EMPIRE STATE
REALTY TRUST

June 16, 2022

Via E-mail to rule-comments@sec.gov

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

Re: Proposed Rule on Climate-Related Disclosures (File No. S7-10-22)

Dear Ms. Countryman:

We appreciate the opportunity to respond to the U.S. Securities and Exchange Commission's (the "Commission" or "SEC") request for comments on the proposed rulemaking "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Release Nos. 33-11042, 34-94478 (March 21, 2022) (the "Proposed Rule"). This comment focuses on the potential adverse consequences of the timing and broad scope of the proposed disclosure requirements.

Empire State Realty Trust, Inc. ("ESRT" or "we") is a self-managed real estate investment trust ("REIT") that owns and operates a portfolio of office, retail, and multifamily properties in Manhattan and the greater New York metropolitan area, including the world-famous Empire State Building office and observation deck. ESRT has been registered with the SEC as a publicly-traded company since 2013, and its shares are listed on the New York Stock Exchange. ESRT is a leader in healthy buildings, energy efficiency, and indoor environmental quality, and according to independent third-party studies has the lowest greenhouse gas ("GHG") emissions per square foot of any publicly-traded REIT portfolio in New York City.[1] In April 2022, ESRT published its *Empire Building Playbook: An Owner's Guide to Low Carbon Retrofits*, a free-to-the-public guide that outlines the step-by-step process for existing commercial buildings to develop a pathway to carbon reduction with proven returns on investment (based on the success of its own retrofit of the Empire State Building), which ESRT co-developed with New York State Energy Research and Development Authority, other NYC-based landlords and the Clinton Global Initiative.

Our Chairman is the Chair of the Real Estate Roundtable's Sustainability Policy Advisory Committee and on the Mayor's Advisory Board for the Implementation of Local Law 97 in New York City. As a real estate industry leader and champion of energy efficiency and stainability,

[1] *See* Morgan Stanley, *Time for the Big Apple to Go Green: Office in Focus* (Feb. 5, 2020) ("Our analysis across office REITs (SL Green, Vornado, Boston Properties, Paramount Group, Columbia Property Trust, and Empire State Realty Trust) suggests that ESRT (not covered) leads at 5.7 kgCO2 per foot . . . ."); Green Street Advisors, LLC, *NYC Local Emissions Regulation Update* (Nov. 24, 2021) (showing ESRT in a graph as having the lowest NYC Office REIT GHG Emissions by kgCO2e at 5.9).

ESRT publishes an annual sustainability report that is informed by Science Based Targets and GRESB, SASB, TCFD and GRI frameworks. The report provides details about ESRT's GHG emissions calculated in alignment with the GHG Protocol, among other information. We support the Commission's efforts to require and standardize climate-related disclosures; however, we believe certain aspects of the rulemaking require further consideration and refinement, in particular:

(i) the requirement to report Scope 1 and 2 emissions in a registrant's Form 10-K does not align with the timing when the required data is available;

(ii) registrants should be encouraged to quantify their GHG emissions impacts using uniform federal government standards, such as those set forth by the U.S. Environmental Protection Agency ("EPA") standards through a real and effective safe harbor;

(iii) the Commission should clarify that emissions from tenant-controlled spaces are Scope 3 emissions for commercial real estate ("CRE") owners; and

(iv) any Scope 3 emissions reporting should be voluntary and protected by a real and effective safe harbor, stronger than that proposed by the Commission.

The requirement to report Scope 1 and 2 emissions in a registrant's Form 10-K does not align with the timing when the required data is available.

The Proposed Rule would require disclosure of Scope 1 and 2 emissions in Form 10-K; however, many registrants would not have actual, verified emissions data ready in time for filing with their Form 10-K. For example, ESRT, like other large accelerated filers with a calendar year end, files its Form 10-K in February of each year. ESRT historically has not published its annual sustainability report until April because it does not have available until March all components of its emissions data to be reported for the preceding calendar year, including data from utility companies. Thus, in light of the time required to compile and internally review the data and then have a third-party verify the data, it would not be practicable for ESRT to publish the previous years' emissions data earlier than April.

