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Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington D.C. 20549-1090

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

Dear Ms. Countryman:

The International Association of Drilling Contractors (“IADC”) appreciates the opportunity to submit this comment letter to the U.S. Securities and Exchange Commission (the “Commission”) in response to the Commission’s recently proposed rulemaking, “The Enhancement and Standardization of Climate-Related Disclosures for Investors” (the “Proposed Rule”). IADC is a trade association whose members include companies servicing the oil and gas industry, onshore and offshore, operating worldwide. With more than 700 members in 67 countries, the breadth of energy development activities performed by IADC’s drilling and support service contractor organizations enables access to vital energy reserves that underpin the 21st century global economy, helping to lift disadvantaged communities from energy poverty while promoting energy security for countries across the world.

A core of mission of IADC is to promote the highest standards of stewardship in industry safety standards, environmental integrity and operational efficiency. Our members have unparalleled experience with developing reporting systems related to Greenhouse Gas (“GHG”) emissions and are well-positioned to evaluate and articulate impacts of the Proposed Rule. Many IADC members comply with at least one of the currently existing emissions reporting frameworks referenced in the Proposed Rule and may already communicate climate-related information to investors and other stakeholders, often through annual sustainability reports. Our members are familiar with the resources required to prepare these communications, the functional limitations on their use and their interpretation by disparate audiences, and the substantial hurdles to converting them into disclosure for inclusion in filings with the Commission.

IADC’s strong view is that a reporting framework consistent with the Proposed Rule presents substantial technical challenges and will result in significantly higher costs and burdens for registrants that far outweigh any perceived benefits of imposing a new, one size fits all framework for climate-related disclosure on a disparate range of public companies in the United States. The more that IADC studies the Proposed Rule, the more evident it is that the Proposed Rule also fails to accomplish the Commission’s goal of promoting consistent, comparable and reliable climate-related disclosure among registrants.

We emphasize that the Proposed Rule represents an unprecedented expansion of the federal securities laws without direction from Congress. We share the concerns expressed by many others that the Proposed Rule exceeds the Commission’s authority and historic role in regulating the U.S. financial market.¹ A prevailing theme in the Proposed Rule is to abandon the historical understanding and application of “materiality” –defined by the Commission as whether there is “a substantial likelihood that a reasonable investor would consider [a matter] important when determining whether to buy or sell securities or how to vote”² – in exchange for a new reporting regime that placates political ends. The Proposed Rule will burden companies with collecting and disclosing information that is not material or relevant to one’s financial evaluation of an investment in that company. This departure from the mission of the Commission – and its focus on *investor* protection in U.S. markets – is unwarranted and overreaching.

Importantly in this respect, the Commission has not provided a sufficient basis for the departure from its authority and approach set forth in its 2010 Interpretive Guidance on Climate Change Disclosure Requirements (the “2010 Guidance”).³ As the Commission noted in the Proposed Rule, the 2010 Guidance emphasized that if climate-related factors have a material impact on a firm’s financial condition, disclosure may be required under current Item 101 (Description of Business), Item 103 (Legal Proceedings), Item 105 (Risk Factors), or Item 303 (MD&A) of Regulation S-K.⁴ The 2010 Guidance stated that with regard to voluntary sustainability reporting, “registrants should be aware that some of the information they may be reporting pursuant to these mechanisms also may be required to be disclosed in filings made with the Commission pursuant to existing disclosure requirements.”⁵ The 2010 Guidance was issued following the consideration of various “thoughtful suggestions” brought to the Commission’s attention regarding whether to enhance disclosure regarding climate change related matters.⁶ The 2010 Guidance did not indicate that a new approach to materiality, or additional disclosure of climate-related information even if not material, were either warranted or within the scope of the Commission’s authority. In the Proposed Rule, however, the Commission now arbitrarily seeks to do just that without establishing a basis to depart from or expand upon the approach and authorities considered by the Commission and set forth in the 2010 Guidance. We urge the Commission to halt this well-intentioned but misguided effort to develop a new disclosure framework – one that differs from the historically understood and universally accepted materiality standard, simultaneously imposes an extraordinarily low and arbitrary threshold, and establishes disclosure requirements that placate certain interest groups at the expense of U.S. public companies and their investors.

