to ask the home builder or developer to calculate its own Scope 1, Scope 2, and Scope 3 emissions. For many of these small businesses, the complicated and burdensome requirements that will be passed along from SEC registrant will increase their costs and may even eliminate their ability or willingness to do business with a preferred lender. Home builders and developers may be unable to acquire the required information or set up new operational processes to obtain and deliver the information, creating further challenges. Public financial institutions may be less willing to extend credit to small companies from which it is difficult to measure or obtain GHG emissions and climate risk exposure information, potentially limiting a critical source of financing for home builders.

As illustrated by this example, the scope of the proposed regulation goes far beyond SEC's regulatory jurisdiction and will, in effect, impose the regulatory burden of SEC regulations on small businesses that are not regulated by SEC and are not familiar with SEC requirements. These concerns are not unfounded as small home builders heavily rely on commercial banks for financing. As reported in NAHB's Quarterly Survey of Acquisition, Development & Construction (AD&C) Financing, 85 percent of construction financing for pre-sold homes is obtained from commercial banks; as is 77 percent for single family speculative construction, and 71 percent for land development.

Scope 3 emissions reporting requirements will essentially give SEC de facto regulatory authority over business affiliates that are not regulated by SEC and give SEC registrants the power to direct the business operations of small entities. The possibility of these negative impacts on business opportunities for small businesses must be addressed by SEC before the disclosure of Scope 3 emissions are required.

NAHB Recommendations

In this proposed rule, SEC would require disclosure of Scope 3 GHG emissions if the emissions are deemed by an SEC registrant to be material or if the SEC registrant has set a GHG emissions reduction goal. However, as with other SEC disclosure requirements, the agency proposes to exempt SRCs from Scope 3 GHG emissions disclosures.[2] NAHB believes SEC should extend this consideration to small businesses doing business with public companies and exempt all SEC registrants from requiring Scope 3 emissions disclosures on business transactions with small businesses that are not public companies and, therefore, not subject to SEC regulations[3].

As currently proposed, for an SEC registrant to disclose its Scope 3 emissions, it must disclose Scope 1, Scope 2, and Scope 3 GHG emissions from activities performed by parties in its upstream and downstream value chains. In effect, this requires all parties in an SEC registrant's value chain to report emissions as though they are SEC registrants. For an SEC registrant to capture the full extent of its GHG emissions, the upstream and downstream value chain could go on ad infinitum and this is untenable for a small company simply because it has a business relationship with an SEC registrant. As noted earlier, NAHB is concerned about how the proposed disclosure requirements for SEC registrants would flow through to small businesses and create added costs and compliance burdens. Small home builders, developers and remodelers generally will not have the company resources to access, gather, calculate and submit the information to an SEC registrant required to disclose its Scope 3 GHG emissions. It would be particularly difficult for these small companies to determine their own Scope 3 GHG emissions data.

SEC has acknowledged it may be difficult for registrants to obtain activity data from suppliers and other third parties in a registrant's value chain, or to verify the accuracy of that information, in order to disclose Scope 3 emissions. NAHB therefore requests that SEC consider the following recommendations:

<u>Exempt small businesses from providing GHG emissions to SEC registrants</u>

NAHB recommends SEC exempt SEC registrants from reporting on the GHG emissions of businesses that meet the SBA's definition of small businesses. In other words, SEC registrants should not be

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[2] 87 Fed Reg. 21390.
[3] The Securities Exchange Act of 1934, 15 U.S.C. Chapt. 2B. Congress established the Securities and Exchange Commission and provided the SEC with broad authority over all aspects of the securities industry. This includes the power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies as well as the nation's securities self regulatory organizations (SROs).

required to disclose Scope 3 emissions from parties with which it does business if those parties constitute small businesses. In the preamble to the proposed rule, SEC recognized the difficulties inherent in reporting Scope 3 emissions data, describing the “proportionately higher costs they could incur…to engage in the data gathering, verification, and other actions associated with Scope 3 emissions reporting.”[4] Moreover, SEC has asked commenters to consider whether “Emerging Growth Companies” (EGCs) should also be exempt from Scope 3 emissions disclosure requirements.[5] As the preamble states, “EGCs may similarly face resource constraints related to company size or age.” Recognizing the burdens that SRCs and EGCs will bear, NAHB believes SEC has rightly concluded that exemptions should be considered. Exemptions are even more appropriate for small businesses like NAHB members who are exponentially smaller than the smallest SRCs and EGCs.

Ensure Scope 3 emissions disclosures are voluntary and the safe harbor is adequate

While NAHB hopes SEC will exempt registrants from obtaining information for Scope 3 emissions disclosures from small businesses, we would like to be on record as supporting voluntary disclosures for Scope 3 emissions unless a registrant has chosen to collect and calculate the emissions as part of an emissions reduction plan.

As proposed, SEC registrants would be required to disclose Scope 3 emissions if material or if the registrant has set an emissions reduction goal. Scope 3 emissions generally will be the result of activities of third parties in a registrant’s value chain and therefore the data must be collected from the third parties. Third parties may not have the information readily available, may not have the ability to obtain the information, or may not be willing to provide the information to SEC registrants. In addition to being challenging to collect, calculating the emissions from the data also will be more difficult than calculating Scope 1 and Scope 2 emissions. Yet, to determine whether Scope 3 emissions must be disclosed, the calculations to determine materiality are necessary. Further, SEC suggests if the emissions are determined not to be material, the registrant should explain the basis for the determination. As such, the “if material” provision for Scope 3 emissions disclosure creates a back-door requirement for a registrant to assess Scope 3 emissions.

Also, SEC should strengthen the safe harbor that would shield SEC registrants from litigation risk in the event of either voluntary disclosures or required disclosures as part of an emissions reduction plan. Since much of the data required for Scope 3 disclosures will be out of the SEC registrant’s control and may be impossible to obtain, the safe harbor should be stronger. The safe harbor should apply unless the registrant has actual knowledge that the third party information it is using in connection with its Scope 3 disclosure is erroneous. The more targeted safe harbor as contemplated by the proposal is insufficient to adequately protect registrants and others.

Further consider a standard for measuring and reporting Scope 3 GHG emissions data in the future

Before imposing a requirement such as Scope 3 emissions disclosures, with its impact on small, privately held businesses, much more thought must go into determining a standard for measuring and reporting Scope 3 emissions information in an efficient and consistent method. SEC should determine if there are uniform, national standards for quantifying Scope 3 GHG emissions or approving emissions factors and calculation tools that are widely available, acceptable and understood for use in calculating and reporting the range of Scope 3 emissions as envisioned by SEC in this proposal.

[4] 87 Fed. Reg. at 21391.
[5] *Id.* at 21450.

Conclusion

NAHB appreciates SEC's intent to respond to calls for an enhanced disclosure framework that informs investors of the environmental impact of companies in which they are considering investing. However, much more consideration must be given to the impact of this rule before it is finalized.

NAHB believes the proposed rule exceeds SEC's intent and authority by extending its GHG emissions reporting requirements beyond SEC registrants under the regulatory purview of SEC. We fear the rule will result in business decisions that will have negative consequences on small businesses and the overall economy that far outweigh benefits to providing this information to investors.

Thank you for your consideration of NAHB's comments and recommendations. For more information, please contact Rebecca Froass, Director of Financial Institutions and Capital Markets at [redacted].

Sincerely,

Jessica R Lynch

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Vice President