



June 14, 2022

U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Attention: Chairman Gensler
Re: The Enhancement and Standardization of Climate-Related Disclosures for Investors. File No: S7-10-22

Dear Chair Gensler and Honorable Commissioners:

Citizens for Responsible Energy Solutions (CRES) has long supported voluntary corporate greenhouse gas disclosures and voluntary commitments that address climate change. We also support federal policy that raises the quality of voluntary carbon accounting, disclosures, and carbon offsets available in the voluntary market, and support a continued race to the top in environmental performance among companies. Consistent with this view, we have a number of concerns about the proposed rule in terms of the SEC's authority, as well as the scope, cost, and unanticipated carbon leakage issues associated with the proposal.

With the purpose of providing constructive input in the finalization of the rule, we respectfully submit the attached white paper. The SEC should seek an approach that achieves consensus on the Commission and will ultimately provide businesses more certainty, not less, on their climate-related disclosures. We believe that approach—as detailed in our white paper—would include the following:

- **Updating existing guidance before promulgating a new rule.** The SEC needs to adequately explain how the current regulations and legal protections for investors do not, or could not with updated guidance, provide reasonable investors with adequate information to inform investment strategy.
- **Better inter-agency coordination.** The SEC should defer to the Environmental Protection Agency (EPA) to improve the utility of existing data for investors instead of creating a new duplicative GHG reporting disclosure framework that increases the reporting burden for companies.
- **Acknowledging the low-quality and high-cost nature of Scope 3 data.** The SEC should provide a more robust and adequate cost-benefit analysis of the entire rule with particular focus on Scope 3 emissions given their incredibly high costs in both compliance and potential for increased liability.
- **Evaluating carbon leakage.** Lastly, to the extent that it must evaluate issues outside its jurisdiction and expertise, the SEC should explain how mandates on publicly traded companies will in fact accomplish their goal of addressing climate-related risk given the global issue of carbon leakage.

CRES recognizes the potential of the free market to deliver climate solutions. We look forward to working with you to advance sensible proposals that increase the quality of climate information. An effective energy strategy will enhance our national security, reduce global emissions, provide American investors with reliable information, and assure that American companies are not disadvantaged in the global marketplace.

Sincerely,

A handwritten signature in black ink that reads "Heather Reams".

Heather Reams
President



Disclosure or Climate Policy? The SEC's Role in the Climate Debate



CRESFORUM



Disclosure or Climate Policy? The SEC's Role in the Climate Debate

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Executive Summary

On March 21, 2022, consistent with President Biden's climate agenda and in response to demands by certain investors, the Securities and Exchange Commission (SEC) proposed a climate-related disclosure rule (Rule). The Rule will drastically change how public traded companies not only disclose climate-related risks to investors, but also how companies comprehensively address the impacts of climate change on most aspects of their organizational structure, operations, and short- and long-term outlook. Following a public comment period ending on June 17, 2022, a final rule is expected by the end of the 2022.

Building off existing regulation that required climate-related disclosure through its business description, relevant legal proceedings, risk factors, and management's discussion and analysis of financial discussions, as well as its implications on a company's consolidated financial statement, the SEC created a new framework and applicable standards modeled on the Task Force on Climate-related Financial Disclosures (TCFD)¹ and the Greenhouse Gas Protocol.²

The proposed disclosure requirements focus on the governance, strategy, and risk management of the board of directors and management of companies. The focus is not merely on disclosing material information as was previously required, but rather expands the disclosure to include the identification, analysis, and management of climate-related decisions on a broad range of risks and potential opportunities. In addition, a company must disclose any targets or goals set and how those are to be met, including any identifiable progress.

A company will also be required to identify, categorize, analyze, and ultimately disclose GHG emissions both under its control and related to its energy consumption, as well as in certain cases, the emissions along its entire value chain. In addition, many companies will be required to have their disclosed emissions data attested to by an independent third-party in an annual report.

Lastly, the SEC proposes that climate-related disclosures be evaluated in conjunction with a company's consolidated financial statements. Specifically, after a 1% threshold test, a company will have to analyze how the impacts of severe weather and transition activities will affect its bottom line, including an explanation, with estimates and assumptions used, about its expenditures and costs to potentially or in fact mitigate those risks and opportunities.

Key Findings from this white paper are:

1. The SEC should defer to the Environmental Protection Agency (EPA) to improve the utility of existing data for investors instead of creating a new duplicitous GHG reporting disclosure framework that increases the reporting burden for companies.
2. The SEC needs to adequately explain how the current regulations and legal protections for investors do not, or could not with updated guidance, provide reasonable investors with decision useful investment information.
3. The SEC must provide a more robust and adequate cost-benefit analysis of the entire rule with particular focus on Scope 3 emissions given their incredibly high costs in both

¹ The TCFD is a project of the Financial Stability Board, an international financial oversight body.

² The Greenhouse Gas protocol is widely considered the best-in-class standard for emissions disclosures. It is maintained and administered by two non-governmental organizations: the World Resources Institute and the World Business Council for Sustainable Development.

compliance and potential for increased liability.

4. Lastly, to the extent that it must evaluate issues outside its jurisdiction and expertise, the SEC must explain how mandates on publicly traded companies will in fact accomplish their goal of addressing climate-related risk given the global issue of carbon leakage.

Introduction

Securities and Exchange Commission (“SEC” or “Commission”) is an independent regulatory agency created in response to the 1929 stock market crash with a tripartite mission: to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.

The Securities and Exchange Commission (“SEC” or “Commission”) is an independent regulatory agency created in response to the 1929 stock market crash with a tripartite mission: to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation.³ In administering this mission, the SEC requires publicly traded companies⁴ to disclose financially material information to investors.⁵ Material information is based on “whether there is a substantial likelihood that a reasonable investor would consider it important in making investment decisions or that its omission would significantly alter the total mix of information used to make investment decisions.” Broadly speaking this disclosure process was originally a principles-based framework that developed a materiality standard to help guide the disclosure process. However, over time the SEC and various judicial interpretations have established a rules-based and at times prescriptive disclosure framework.⁶ In addition, following market failure Congressional action has required the SEC to mandate certain disclosures. This notably occurred after the Enron accounting scandal resulting in the passage of the Sarbanes Oxley Act of 2002. It happened again in response to the 2007-8 financial crisis resulting in the passage of the Dodd-Frank Act of 2010.

Material information is based on “whether there is a substantial likelihood that a reasonable investor would consider it important in making investment decisions or that its omission would significantly alter the total mix of information used to make investment decisions.

Some argue that failure to adequately account for climate-related risks in the financial sector and transition to a zero or low-carbon economy will have a devastating impact on the U.S. economy and ultimately result in a cataclysmic end to modern society. Others believe that climate-related risks are

³ SEC, *What We Do* (modified Nov. 22, 2021); available at <https://www.sec.gov/about/what-we-do>; see also See Securities Act of 1933 (15 U.S.C. §§77a et seq.) and Securities Exchange Act of 1934 (15 U.S.C. §78a et seq.).

⁴ The term “company” is used synonymously with “issuer” and “registrant” for readability.

⁵ See Securities Act of 1933 (15 U.S.C. §§77a et seq.) and Securities Exchange Act of 1934 (15 U.S.C. §78a et seq.).

⁶ See SEC Commissioner Roel Campos, *Speech “Principles v. Rules”* (Jun. 14, 2007); available at <https://www.sec.gov/news/speech/2007/spch061407rcc.htm>

already accounted for in current risk assessments and that climate change is a global issue that will not be solved by enhanced corporate disclosure until state-owned enterprises, geopolitical factors, and technological advances are included to best address global climate change.

The financial impact of climate-related risks was prioritized by President Biden's whole-of-government approach to addressing climate change in his January 27, 2021, Executive Order ("E.O.").⁷ Specifically, President Biden called upon government agencies to evaluate the risks of climate change. Seemingly to answer that call, SEC then-Acting Chair Allison Herren Lee requested public input on updating the SEC's climate-related disclosure of publicly traded companies.⁸ In a subsequent May 20, 2021 E.O., the President then asked agencies, including the financial regulatory agencies, "to advance a consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk"⁹ He also instructed the Financial Stability Oversight Council¹⁰ ("FSOC"), and other agencies, to conduct an economy-wide evaluation of the risks of climate change.¹¹ In October 2021, FSOC released its findings indicating that climate-related risk was an "emerging and increasing threat to U.S. financial stability."¹²

On March 21, 2022, during a session of the SEC's open meeting, the Commission voted 3 to 1¹³ to propose "The Enhancement and Standardization of Climate-Related Disclosures for Investors" Rules ("Climate Rule" or "Rule" or "Proposal") for public comment.¹⁴ The proposed Rule was published on April 11, 2022, with its comment period ending on June 17, 2022.¹⁵

Since the release of the proposed rule, SEC Chair Gary Gensler has made numerous public statements in support of it. As a key rationale for the Rule, the Chair argued that it would provide investors with "consistent, comparable, and decision-useful information" for their investment decisions. He went on

⁷ E.O. 14008, "Tackling Climate Crisis at Home and Abroad" (Jan. 27, 2021); available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>

⁸ Then-Acting Chair Allison Herren Lee, *Statement* "Public Input Welcomed on Climate Disclosure" (Mar. 15, 2021) ("2021 Public Input Request") (Questions 1-14 addressed climate-related risk and question 15 addressed ESG-related disclosures.); available at <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>

⁹ E.O. 14030, "Climate-Related Financial Risk" (May 20, 2021) ("Climate Risk E.O."); available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/>

¹⁰ The Financial Stability Oversight Council was created under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act. The SEC is one of its ten voting members. The others include the Treasury Secretary as Chair; Federal Reserve; CFPB (Consumer Financial Protection Bureau); FDIC (Federal Deposit Insurance Corporation); CFTC (Commodity Futures Trading Commission); FHFA (Federal Housing Finance Agency); NCUAB (National Credit Union Administration Board); Comptroller of Currency (OCC); and an independent member (with insurance experience) appointed by the President.; available at <https://home.treasury.gov/policy-issues/financial-markets-financial-institutions-and-fiscal-service/fsoc/about-fsoc>

¹¹ Climate Risk E.O., *supra* note 9.