In addition to these concerns regarding the scope of the Commission’s authority in this area and its proposed deviations from its historical and Congressionally mandated function,

¹ See, e.g., Comment letter to the Proposed Rule submitted by Lawrence A. Cunningham, Professor of Law, George Washington University, Corresponding Author, on Behalf of Twenty-Two Professors of Law and Finance. See also Commissioner Hester M. Peirce Statement, We are Not the Securities and Environment Commission - At Least Not Yet, March 21, 2022 <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>.

² See Proposed Rule at 64.

³ Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106; 34-61469 (2010).

⁴ See Proposed Rule at 296.

⁵ See 2010 Guidance at 10.

⁶ *Id.* at 11-12.

we respectfully submit this letter to the Commission to provide our views on a selection of issues raised by the Proposed Rule as further described below.

I. The Proposed GHG Emissions Reporting Regime Imposes Substantial Burdens and Costs on Companies and Will Fail to Promote Consistent, Comparable and Reliable Disclosure

IADC believes that the new GHG emissions reporting regime as contemplated by the Proposed Rule is unnecessary, unduly burdensome and ultimately would not achieve the Commission’s goal of increasing comparable, consistent and reliable climate-related disclosure for investors.

The Proposed Rule’s requirement that registrants disclose Scope 1 and Scope 2 emissions regardless of whether that information is material to an investment decision with respect to a registrant is contrary to the Commission’s stated goal of providing “decision-useful information” to investors.⁷ By framing the purpose of the Proposed Rule primarily in terms of what information is useful to investor’s decisions, the Commission has recognized the nexus between its disclosure goals for the Proposed Rule and the historically understood and universally accepted materiality standard. That materiality threshold is the correct rubric through which registrants should decide whether to disclose Scope 1 or Scope 2 emissions.

Requiring disclosure of this information when much of it is not material to the registrant will be harmful both to registrants and investors. As we explain below, registrants will incur substantial expense in compiling and preparing the information needed for these disclosures. And while some registrants, including some of our members, may report similar information through other means, that those registrants believe the information is of interest to some of their stakeholders does not mean that the information is material to *investors* or otherwise should be disclosed to give an investor a better understanding of an investment in the company. Moreover, inclusion of this information in filings to the Commission significantly increases risk of shareholder litigation, including from the active plaintiff bar, a risk that registrants should not be forced to bear. Registrants can expect these disclosures to usher in a new, energized era of securities litigation that would be effectively sponsored and abetted by the Commission adopting the Proposed Rule and churn frivolous lawsuits that registrants will have to address at great cost and expense to both internal and external resources. Congress has recognized the great harm that baseless securities lawsuits may have on registrants, and indirectly on their shareholders, noting that even the mere *filing* of a putative shareholder class action may have an “in terrorem” effect.⁸

The collective experience of IADC members tells us that designing, implementing and refining internal reporting programs requires substantial time and resources. Companies often must identify, recruit and hire additional staff, or train existing staff, when subject to a new reporting regime. Companies frequently will need to obtain advice and assistance from external advisors and consultants when setting up such programs. Additional, unanticipated resources may be required to resolve complications in light of how an enterprise is organized to achieve structural,

⁷ SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors, Press Release, March 21, 2022 <https://www.sec.gov/news/press-release/2022-46>.

⁸ S. REP. NO. 104-98, at 6 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 685 (“The dynamics of private securities litigation create powerful incentives to settle . . .”).

operational or other efficiencies, including with respect to its attempts to harmonize any conflicts between the requirements of the Proposed Rule with disclosures that are already being made to other U.S. agencies or outside of the United States. Our members have conveyed to us concerns that these resources are not presently available at a scale on which all companies affected by the Proposed Rule will be able to obtain them within the compliance timelines in the Proposed Rule. A new reporting regime would represent a substantial claim on the availability of personnel already dedicated to complying with existing financial and emissions reporting regimes.

In a significant departure from presently existing GHG emissions reporting frameworks — both mandatory and voluntary — the Proposed Rule requires companies to set organizational boundaries “using the same scope of entities, operations, assets, and other holdings within its business organization as those included in, and based upon the same set of accounting principles applicable to, its consolidated financial statements.”⁹ Our members have years of experience building out and implementing systems for complying with existing emissions reporting frameworks, which in many cases (i) include reporting thresholds, (ii) define the form and content of a report and (iii) impose liability for acts or omissions that do not comply with such requirements. In addition to numerous non-GHG emissions reporting requirements under various state and federal environmental regulatory programs, IADC members have reported under GHG-relevant frameworks including the U.S. Environmental Protection Agency’s (“EPA”) Greenhouse Gas Reporting Program, found in 40 CFR Part 98, the Greenhouse Gas Protocol (“GHG Protocol”), the Sustainability Accounting Standards Board (“SASB”) Standards, and the GRI Standards, among others, as well as the regulatory frameworks of environmental agencies in countries outside of the United States. The Commission references the EPA, the GHG Protocol and SASB in the Proposed Rule and lauds them for advancing efforts at communicating information about emissions to various stakeholders both inside and outside the investment community. None of these frameworks, however, require organizational boundaries to be aligned with consolidated financial statements. To do so would require the implementation of an entirely new internal reporting program by registrants, would be unduly burdensome to them, and fail in promoting consistent, comparable and reliable disclosure among them.

