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June 16, 2022

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

BY EMAIL TO rule-comments@sec.gov

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

Dear Ms. Countryman:

We welcome the opportunity to comment on the proposed rule amendments (the "**Proposal**") set forth in the Commission's Release No. 33-11042; 34-94478; File No. S7-10-22 (March 21, 2022) (the "**Release**").

I. Background and Summary

Our perspective on the Proposal is informed by our role as legal advisers who represent investors, issuers and others in connection with a wide variety of matters in the financial markets. We advise registrants, financial institutions and other market participants on climate-related disclosure and similar matters, and the Proposal is of particular interest to our public company clients. We also advise institutional investors and financial institutions that require climate-related disclosures from investees and that must present climate-related information to regulators and investors for regulatory or commercial purposes. All these clients share the Commission's objective of promoting quality, decision-useful climate-related disclosures, and as climate disclosure frameworks have evolved over the past decade they, and firms like ours that advise them, have built up extensive experience in the subject.

The Proposal is a groundbreaking initiative toward providing investors in the U.S. public securities markets with consistent, comparable and reliable information on climate-related risks and opportunities. High-quality corporate disclosures concerning climate-related matters can

make an important contribution to the Commission's mission of protecting investors, maintaining fair, orderly and efficient markets and facilitating capital formation.

But the interests of investors will be best served if the Commission's rules contribute to a broader eco-system of climate-related information provided by multiple economic actors (not just U.S. reporting companies) acting under multiple frameworks (not just the SEC's rules). To that end, we believe the Proposal does not take sufficient account of three major themes:

- *Coordination across markets and geographies.* The standards for disclosure across the major world financial markets should be as consistent as possible. We agree with the Commission's decision to base the Proposal on the recommendations of the Task Force on Climate-related Financial Disclosures (the "**TCFD Framework**")[1], and it should encourage the development and acceptance of quality disclosure frameworks everywhere – including different jurisdictions and different regulatory regimes – and not just in the U.S. public securities markets. There will not be only one high-quality disclosure framework in the world.

- *Attractiveness of U.S. public markets.* The Commission's disclosure requirements should not unnecessarily deter companies from using the U.S. public markets or penalize those that do. To this end, the requirements should be practicable, should require only information investors have sought and will use, and should avoid imposing unnecessary burdens on registrants.

- *Flexibility.* Climate-related disclosures are in their infancy, with rapidly changing practices, methods and standards, and the Commission's disclosure framework should accommodate experimentation and evolution of disclosure practices. Freezing yesterday's techniques with SEC rules is contrary to the Commission's goals. So is subjecting innovation in climate disclosures to the distractions and costs of entrepreneurial private litigation.

Revising the Proposal with these themes in mind will make it more effectual in serving the interests of investors. We have detailed in Part II of this letter a number of suggested changes that we believe would enhance the efficacy of the Commission's initiative without undermining its integrity. In summary:

A. <u>Eliminate the financial statement note disclosure</u>. The Commission should eliminate the requirement for note disclosure in audited financial statements. The requirement's proposed 1% threshold is inexplicably low and will result in unnecessary work and in disclosures that are not useful for investors, and concepts in the proposed rule suffer from a lack of clarity. Instead of note disclosure, the Commission could require MD&A disclosure on climate-related metrics.

[1] *See Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures*, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES (Oct. 2021), https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf.

B. Stick with limited assurance. With respect to the independent attestation requirement, the Commission should defer to future rulemaking the transition to reasonable assurance. Reporting and attestation practices remain in the preliminary stages of development, and even obtaining limited assurance attestations on GHG emissions disclosures presents companies with significant challenges. The Commission should require attestation only at the level of limited assurance while the methodology for GHG emissions verification continues to develop.

C. Add an alternative reporting provision. To encourage the development and acceptance of equally effective frameworks other than its own, the Commission should add an alternative reporting provision, and the provision should permit reliance on the recently proposed ISSB standard. Such a provision would also reduce the risk that the climate disclosure rules will be an incentive for companies to avoid or exit the U.S. public markets.

D. Extend the liability safe harbor. The Commission should extend the liability safe harbor provided for Scope 3 emissions disclosures to other disclosures where (i) the disclosure is necessarily forward-looking, (ii) the registrant will be dependent on third-party information or (iii) the methods and standards used in disclosure are evolving, uncertain or subject to change. Inviting private litigation over climate-related disclosures at this stage would chill the development of quality disclosure and create substantial negative externalities.

E. Give expert directors a safe harbor. The Commission should provide a safe harbor for directors with climate expertise, including for purposes of Section 11 of the Securities Act. Such a safe harbor will alleviate concerns of climate experts who may be considering board service, which will in turn serve the public interest.