¹² FSOC Report on Climate-Related Financial Risk 2021, at <https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf>

¹³ At the time of the vote Republican appointed SEC Commissioner Elad Roisman's position on the Commission had not yet been filled. He resigned from the Commission in January of 2022.

¹⁴ SEC Release "The Enhancement and Standardization of Climate-Related Disclosures for Investors" (Mar. 21, 2022, later conformed to the Federal Register versions) ("Proposal"); available at <https://www.sec.gov/rules/proposed/2022/33-11042.pdf>; see also SEC Press Release "SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors" (Mar. 21, 2022), available at <https://www.sec.gov/news/press-release/2022-46>

¹⁵ Proposed Rule published in the Federal Register (Apr. 11, 2022); 87 FR 21334, available at <https://www.federalregister.gov/documents/2022/04/11/2022-06342/the-enhancement-and-standardization-of-climate-related-disclosures-for-investors>.

to say that the SEC has a role in standardizing those disclosures that are material to investors and importantly that the SEC has required disclosure of environmental issues since the 1970s.¹⁶ He also argued that many companies are already disclosing climate-related data under existing regulations, in their sustainability reports, and through the Task Force on Climate-related Financial Disclosures (“TCFD”)¹⁷ framework and the Greenhouse Gas (“GHG”) Protocol.¹⁸ Chair Gensler continued to explain referencing the proposed Rule’s substantive requirements such as disclosures related to corporate strategy, governance, risk management, targets, and GHG emissions, as well as its inclusion and connection to a company’s consolidated financial statements.²⁰

Some, such as Chair Gensler and Democrat appointed Commissioners, have argued that the proposed Rule is just an extension of existing disclosures requirements coupled with additional data that many companies are already disclosing. However, others, such as former SEC Chair Jay Clayton and Republican appointed Commissioners have argued that the proposed Rule is unnecessary, costly, and will be transformational to the SEC’s historic tripartite role regarding corporate disclosure. This white paper will first explore some of the background issues such as the actions that the SEC has already taken with regard to climate-related risk, then a review of the existing body of regulations regarding climate disclosure including the current sense of Congress, and finally an in depth look at what the proposed Rule will require from companies and key findings from the paper.

Background

Why Climate Is On SEC’s Agenda

Before the SEC issued the proposed Rule in March of 2022, it took a number of actions to address climate-related issues, seemingly in response to President Biden’s stated policy goals. Shortly after the President’s January E.O., then-Acting Chair Allison Herren Lee created a new Senior Policy Advisor for Climate and ESG in Office of the Chair.²¹ Then directed the SEC’s Divisions of Corporation Finance to enhance its focus on climate-related disclosure and assess corporate compliance under the SEC’s 2010 commission level guidance²² with the intent to amend it.²³ This was followed by the SEC’s Division of Examinations announcing their 2021 priorities including a “greater focus on climate-related risk.”²⁴ A day later, on March 4, 2021, the SEC announced a newly created 20-person Climate

¹⁶ Proposal, *supra* note 14, at 13.

¹⁷ The Task Force on Climate-related Financial Disclosures (TCFD) final report and recommendations (2017) (“TCFD Recommendations”); available at <https://www.fsb-tcf.org/wp-content/uploads/2017/06/FINAL-TCFD-Report-062817.pdf>

¹⁸ The Greenhouse Gas Protocol (Mar. 2021) (“GHG Protocol”); available at <https://ghgprotocol.org/>

¹⁹ Proposal, *supra* note 14, at 34.

²⁰ *Id.*

²¹ SEC Press Release “Satyam Khanna Named Senior Policy Advisor for Climate and ESG” (“In this new role, Mr. Khanna will advise the agency on environmental, social, and governance matters and advance related new initiatives across its offices and divisions.”) (Feb. 1, 2021), available at <https://www.sec.gov/news/press-release/2021-20>

²² SEC “Commission Guidance Regarding Disclosure Related to Climate Change,” Rel. No. 33-9106, 75 FR 6290 (Feb. 8, 2010) (“2010 Guidance”); available at <http://www.sec.gov/rules/interp/2010/33-9106.pdf>

²³ Acting Chair Allison Herren Lee, “Statement on the Review of Climate-Related Disclosure” (Feb. 24, 2021); available at <https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure>

²⁴ SEC Press Release, “SEC Division of Examinations Announces 2021 Examination Priorities: Enhanced Focus on Climate-Related Risks” (Mar. 3, 2021), <https://www.sec.gov/news/press-release/2021-39>;

and ESG Task Force in the Division of Enforcement.²⁵ The extraordinary actions taken by then-Acting Chair lead to a concerning response by the two Republican members of the Commission.²⁶ Two weeks later, on March 15, 2021, the then-Acting Chair put out a request for public input on climate-related risk disclosure.²⁷

After the confirmation of Gary Gensler on March 2, 2021, where he indicated that he would “always be grounded in the courts, the law, and economic analysis about *materiality*...” (emphasis added),²⁸ then-Commissioner Allison Herren Lee made a speech arguing that there were a number of misconceptions about “materiality,” which was widely thought of as the existing foundational analysis of what is to be disclosed under the SEC’s disclosure framework.²⁹ While the request for public input on climate-related disclosure was an indication that the SEC was preparing for a rulemaking, the speech by Commissioner Lee may have been the first indication that the Commission was headed towards one that would be transformational in nature.³⁰ This was further exemplified when it was later learned that the Commission was demanding companies to explain why their climate-related disclosures did include certain data they deemed material.³¹ When the companies responded that they did not find the data material, the writing was on the proverbial wall that a major change and likely controversial rulemaking was in the works. Interestingly, much of what was requested of the companies is now included in the proposed Rule.³²

Congress Is Politically Divided On The SEC’s Proposed Rule

While the SEC had a 3-1 democrat majority when the Rule was voted on in March of 2022, Congress had already acted when in June of 2021, it expressed its “sense of Congress” to the Administration

²⁵ SEC Press Release “SEC Announces Enforcement Task Force Focused on Climate and ESG Issues” The 20-person Task Force was created to “develop initiatives to proactively identify ESG-related misconduct, ... any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules, ... [and] review ESG-related whistleblower complaints.” (Mar. 4, 2021); available at <https://www.sec.gov/news/press-release/2021-42>

²⁶ SEC Commissioners Hester Peirce and Elad Roisman, *Joint Statement*, “Enhancing Focus on the SEC’s Enhanced Climate Change Efforts” (March 4, 2021) (Their response expressed concern with the announced changes and asking if the changes were a continuation of existing policy or there was some new yet undefined policy change?); available at <https://www.sec.gov/news/public-statement/roisman-peirce-sec-focus-climate-change>

²⁷ Public Input Request March 2021, *supra* note 8.

²⁸ Senate Banking Committee Confirmation Hearing of Gary Gensler (Mar. 2, 2021); (Statements found at 00:45:47), available at <https://www.c-span.org/video/?509429-1/sec-chair-cfpb-director-confirmation-hearing>; See also <https://www.banking.senate.gov/hearings/02/22/2021/nomination-hearing>

²⁹ Commissioner Allison Herren Lee *Speech* “Living in a Material World: Myths and Misconceptions about “Materiality” (Argued there were misconceptions about the role of *materiality* in the existing disclosure framework)(May 24, 2021); available at <https://www.sec.gov/news/speech/lee-living-material-world-052421>

³⁰ See Soyoung Ho, Thomson Reuters, “SASB Founder Criticizes SEC Commissioner Allison Lee’s View on Materiality” (Aug. 16, 2021) (Commissioner Lee’s thoughts on materiality were considered by many to be controversial and a break with a decades-old interpretation from what was considered the legal foundation for SEC disclosure requirements); available at <https://tax.thomsonreuters.com/news/sasb-founder-criticizes-sec-commissioner-allison-lee-view-on-materiality/>

³¹ Commissioner Hester Peirce, *Statement* “We are Not the Securities and Environmental Commission – At Least Not Yet” (Mar. 21, 2022); available at <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>; see also Nicola M. White, *SEC Drops Hints About ESG Rule in Retorts to Vague Disclosures*, Bloomberg Law (Mar. 18, 2022); available at <https://news.bloomberglaw.com/securities-law/sec-scrutiny-of-big-companies-sheds-light-on-climate-priorities>.

³² See SEC’s Div. of Corp. Fin., “Sample Letter to Companies Regarding Climate Change Disclosures” (modified Sep. 22, 2021); available at <https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures>.

and the Commission. By a 215-214 vote, the House of Representatives passed the Corporate Governance Improvement and Investor Protection Act of 2021 (“Disclosure Act”).³³ The Disclosure Act was said to be a response to the growing interest in “what” information companies disclose and “how” they should disclose that information to the SEC.³⁴ The Disclosure Act would have required the SEC to mandate the disclosure of climate-related risk information by finding that it was *de facto* material.³⁵

While no further legislative action was taken on the Disclosure Act, Senator Sherrod Brown (D-OH), Chair of the Senate Banking Committee, and numerous other Senate Democrats, have expressed their support for the SEC’s proposed Rule.³⁶ However, Senator Joe Manchin (D-WV) sent a letter to Chair Gensler on April 4, 2022, expressing his concerns that the proposed Rule may run counter to the SEC’s tripartite mission by adding an undue burden on companies, that it is unnecessary because of existing regulations that capture material climate-related disclosures, and that it may signal opposition to an all-of-the-above energy policy that the majority of Senators support.³⁷ The next day 19 Republican Senators sent a letter to Chair Gensler expressing their concerns that included those expressed by Senator Manchin, but also included references to the SEC’s lack of authority to impose “environmental regulations” and a concern with the SEC’s application of the *materiality* standard.³⁸

SEC’s Existing Role In Climate-Related Disclosure

Climate-related data has traditionally been considered non-financial data that is captured under Regulation S-K and further explained through the Commission’s 2010 interpretive guidance. Financial data, on the other hand, such as revenue, debt, expenses etc., is disclosed under Regulation S-X. The proposed Rule creates an entirely new section of Regulation S-K and takes a novel approach in its requirement that certain climate-related data also be disclosed under Regulation S-X.