Securities laws that benefit the investing community generally are designed to ensure consistent application among registrants and require the substance and form of disclosures to be helpful to an investor when considering an investment decision in a company’s securities. Introducing a new hybrid emissions reporting regime, as the Proposed Rule does, will cause confusion in the market for companies that also are required to report emissions and other environmental-related matters under different regimes. Information included in a company’s filings with the Commission under the Proposed Rule – with the attendant potential liability therewith – will not be consistent with similar information that company is already required to report pursuant to regulations that have been adopted by environmental and similar agencies. For example, the disclosure under other reporting regimes based on ownership or control (*e.g.*, the federal EPA GHG Reporting Program, the GHG Protocol, or the eventual standards adopted by the International Sustainability Standards Board’s (“ISSB”)) appears to conflict with disclosure required under the Proposed Rule, which would require a registrant to report emissions based on boundaries delineated by reference to a registrant’s consolidated financial statements. At a minimum, registrants should have the flexibility to determine the appropriate parameters for

⁹ See Proposed Rule at 187.

evaluating climate-related information in preparing any required disclosure in order to conform with that company’s operations and other reporting obligations. Requiring compliance with multiple reporting regimes for similar information that would necessarily appear to be in conflict undermines the reliability of each reporting regime. IADC members question whether reporting the emissions information required by the Proposed Rule is valuable to investors in light of the challenges that investors would face in understanding the varied landscape of reported information.

Investors are also not well-served by the Proposed Rule, which indiscriminately requires disclosure of Scope 1 and Scope 2 emissions. The Commission’s conclusory statements that this one-size-fits-all approach may improve consistency of disclosure does not justify its adoption, nor is it an accurate statement. As the Supreme Court has warned, “ease of application alone is not an excuse for ignoring the purposes of the Securities Acts.”¹⁰ Similarly, it is not true that Scope 1 or Scope 2 data is necessarily material to all registrants. The Supreme Court has warned against such oversimplification of any such analysis and reasoned that “[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality must necessarily be overinclusive or underinclusive.”¹¹

Our members have expressed additional concerns associated with aspects of the proposed GHG emissions disclosure requirements:

- Scientifically accepted CO₂ equivalent factors (CO₂e) are commonly used across existing GHG emissions reporting for many industries and offer a clear and scientifically accepted way to present all six referenced GHGs in the Proposed Rule. Any requirement to disaggregate these gases represents a significant additional time and cost investment for no perceivable gain. The argument that a government may target specific GHGs is forward-looking and is not relevant to current regulations or to providing increased climate knowledge to a company’s investors.
- If any emissions reporting framework is adopted by the Commission, it should allow registrants to reference GHG emissions reported under the EPA GHG reporting program to satisfy the Proposed Rule’s GHG emissions reporting requirements. As an alternative, the Commission should wait to align any adopted framework with the anticipated issuance of the ISSB climate disclosure standard, which aims to ensure connectivity and compatibility between the IFRS Accounting Standards and is referenced by the Proposed Rule¹², or a similar consultative process involving the Financial Accounting Standards Board. Delaying action in this area until international standards are more developed would help promote the Commission’s stated goal of disclosure that is comparable and consistent with those international standards.
- The Commission must provide clear guidelines for the accounting and attestation of emissions before reporting companies can be expected to provide results that are verifiable under attestation standards. Current guidelines, including those in the GHG Protocol and GRI, allow degrees of flexibility in interpretations that would be difficult to audit for lack of clear subject matter criteria. Companies are able to choose their own estimation methods, factors, intensity

¹⁰ *Basic v. Levinson*, 485 U.S. 224, 236 (1988).

¹¹ *Id.* at 234, 236.