F. Simplify the Scope 3 disclosures. The Commission should accommodate the challenges unique to Scope 3 emissions disclosure by (i) eliminating for Scope 3 emissions the requirement that emissions data be disaggregated by each of seven constituent greenhouse gases, (ii) eliminating for Scope 3 emissions the requirement to disclose GHG intensity in terms of metric tons of CO_2e per unit of production and (iii) providing an instruction that expressly recognizes the inherent uncertainty of Scope 3 disclosures.

G. Introduce more flexible filing mechanics. The rules should be more flexible about the mechanism for filing climate-related disclosures. The Commission should allow registrants to file climate disclosures by amending the annual report at any time prior to 120 days after the end of the fiscal year, and the Commission should also allow the corporate governance disclosures required by proposed Items 1501 and 1503(b) to be included in the proxy statement rather than in the annual report.

H. Cut back gratuitously prescriptive requirements. The Commission should modify several of the Proposal's excessively detailed requirements in order to provide investors with decision-useful information. In particular, the Commission should permit use of the GHG Protocol's approach to organizational boundaries for GHG emissions, should remove the requirement for disclosure about internal carbon pricing, should revise its proposal concerning disclosure of scenario analysis to require presenting only the climate change scenarios management determines are most useful to investors, should remove the detailed requirement for disclosure about carbon offsets and should broaden the definition of "location."

I. Eliminate retroactive disclosures. The Commission should not require quantitative climate-related information for periods prior to the rules becoming effective. Many registrants will be developing climate-related disclosure for the first time, and the development of processes for producing such disclosure will take time. Providing this disclosure retroactively for the historical fiscal years prior to the rules becoming effective is likely to be infeasible.

J. Give registrants time to prepare. The Commission should provide a more realistic compliance timeline. The compliance timeline should provide for at least one year between the adoption of the final rules and the beginning of the first reporting period for which the rules apply in order to allow registrants sufficient time to implement the governance enhancements and develop the climate-related infrastructure and expertise that will be needed to implement the new required disclosures.

Before we turn to our detailed suggestions, we would urge the Commission to be discerning about the nature of the comments it received in response to the statement "Public Input Welcomed on Climate Change Disclosures" issued by Acting Chair Allison Herren Lee on March 15, 2021 (the "**March 2021 Request**") and that it will receive on the Proposal. The Commission's basis for the Proposal rests in part on the proposition that investors in public companies are seeking climate-related disclosures to make investment decisions, and in our experience this is true. However, on several points we highlight below, the Proposal goes beyond current practices and investor preferences in ways that are gratuitous and unjustified. Investors, particularly institutional investors, have made clear to the Commission that they are *not* looking for information that goes beyond what is useful for investment decisions. In this connection, the Commission should distinguish comments by activist interest groups from comments that address the interests of investors and other market participants. All these comments are valuable, but they do not bear equally on the Commission's rationale for the Proposal.

II. Specific Comments on the Proposal

A. The Commission Should Eliminate the Requirement for Note Disclosure in Audited Financial Statements

There are Better Alternatives to Elicit Climate-Related Metrics Disclosures

The Proposal for note disclosure in the audited financial statements under proposed Article 14 of Regulation S-X is seriously flawed, and we strongly urge the Commission to eliminate it in its entirety. It will require registrants to ascribe false precision to unmeasurable matters, even when they are trivial, and it will impose impossible tasks on auditors and on internal control systems. It is a prescription for a lot of busywork, which risks delaying and complicating the financial reporting process and ultimately the filing of the annual report, for no advantage.

Proposed Article 14 is unsupported by the record of comments to the Commission and by the market practices and evolving frameworks that have otherwise inspired the Proposal. The Commission has proposed a substantial new body of disclosures that departs from every existing framework and that exceeds the many wish lists submitted to it.

It also unnecessarily short-circuits the standard-setting process for financial statement disclosures. Proposed Article 14 is not just a disclosure requirement: it requires the development of new analytical concepts and measurement and disclosure practices, which should be delegated to the process of the Financial Accounting Standards Board ("**FASB**"). The FASB process for setting new accounting standards is better suited to developing standards for novel and complex types of metrics than rulemaking carried out by the Commission.

The development of metrics to measure climate impacts is an important objective, but the Commission should pursue it by other means. It could require that MD&A include a discussion of the financial statement impact of material climate risks, weather events and transition activities, quantified to the extent practicable. It could require an unaudited presentation, as it does under subpart 1200 of Regulation S-K for oil and gas companies, subpart 1300 of Regulation S-K for mining operations and subpart 1400 of Regulation S-K for banking businesses, but even that approach would only be suitable if the concepts and practices for climate-related metrics are first developed and deepened by market participants, as they were in the case of disclosures for oil and gas, mining and banking.