Non-Financial Data Disclosure: Regulation S-K; 2010 Guidance; & Materiality Standard

Regulation S-K was originally implemented in 1977 to integrate disclosure under the SEC’s two

³³ Corporate Governance Improvement and Investor Protection Act of 2021 (H.R. 1187 passed the House with one vote after all Republicans and four Democratic voted against the bill. The following day it was received, read, and referred to the Senate Banking Committee where no further action occurred.) (Jun. 16, 2021); available at <https://www.congress.gov/bill/117th-congress/house-bill/1187/actions>

³⁴ Timothy M. Doyle, BPC Blog, “Disclosure Act’ (H.R. 1187): What it Means for the SEC and Other Stakeholders” (Aug. 25, 2021); available at <https://bipartisanpolicy.org/blog/disclosure-act/>

³⁵ *Id* (“The bill would have required the SEC to mandate disclosing information on political expenditures; pay ratios of certain employees; climate risk; tax havens; workforce demographics; workplace harassment; cyber security; board diversity; and forced labor. Proponents of the legislation argued investors need more ESG information to make sound investment decisions. Opponents argued that under the existing regulations and materiality standard the types of information listed are already required to be disclosed if the information is material to a reasonable investor.”).

³⁶ Sen. Sherrod Brown (D-OH), Press Release “Brown Applauds SEC’s New Climate Disclosure Rule” (Mar. 21, 2022); available at <https://www.banking.senate.gov/newsroom/majority/brown-sec-climate-disclosure-rule>

³⁷ Sen. Joe Manchin (D-WV), Letter to Chair Gensler expressing his concerns with the SEC’s proposed Rule. (Apr. 4, 2022); available at <https://www.manchin.senate.gov/download/sec-climate-disclosure-letter&download=1>

³⁸ 19 Senate Republicans, Joint Letter to Chair Gensler expressing concerns with the SEC’s proposed Rule. (Apr. 5, 2022); available at <https://senatorkevincramer.app.box.com/s/tpo6hagvk3ynh0752g38aiwnnast7mjt>

authorizing statutes and has been expanded to capture certain non-financial data.³⁹ Initially there were only two requirements: a description of the business and its properties, but more were added in 1978 and 1980.⁴⁰ While the SEC expanded and reorganized S-K disclosures in 1982 as a collection of non-financial data, it has since been expanded multiple times through a fairly rigorous process.⁴¹ At that time, the focus was on mandating disclosure of environmental litigation and compliance costs as a result of enhanced Congressional action and subsequent regulatory activity.⁴² The pressure to disclose more and more data led to increased litigation ultimately resulting in the 1976 Supreme Court case of *TSC Industries*.⁴³ Justice Marshall writing for a unanimous Court established the *materiality* standard or test to determine whether certain information must be disclosed.⁴⁴ Justice Marshall thought of disclosure as a balancing act between giving investors enough information to make a reasoned decisions, but not so much information that they would be overloaded with an “avalanche” of information.⁴⁵ The compromise the Court came up with was that informational is deemed material if “there is a substantial likelihood that a reasonable shareholder would consider it important” in making investments decisions, or stated another way, that the disclosure would have “significantly altered the ‘total mix’ of information disclosed.”⁴⁶ The balancing of the materiality analysis has been the bedrock of disclosure for over four decades.

By 2010, the focus of disclosure was on climate-related issues. In response, the SEC published Commission level interpretive guidance (“Guidance” or “2010 Guidance”) on the existing disclosure requirements.⁴⁷ The SEC acknowledged and supported the applicability of the materiality standard, but stressed that while ultimately disclosure was a management decision, doubts should be resolved in favor of disclosing information to investors as had been discussed in the *TSC Industries* case.⁴⁸

The 2010 Guidance focused almost exclusively on “clarifying” Regulation S-K Items 101 (*Description of Business*); 103 (*Legal Proceedings*); 105⁴⁹ (*Risk Factors*); and 303 (*Management’s Discussion and Analysis*). According to the Commission these S-K items were the most relevant of the non-financial disclosure regulations regarding climate-related issues.⁵⁰ The Guidance specifically addresses how companies are to evaluate the impact of legislation and regulation; international accords; indirect

³⁹ See SEC, “Adoption of Disclosure Regulation and Amendments of Disclosure Forms and Rules,” Release No. 33-5893 (Dec. 23, 1977); 42 FR 65554 (Dec. 30, 1977).

⁴⁰ See SEC Concept Release “Business and Financial Disclosure Required by Regulation S-K” (Apr. 13, 2016); *available at* <https://www.sec.gov/rules/concept/2016/33-10064.pdf>

⁴¹ *Id.*

⁴² See 2010 Guidance, *supra* note 22, at 10-11.

⁴³ *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438,449-450 (1976) (“*TSC Industries*”); *see also* *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) (Materiality is determined by whether there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to make an investment decision.).

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *See TSC Industries, supra* note 43, at 449-450.

⁴⁷ *See* 2010 Guidance, *supra* note 22.

⁴⁸ *See id.* at 11., *see also* *TSC Industries, supra* note 43, at 448.

⁴⁹ In the 2010 Guidance the Commission makes reference to Item 503(c) Risk Factors. This section was deleted in 2019 and incorporated in Item 105 at 17 CFR §229.105 in an attempt to streamline regulations. *See* 2010 Guidance, *supra* note 22.

⁵⁰ *See* 2010 Guidance, *supra* note 22, at 12.

consequences; and the physical impacts of climate change.⁵¹ It is noteworthy that these four Regulation S-K Items and four specific areas of focus are incorporated in the proposed Rule, though controversially, the materiality standard has been either altered or removed altogether similarly to what was called for by Congressional democrats in 2021.

ITEM 101: DESCRIPTION OF BUSINESS⁵²

Under item 101, a company is required to provide a description of the business, including each reportable business segment.⁵³ It specifically includes “... principal products and services, major customers, and competitive conditions.”⁵⁴ It is one of two of the oldest S-K requirements and is considered the foundation of disclosure under Regulation S-K.⁵⁵ With regard to climate issues dealing with legislation and regulations, it specifies that disclosure includes material effects to compliance of environmental regulations that may have an effect on capital expenditures.⁵⁶ The SEC indicated that it first addressed this type of disclosure in the 1970s.⁵⁷ In addition, there may be risks associated with the indirect consequences of climate change that have a such a significant impact on the business, including changing operational plans or its overall business purpose, that disclosure would be required under Item 101.⁵⁸

ITEM 103: LEGAL PROCEEDINGS

Under item 103, a company is required to provide a description of pending legal proceedings that are material⁵⁹ as well as administrative or judicial proceedings relating to the environment if certain conditions are met.⁶⁰ Ordinary business litigation is not required under a certain level, unless it is in violation of a law with the primary purpose of environment protection and meets other specific criteria i.e., material and damages or involves the government.⁶¹ It is worth noting that this limitation on disclosing ordinary business litigation was a revision “to address the problem that disclosure documents were being filed with descriptions of minor infractions that distracted from the other material disclosures included in the document.”⁶² Thus, the rationale was that companies were disclosing too much information to the detriment of investors.

ITEM 105: RISK FACTORS

Under item 105, a company is required to disclose climate-related risks under its broad requirement to discuss all “material factors that make an investment ... speculative or risky.”⁶³ These disclosures

⁵¹ See *id.* at 22. (Explains its application specifically to pending regulations and legislation, international accords, indirect consequences of regulations and business trends, and the physical impacts of climate change.)

⁵² 17 CFR §229.101.

⁵³ *Id.* §(c)(1).

⁵⁴ See 2010 Guidance, *supra* note 22, at 12.

⁵⁵ See SEC “Adoption of Disclosure Regulation and Amendments of Disclosure Forms and Rules,” Release No. 33-5893 (Dec. 23, 1977); 42 FR 65554 (Dec. 30, 1977).

⁵⁶ 17 CFR §229.101(c)(1)(xii)

⁵⁷ See 2010 Guidance, *supra* note 22.

⁵⁸ See *id.* at 25.

⁵⁹ 17 CFR §229.103.

⁶⁰ See *id.* §(c)(3).

⁶¹ *Id.*

⁶² See 2010 Guidance, *supra* note 22, (Discussion and history of Instruction 5).

⁶³ 17 CFR §229.101(a).

must be listed under each specific risk factor and with a deference to specific factors over generalities.⁶⁴ This may require disclosure of specific risks associated with existing or even pending climate-related regulation or legislation and that those risks may be significantly different depending on the industry or sector.⁶⁵ In addition, there may be disclosable risks associated with the indirect consequences of regulations or business trends as products and services are evaluated through the lens of climate change.⁶⁶

There are also *reputational risks* indirectly associated with climate change.⁶⁷ This would likely depend on the company's sector and the impact of public opinion. The idea that a company produces certain products or provides certain services that some find objectionable may result in certain investors refraining from investing. Reputational "risks" may be inherent in the nature of the business and considered not material for disclosure purposes. On the other hand, a company not known for certain products or services, or acquires additional business lines in those areas, may well find a material need to disclose that data. This is a good example of the dynamic aspect of materiality especially with the constantly changing opinions about how to address climate change.