¹² See Proposed Rule at 33, footnote 92.

metrics, and scope boundaries. In contrast to selecting among approved accounting methods, such as electing to apply “LIFO” or “FIFO” when preparing financial statements, there is no settled view on the circumstances when one application may be more appropriate. The Commission has identified this flexibility as a concern in the Proposed Rule, but we do not believe that it has provided sufficient information to resolve these concerns.¹³ Without clarification on reporting against these subjective standards, the emissions reporting and attestation requirements create undue liability concerns for reporting companies. Allowing companies to furnish this information in lieu of filing the information could be a more realistic path forward until more concrete standards are made available.

The inclusion of Scope 3 GHG emissions reporting requirements is particularly troublesome and should be eliminated from the proposal as there is no reliable framework to collect and report Scope 3 GHG emissions in the manner proposed. Attempting to impose requirements for companies to disclose Scope 3 GHG emissions fails the stated goals of the Proposed Rule: there will not be consistency in how Scope 3 emissions are determined among companies, and accordingly the information will not promote comparable disclosure across companies. Most notably, because a company would not possess all of the information required to calculate Scope 3 GHG emissions, the reliability of any such estimates cannot be attested to by the company. The Commission acknowledges this concern in the Proposed Rule, describing the proposed safe harbor for Scope 3 GHG emissions information as being “intended to mitigate potential liability concerns associated with providing emissions disclosure based on third-party information.”¹⁴ Nonetheless, even if a company believes it would ultimately prevail in any such litigation, the specter of protracted and expensive litigation will act as a continuing distraction for teams preparing a registrant’s disclosure.

There are also unanticipated secondary and tertiary effects of adopting disclosure requirements for Scope 3 GHG emissions. For example, small businesses likely will be ill-equipped to provide data at the level necessary to allow companies subject to Commission regulation to prepare required Scope 3 GHG emissions disclosure. The cost and complexity associated with collecting and providing information necessary for reporting Scope 3 emissions will drive up costs unnecessarily for a wide range of companies – including many that are not required to file reports with the Commission, but which provide critical services and products to the offshore drilling market. These measures will put smaller firms at a competitive disadvantage. One can expect to see a natural move over time toward using larger suppliers, which are often better equipped to bear the financial consequences of burdensome regulation as compared to smaller competitors. Ultimately, we expect it may even encourage some companies to avoid entanglements with U.S. companies that are required to disclose Scope 3 emissions information. Both could reduce innovation, hinder free-market developments, place more inflationary stress on supply chains, and ultimately increase costs to U.S. consumers.

We would also emphasize that not all participants in the oil and gas industry have material Scope 3 emissions by virtue of their participation in the industry. We note with concern the Commission’s statement that, “[f]or oil and gas product manufacturers, for example, Scope 3 emissions are likely to be material and thus necessary to an understanding of a registrant’s climate-

¹³ *Id.* at 202, 205.

¹⁴ *Id.* at 212.

related risks.”¹⁵ To the extent that the Commission intends to create a presumption that all participants in the oil and gas industry have material Scope 3 GHG emissions, we strongly disagree with this assessment. Many participants in the oil and gas industry, including many service providers and manufacturers in the industry, do not produce oil and gas. If a reporting company believes Scope 3 GHG emissions information are material to its investors, there are already existing frameworks that require its disclosure, but it is entirely reasonable for the vast majority of companies to conclude that such information is not material to their business or to their investors. At a time when there is no basis to presume that the disclosure would not satisfy the objectives for consistent, comparable and reliable disclosure, the Commission should not substitute its judgment for that of experienced industry participants based on a misguided understanding of the emissions profiles of many companies in an industry.

II. The Extensive Disclosure of Climate-Related Information Required by the Proposed Rule, including Financial Statement Metrics, Will Not Yield Decision-Helpful Information for Investors

The requirement in the Proposed Rule that many companies to disclose, in a note to their financial statements, certain disaggregated climate-related financial statement metrics on a line-item basis is flawed and will not achieve the Commission’s stated goals of promoting consistency and comparability of disclosure among registrants. The judgments and assumptions upon which the Commission bases the Proposed Rule in important ways depart from generally understood principles of accounting, and the proposal to impose an extraordinarily low bright-line materiality threshold on a line-item basis in respect of notes to a company’s financial statements will result in voluminous and often unimportant disclosure at great cost to registrants.