The Proposed 1% Disclosure Threshold is Inappropriate

In comparison to the other new information that registrants would be required to disclose under the Proposal, the information sought by proposed Article 14 is of negligible utility to investors, in part because the 1% thresholds are inexplicably low. In contrast to existing materiality precedent of both the U.S. Supreme Court and the Commission,[2] the proposed note disclosure requirements are pegged to an arbitrary quantitative threshold. Such a threshold fails to take account of "the factual context in which the user of financial statements would view the

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[2] *See, e.g.*, Basic, Inc., v. Levinson, 108 S. Ct. 978 (1988) and SEC Staff Accounting Bulletin No. 99 – Materiality, 17 CFR Part 211 (Aug. 12, 1999), https://www.sec.gov/interps/account/sab99 htm#body1 [hereinafter SAB 99].

financial statement item," even though the Commission has long endorsed the position that "materiality cannot be reduced to a numerical formula."[3] The proposed note disclosure requirement thus bears a very tenuous relationship to investor decision-making, as it would frequently elicit disclosure that goes well beyond what investors are seeking, may obscure material information and is of no use to anyone.

The threshold may be a reaction to the Commission staff's comment letter engagement in late 2021 with a handful of registrants that indicated that climate change risk and weather effects did not have material impacts on their financial statements, but if so the Commission drew the wrong lesson from that engagement. That experience showed that issuers think carefully about materiality and that they often conclude climate-related effects are not material. That does not mean registrants would hide behind materiality to evade more specific requirements, and it certainly does not suggest that the financial statements are the right place to impose them.

The Concepts Used in the Proposed Rule are Unclear

The problems with the proposed note disclosure requirement cannot be rectified by simply increasing the thresholds of financial impact, because the concepts in the proposed rule suffer from a lack of clarity. At a minimum, the rules would need to include clear definitions of "severe weather events," "other natural conditions" and "transition activities" that would enable registrants to identify – on an objective, comparable and auditable basis – which events, conditions or activities must be included. As proposed, it is unclear which impacts would apply, which impacts are causally relevant, and how registrants would disaggregate them from other variables that impact the financial statement line items without relying on a multitude of assumptions that would make the information unreliable and uninformative to investors.

These difficulties are compounded by the fact that the proposed note disclosure would be subject to registrants' internal control over financial reporting and related audit testing. The number of individual judgments and assumptions that would be required to calculate the proposed financial impacts on each line item makes it virtually impossible for registrants to achieve the rigor and verifiability that should characterize audited financial statements.

B. With Respect to the Independent Attestation Requirement, the Commission Should Not Impose the Transition to Reasonable Assurance

The Commission should moderate proposed Item 1505 of Regulation S-K by deferring to future rulemaking the requirement for accelerated filers and large accelerated filers to move to a reasonable assurance level of attestation. To go beyond the limited assurance level of attestation with this Proposal is unnecessary from the perspective of investors and other users of climate-related disclosures.

The verification of GHG emissions is an evolving field in which standards and practices vary widely. The Proposal does not set forth detailed methodology for providing attestations, and we agree it should not do so. Many companies currently obtain limited assurance attestations on their GHG emissions disclosures, but obtaining even this lower level of assurance presents significant challenges. There is currently no uniform standard for what is required to

[3] SAB 99.

provide attestation, and a consensus has yet to emerge on methods, processes or results required for a provider to attest to "limited assurance." Because reporting and attestation practices are in the preliminary stages of development, it is premature to mandate that registrants obtain reasonable assurance.

The transition to a reasonable assurance standard has not been supported by investors, and it has no basis in the numerous comments submitted to the Commission in response to the March 2021 Request, or in the practices under other frameworks that have in most respects guided the Proposal. It is unrealistic and would have a detrimental impact on registrants' ability to prepare disclosures by the applicable annual report filing deadline under SEC rules. It would also introduce unnecessary urgency in the continued evolution of GHG emissions verification and risk disrupting an otherwise positive trend.

Instead, the Commission should adopt rules that require attestation only at the level of limited assurance, which will promote well supported and reliable data, while allowing the continued development of GHG emissions verification without the additional challenges of obtaining reasonable assurance.

C. The Commission Should Add an Alternative Reporting Provision

In a series of detailed questions in the Release, the Commission raised the question whether it should adopt an alternative reporting provision, under which an issuer could comply with some other disclosure framework in lieu of Subpart 1500 of Regulation S-K and Article 14 of Regulation S-X. We urge the Commission to do so, along the lines set forth below.