ITEM 303 MANAGEMENT'S DISCUSSION AND ANALYSIS (MD&A)

Under item 303 (Management's Discussion and Analysis ("MD&A") of Financial Conditions and Results of Operations) a company is required to provide analysis and disclosure of "material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."⁶⁸ The purpose of MD&A disclosure is to provide the management's narrative perspective, context to analyze the financials disclosed, and the quality and variability of the disclosed data to help investors consider future performance in their investment decisions.⁶⁹ The focus is on the future of the company and relies on *both* financial and non-financial information.⁷⁰ While the Commission indicated that they have to continue to remind companies to be clear with their disclosures, "the flexible nature of this requirement has resulted in disclosures that keep pace with the evolving nature of business trends without the need to continuously amend the text of the rule."⁷¹ The Commission acknowledged that some items under MD&A are rules-based and prescriptive and others are principles-based, but does not specify a "future time period that must be considered" though the future "trend, event, or uncertainty" must be "reasonably likely" to occur and satisfy a company's materiality analysis.⁷²

The Commission also recognized that the "effectiveness of MD&A decreases with the accumulation of unnecessary detail or duplicative or uninformative disclosure that obscures material information."⁷³ This position was consistent with Justice Marshall's warning in *TSC Industries* case about the dangers

⁶⁴ See *id.*

⁶⁵ 2010 Guidance, *supra* note 22, at 22.

⁶⁶ See *id.* at 25.

⁶⁷ *Id.*

⁶⁸ 17 CFR §229.303(a).

⁶⁹ See 17 CFR §229.303; see also 2010 Guidance, *supra* note 22, at 15. (Showing the financial condition and results of operations that satisfy three objectives: 1) a narrative perspective through the eyes of management; 2) context to its financial disclosures; and 3) information on the quality of earnings and cash flow to show "future performance.").

⁷⁰ See 2010 Guidance, *supra* note 22, at 16.

⁷¹ *Id.*

⁷² *Id.* at 16-17; also see fn. 58 (Basic at 238, quoting *Texas Gulf Sulfur Co.*, 401 F. 2d 833 (2d Cir. 1968) at 849.).

⁷³ *Id.* at 18.

of too much information having a negative influence over investors.⁷⁴ The Commission recognized that with advances in technology, management would be expected to review more financial and non-financial data, but would not necessarily result in more disclosure rather only that disclosure decisions would be better informed.⁷⁵

The Commission acknowledged the difficulty of preparing MD&A disclosure for trends, events, or uncertainties, and referenced their 1989 release that established a two-part test.⁷⁶ The first part is whether it is “likely” to occur and absent that finding disclosure is not required. Second, if a determination cannot be made on the likelihood of its occurrence, management must assume it is likely and evaluate the impacts. Disclosure then is required unless management concludes that a *material* impact is not “reasonably likely” to occur.⁷⁷ Companies are required to disclose the difficulties in analyzing this data and discuss when such difficulties may be overcome.⁷⁸ This of course would depend on the event horizon of the data being disclosed. For example, some climate models are predicated on time judged in decades and not months or years.

Financial Data Disclosure: Regulation S-X

Regulation S-X requires a company’s consolidated financial statements and annual reports be filed with the SEC. These documents must be audited under the Generally Accepted Accounting Principles (“GAAP”).⁷⁹ While the SEC relies on the Financial Accounting Standards Board (“FASB”) to create the standards, the SEC is ultimately responsible for enforcing those standards. As a result, the SEC works closely with FASB to ensure that the GAAP are capturing the necessary data. The data typically includes a company’s balance sheet, cash flow, operations, and outlook.⁸⁰ The SEC has also advocated for “high-quality globally accepted standards” that may include consolidating the International Financial Reporting Standards (“IFRS”) through FASB’s continued work with the International Accounting Standards Board (“IASB”), who sets the standards under IFRS.⁸¹

SEC mandates certain filings such as audited financial statements and MD&A as a foundational aspect of disclosure. However, unlike in filings under Regulation S-K, here a company’s primary focus is on its historical data with a forward-looking assessment based on that data. Ensuring that the data is accurate and consistent is of paramount importance.

⁷⁴ TSC Industries, *supra* note. 41, at 449.

⁷⁵ See 2010 Guidance, *supra* note 22, at 18-19; see also fn. 62 (“Pursuant to Exchange Act Rules 13a-15 and 15d-15, a company’s principal executive officer and principal financial officer must make certifications regarding the maintenance and effectiveness of disclosure controls and procedures.”).

⁷⁶ See *id* at 19; see also 1989 Release.

⁷⁷ See *id*.

⁷⁸ See *id*; see also 1989 Release.

⁷⁹ See SEC’s “Financial Reporting Manual” (Sept. 27, 2019); available at <https://www.sec.gov/corpfin/cf-manual>; see also, section 19(a) of the Securities Act of 1933, 15USC 77s(a), and section 13(b)(1) of the Securities Exchange Act of 1934, 15 USC 78m(b)(1).

⁸⁰ See Chair Mary Jo White, “A U.S. Imperative: High-Quality, Globally Accepted Accounting Standards” (Jun. 5, 2017); available at <https://www.sec.gov/news/statement/white-2016-01-05.html>; see also statement of the SEC’s chief accountant (May 14, 2002); available at <https://www.sec.gov/news/testimony/051402tsrk.htm>

⁸¹ *Id*.

SEC’s Proposed Climate Disclosure Rule

SEC’s Rationale for the Proposed Rule

The SEC provides numerous rationales for the proposed Rule. As previously discussed, the Biden Administration demanded that FSOC, including SEC as one of its members, evaluate the impact of climate-related risk on the economy. Based on FSOC’s recommendations, the Commission explained that climate-related risk and associated financial impact “could negatively impact the economy” and “create a systemic risk for the financial system.”⁸² Next, that the proposed Rule, citing their statutory authority, promulgated “in the public interest” and “would protect investors.”⁸³ The Commission explains that requiring climate-related disclosure, presumably beyond what is already required, will “promote, efficiency, competition, and capital formation,”⁸⁴ part of their tripartite mission, arguing that climate-related risks can have a impact on financial performance and may be material to investors.⁸⁵

Furthermore, the proposed Rule is based on investor demand for “consistent, comparable, and reliable” decision-useful information.⁸⁶ Investor demand is repeatedly referenced throughout the proposed Rule citing “approximately 600 unique letters and over 5,800 form letters” in response to the March 15, 2021 request for public comment.⁸⁷ The Commission explained that the comments expressed the position that the current regulations were inadequate to obtain the information they sought, and confirmed by a 2018 GAO report,⁸⁸ and as a result had to look in places outside the disclosure framework.⁸⁹ The Commission then concluded that if accurate, the current regulations are not adequately providing investors with the information they need nor in the format they want to make informed investment decisions.⁹⁰ Lastly, as a result of investor and other stakeholder demands, companies are already providing much of the information sought resulting in investors using the information in their investment decisions. Therefore, requiring disclosure is necessary to provide investors with “consistent, comparable, and reliable” information. Further, according to Chair Gensler, companies must disclose in their official SEC filings because that is where investors look.⁹¹

The Commission argues that the “primary benefit” is that it will provide investors with more “consistent, comparable, and reliable” information.⁹² The costs would be mainly in compliance where

⁸² Proposal, *supra* note 14, at 10-11.

⁸³ Proposal, *supra* note 14, at 7 (citing §7 of the Securities Act [15 U.S.C. 77g] and §§12, 13, and 15 of the Exchange Act [15 U.S.C. 78l, 78m, and 78o].).

⁸⁴ *Id.* (citing §2(b) of the Securities Act [15 U.S.C. 77b(b)] and §3(f) of the Exchange Act [15 U.S.C. 78c(f)]).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 18.

⁸⁸ *Id.* at 323 (In citing a 2018 GAO Report, the Commission argued that due to deficiencies in current disclosure practices, “investors may face difficulties locating and assessing climate-related information.” However, the Commission did not reference that the SEC’s own Investor Advisory Group told the GAO that “investors have **not** agreed on the priority of climate-related disclosures.”) (See GAO, Climate-Related Risks “What GAO Found” (Feb. 2018); available at <https://www.gao.gov/assets/gao-18-188.pdf>)

⁸⁹ *Id.* at 7-8.

⁹⁰ *Id.*

⁹¹ Chair Gary Gensler *Speech* at Ceres Investor Briefing “Building Upon a Long Tradition” (Apr. 12, 2022); available at https://www.sec.gov/news/speech/gensler-remarks-ceres-investor-briefing-041222?utm_medium=email&utm_source=govdelivery

⁹² Proposal, *supra* note 14, at 334.

companies “may need to re-allocate in-house personnel, hire additional staff, and/or secure third-party consultancy services.”⁹³ “The economic analysis of the proposed Rule estimates the cost at almost \$10.3 billion.⁹⁴

Disclosure Framework & Standards: TCFD & GHG Protocol

As a result, they evaluated a number of frameworks and standards and decided to model the proposed Rule on the Task Force on Climate-Related Financial Disclosures (“TCFD”) framework⁹⁵ and the standards from the GHG Protocol.⁹⁶ In selecting TCFD and the GHG Protocol, the SEC argued that many companies were already using both for disclosing relevant climate-related data. However, their voluntary use based on a company’s materiality analysis did not produce the type of consistent, comparable, or reliable data that the SEC contemplated in the proposed Rule. As a result, the SEC is proposing that disclosure and analysis be mandatory, with limited exception, including all four foundational categories of the TCFD framework⁹⁷ and calculation of a company’s emissions using the GHG Protocol.

Once the SEC decided on the framework and standards to use, it drafted section 1500 which would be an entirely new section under Regulation S-K.

The SEC had to grapple with whether they should modify existing regulation and guidance under the existing framework or create a new framework to disclose and standards to evaluate the data. The SEC decided that neither the existing framework and accompanying guidance, nor current standards were sufficient to produce “consistent, comparable, and reliable” disclosures.

Governance & Management of Climate-related Risks & Strategy

Under §1501 (Governance), a company must disclose the board of director’s (“Board”) specific oversight obligations and the management’s specific role and process for assessing climate-related risks and, if applicable, related opportunities.⁹⁸ This includes how the Board collectively analyzes data, staffs the issues, ensures expertise, creates goals and targets, and evaluates progress.⁹⁹ While most companies assess these issues as they become relevant, the rule requires an explanation of their oversight and analysis.