Recognizing this issue, the Commission proposes a registrant can use a "reasonable estimate" of fourth quarter emissions for its Form 10-K disclosure, together with "actual" emissions data for the first three quarters. Later, in a subsequent filing, the registrant would be obliged to disclose "material differences" between the prior estimate and "actual, determined" data after it becomes available.[2] We believe it would hinder investors' desire for transparency and accuracy to receive information in two stages, with the first report merely being an estimate. Such two-stage disclosure would also impose an unnecessary burden on registrants that will be rushed to produce an estimate and undergo a costly verification process only to provide data that will be corrected a month later. Registrants also will be wary of filing an estimate in a Form 10-K, rather than furnishing it, as filed estimates could result in potential regulatory liability and litigation risks. We believe the

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[2] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,387 (Apr. 11, 2022).

Commission can ease a registrant's compliance burdens and still promote the objectives of investor transparency by requiring the disclosure of GHG emissions data after the registrant has been able to collect and verify its data. In light of our experience, we believe it is more practicable for registrants to provide their GHG emissions disclosure for the preceding year by the due date for their quarterly reports on Form 10-Q for the second quarter of each calendar year. This disclosure timeframe would align with New York City's local law that requires annual benchmarking report to be filed in the second quarter of the calendar year.

Registrants should be encouraged to quantify GHG impacts using uniform federal government standards, such as those set forth by the EPA, through a real and effective safe harbor.

The Proposed Rule does not define a GHG emissions calculation approach and rather puts the onus on the registrant: "In addition to setting its organizational and operational boundaries, a registrant would need to select a GHG emissions calculation approach."[3] The Commission recognizes that the "EPA has published a set of emissions factors,"[4] but does not require that a registrant use them. The Commission should instead encourage registrants to use these factors that were carefully developed by the EPA and are familiar to many registrants that already report GHG emissions. Setting forth a common framework will serve investor interest by making comparisons among companies easier.

The best way to encourage registrants to use the EPA framework is to create a safe harbor for registrants that calculate their GHG emissions in accordance with the EPA emissions factors, including those from the EPA's eGRID tool. A registrant that reports in good faith relying on calculation methods developed by a federal agency with the relevant expertise should benefit from the protection of a safe harbor. The Commission should create a "calculation safe harbor" that insulates emissions disclosures from liability when they are: (1) based on the best, available, and most recent data and tools released by the federal government; and (2) reasonably quantified by professionals with expertise in GHG calculations.

The Commission should clarify that emissions from tenant-controlled spaces are Scope 3 emissions for CRE owners.

The Proposed Rule would require Scope 2 reporting "from the generation of purchased or acquired electricity, steam, heating, or cooling that is consumed by operations owned or controlled by a registrant."[5] We agree with this "consumed by operations owned or controlled" test for Scope 2; however, we believe the Commission should add additional clarification as it relates to the real estate industry.

Categorization of emissions from tenant-controlled spaces is a large area of confusion and potential inconsistency. Tenant-based emissions are Scope 3 emissions from downstream "leased assets".[6]

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[3] *Id.* at 21,385.

[4] *Id.* at 21,386.

[5] *Id.* at 21,466.

[6] Proposed 17 C.F.R. § 229.1500(r)(2)(v) (codifying GHG Protocol, Scope 3 Category 13).

Business tenants that lease space in buildings are not a CRE owner's "consolidated" entities or "unconsolidated" investments. CRE owners do not have "operational control" in tenant spaces beyond the terms of their contractual lease agreements – and commercial tenants have significant market leverage in the negotiation of those leases. In addition, electricity, steam, heating or cooling measured by a meter for a particular leased space does not generate a CRE owner's Scope 2 emissions – because the meter quantifies energy "consumed ***by***"[7] a specific tenant to run its operations, which are beyond a CRE owner's control..

However, others have interpreted the GHG Protocol Scope 2 Guidance such that only direct-metered tenant emissions would qualify as Scope 3 since the CRE owner purchases utilities used by tenants other than direct-metered utilities. Thus, absent the Commission's clarification, some CRE owners may report emissions from tenant-controlled spaces as Scope 2, while others may report emissions from tenant-controlled spaces as Scope 3. This would lead to wide variances in reporting among CRE owners and a lack of comparability for investors. Additionally, if CRE owner and tenant were to treat the same emissions as Scope 2, it would lead to double counting along the value chain. For these reasons, we recommend that the Commission clarify that both sub-metered and direct-metered tenant emissions are Scope 3 emissions for CRE owners such as ESRT. We believe this approach is consistent with the Commission's proposed "consumed by operations owned or controlled by a registrant" test.