The Commission's goal – quality climate-related information for investors – requires not only a high-quality SEC disclosure framework, but also high-quality disclosure frameworks in other jurisdictions and under other auspices. The world will have more than one high-quality reporting framework, at least for the foreseeable future, and the Commission should not suppose that its framework is uniquely suitable for its broader goals. Instead it should encourage the development and acceptance of equally effective frameworks other than its own, to maximize the global impact and quality of climate-related disclosures. A particular strength of some frameworks is the development of sector-specific standards for climate-related disclosures, and a registrant should be able to select among high-quality reporting frameworks the one that best meets the expectations of its investors. In particular, the Commission should accommodate reporting under the proposed International Sustainability Standards Board standard on Climate-related Disclosures.[4]

We also believe that an alternative reporting regime would reduce the risk – which we believe is a serious threat to the beneficial impact of the Proposal – that the climate disclosure rules will be an incentive for companies to avoid or exit the U.S. public markets.

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[4] *See Exposure Draft: IFRS S2 Climate-related Disclosures*, INTERNATIONAL SUSTAINABILITY STANDARDS BOARD, (Mar. 2022), https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-climate-related-disclosures.pdf.

An analogy in this regard is the Commission's acceptance of financial statements prepared in accordance with IFRS in filings by foreign private issuers. We believe the acceptance of IFRS, together with the Commission's engagement with IFRS standards and disclosures, has had a very important positive effect on the quality of IFRS reporting around the world, to the benefit of U.S. investors. We also believe it has helped keep the U.S. public markets attractive to non-U.S. issuers. An alternative reporting regime for climate-related information would have similar salutary effects.

Two key points about an alternative reporting provision are addressed further below. In addition to those points, the design of the provision would also need to consider the possibility of alternative mechanics and timing for filing, where mandatory disclosures in another jurisdiction are eligible for the alternative reporting provision.

> *Identification of Eligible Alternative Frameworks*. The Commission should establish, in adopting the new climate-related disclosure rules, a process that will continue to be available going forward for identifying eligible alternative reporting frameworks. One possibility would be to provide for a Commission order, and to delegate authority to issue such an order to the Director of the Division of Corporation Finance. This would be similar to the approach the Commission took in its rules requiring disclosure of resource extraction payments pursuant to Section 1504 of the Dodd-Frank Act.
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> The Commission could identify one or more eligible alternative frameworks in its adopting release for final rules. But if it cannot – because other frameworks are evolving rapidly – its staff should mobilize to identify alternative frameworks promptly, so that registrants can begin planning how they will comply with the rules. An alternative reporting provision will be less effective if it becomes available only after registrants have implemented plans to comply with the principal provisions of the Commission rules.
>
> The Commission should not require mutual recognition as a condition or criterion for recognizing an alternative regime as eligible. There is no particular reason to do so, and the concept is inapposite because many high-quality disclosure frameworks do not emanate from regulatory authorities, or have not been explicitly adopted by them.
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> *Eligible Issuers*. The alternative reporting provision should be available to any registrant, and should not be limited to foreign private issuers or to dual-listed foreign private issuers. If a framework is determined to be of high quality, there is no reason to limit its availability to a particular class of issuers. An alternative reporting provision will potentially relieve burdens on a dual-listed issuer facing inconsistent requirements, but that is not the principal reason to accommodate alternative frameworks.
>
> The Commission should not require that the registrant be under a legal or regulatory obligation to comply with the alternative framework. A registrant should be able to elect voluntarily to rely on an eligible framework, and to rely on the alternative reporting provision, if it adopts the eligible framework in full.

The Commission should consider a two-part alternative reporting provision, under which (a) any issuer could report under a limited range of frameworks like ISSB and (b) a foreign private issuer subject to mandatory reporting under any of a broader range of frameworks could rely on that reporting in its SEC filings.

D. The Commission Should Expand the Liability Safe Harbor

The Proposal would make the Commission a major participant in an evolving area of practice globally, taking up the challenge presented by the pioneering work done by investors, companies, standard-setters and other regulators. This is an appropriate step. However, the Proposal would also have the effect of inviting private litigation under the federal securities laws over climate-related disclosures. This will predictably undermine the Commission's objectives by providing an incentive for entrepreneurial litigation against registrants, chilling the development of quality disclosure and creating substantial negative externalities to the detriment of experimentation and innovation by reporting companies. There is no reason to ask private plaintiff-side lawyers to the table while markets and regulators address the complicated and critical topic of developing climate-related disclosure methods and standards.

The Proposal recognizes this in one respect, by including in proposed Item 1504(f) a liability safe harbor for disclosures on Scope 3 greenhouse gas emissions. We support that safe harbor and believe similar protection should extend to other disclosures where (i) the disclosure is necessarily forward-looking, (ii) the registrant will be dependent on third-party information or (iii) the methods and standards used in disclosure are evolving, uncertain or subject to change.