In proposing to require disclosure of climate-related financial statement metrics, the Commission claims that preparing these metrics “would involve estimation uncertainties that are driven by the application of judgments and assumptions, similar to other financial statement disclosures.” We disagree. The Proposed Rule departs from important accounting principles incorporated into ASC 450 (Contingencies) when determining what disclosures are required under generally accepted accounting principles in the United States with respect to certain loss contingencies. Under ASC 450, loss contingencies are recognized only if there is an impairment of an asset or the incurrence of a liability as of the date of the statement of financial position. A loss must be accrued if both of the following conditions are met: (1) it is probable that an asset has been impaired or a liability has been incurred at the date of the financial statements and (2) the amount of loss can be reasonably estimated. There is also specific guidance to address circumstances when a loss is probable, but an estimate of the amount of loss is not practicable, and when a loss is “reasonably possible.” Depending on the circumstances, a loss may be required to be accrued, an estimate of loss may be required to be disclosed, or the facts and circumstances that may result in a loss are required to be disclosed. General or unspecified business risks are not considered loss contingencies. In relation to the principles underlying Regulation S-K, however, the Proposed Rule severs the link between the uncertainty estimates and a specific future event while also lowering the threshold at which disclosure of “potential” negative impacts is required in relation to climate-related risks. A registrant would be required to disclose the impact of “potential negative impacts” not only from physical risks attributable to climate but also transition

¹⁵ *Id.* at 165.

risks. Disclosure based on this heightened level of uncertainty, and with respect to a broad array of risks not tied to specific claims or events that may not materialize for decades, is not appropriate in our view.

We urge the Commission also to consider that there is sharp disagreement among many professionals in how to analyze the impacts of climate-related events and transition activities on a business and any communities it affects. For example, the parameters of what constitutes a “climate-related” event or risk are not presently defined in current accounting guidance. There is no generally accepted view of when climate-related conditions are sufficiently linked to impacts on financial statements so as to require disclosure, with one practical impact being that present accounting systems are not designed to capture and present such information. While the Commission provides examples of “severe weather related events” and “natural conditions” that it believes potentially would trigger the proposed disclosure requirement, we do not consider this as an illustrative list of examples to provide sufficient guidance to personnel charged with preparing, certifying or auditing this information.

Unless sufficient guidance is established, and accounting processes and systems have been updated accordingly, we do not believe that the burden for making such determinations should fall primarily on accounting personnel under the supervision of management, who often will not have the training and knowledge necessary to make these types of conclusions. Requiring registrants to assess all potential impacts in connection with the preparation of financial statements so as to demonstrate that all of the “potential negative impacts of climate-related conditions” have been identified and reflected in a registrant’s financial statements on a line-item basis is incredibly burdensome on financial reporting groups and other management. There is inherent judgment in concluding an event is “climate-related,” and the phrase itself is tinged with political judgment in any public communication. Without sufficient guidance as to when to conclude that a “climate related” event is linked to a financial statement impact, professionals acting in good faith are certain to reach very different conclusions, undermining the goal of the Proposed Rule in promoting consistent and comparable disclosures. For example, operators in the offshore drilling industry plan and design systems to mitigate the potential impacts of hurricanes in the U.S. Gulf of Mexico and ensure the safety of crew. To the extent that industry participants are not able to avoid these impacts altogether, accounting personnel would be required to assess if and to what extent such failure is the result of a “climate-related” event. The circumstances in which these impacts can arise present substantial challenges in parsing to what extent an impact is “climate-related” as compared with a consequence of operational decisions. The Proposed Rule risks converting the materialization of the unforeseen or the unavoidable into claims that climate-related risks were improperly assessed in connection with the preparation of financial statements. The increased burden on management and financial reporting teams to document and support for their conclusions in these respects will be substantial and distracting from their core function and day-to-day responsibilities.

As to financial impacts metrics, the quantification of a bright line standard requiring disclosure if the aggregated impact of all severe weather events, other natural conditions, transition activities, and identified climate-related risks unless the absolute value of the aggregate impacts are less than one percent of the total line item for the relevant fiscal year is extraordinarily low. Investors are also not well-served by rules that would indiscriminately require disclosure of significant amounts of information that is not material to investors. Both the United States Supreme

Court and the Commission have historically recognized the dangers of over-disclosure, including the resulting *diminishment* of investors’ ability to make informed investment decisions. The Supreme Court has long noted the danger that “too low a standard of materiality” may “bury the shareholders in an avalanche of trivial information – a result that is hardly conducive to informed decisionmaking.”¹⁶ Former Chair Mary Jo White echoed these concerns, remarking that “[w]hen disclosure gets to be ‘too much’ or strays from its core purpose, it could lead to what some have called ‘information overload’ – a phenomenon in which ever-increasing amounts of disclosure make it difficult for an investor to wade through the volume of information she receives to ferret out the information that is most relevant.”¹⁷ Where the registrant — which is most intimately familiar with the operations and financial position of the company — has not determined that this type of information is material, its inclusion may well be counter-productive.

