June 17, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NW
Washington, DC 20549

Via email: rule-comments@sec.gov

Re: File Number S7-10-22
AF&PA Comments on "The Enhancement and Standardization of Climate-Related Disclosures for Investors," 87 Fed. Reg. 21334 (April 11, 2022)

Dear Ms. Countryman:

The American Forest & Paper Association (AF&PA) appreciates the opportunity to provide comments and recommendations on the proposed rules on climate-related disclosures of the Securities and Exchange Commission (SEC or Commission). We respect the SEC's role to facilitate the disclosure of decision-useful information to shareholders in public companies. Our hope is that the proposed rules can be improved to ensure that investors can be better informed by material information; to reduce unnecessary costs and burdens; to significantly reduce the enormous compliance and information-gathering efforts that would be required; to ensure that important legal requirements are satisfied; and to achieve sustainable regulations that will stand the test of time. Meaningful progress in addressing our changing climate requires innovation that our free enterprise system can provide, as well as government policies that facilitate a sustainable path forward. We urge the Commission to ensure that its final rules optimally address both needs. While promoting the disclosure of material information, the Commission should eschew any requirements that inadvertently could chill innovation and progress. In addition to filing these separate comments, AF&PA also supports the comments filed by the U.S. Chamber of Commerce and the National Association of Manufacturers.

Introduction

AF&PA serves to advance U.S. paper and wood products manufacturers through fact-based public policy and marketplace advocacy. Our members include companies with mills that utilize both virgin and recycled fiber, and our members make essential paper products including packaging, printing papers, tissue, wood products, and a range of other products that are among the most used and necessary items for people in the U.S. and abroad – and are made from renewable and recyclable resources.

The forest products industry accounts for approximately four percent of the total U.S. manufacturing GDP, manufactures nearly $300 billion in products annually and employs approximately 950,000 people. The industry meets a payroll of approximately $60 billion annually and is among the top 10 manufacturing sector employers in 45 states.[1]

AF&PA's sustainability initiative — *Better Practices, Better Planet 2030* — comprises one of the most extensive quantifiable sets of sustainability goals for a U.S. manufacturing industry and is the latest example of our members' proactive commitment to the long-term success of our industry, our communities and our environment. We have long been responsible stewards of our planet's resources.

We are pleased to report that our members achieved most of our 2020 sustainability goals, including reducing greenhouse gas emissions 24.1 percent during 2005-2020 and improving purchased energy efficiency by 13.3 percent. Additionally, our 2030 goal to reduce greenhouse gas emissions by 50 percent is consistent with President Biden's 2030 economy-wide goal, and a leading example for the U.S. manufacturing sector. AF&PA recognizes the ongoing challenges of our changing climate, and our industry greenhouse gas (GHG) goals reflect our commitment to reducing emissions.

Congress delegated to the SEC the authority to promulgate disclosure requirements that are "necessary or appropriate in the public interest of for the protection of investors."[2] In making this determination, the Commission must ensure that the disclosure requirements "will promote efficiency, competition, and capital formation."[3] Moreover, Section 23(a)(2) of the Securities Exchange Act of 1934, as amended (the Exchange Act), 17 U.S.C. 78w(a)(2), requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the

[1] AF&PA 2030 Sustainability Goals, https://www.afandpa.org/2030
[2] *See* Section 7 of the Securities Act, 15 U.S.C. 77g, and Sections 12, 13 and 15 of the Exchange Act, 15 U.S.C. 78l, 78n, and 78o.
[3] *See* Section 2(b) of the Securities Act, 15 U.S.C. 77b(b) and Section 3(f) of the Exchange Act, 15 U.S.C. 78c(f).

Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act. On April 11, 2022, the Commission issued its proposed rules: "The Enhancement and Standardization of Climate-Related Disclosures for Investors." The proposed rules would create a wide range of new disclosure obligations for public companies, including requiring climate-related metrics and climate-related risks.

As for climate-related metrics, public companies would be required to disclose Scope 1 (direct emissions from facilities), Scope 2 emissions (indirect emissions from purchased electricity, steam, heat, and cooling), and, if material or if the company has set a GHG emissions reduction target or goal that includes its Scope 3 emissions, Scope 3 emissions (indirect emissions from the upstream and downstream activities of the company's "value chain"). Public companies would also be required to make quantitative and qualitative disclosures regarding the impact of climate-related risks and other events to financial statement line items (e.g., revenues, assets, cash flow), if such impacts aggregate to more than 1% of the relevant line item. Public companies also would be required to report information related to climate goals, including the baseline, metrics, how the company plans to meet its goals and annual progress towards its goals.

As for climate-related risks, public companies would be required to disclose material physical (e.g., weather or environment related) or transition (e.g., regulatory, market-related or reputational) risks attributable to climate change over the short, medium, and long term and related discussion and analysis. Additional reporting would be required for the use of carbon offsets, renewable energy credits (RECs), transition plans, scenario analyses and carbon prices. The proposed rules would also require new annual disclosures related to board and management oversight of climate-related risks.

I. The SEC should be mindful of the carbon benefits of the U.S. forest-based circular bioeconomy.

The Forest-Based Circular Bioeconomy

The large current and potential future contributions of U.S. forest products and forests are best understood from the perspective of an integrated and circular bioeconomy. Every link in the value chain is interdependent and essential for optimizing the potential of the U.S. forest-based bioeconomy for carbon benefits and other benefits.