With respect to several provisions of the Proposal, the Release refers to the safe harbor for forward-looking statements under the Private Securities Litigation Reform Act of 1995,[5] but that safe harbor is insufficient for current purposes because (a) it is limited to forward-looking information and (b) it is unavailable in several important circumstances, including disclosure in an initial public offering, disclosure in the financial statements and related notes, disclosures of an "ineligible issuer" (as defined in Rule 405 under the Securities Act) and disclosure that is not identified as forward-looking and accompanied by meaningful cautionary statements.

Consequently we suggest that the Commission include safe harbor protection, drafted like proposed Item 1504(f), that covers at least:

- disclosures on impacts of climate-related risks under proposed Item 1502(b);
- disclosures about future financial statement impacts under proposed Item 1502(d);
- disclosures about scenario analysis under proposed Item 1502(f);
- transition plan disclosures under proposed Item 1503(c);

[5] *See* Securities Act of 1933 (the "**Securities Act**"), § 27A, 15 U.S.C. § 77z-2; Securities Exchange Act of 1934 (the "**Exchange Act**"), § 21E, 15 U.S.C. § 78u-5.

- disclosures under proposed Item 1504 on the methodology, significant inputs and significant assumptions that registrants use in the process of calculating GHG emissions;

- "targets and goals" disclosures under proposed Item 1506; and

- forward-looking disclosures in the notes to the audited financial statements pursuant to proposed Article 14 of Regulation S-X.

E. The Commission Should Provide a Safe Harbor for Directors with Climate Expertise

The proposed language of paragraph (a)(1)(ii) of proposed Item 1501 would require detailed disclosure of the nature of any board member's climate-risk-related expertise. The Commission should create a safe harbor for such directors to insulate them against additional liability derived solely from their designation as a climate expert.

The Commission provided such a safe harbor when it adopted rules in 2003 on disclosure about audit committee financial experts, providing that no increased responsibility, obligation or liability shall be imposed on a director by virtue of being so designated, including for purposes of Section 11 of the Securities Act.[6] In the adopting release, the Commission noted that a conclusion by a court that designation as an audit committee financial expert could lead to additional obligations or liabilities would "adversely affect the operation of the audit committee and its vital role in [the] financial reporting and public disclosure system, and systems of corporate governance more generally" and "would be adverse to the interests of investors and to the operation of markets and therefore would not be in the public interest."[7] In the Commission's recent proposal on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure (the "**Cybersecurity Proposal**"),[8] the Commission again recognized the importance of such protection, proposing a safe harbor that a designation as an individual with cybersecurity expertise would not result in an individual being deemed an expert for any purpose, including Section 11 liability.[9]

Similarly, paragraph (a)(1)(ii) of proposed Item 1501 should include a safe harbor provision stating that a person who is identified as having expertise in climate risk will not be deemed an expert for any purpose, including, without limitation, for purposes of Section 11 of the Securities Act (15 U.S.C. 77k), as a result of being designated or identified as a director with expertise in climate risk pursuant to proposed Item 1501(a). The language should clarify that Item 1501(a) would not impose additional duties, obligations or liability on the designated individual that are greater than those imposed on such person as a member of board of the

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[6] 17 C.F.R. § 229.407(d)(5)(iv); Form 20-F, Item 16A(d).
[7] Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Exchange Act Release Nos. 33-8177; 34-47235; File No. S7-40-02 (Jan. 24, 2003).
[8] Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Exchange Act Release Nos. 33-11038; 34-94382; IC-34529; File No. S7-09-22 (Mar. 9, 2022).
[9] *See* proposed 17 C.F.R. § 229.407(j)(2).

directors in the absence of such designation. Including this provision will alleviate concerns of climate experts who may be considering board service and will serve the public interest.

F. The Commission Should Accommodate the Challenges Unique to Scope 3 Emissions Disclosure

The Proposal requires separate and comprehensive disclosure of a registrant's total Scope 3 emissions if such emissions are material, or if the registrant has set a GHG emissions reduction target that includes its Scope 3 emissions.

The Release recognizes that Scope 3 emissions are "a relatively new type of metric" and "may present more challenges than the reporting of Scopes 1 and 2 emissions,"[10] and we support the safe harbor in proposed Item 1504(f). We believe the Commission should go farther to moderate the Scope 3 disclosure requirements and to recognize the particular difficulties of identifying and measuring them, which stem not only from reliance on external data but also from unavailability of information and from the wide range of methods for both identification and measurement. Scope 3 information today is not fully reliable or comparable – not because of a lack of effort or care on the part of individual registrants, but because they are using young and still evolving disclosure standards, definitions and techniques. The situation is likely to change in the future, but today there is no firmly established and widely accepted methodology for identifying and measuring Scope 3 emissions, and the Commission's rules should not be written as if there were. Otherwise the Commission will run the risk of eliciting disclosure that undermines the goals of transparency and comparability.