The Commission argues that a 1% quantitative threshold is used in other contexts¹⁸, but the examples the Commission cites are circumstances where the quantitative amounts involved are knowable under current accounting practice, have discrete impacts on specific financial line items, and address scenarios in which more detailed disclosure is appropriate. Rather than facilitating comparability, consistency and reliability for investors, disclosure of impacts using the proposed quantitative threshold heightens the risk of confusion and may lead to repetitive disclosure of information far in excess of its relative importance to an investor. By introducing an unworkably low bright-line threshold for reporting climate-related impacts, the Commission may inadvertently signal that climate-related impacts are more important to an investor than financial impacts of other matters. The volume and nature of this type of disclosure may overwhelm other disclosure, including potentially more significant and material financial information contained elsewhere in the notes to financial statements. Of note, this impetus for overbroad and repetitive disclosure stands in contrast to the Commission’s efforts to encourage conciseness and clarity for investors in other areas of a company’s periodic reports.¹⁹ In addition, the bright line standard creates a framework under which positive and negative impacts of climate-related events with respect to a line item may offset each other, with registrants required to make quantitative assessments based on the absolute value of impacts in respect of each line item. This represents a significant departure from typical accounting practices, which do not ordinarily provide for offsetting amounts in different contexts.

For similar reasons, the proposal to require disclosure of expenditure metrics should be abandoned. We do not believe that the requirement would provide decision-useful information for investors but would require companies to spend substantial time and resources to calculate and document, on a disaggregated basis, business decisions regarding the timing and amounts of expenditures and capitalized costs. This is particularly true for expenditures related to transition activities, which often are taken based on a blend of considerations across longer time horizons than other expenditures. Some of these considerations are likely to be competitively sensitive or

¹⁶ *Basic v. Levinson*, 485 U.S. 224, 231 (1988).

¹⁷ Chair Mary Jo White, Speech, National Assoc. of Corp. Directors, Oct. 15, 2013 <https://www.sec.gov/news/speech/spch101513mjw>.

¹⁸ See Proposed Rule at 121, footnote 347 for examples cited by the Commission.

¹⁹ For example, the Commission’s 2020 amendments to modernize certain sections of Regulation S-K require summary risk factor disclosure of no more than two pages if the risk factor section exceeds 15 pages. Release Nos. 33-10825; 34-89670.

would otherwise not be appropriate to publicly disclose at the time the Proposed Rule would require.

We instead recommend that the Commission continue to look to the principles expressed in the 2010 Guidance to guide what disclosure is appropriate for companies to make on climate-related matters. Many of our members independently have concluded that there is value in including certain information from sustainability disclosure in their periodic reports filed with the Commission. This disclosure often incorporates a detailed discussion of “acute risks” and “chronic risks” in periodic reports where those risks are considered material to a registrant. Expanding this type of disclosure with a new, required note to a company’s financial statements, and subjecting this information to accounting systems and controls without an existing framework for doing so, imposes substantial burdens on teams responsible for the preparation of financial statements. A registrant can reasonably be expected to identify and to discuss important risks in these categories, but that discussion should be informed by that company’s assessments and judgments as to the likelihood and magnitude of each of them. A reasonable location to present this narrative disclosure, to the extent determined material by a registrant, could be Management’s Discussion and Analysis of Financial Condition and Results of Operations. This approach is one familiar to investors and we believe better facilitates comparable and reliable disclosure across companies and industries because investors will not be overwhelmed by the inclusion of insignificant information in a registrant’s financial statements.