Under §1502 (Strategy), a company must describe climate risks and opportunities that are

⁹³ *Id.* at 371.

⁹⁴ *Id.* at 437-441 (Incremental and Aggregate Burden and Cost Estimates).

⁹⁵ Proposal, *supra* note 14, at 37-39 (explaining the rationale for using the TCFD recommendations on disclosures); see also *supra* note 17.

⁹⁶ See GHG Protocol, *supra* note 18 (GHG Emission Calculation Tool); available at <https://ghgprotocol.org/calculation-tools>

⁹⁷ See TCFD Recommendations, *supra* note 17, at 14. (The four categories of the TCFD framework include: Governance; Strategy; Risk Management; and Metrics & Targets. In addition, each category has between 2 and 3 additional disclosure recommendations.).

⁹⁸ Proposal, *supra* note 14, at 450 (VIII Statutory Authority) (All references to the proposed additions under §229.1500 et al. will be cited simply by their proposed citation under Title 17, Chapter 2 SEC, Part 229, §1500 and Part 210 Article 14); §229.1501 (Governance).

⁹⁹ See §229.1501(a)(1).

“reasonably likely to have a material impact” on the company which may occur over a defined¹⁰⁰ “short, medium, and long term” time horizon.¹⁰¹ These risks must be described as physical or transitional risks.¹⁰² Physical risks include *acute risks*, which are typically short term and event driven such as a hurricane.¹⁰³ Physical risks also include *chronic risks*, which are over a longer term such as rising sea levels and extreme fluctuations in temperature.¹⁰⁴ Transition risks include the “actual or potential negative impacts” on a company that occur as a result of but not limited to regulatory, legislative, policy, liability, reputational or market changes in response to climate-related issues.¹⁰⁵ The company must also provide a narrative discussion of whether and how the “risks,” including a discussion of climate-related “metrics,”¹⁰⁶ affected or are reasonably likely to affect the consolidated financial statements filed or that will be filed with the SEC.¹⁰⁷ This last point is a reference to the confluence of Regulation S-K and S-X as previously discussed.

In addition to disclosing a discussion of climate-related risks, a company must also describe the actual and potential impacts of those risks including the time horizon for each impact on their business operations including their value chain, mitigation efforts, and expenditures.¹⁰⁸ The discussion should consider whether the “impacts” are part of the company’s “business strategy, financial planning, and capital allocation” analysis.¹⁰⁹ This disclosure should also include both “current and forward looking statements” in describing whether the identified “risks” have been integrated into the business strategy including how resources are being used to mitigate those risks.¹¹⁰ There is also a requirement to discuss how the metrics discussed in other sections of the proposed rule relate to the company’s business strategy including the use of carbon offsets¹¹¹ or RECs, renewable energy credits or certificates,¹¹² if applicable.¹¹³

A business must also disclose a description and analysis of any “internal carbon price”¹¹⁴ used, including the rationale for its use.¹¹⁵ In describing the business strategy under this section, a company must also address its “resiliency” and discuss any analytical tools such as a scenario analysis.¹¹⁶ If a

¹⁰⁰ See *id.* §(a)(2) (Requirement to define the time horizons used and provide analysis with regard to the life of a company assets and “climate-related planning processes and goals”).

¹⁰¹ See §229.1502(a) (Strategy, business model, and outlook).

¹⁰² See *id.* §(a)(1).

¹⁰³ See *id.* §(a)(1)(i); see also §229.1500(c)(2) (Climate-related risks Definitions).

¹⁰⁴ See *id.*; see also §229.1500(c)(3) (Climate-related risks Definitions).

¹⁰⁵ See §229.1502(a)(1)(ii); see also §229.1500(c)(4) (Climate-related risks Definitions); see also §229.1503(c)(2)(ii) (Discussion of transition risks in a company’s transition plan.).

¹⁰⁶ See §210.14-02.

¹⁰⁷ See §229.1502(d).

¹⁰⁸ See *id.* §(b)(1) and (2).

¹⁰⁹ See *id.* §(c).

¹¹⁰ See *id.*

¹¹¹ §229.1500(a) (Defines carbon offsets as “emissions reduction or removal of greenhouse gases (“GHG”) in a manner calculated and traced for the purpose of offsetting an entity’s GHG emissions.”).

¹¹² §229.1500(n) (Defines “REC” as a renewable energy credit or certificate “representing each megawatt-hour (1 MWh or 1,000 kilowatt-hours) of renewable electricity generated and delivered to a power grid.”).

¹¹³ See §229.1502(c); see also a discussion of “metrics” at §§229.1504 and 1506 as well as §210.14-02 under the proposed amendments to Part 210 under Regulation S-X with regard to a company’s financial statements.

¹¹⁴ §229.1500(j) (Defines “Internal carbon price” as “an estimated cost of carbon emissions used internally within an organization.”).

¹¹⁵ See §229.1502(e).

¹¹⁶ See *id.* §(f).

scenario analysis is used, a qualitative and quantitative analysis and description of each scenario is required including the parameters and assumptions used.¹¹⁷

Under §1503 (Risk Management) a company must describe the “processes” used for “identifying, assessing, and managing climate-related risks” or applicable “opportunities.”¹¹⁸ If applicable, the description must include how companies compare these climate-related risks to other risks,¹¹⁹ consider current or likely regulations,¹²⁰ evaluate consumer shifts, technological advancements, and market price volatility with regard to transition risks.¹²¹ The SEC also wants to know the process by which a company makes a *materiality* determination.¹²²

The company must describe, as applicable, the process for deciding whether to “mitigate, accept, or adapt to the identified risks.”¹²³ In addition, whether a company prioritizes climate-related risks,¹²⁴ and the process by which it may mitigate *any* “high priority” risks.¹²⁵ A company must also disclose if any of its climate-related risk “processes” are integrated in the broader management system including whether and how internal committees addressing the issue, interact with the board and management.¹²⁶

If a company has a “transition plan”¹²⁷ as part of its risk management strategy, it must disclose the “relevant metrics and targets used to identify and manage any physical and transition risks.”¹²⁸ The SEC is also requiring a company to update their transition plan annually with actions taken to progress toward its targets or goals.¹²⁹ In addition, if applicable, a company must explain how it “plans to mitigate or adapt to any identified physical ... or transition risks.”¹³⁰ The SEC specifies that transitions risks include legislative, regulatory, or policies that restrict “GHG emissions or products”; “protect land or natural assets”; “impose a carbon price”; or if changes in stakeholders’ preferences.¹³¹

A company with an adopted transition plan, may also describe how it intends to take advantage of transition opportunities such as the development of new products and services, increased use of renewable energy, enhanced use of recycled materials, or conservation goals.¹³²

¹¹⁷ See *id.*

¹¹⁸ §229.1503(a).

¹¹⁹ *Id.* §(1)(i).

¹²⁰ *Id.* §(1)(ii).

¹²¹ *Id.* §(1)(iii).

¹²² *Id.* §(1)(iv).

¹²³ *Id.* §(2)(i).

¹²⁴ *Id.* §(2)(ii).

¹²⁵ *Id.* §(2)(iii).

¹²⁶ §229.1503(b).

¹²⁷ §229.1500(s) (Defines “Transition plan” as a “strategy and implementation plan to reduce climate-related risks, which may include a plan to reduce its GHG emissions in line with its own commitments or commitments of jurisdictions within which it has significant operations.”).

¹²⁸ §229.1503(c)(1).

¹²⁹ *Id.*

¹³⁰ *Id.* §§(c)(2)(i) and (ii).

¹³¹ *Id.* §§(c)(2)(ii)(A)(1) and (2); (B); and (C).

¹³² *Id.* §§(c)(3)(i)-(v).

Climate-related Targets & Goals

Under the proposed rule §1506 (Target and Goals), a company must disclose its climate-related targets or goals (targets) if it has set them.¹³³ These targets may include goals set in response to existing or likely regulations, market volatility, or other climate-related policies disclosed under §§1502 and 1503.¹³⁴ The SEC is also requiring that a company disclose the targets' scope,¹³⁵ measurements,¹³⁶ time horizons,¹³⁷ baselines,¹³⁸ interim settings,¹³⁹ and importantly how the company plans to achieve them.¹⁴⁰ There is also a requirement to disclose annually whether there was progress and if so, how it was achieved.¹⁴¹ Further, if carbon offsets of RECs are used in the target plan, the SEC requires the disclosure of the amount of carbon reduction, source, description, location, certification, and costs of the carbon offsets or RECs.¹⁴²

Under the proposed rule a company must disclose its climate-related targets or goals (targets) if it has set them.

GHG Emissions Metrics: Scopes; Intensity; Methodology & Liability

Under the proposed rule §1504 (GHG emissions metrics), a company must disclose their GHG¹⁴³ emissions for the most recently completed fiscal year and for past years that are included in its consolidated financial statements if that historical data is “reasonably available.”¹⁴⁴ The emissions must be disclosed in both the *disaggregate* form according to the type of GHG emissions and in terms of its carbon dioxide equivalent (CO₂e)¹⁴⁵ as well as in the *aggregate*, excluding the impact offsets.¹⁴⁶ CO₂e is the measurement used to calculate each of the GHG's global warming potential (GWP).¹⁴⁷ It is important to note that each GHG has a different ability to absorb energy (radiative efficiency) and length of time it stays in the atmosphere (lifetime), both of which are part of their calculated GWP.

¹³³ See §229.1506(a).

¹³⁴ See *id.* §§(1) and (2).

¹³⁵ See *id.* §(b)(1).

¹³⁶ See *id.* §(2).

¹³⁷ See *id.* §(3).

¹³⁸ See *id.* §(4).

¹³⁹ See *id.* §(5).

¹⁴⁰ See *id.* §(6).

¹⁴¹ See *id.* §(c).