To mitigate this risk, we suggest that the Commission eliminate for Scope 3 emissions the requirement that emissions data be disaggregated by each of seven constituent greenhouse gases and the requirement to disclose GHG intensity in terms of metric tons of CO_2e per unit of production. Both of these requirements present significant challenges and are unlikely to yield dependable, decision-useful disclosure. We also recommend that the Commission address the challenges in Scope 3 emissions disclosure that will arise from use of different reporting periods by a registrant and its suppliers and customers, at least by acknowledging the resulting need to make estimates.

Finally, in connection with the final rule, the Commission should provide an instruction that expressly recognizes the inherent uncertainty of Scope 3 disclosures, and specifically:

- the need to make estimates;
- the need to rely on external data sources;
- the need to make judgments to identify Scope 3 emissions, and the possibility that part of the registrant's material Scope 3 emissions cannot be identified;
- the need to make judgments to measure Scope 3 emissions, and the possibility that part of the registrant's Scope 3 emissions cannot be measured;

[10] Release at 182.

- the range of alternative methodologies that may be equally valid and the need to elect among them; and

- the consequent uncertainty of Scope 3 emissions disclosures.

The proposed rule text acknowledges indirectly these methodological challenges, by requiring disclosures on data sources (Items 1504(c)(2) and 1504(f)(5)), methods (Item 1504(e)(1)), estimates (Item 1504(e)(4)) and gaps in data (Item 1504(e)(7)). The final rule should recognize them directly.

G. The Mechanism for Filing Climate-Related Disclosures Should be More Flexible in Two Respects

The Proposal generally requires climate-related disclosures to be included in the annual report on Form 10-K or Form 20-F. We recommend that the Commission consider allowing registrants to file climate disclosures by amending the annual report at any time prior to a separate deadline, either 120 days or another appropriate longer period after the end of the fiscal year. This would be analogous to the way current rules permit disclosures to be incorporated by reference into the annual report on Form 10-K from the subsequently-filed proxy statement. We also recommend that the Proposal be amended so as not to require climate-related disclosures in initial registration statements on Form S-1 or Form F-1, as other jurisdictions have chosen not to require climate-related disclosures for new registrants and doing so could deter registrants from using the U.S. public markets.[11]

For domestic large accelerated filers and accelerated filers, this approach would alleviate timing pressure that is already very intense, and the additional time will enhance the quality of the resulting disclosures. As for foreign private issuers, today many of them file the annual report on Form 20-F in advance of the deadline, and the change would avoid the risk that they will now delay filing because of the climate-related disclosures.

With respect to corporate governance disclosures required by proposed Items 1501 and 1503(b), the Proposal should be revised to permit this information to be included in the proxy statement rather than in the annual report. That would align these disclosures with the other, comparable disclosures required by Part III of Form 10-K. The Commission took this approach in the Cybersecurity Proposal and should follow it for climate-related governance disclosures.

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[11] For example, the United Kingdom legislation mandating TCFD-aligned disclosure allows a registrant to include climate-related disclosures in its annual report. *See Mandatory Climate-Related Financial Disclosures By Publicly Quoted Companies, Large Private Companies and LLPs*, DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY (Feb. 2022), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056085/mandatory-climate-related-financial-disclosures-publicly-quoted-private-cos-llps.pdf.

H. The Commission Should Modify Several of the Proposal's Excessively Detailed Requirements In Order to Provide Investors with Decision-Useful Information

The Final Rule Should Permit Use of the GHG Protocol's Approach to Organizational Boundaries for GHG Emissions

The Proposal requires disclosures about GHG emissions to apply organizational boundaries that are consistent with those applied in the consolidated financial statements. As the Release notes, this differs from the GHG Protocol, which permits the use of organizational boundaries based on either equity share or operational control.[12] The Proposal's method presents significant complications (particularly with respect to the distinction between Scope 1 and Scope 3 disclosures) and has no particular advantages. The Commission should not seek to displace the GHG Protocol (and the other disclosure initiatives that rely on it) in this regard, particularly since this is not supported by the record of comments.

The Commission Should Remove the Requirement for Disclosure About Internal Carbon Pricing

The Proposal provides for mandatory disclosures by a registrant that "maintains an internal carbon price." The text of proposed Item 1502(e)(1) is vague, and the Release is clear that it represents a compromise. Climate activists contend that economic actors should put a price on the carbon they emit and disclose what price they use, but the Commission chose not to propose such a requirement, because there is not at present an adequate market from which to draw a price and many registrants do not use one. The resulting half-measure – unsupported by market practice or commenter requests – is unwarranted. Companies that are trying to think carefully about climate risks will be subject to an extra disclosure requirement, but many will not, and at the margin some could be deterred from using a carbon price for internal purposes. It is hard to see how that will advance the cause of consistent, comparable, useful disclosure.