III. Implementing the Proposed Rule Would Impose Other Substantial Burdens on Companies and Unnecessarily Expose Many Public Companies to Increased Risk of Liability

The more than 200 questions presented by the Commission in its request for comment highlight a number of other concerns our members have regarding the effects of the Proposed Rule if adopted. Among the most salient of these concerns are the following:

- The timeline for implementing the Proposed Rule is far too aggressive. If adopted as proposed, the compliance date for the proposed disclosures (other than Scope 3 emissions disclosure) in annual reports for large accelerated filers could be as early as the fiscal year 2023, and for accelerated and non-accelerated filers the fiscal year 2024. That suggests that the necessary systems for compliance be in place by the end of this year for large accelerated filers (and would have already needed to be in place to the extent necessary for comparison to prior periods). By the Commission’s own analysis, there are likely hundreds of companies that will simultaneously need to develop these systems in whole or in part for the 2023 fiscal year.²⁰ Based on our members’ experiences developing internal capabilities in emissions reporting, this will not allow sufficient time for members to build out internal staff, engage consultants and advisors, develop and test new systems, apply accounting controls to these new systems and finally prepare required disclosures to include in a company’s filings with the Commission. For any adopted rule, there should be a multi-year transition period for large accelerated filers, with transition periods further extended for accelerated filers, non-accelerated filers and

²⁰ See Proposed Rule at 227, footnote 592.

smaller reporting companies, consistent with the tiered framework proposed by the Commission.

- Requiring climate-related disclosure, including the proposed financial statement metrics, in annual reports will unduly burden the teams responsible for preparing such disclosure. With large accelerated filers presently required to file annual reports on Form 10-K within 60 days of a registrant’s fiscal year end, we believe the Commission significantly underestimates the burdens associated with increasing the scope of disclosure information to be compiled, reviewed and audited at a registrant within that timeframe. In part to more efficiently allocate resources across a fiscal year, many companies do not finalize and publish sustainability reports prior to the second quarter of the year.²¹ We believe that many registrants would find it difficult to prepare all of the required disclosure by the applicable 10-K deadline, and that other registrants that normally file well in advance of the applicable 10-K deadline will be required to file later than has been the case historically, delaying the release of other important information to investors.²² In order to help reduce costs to a registrant, the Commission should provide additional time for companies to prepare required climate-related disclosure, such as by establishing a deadline to publish a sustainability report later in the fiscal year.²³
- A registrant should control the timing and extent to which it communicates with investors and other stakeholders about any “transition plan” that it may have adopted. The Proposed Rule may compel companies to disclose potentially sensitive and competitive information earlier than is appropriate. For example, a transition plan may incorporate future plans to divest a division or other part of a company’s business. Requiring a company to disclose prematurely these aspects of its transition plan would adversely impact the registrant, including potentially harming employee and community relations, and would impede the registrant’s ability to manage an efficient and orderly divestiture process. Requiring this disclosure also will likely

²¹ A recent analysis by Harvard Law School of 200 sustainability reports published during the first half of 2021 by companies included in the S&P 500 found that more than 80% were published during the second calendar quarter, with June being the most common month of publication. *See* The State of U.S. Sustainability Reporting, available at <https://corp.gov.law.harvard.edu/2021/11/02/the-state-of-u-s-sustainability-reporting/>.

²² We also do not believe that this concern is sufficiently addressed by permitting a registrant to use a reasonable estimate of its GHG emissions for its fourth fiscal quarter if no actual reported data is reasonably available, as long as the registrant later discloses any material difference between the estimate used and the actual, determined GHG emissions data for the fourth fiscal quarter. A registrant will frequently find itself in the position of having to determine whether previously disclosed emissions information that it now knows to be incorrect must be updated. This will undermine efforts to generate consistent disclosure for a registrant across multiple years, and because any initial estimate may be incorrect, it will simultaneously reduce the reliability of such information for investors. Registrants may also find it challenging to develop adequate procedures with respect to annual GHG emissions data when it is partially based on an estimate of an amount that would be known soon after the estimate has been disclosed.

²³ One consideration is whether climate-related information could be treated as Part III information in an annual report on 10-K, which would permit registrants to incorporate by reference such information from a registrant’s definitive proxy or information statement filed not later than 120 days after the end of the related fiscal year. If the Commission adopts such an approach, we believe it should clarify that a registrant will be permitted to file and have declared effective registration statements during the period after the registrant has filed its Form 10-K but prior to filing the climate-related disclosure that would be incorporated by reference into the Form 10-K. We believe it is important that registrants not be impeded from carrying out capital markets transactions in the United States while the registrant may still be collecting and analyzing information required in connection with preparing climate-related disclosure.

have a chilling effect on the progress of goals and sustainability initiatives at companies that are at the early stages of addressing the transition to a low carbon economy. For example, while the offshore drilling industry has made substantial strides in furtherance of sustainability initiatives and reporting ESG related data, the industry's sustainability initiatives and reporting are not as mature as other, better capitalized sectors, such as global technology companies. The Proposed Rule risks slowing progress in sustainability initiatives as companies may have concerns that disclosure required in connection with adopting a transition plan would require revealing sensitive strategic planning information and expose the registrant to additional liability.