¹⁴² See *id.* §(d).

¹⁴³ §229.1500(g) (Defines the seven greenhouse gases as carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), nitrogen trifluoride (NF₃), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆)).

¹⁴⁴ §229.1504(a) and § 229.1500(h) (Defines GHG emissions as a company's direct (owned or controlled) and indirect (as a result activities but not owned or controlled) emissions of greenhouse gases expressed in metric tons of carbon dioxide equivalent (CO₂e)).

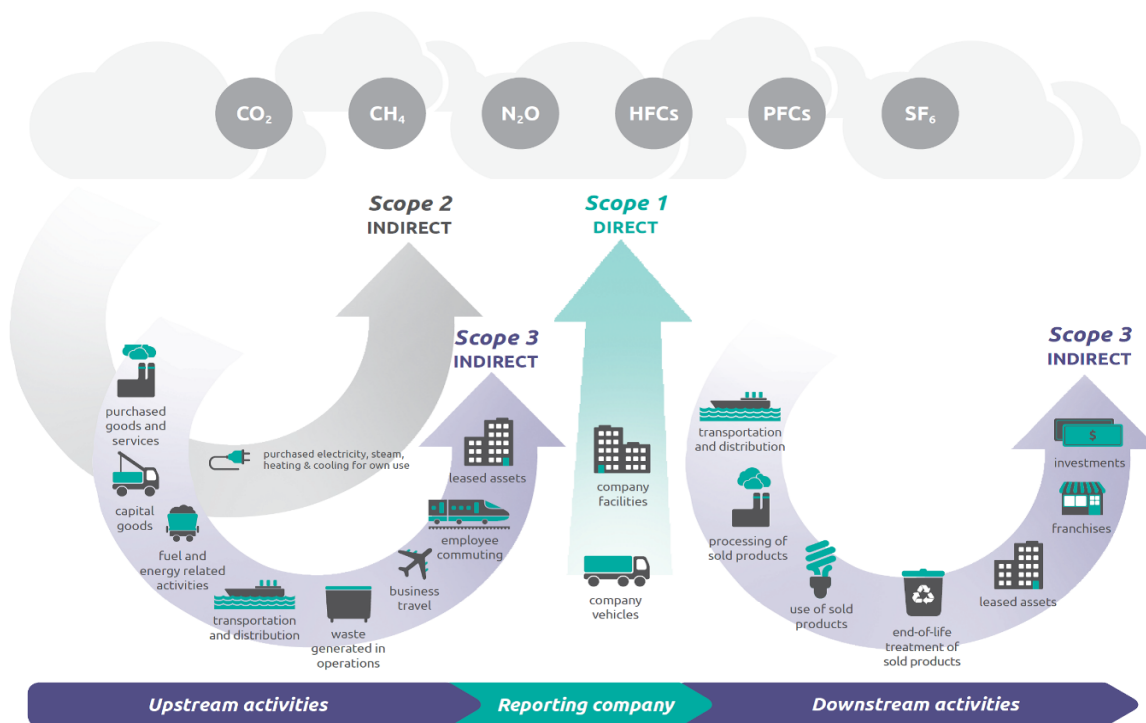
¹⁴⁵ §229.1500(d) (Defines CO₂e – carbon dioxide equivalent – as “the common unit of measurement to indicate the global warming potential (“GWP”) of each greenhouse gas, expressed in terms of the GWP of one unit of carbon dioxide.”).

¹⁴⁶ See §229.1504(a)(1) and (2).

¹⁴⁷ §229.1500(f) (Defines the GWP (Global Warming Potential) as “a factor describing the global warming impacts of different greenhouse gases. It is a measure of how much energy [heat] will be absorbed in the atmosphere over a specified period of time as a result of the emission of one ton of a greenhouse gas, relative to the emissions of one ton of carbon dioxide (CO₂).”).

Under the proposed rule a company must disclose their GHG emissions for the most recently completed fiscal year and for past years that are included in its consolidated financial statements.

OVERVIEW OF GHG PROTOCOL SCOPES AND EMISSIONS ACROSS THE VALUE CHAIN



Source: WRI/WBCSD Corporate Value Chain (Scope 3) Accounting and Reporting Standard.

SCOPE 1 & 2 EMISSIONS

In addition to disclosing in both the disaggregate and aggregate, a company must disclose emissions according to their Scope. There are three Scopes through which a company must disclose, though not every company has to disclose under all three scopes. The first is *Scope 1*, which includes all GHG direct emissions from operations owned or controlled by the company.¹⁴⁸ The second is *Scope 2*, which includes indirect GHG emissions from the generation of energy purchased and consumed by the company.¹⁴⁹ The third is *Scope 3*, which includes indirect or value chain GHG emissions that are not included in scopes 1 and 2, which are calculated from upstream (e.g., purchased goods, raw materials, employees commuting) and downstream (e.g., life cycle of sold products, third party usage, investments) activities.¹⁵⁰

¹⁴⁸ §229.1500(p) (Defines scope 1 as “direct GHG emissions from operations that are owned or controlled by a registrant.”).

¹⁴⁹ §229.1500(q) (Defines scope 2 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.”).

¹⁵⁰ §229.1500(r) (Defines scope 3 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.” further defines “upstream” and “downstream” activities.); see also §229.1500(t) (Defines “Value chain.”).

All three of the Scopes must be disclosed separately and Scopes 1 & 2 must be calculated using a company’s “organizational”¹⁵¹ and “operational”¹⁵² boundaries but may exclude investments not included in their consolidated financial statement.¹⁵³

SCOPE 3 EMISSIONS

Material Scope 3 emissions must be disclosed, unless the business is a “smaller reporting company.”¹⁵⁴ In addition, a company that has set a GHG reduction target will also be required to disclose Scope 3 emissions even if they would otherwise be exempt.¹⁵⁵ Disclosures must include both upstream and downstream emissions categorized by activity.¹⁵⁶ Any category that is significant to a company must have its emissions data separately disclosed.¹⁵⁷

Material Scope 3 emissions must be disclosed, unless the business is a “smaller reporting company.” In addition, a company that has set a GHG reduction target will also be required to disclose Scope 3 emissions even if they would otherwise be exempt.

A company must also describe the source of their emissions data reported through parties in their value chain and whether the company or a third party verified the data.¹⁵⁸ In addition a company must disclose other data sources including economic studies, databases, government statistics, industry associations or other third-party source outside their value chain.¹⁵⁹ One thing to keep in mind is that Scope 1 and 2 emissions of one company are likely the Scope 3 emissions for another company if in their value chain, which in an ideal world, would lessen the burden of collecting Scope 3 data.¹⁶⁰ Unfortunately, unless an exception is made, a company would still be responsible for Scope 3 data.

GHG INTENSITY

Once Scope 1 & 2 emissions are added together (Scope 3 is disclosed separately),¹⁶¹ a company must

¹⁵¹ §229.1500(m) (Defines “organizational boundaries” as “the boundaries that determine the operations owned or controlled by a registrant for the purpose of calculating its GHG emissions.”); *See also* §229.1504(e)(1)-(3).

¹⁵² §229.1500(l) (Defines “operational boundaries” as the boundaries that determine the direct and indirect emissions associated with the business operations owned or controlled by a registrant.”); *See also* §229.1504(e)(1) and (3).

¹⁵³ *See* §229.1504(b)(1).

¹⁵⁴ §229.1504(c)(1); *see also* §229.10(f)(1) (Defines a “smaller reporting company” as one that has a public float less than \$250M or annual revenues less than \$100M *and* a public float, if any, less than \$700M.); *see also* §230.405 and §240.12b-2.).

¹⁵⁵ *See* §229.1504(c)(1).

¹⁵⁶ *See id.* §(c)(1).

¹⁵⁷ *See id.*

¹⁵⁸ *See id.* §§(c)(2)(i) and (ii).

¹⁵⁹ *See id.* §(c)(2)(iii).

¹⁶⁰ §229.1500(r); *see also* EPA’s Center for Corporate Climate Leadership, “Description of Scope 3 Emissions”; *available at*, <https://www.epa.gov/climateleadership/scope-3-inventory-guidance>

¹⁶¹ §229.1504(d)(2).

disclose the GHG intensity.¹⁶² GHG intensity is to be disclosed “in terms of metric tons of CO₂e per unit of total revenue *and* per unit of production relevant to the company’s industry.”¹⁶³ If there is no revenue or unit of production, a company must explain and disclose another financial measure of its GHG intensity.¹⁶⁴ A company may choose to disclose additional nonfinancial or other measures of GHG intensity provided it explains why it is doing so and it’s useful to investors.¹⁶⁵

METHODOLOGY

A company must also disclose the methodology used, including any significant inputs and assumptions and a description of the organizational and operational boundaries (including an explanation of its Scope 1 & 2 determination), and the calculation approach (including emission factors)¹⁶⁶ and the tools used to calculate the GHG emissions.¹⁶⁷ As a potential guide, the SEC references the EPA’s set of “emission factors”¹⁶⁸ and the GHG Protocol’s “calculation tools”¹⁶⁹ and indicates that a company must disclose the factors to be used and identify its source.¹⁷⁰

A company’s organizational and operational boundaries must be consistently applied throughout their organization, consolidated financial statements, and in calculating Scope emissions.¹⁷¹ A company may use “reasonable estimates” of emissions, provided it gives a rationale and describes the assumptions used.¹⁷² When evaluating a company’s fiscal year for calculation purposes, a company may use its first three quarters to provide an estimate for its fourth quarter, provided it subsequently files any material difference between the estimated and actual emissions data.¹⁷³ In addition to the estimates, a company may provide a range of emissions data, with an explanation including assumptions.¹⁷⁴

A company must provide any use of third-party data, identifying the source and assurance process taken, if material to calculating its GHG emission regardless of scope.¹⁷⁵ A company must annually disclose any material change in methodology or assumptions.¹⁷⁶ It must also disclose how it

¹⁶² §229.1504(d); *also* §229.1500(j) (Defines GHG (or carbon) intensity as a ratio that expresses the impact of GHG emissions per unit of economic value (e.g., metric tons of CO₂e per unit of total revenues, using the registrant’s reporting currency) or per unit of production (e.g., metric tons of CO₂e per product produced.”).