The Commission Should Revise its Proposal Concerning Disclosure of Scenario Analysis

We urge the Commission to reconsider its approach to disclosures about scenario analysis in the two final sentences of proposed Item 1502(f). Other U.S. financial regulators are also considering requirements for the management of climate-related financial risk,[13] some of which

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[12] *See Greenhouse Gas Protocol, Companies and Organizations*, https://ghgprotocol.org/companies-and-organizations.

[13] For example, within the past 18 months, the Office of the Comptroller of the Currency ("**OCC**") and the Federal Deposit Insurance Corporation ("**FDIC**") have proposed principles addressing climate-related financial risk management, and the Financial Stability Oversight Council ("**FSOC**") released a report describing climate-related financial risks as an "emerging threat" to financial stability that necessitates action by the financial regulatory agencies and by the industry. *See, e.g.*, *Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions*, FDIC, 87 Fed. Reg. 19507 (Apr. 4, 2022); *Principles for Climate-Related Financial Risk Management for Large Banks*, OCC (Dec. 16, 2021), https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-62a.pdf; Michael J. Hsu, Acting Comptroller of the Currency, OCC, "Five Climate Questions Every Bank Board Should Ask" (Nov. 8, 2021), https://www.occ.gov/news-issuances/speeches/2021/pub-speech-2021-116.pdf; *Report on Climate-Related Financial Risk*, FSOC (Oct. 21, 2021), https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf; Lael Brainard, Governor, Bd. of Governors of the Fed. Reserve Sys., "The Role of Financial Institutions in Tackling the Challenges of Climate

are expected to include requirements for scenario analysis, and the Commission should ensure that its approach is not inconsistent with that of other regulators.

As proposed, 1502(f) will present difficulties for registrants regarding both scope and confidentiality. While the Commission's intention with regard to scope is not clear, the language appears to capture any scenario – broadly defined – that the registrant has actually considered, whether or not the registrant has provided public disclosure about it or whether the particular scenario provides decision-useful content to investors. Registrants use scenarios for a wide variety of reasons, some of which have no relevance to investors. Certain types of scenario analysis, particularly at financial institutions, may be performed at the request of regulators and under their supervision, and public disclosure of the analysis is not expected and may not be permitted because the institution's regulator considers it to be confidential supervisory information. Similar concerns apply to supervisory requirements in jurisdictions outside the United States.

Mandatory disclosure of scenario analysis may have the chilling effect of deterring the company from undertaking the scenario analysis. Additionally, such analysis may reflect distinctive elements of a registrant's specific business plan, which should be considered highly confidential.

To address these issues, the Commission should revise the Proposal to limit the scope of the last two sentences of Item 1502(f). The final rule could provide that if a registrant publicly discloses a scenario analysis, it must present the requisite information about the one or more internationally-recognized climate change scenarios management determines are most useful to provide investors with an understanding of its resilience to climate-related risks. This would be similar to the MD&A requirement to present for investors the registrant's financial performance as seen "through the eyes of management."

The Commission should also limit the disclosure requirements to scenarios that the registrant expressly identifies in its public disclosures. Alternatively, the Commission could provide an exception for scenario analysis that is conducted pursuant to a regulatory framework applicable to the registrant or its subsidiaries and that is not otherwise made public.

Change" (Feb. 18, 2021), https://www federalreserve.gov/newsevents/speech/brainard20210218a htm#:~:text=Financial%20institutions%20are%20collecting%20data,balance%20sheets%20and%20business%20models. In addition, the New York State Department of Financial Services ("**DFS**") has issued guidance on managing the financial risks arising from climate change to all New York-regulated banking organizations and New York domestic insurers. *See Climate Change and Financial Risks*, DFS (Oct. 29, 2020), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20201029_climate_change_financial_risks; *CRA Consideration for Activities that Contribute to Climate Mitigation and Adaptation*, DFS (Feb. 9, 2021), https://www.dfs.ny.gov/industry_guidance/industry_letters/il20210209_cra_consideration; *Guidance for New York Domestic Insurers on Managing the Financial Risks from Climate Change*, DFS (Nov. 15, 2021), https://www.dfs.ny.gov/system/files/documents/2021/11/dfs-insurance-climate-guidance-2021_1.pdf.

The Commission Should Remove the Detailed Requirement for Disclosure About Carbon Offsets

Proposed Item 1506(b)(6) requires a registrant to disclose how it intends to meet its climate-related targets or goals, and it gives examples including reliance on purchased carbon offsets. We support this requirement and believe it is sufficient to elicit a full explanation of the registrant's strategy to achieve its announced goals.