- Similarly, while we agree with the Commission's determination not to require a registrant to conduct scenario analysis, we believe that registrants that may use scenario analysis in business planning should not be required to disclose the parameters, assumptions and analytical choices. These analytical tools and the resulting analyses are tools utilized to inform internal decision making. Requiring this disclosure may discourage the use of these tools by some registrants or open them up to unnecessary and distracting criticism of the use of underlying assumptions, for which there are not settled views as to approach.
- The requirement that a registrant include in its description of an identified physical risk the location of the properties, processes, or operations subject to the physical risk at a ZIP code level or "a similar subnational postal zone or geographic location"²⁴ must account for sensitivities regarding disclosing the location of certain assets and operations, as well as the fact that material physical assets subject to a physical risk, such as offshore drilling rigs, are mobile. It is common for offshore drillers to provide periodic updates to the market on the general location where its rigs are operating through fleet status reports (*e.g.*, U.S. Gulf of Mexico), but drillers typically will not provide more specific information about their location as this may raise security concerns for the rig, as well as confidentiality concerns with respect to a customer's lease and well locations. Registrants operating mobile assets should be permitted to describe at a general level the physical risks in the location of operations, as many already do, and the Commission should not require disclosure of the specific physical location of mobile assets.
- As it does with respect to designations as an Audit Committee Financial Expert, the Commission should provide additional guidance as to whether a director's expertise in climate-related risks can be demonstrated through Board education or whether such expertise must be demonstrated by prior professional experience.
- Some of our members have expressed concerns that the Proposed Rule may discourage companies from accessing U.S. capital markets. For example, smaller companies may defer plans for a listing in the United States, or may decide to list on an international exchange, rather than be subjected to the requirements of the Proposed Rule. Applying the requirements to foreign private issuers as proposed may also encourage these issuers to exit or otherwise avoid becoming subject to the U.S. reporting regime. These concerns are more acute at a time when

²⁴ See Proposed Rule at 59.

the Commission has embarked on a series of ambitious and wide-ranging rulemaking endeavors broadly affecting U.S. public companies within a compressed time frame.²⁵

- The safe harbor protections included within the Proposed Rule are inadequate. Safe harbor provisions are an important recognition that registrants should not be subject to liability for disclosures made in good faith that, due to their nature, may be too easily questioned by opportunistic litigants. This protection also serves to encourage registrants to provide fuller disclosure in such areas, aware that while they remain subject to the Commission’s watchful eye, they can safely disclose information helpful to investors without undue risk of liability. This is all to the benefit of investors, who gain the benefit of disclosure, without the risk that any investment will be impaired by the significant expense that is associated with even frivolous securities litigation. The safe-harbor provisions of the Private Securities Litigation Reform Act (“PSLRA”), paired with the limited additional safe harbor included in the Proposed Rule in connection with Scope 3 reporting, are not sufficient. Without additional protections, the Proposed Rule will bring with it significant liability risk in connection with the sweeping new disclosures that it is widely recognized will be difficult to implement. At a minimum, the Proposed Rule should include Scope 1 and Scope 2 reporting (the latter of which registrants will necessarily need to rely on other entities to provide), as well as any discussion of scenario analysis, within the safe harbor presently proposed for Scope 3 GHG emissions. The Commission also should make express that the medium- and long-term impact analysis required for climate-related disclosure is necessarily covered by the PSLRA’s safe-harbor protections for forward-looking statements. These safe harbor protections should extend to all filings with the Commission, including registration statements.

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We appreciate the opportunity to comment on the Proposed Rule and respectfully request that the Commission consider the concerns expressed and recommendations set forth above.

Sincerely,



Jason McFarland
President

²⁵ For example, the Commission within the last six months has proposed new rulemaking with respect to Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure (Release Nos. 33-11038; 34-94382; IC-34529); Modernization of Beneficial Ownership Reporting (Release Nos. 33-11030; 34-94211); Rule 10b5-1 and Insider Trading (Release No. 33-11013; 34-93782); and Share Repurchase Disclosure Modernization (Release Nos. 34-93783; IC-34440).