¹⁶³ §229.1504(d)(1).

¹⁶⁴ *Id.* §(d)(3).

¹⁶⁵ *Id.* §(d)(4).

¹⁶⁶ §229.1500(e) (Defines “emission factor” as “a multiplication factor allowing actual GHG emissions to be calculated from available activity data or, if no activity data is available, economic data, to derive absolute GHG emissions. Examples of activity data include kilowatt-hours of electric used, quantity of fuels used, output of a process, house of operations of equipment, distance traveled and floor area of a building.”)

¹⁶⁷ See §229.1504(e)(1)-(3).

¹⁶⁸ See EPA, Emission Factors for Greenhouse Gas Inventories (Apr. 2021); available at https://www.epa.gov/sites/default/files/2021-04/documents/emission-factors_apr2021.pdf

¹⁶⁹ See GHG Protocol, *supra* note 18 (GHG Emission Calculation Tool) (Mar. 2021); available at <https://ghgprotocol.org/calculation-tools>

¹⁷⁰ Proposal, *supra* note 14, at 193.

¹⁷¹ See §229.1504(e)(1)-(3); see *also* §229.1500(m) and (l) (Defining both organizational and operational boundaries).

¹⁷² See §229.1504(e)(4).

¹⁷³ *Id.* §(4)(i).

¹⁷⁴ *Id.* §(4)(ii).

¹⁷⁵ *Id.* §(5).

¹⁷⁶ *Id.* §(6).

addressed any gaps in data and its impact on the accuracy of its emissions disclosure.¹⁷⁷

Under a Scope 3 materiality analysis, a company must include emissions from “outsourced” activities that would have previously been captured under Scope 1.¹⁷⁸ In addition, it must describe and explain any *significant* overlap of Scope 3 data and its impact.¹⁷⁹

LIABILITY FOR SCOPE 3 EMISSIONS¹⁸⁰

The SEC indicated that, with regard to Scope 3 emissions disclosures in this section, a statement made would not be considered “fraudulent”¹⁸¹ unless it was made without a reasonable basis (negligence) or not made in good faith.¹⁸²

Attestation Of Scope 1 & 2 Emissions

Under §229.1505 (Attestation) the SEC requires that “accelerated”¹⁸³ and “large accelerated”¹⁸⁴ filers must provide an attestation report certifying their emissions data.¹⁸⁵ For the first fiscal year, filers can rely on “voluntary” assurances of the data provided they comply with §1504(e), which requires additional disclosures if the data submitted was subject to third-party attestation or verification.¹⁸⁶ In the second and third fiscal years, accelerated and large accelerated filers must at a minimum have a “limited” assurance of the accuracy of the emissions data.¹⁸⁷ In the fourth and all subsequent fiscal years, accelerated and large accelerated filers must have a “reasonable” level of assurance *and* at a minimum cover Scope 1 & 2 emissions disclosures.¹⁸⁸ Non-accelerated and large accelerated filers would have to comply with §1504(e) to the extent that its Scope 1 & 2 emissions data was subject to third-party attestation or verification.¹⁸⁹

ATTESTATION PROVIDER

The attestation report must be prepared and signed by a “provider.”¹⁹⁰ The SEC defines a “provider”

¹⁷⁷ *Id.* §(7).

¹⁷⁸ §229.1504(e)(8) (SEC requires disclosure of emissions outside the company’s value chain, if during the time period of calculation.).

¹⁷⁹ §229.1504(e)(9).

¹⁸⁰ *See* §§15 USC 77z-2(g) and (h) and safe harbor (§15 USC 77z-2(c) (SEC afforded protection to Scope 3 emissions through their statutory authority.).

¹⁸¹ §229.1504(f)(3) (Defines “fraudulent statement” as shall mean a statement that is an untrue statement of material fact, a statement false or misleading with respect to any material fact, an omission to state a material fact necessary to make a statement not misleading, or that constitutes the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business, or an artifice to defraud as those terms are used in the Securities Act of 1933 or the Securities Exchange Act of 1934 or the rules or regulations promulgated thereunder.”).

¹⁸² §229.1504(f).

¹⁸³ §240.12b-2(1) (Defines “accelerated filer” summarized as a company that had a market value between \$75M and \$700M, was subject to 13(a) or 15(d) requirements for 12 months, issued at least one annual report, and is not otherwise eligible to disclose as a “smaller reporting company.”).

¹⁸⁴ §240.12b-2(2) (Defines “large accelerated filer” summarized as a company that had a market value more than \$700M, was subject to 13(a) or 15(d) requirements for 12 months, issued at least one annual report, and is not otherwise eligible to disclose as a “smaller reporting company.”).

¹⁸⁵ *See* §229.1505(a)(1).

¹⁸⁶ *See id.* §(a)(2) and (e).

¹⁸⁷ *See id.* §(a)(1).

¹⁸⁸ *See id.* §(a)(1) (It appears from the sentence structure used that setting a minimum coverage of Scope 1 & 2 emissions infers the possibility of attestation for Scope 3 in the future.).

¹⁸⁹ *See* §229.1505(e).

¹⁹⁰ §229.1505(b)

as one that 1) has significant¹⁹¹ experience in “measuring, analyzing, reporting, or attesting to GHG emissions.”; and 2) is independent from the company.¹⁹² Independence is judged on the ability of the provider to exercise “objective and impartial judgment” on all issues in their engagement with the company.¹⁹³ The engagement between the company and the provider includes the period covered in the report and either when a contract is signed or work began, whichever was earlier.¹⁹⁴ In determining independence, the SEC includes both a “reasonable investor” standard and factors the SEC would consider.¹⁹⁵ Specifically, the SEC would consider any relationship or potential conflicts of interest with the company or its affiliates¹⁹⁶ and “all relevant circumstances” during the engagement period.¹⁹⁷

ATTESTATION REPORT REQUIREMENTS

The report must be filed under a separate section captioned as “Climate-Related Disclosures.”¹⁹⁸ The form and content must follow standards used by the provider.¹⁹⁹ However, at a minimum the report must include a description of the subject matter; work performed; and criteria measured against. In addition, there must be a statement regarding: the level of assurance; standards used; the company’s and provider’s responsibility during engagement; independence; and any significant limitations. Lastly, it must include a provider’s conclusion with a signature, date, and location issued.²⁰⁰

The SEC also requires companies to disclose and give background on, within the captioned “Climate-Related Disclosure” section, whether a provider was licensed, subject to oversight, and had any record-keeping requirements during the engagement period.²⁰¹

VOLUNTARY ATTESTATION DISCLOSURE

The SEC has an extensive list of disclosures under voluntary attestation including disclosing the provider’s identity, standards used, level and scope, results, conflicts, and any subjected oversight.²⁰² For non-accelerated filers these must be provided in a separate section captioned as “Climate-Related Disclosure.”²⁰³

¹⁹¹ §229.1505(b)(1)(i) and (ii) (Defines “significant” as having “sufficient competence and capabilities necessary to: (i) perform engagements in accordance with professional standards and applicable legal and regulatory requirements; and (ii) Enable the service provider to issue reports that are appropriate under the circumstances.”).

¹⁹² See *id.* §(b)(1) and (2).

¹⁹³ §229.1505(b)(2)(i).

¹⁹⁴ *Id.* §(b)(2)(iv).

¹⁹⁵ See §229.1505(b)(2)(i) and (ii).

¹⁹⁶ §229.1505(b)(2)(iii) (Defines “affiliates” as that which is used at 17 CFR 210.2-01. Under §210.2-01(f)(4) the definition of affiliates focuses on the extent to which there is control or material significant influence.).

¹⁹⁷ *Id.* §(b)(2)(ii)(A) and (B).

¹⁹⁸ *Id.* §(c).

¹⁹⁹ *Id.* §(c).

²⁰⁰ See *id.* §(c)(1)-(13).

²⁰¹ See *id.* §(d).

²⁰² See *id.* §(e)(1)-(6).

²⁰³ See *id.* §(e).

The SEC also added two new relevant sections under Article 14 of Regulation S-X addressing climate-related *instructions* and *metrics*.²⁰⁴ As previously mentioned, Regulation S-X provides the framework for reporting financial data in a company's consolidated financial statement.

Climate-related Data through Consolidated Financial Statements (Reg. S-X)

Under §210.14.01 (Climate-related disclosure *Instructions*), a company must include any disclosure pursuant newly proposed §229.1500's (Regulation S-K) requirements and use its listed definitions.²⁰⁵ When calculating metrics in this section, a company must use data that is consistent with the data used for its consolidated financial statement and apply the same accounting principles if applicable.²⁰⁶ A company must also disclose the data for its most recently completed fiscal year and must consider and disclose any climate-related data as it would for other historical data that are required.²⁰⁷

Under §210.14.01 (Climate-related *Metrics*), a company must provide contextual information about each metric including a description of inputs, assumptions, and internal policy decisions relied on for disclosure.²⁰⁸ The rule establishes a 1% minimum threshold in determining whether climate-related *impacts* and separately the aggregate amount of *expenditures* expensed and *capitalized costs* incurred must be disclosed.²⁰⁹ The impacts, expenditures, and capitalized costs referenced apply to those from severe weather,²¹⁰ transitions activities, climate-related risk, and opportunities.²¹¹

If the 1% threshold is met a company must disclose separately any positive and negative financial impacts from severe weather and transition activities.²¹² A company will also have to disclose in the aggregate any expenditures and capitalized costs to mitigate risks of severe weather and in response to any transition activities to reduce GHG emissions or mitigate any transition risk.²¹³ If a company has previously disclosed a GHG reduction target or goal it must disclose any expenditures or costs in meeting those targets in the years identified.²¹⁴ In addition, a company must disclose if and qualitatively how financial estimates and assumptions used in producing its consolidated financial statements were impacted by the risk and occurrence of severe weather events or transition activities.²¹⁵ Further, a company must disclose the impact of any identified climate-related risk both as physical and transition risks.²¹⁶ A company may include the impact of any climate-related

²⁰⁴ Though not addressed in this white paper, the SEC also proposed amending Parts 232 addressing the requirements of electronic filings and Parts 239 under the Securities Act and 249 under the Exchange Act, both updating relevant Forms.