The requirement for reporting Scope 3 emissions should be removed, and any Scope 3 reporting should be voluntary and protected by a stronger safe harbor than proposed by the Commission.

The Proposed Rule would require Scope 3 emissions disclosure if registrants have established a voluntary Scope 3 emissions reduction target or if those emissions are material.[8] Given the difficulty and inherent inaccuracy that come with tracking and reporting Scope 3 emissions, the Commission should not require any Scope 3 emissions disclosure. The Proposed Rule would effectively mandate Scope 3 reporting for CRE owners such as ESRT despite the materiality threshold, and we do not believe any registrant should be required to assume potential liability for reporting on GHG emissions from sources they do not own or from operations they do not control.

Scope 3 emissions are difficult to measure and potentially limitless. As the Commission admits: "Depending on the size and complexity of a company and its value chain, the task of calculating Scope 3 emissions could be relatively more burdensome and expensive than calculating Scope 1 and Scope 2 emissions. In particular, it may be difficult to obtain activity data from suppliers, customers, and other third parties in a registrant's value chain, or to verify the accuracy of that information compared to disclosures of Scope 1 and Scope 2 emissions data, which are more readily available to a registrant."[9] For CRE owners such as ESRT, their tenants and third-party vendors may have no structure in place for measuring and reporting their emissions and may use

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[7] Proposed 17 C.F.R. § 229.1500(q) ("Scope 2 emissions" definition) (emphasis supplied) .

[8] 87 Fed. Reg. at 21,377.

[9] *Id.* at 21,396.

different methods to calculate their emissions, leaving such CRE owners with incomplete or inaccurate data.

At the same time, the "if material" proviso is effectively a reporting mandate. Guidance from the Task Force on Climate-Related Financial Disclosures ("TCFD")[10] explains that adding up emissions from all indirect sources will virtually always be "material" because they will readily exceed Scopes 1 and 2 amounts in nearly every industry sector. For example, TCFD reports that "downstream" Scope 3 GHG emissions alone account for about 90% of real estate sector emissions. Thus, the materiality provision of the rule would result in mandated Scope 3 reporting by CRE owners like ESRT. Given the inherent complexities in reporting Scope 3 emissions, we believe registrants should be under no mandate to report on such emissions, and the materiality provision of the rule must be removed and reporting on Scope 3 emissions be only voluntary. .

If a registrant choses to voluntarily report on its Scope 3 emissions, it should get the benefit of protective safe harbor. The Commission proposes to include a targeted safe harbor for Scope 3 emissions disclosure, but such safe harbor is not sufficient to protect a company from liability, especially when the company is forced to rely on third-party data, estimates and assumptions to provide the information. Any Scope 3 "safe harbor" should affirmatively protect estimates with a reasonable basis of support (not just intentionally fraudulent reports). Also, given the major challenges acknowledged by the Commission regarding Scope 3 calculations, any safe harbor should apply to a registrant's reasonable decision to omit "value chain" estimates.

Recommendations

In order to address and mitigate the above concerns, the SEC should consider revising the Proposed Rule to:

(i) Allow registrants to report their Scope 1 and 2 emissions in their quarterly reports on Form 10-Q for their second calendar quarter rather than in their annual reports on Form 10-K, such that the registrant will have a full year of emissions data ready to report;

(ii) Add a safe harbor for GHG emissions calculated using federal government standards;

(iii) Clarify that emissions from tenant-controlled spaces are Scope 3 emissions for CRE owners; and

(iv) Revise the Proposed Rule such that the reporting of Scope 3 emissions is voluntary only and protected by a stronger safe harbor than proposed by the Commission.

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[10] TCFD, *Guidance on Metrics, Targets, and Transition Plans*, at p. 56, Figures A1-1, A1-2 (2021).

We appreciate this opportunity to provide comments on the Proposed Rule for the Commission's consideration and welcome further discussion if helpful.

Sincerely,

Thomas N. Keltner
Executive Vice President and General Counsel
Empire State Realty Trust, Inc.