Proposed Item 1506(d) requires additional disclosures if the registrant uses carbon offsets. We suggest that this be removed. The detailed requirement is unnecessary, and it may have undesirable effects on disclosures and on the market. Carbon offsets represent an important but clearly underdeveloped tool, as the Release acknowledges, and the Commission should be wary of chilling innovation or other unintended consequences. The specifics given in the rule are arbitrary and selective, for example in neglecting sequestration approaches and in using concepts that may become obsolete. Mandatory disclosure of carbon offset details could inflate already growing demand, affect the price and other aspects of the market, and could elicit excessive details about the registrant's own internal pricing calculations.

The Commission Should Broaden the Definition of "Location"

The Commission should broaden the definition of "Location" in the final rule to avoid unnecessarily detailed disclosure. The Proposal requires information about location (for example, location of operations subject to physical risk) and defines "Location" to mean zip code "or similar subnational postal zone or geographic location." This requirement will produce an excess of overly detailed disclosure that will not be useful for investors and that is not supported by comment or by other disclosure frameworks. The Commission should instead broaden the definition of "Location" to refer more generally to geographic region.

I. The Commission Should Not Require Quantitative Climate-Related Information for Periods Prior to the Rules Becoming Effective or For New Registrants

The Proposal requires a registrant to present quantitative climate-related information for the most recently completed fiscal year and for the historical fiscal years included in the registrant's consolidated financial statements, which will require many registrants to provide three years of historical climate-related data. The Commission should revise the Proposal to clarify that quantitative climate-related information is required beginning with the first fiscal year for which the rules are effective.

Development of processes that will produce the required quantitative climate-related information will take time. Many registrants will be developing climate-related disclosure for the first time, and even those registrants that currently include some climate-related disclosure will need to revise their practices significantly to comply with the Proposal – for example, to recalculate data that was previously reported using the GHG Protocol concept of operational control. Given the novelty of the disclosure and the infrastructure and related tools required to gather such information, many registrants may find it infeasible to produce the required quantitative information for periods prior to the rules becoming effective.

The Proposal notes the availability of accommodations under Securities Act Rule 409 or Exchange Act Rule 12b-21, which allow a registrant to exclude a historical metric if the metric was not previously presented and the historical information necessary to calculate or estimate it is not reasonably available without "unreasonable effort or expense."[14] However, Rule 409 and Rule 12b-21 set a high standard for exclusion of such information and impose an unnecessary process, particularly with respect to the proposed note disclosure under proposed S-X Article 14. Given the complex nature of this disclosure and the effort and investment involved in its development, a revision to the Proposal to omit historical financial statement metric data for previous fiscal years would be more appropriate.

J. The Commission Should Provide a More Realistic Compliance Timeline

The Proposal contains an illustrative timeline for compliance, which assumes that the final rule is adopted before the end of 2022. Under the Proposal's illustrative timeline, the first reporting period for which the new rules would apply could begin shortly after the Commission adopts the final rules. We urge the Commission to adopt final rules with a compliance timeline that is more realistic in light of the significant efforts that will be required to implement the new required disclosures.

The compliance timeline should provide for at least one year between the adoption of the final rules and the beginning of the first reporting period for which the rules apply. To properly comply with the Proposal's disclosure requirements, registrants will need to implement governance enhancements, including with respect to disclosure controls and procedures, committee structures and policy adoption. Registrants will also need to develop and expand their climate-related infrastructure and expertise, which will likely include training, hiring additional personnel and the use of consultants. Finally, registrants will need to work closely with their external auditors to apply accounting and auditing standards to climate-related financial disclosures. External auditors may need additional time to perform "dry runs" of new procedures in the quarters prior to implementation of the final rules. Unless the Commission adopts a realistic timeline, many registrants may be unable to comply with the requirements during the first reporting period.

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We appreciate the Commission's attention to these comments and support the Commission's initiative to propose a disclosure regime for climate-related matters. We hope the Commission will give careful consideration to the ways in which the Proposal can be improved. Our firm's Sustainability Working Group would be pleased to respond to any questions or comments and can be contacted through

[14] 17 C.F.R. § 230.409; 17 C.F.R. § 240.12b-21.

Very truly yours,

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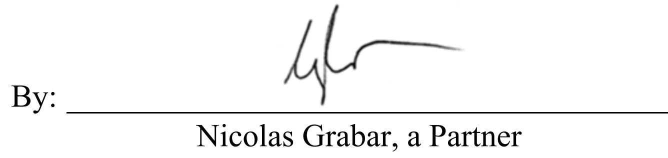

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