²⁰⁵ §§210.14-01(a) and (b).

²⁰⁶ *Id.* §(c).

²⁰⁷ *See id.* (d).

²⁰⁸ §210.14-02(a).

²⁰⁹ *Id.* §(b)

²¹⁰ *See* §210.14-02(c) (The SEC includes other natural conditions such as "flooding, drought, wildfires, extreme temperatures, and sea level rise.").

²¹¹ §210.14-02(b); *see also* §§210.14-02(c); (d); (i); and (j).

²¹² *Id.* §§(c) and (d).

²¹³ *Id.* §§(e) and (f).

²¹⁴ *Id.* §(f).

²¹⁵ *Id.* §§(g) and (h).

²¹⁶ *Id.* §§(i) and (j).

opportunities associated with the risks of severe weather and transitions activities but must do so consistently in the fiscal years presented if more than one.²¹⁷

Key Findings and Conclusion

Key Findings

To address the concerns over an SEC Rule's ultimate effectiveness, consensus driven Congressional action is the better approach to truly solve the climate problem. Unfortunately, the SEC is pressing ahead without bipartisan Congressional support posing a mandate for unprecedented, detailed climate-related risk data that goes well beyond the existing requirement for companies to report on material risks. Based on this analysis policymakers should consider the following concerns and recommendations:

The SEC should defer to the EPA to improve the utility of existing data for investors instead of creating a new duplicitous GHG reporting disclosure framework that increases the reporting burden for companies.

One concern is that the SEC has used their statutory mission to "protect" the public and investors as an excuse to not only require unnecessarily detailed information for investors but require the type of information that the public already has access to. Specifically, under the EPA's Greenhouse Gas (GHG) Reporting Program, 85-90% of U.S. GHG emissions are captured with detailed disclosure from the largest emitters.²¹⁸ The 10% not covered under the reporting program, given its exponential costs, is more generally catalogued through the U.S. Inventory of GHG emissions. Combined, both the public and investors have more than enough macro-level information from both a societal and investment perspective. To the extent disclosed emissions data is material, the SEC should allow reference to the data provided to EPA. And to the extent investors seek up-stream Scope 3 emissions data for businesses, the SEC and EPA should encourage voluntary disclosure and embark on a period of learning to better delineate appropriate reporting boundaries to avoid double counting or gaps in accounting.

The SEC should better develop their cost-benefit analysis in the final rule.

The SEC indicates repeatedly that another rationale for the rule is based on "investor demand." However, the SEC does not appear to differentiate between the different types of investors that may or may not be demanding the enhanced disclosure. This in spite of the fact that the same 2018 GAO report that the Commission cites to support investors demand for a disclosure, clearly indicates that the SEC's own Investment Advisory Committee told GAO investigators that "investors have not agreed on the priority of climate-related disclosures."²¹⁹ Differentiating the various interests of these investors would address the appearance that they are favoring one type of investor over another and

²¹⁷ §210.14-02(j).

²¹⁸ See CRS report "EPA's Greenhouse Gas Reporting Program" (Nov. 16, 2021); available at <https://sgp.fas.org/crs/misc/IF11754.pdf>

²¹⁹ See Proposal, *supra* note 14, at 323; see also GAO report "Climate-related Risks: SEC Has Taken Steps to Clarify Disclosure Requirements" (2018); available at <https://www.gao.gov/assets/gao-18-188.pdf>

that those investors may well have different goals and investment strategies. There is scant evidence that the SEC has adequately contemplated the interests of retail investors in relations to large institutional investors.

Furthermore, the analysis must better explain the overall costs and benefits with considerably more specificity. As proposed, the SEC acknowledges that they are "unable to reliably quantify ... potential benefits and costs" finding that the rule may ultimately cost over \$10 billion. This is even more concerning by the admission that "existing empirical evidence does not allow [the SEC] to reliably estimate how enhancements in climate-related disclosure affect information processed by investors ..." Given that additional climate-related data is the foundational aspect of this proposed Rule, the SEC may want to consider a more incremental approach that would be far less costly until it can provide an adequate cost-benefit analysis.

This could easily be done through updating their 2010 interpretative guidance that specifically addressed how companies must evaluate climate-related risk. Updating this guidance document would also confirm that while disclosure is to protect investors, the courts have placed the burden of disclosure on the boards and management of companies. Companies are required to apply a materiality standard to ensure that reasonable investors get the information they need to make sound investment decisions while balancing against an "avalanche of information" that would likely confuse a large segment of investors. It appears from the record that in early 2021 the SEC did intend on updating the 2010 guidance. An incremental approach focused on updating guidance should be seriously considered as an alternative to the proposed Rule.

The SEC should more fully evaluate how mandates on publicly traded companies may lead to carbon leakage—climate change is a global issue.

The SEC references other international disclosure frameworks but does not adequately explain how their proposed Rule would address companies choosing to go private or sell off their carbon intensive assets and its impact on retail investors, leading to less investment opportunities and carbon leakage. In mandating not only a prescriptive disclosure framework but also attempting to change corporate behavior, the SEC fails to consider the influence of state-owned enterprises and countries such as China that have double the emissions of the U.S. It is well understood that American producers are among the most carbon efficient in the world. The chilling effect of this Rule on American production could lead to increased competitiveness of less carbon efficient offshore production. It would be tragically ironic for an SEC rule focused on reducing climate-related risks to actually be responsible for an increase in those risks.

Part of any regulatory analysis must include an explanation of how the proposed regulations will achieve its goals. Here, without acknowledging the largest GHG emitters in the world or the issue of carbon leakage, the SEC has significantly missed the mark of "protecting" the public. As for the investor, without a more robust explanation of global factors, how could the SEC expect that a reasonable investor would benefit from the proposed enhanced disclosure if that rationale for those disclosures are based on an inadequate analysis on its financial impact toward addressing global climate change.

The SEC should acknowledge that requiring Scope 3 emission disclosure adds unnecessarily to the cost of the rule in both compliance and increased liability.

The SEC acknowledges that Scope 3 emissions may be the most difficult aspect of complying with the proposed Rule. From a technical standpoint and by definition, Scope 3 emissions cannot be directly measured and are inherently estimated. All Scope 3 calculations have some degree of uncertainty. While better accounting for Scope 3 emissions is vital to solving the climate challenge, the technology and software for doing so is still in its infancy for many sectors and factors of production. As an accommodation, the SEC proposes to exempt "smaller" companies, allow a phased-in approach by adding a year to a company's Scope 1 & 2 disclosure requirements, refrain from extending an attestation requirement, and establish a new safe harbor rule to reduce liability. While acknowledging the exemption, the proposed Rule will likely disproportionately affect smaller companies because of the additional burdens that many larger companies have already bore by exiting regulations. The phased-in approach is certainly some help for certain companies, but given the impact of the Rule on corporate decision making and the incredible burden this new requirement will have, a one-year extension may seem de minimis. While the lack of attestation appears to be an accommodation, when coupled with the enormous amount of disclosure and change in business behavior required by the rule, a reprieve from attestation may be the least of a company's worries, though CFOs may disagree. It is noteworthy given SEC Commissioner Allison Herren Lee's strong support of attestation for Scope 3. Lastly, while the safe harbor provisions will add a layer of protection, the SEC appears to go out of its way to explain when those provisions are not applicable i.e., during SEC enforcement action. This provision needs to be clarified if it is to truly be an accommodating safe harbor.

Setting aside the accommodations that the SEC puts forth to soften the blow of this requirement, the SEC needs to better explain why this difficult to obtain data, that is neither controlled nor owned by the company, should be a disclosure requirement. In mandating this information, the SEC is forcing companies to by threat or persuasion do their enforcement job for them. If disclosure for investors is the goal, then investors can evaluate the emissions of others along a company's value chain. If, however, that data is not obtainable, then the SEC needs to explain why investors need that information to make an investment decision. And if a certain class of investor demands that information, it is incumbent upon the SEC to explain why all investors should ultimately bear the high costs associated with obtaining that data as reflective though a lower rate of return.

Conclusion

Publicly traded companies from all sectors have been addressing climate-related risks for years. Certain investors have put considerable pressure on companies to account for that risk. As climate risk is incorporated in strategic and operational decisions, some companies see an opportunity to gain market share with changing public opinion on sustainability. Each year more companies disclose their greenhouse gas emissions, weigh climate change in investment decisions, and set voluntary targets for reducing emissions. Many companies are striving for net zero. However, the proposed Rule's new reporting requirements and disclosure mandates may change the nature of voluntary goal setting due to concerns about triggering additional disclosure requirements. While companies once

voluntarily used the TCFD to assist in certain aspects of their disclosure process, now the SEC is mandating all of its recommendations and adding a few more of its own.

These additional requirements are a direct reflection of pressure that certain institutional investors and environmental activists have demanded with the goal of linking climate policy to the governance of public companies. However, as a global problem with differing impacts occurring over different geographies and timelines, and with negative and sometimes positive effect, climate policies that would be in the best interest of society are not always in the best interest of all investors. Or put another way, requiring this data may well be for reasons other than financial and arguably contrary to the longstanding belief that individuals invest in companies to maximizing returns on those investments.

Publicly traded companies should continue to analyze climate risks, market changes, and consumer demands with an eye toward disclosure. However, sought-after climate emissions and risk data, while in important for certain investment decisions, should not be assumed to be material to all companies.

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