Vast volumes of CO_2 are removed from the atmosphere and stored in sustainably managed forests. Moreover, substantial amounts of this carbon are stored for varying

times in a variety of paper and wood products (harvested wood product pools). Forest products also have a beneficial substitution effect – a low carbon footprint and other co-benefits, as discussed below. Additionally, due to the high recycling rate, biodegradability and other sustainable characteristics of our products, there are benefits in terms of reduced impacts on ocean life and other wildlife.[4] And as the future unfolds, more efficient use of bio-based materials, new innovations in more climate-smart products, and enhanced recycling could lead towards higher substitution effects and additional co-benefits.[5]

As an integrated whole, the forest-based circular bioeconomy provides substantial climate benefits and many other co-benefits,[6] such as:

- Maintaining forest health and resilience[7] and sequestering carbon in both forests and forest products;

- Cutting in half the Scope 1 and 2 GHG emissions of paper and wood products manufacturers since 1990 and contributing to greening the electrical grid;[8]

- Improving recycling performance[9] (the paper recovery rate for recycling almost doubled from 33.5% in 1990 to 65.7% in 2020), resulting in avoided emissions, keeping materials in use at their highest value, and preventing waste;[10]

- Generating carbon-neutral bioenergy, largely from the residuals of our manufacturing process; and

- Providing more sustainable alternatives to GHG-intensive or fossil-based products.[11]

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[4] National Council for Air and Stream Improvement (NCASI), Fact Sheet, "Paper and Plastic in Marine Environments (Aug. 2020).
[5] *See, e.g.,* Peter Holmgren, FutureVistas, "Climate Effects of the Forest-Based Sector in the European Union" (2019), 4, 16.
[6] *See* Kirsten Vice, NCASI, Slide Presentation, "Articulating the Forest Sector's GHG/Carbon Story – Key Facts" (June 10, 2021).
[7] *See* R.W. Malmsheimer et al., "Managing Forests because Carbon Matters: Integrating Energy, Products, and Land Management Policy," 109 Journal of Forestry 7 (2011).
[8] NCASI, White Paper, "Greenhouse Gas Reductions for the U.S. Pulp and Paper Industry" (Oct. 2021).
[9] Paper is recycled at much higher rates than other commodities, and the paper industry has planned or announced approximately $5 billion in manufacturing infrastructure investments by the end of 2023 to further the best use of recycled fiber in our products.
[10] NCASI, Fact Sheet, "The Forest Products Sector: Circular by Design?" (Dec. 2018).
[11] NCASI, White Paper, "Review of Literature on Forest Products-Related Avoided Greenhouse Gas Emissions" (July 2020).

Upon taking office, President Biden set the most ambitious climate goals of any President in U.S. history. In Executive Order 14008, he stated:

> It is the policy of my Administration to organize and deploy the full capacity of its agencies to combat the climate crisis to implement a Government-wide approach that reduces climate pollution in every sector of the economy, increases resilience to the impacts of climate change; protects public health; conserves our lands, waters, and biodiversity; delivers environmental justice; and spurs well-paying union jobs and economic growth, especially through innovation, commercialization, and deployment of clean energy technologies and infrastructure.[12]

Finding the kind of climate solutions that President Biden has called for includes reliance on renewable energy, lowering the fossil-intensity of products, supporting local economies, providing sustainable investment opportunities, and operating at a scale that can have a meaningful impact, while supporting human health, the environment, and opportunities for everyone. The U.S. forest-based bioeconomy can help contribute to all of these benefits.

Forest Products Industry Energy Profile

Paper and wood products manufacturers produce enormous amounts of carbon-beneficial bioenergy integral and incidental to making forest sector products. The U.S. paper and wood products industry is a significant contributor to our country's base of renewable energy, producing more carbon-beneficial bioenergy than any other industrial sector. On average, about two-thirds of the energy used at AF&PA member facilities is generated from carbon-neutral biomass.[13]

The industry also strives to produce and use this energy as efficiently as possible. The industry is a leader in the use of combined heat and power (CHP) technology, which is extremely efficient because it uses the same fuel to produce both thermal energy used in the manufacturing process and electricity, some used on-site and some sold to the grid. In 2020, 99% of electricity produced by the industry was CHP-generated.[14] The use of CHP provides energy efficiencies in the range of 50% to 80% at forest products mills,

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[12] Exec. Order No. 14008, "Tackling the Climate Crisis at Home and Abroad," 86 Fed. Reg. 7619 (Jan. 27, 2021).
[13] "In 2020, renewable bioenergy provided, on average, about 64 percent of member facility energy needs." 2020 AF&PA Sustainability Goals: Achievements Summary, https://www.afandpa.org/sites/default/files/2022-02/BPBP2020SustainabilityGoalsAchievementsSumary-2-2-22.pdf, at 4.
[14] U.S. Energy Information Agency, Form EIA-923 2020 data, https://www.eia.gov/electricity/data/eia923/ AF&PA Analysis.

far beyond non-CHP electrical stations such as utilities, which are only about 33% energy efficient.[15]

Bioenergy produced and used by the forest products industry is extracted from biomass manufacturing residuals that otherwise could be wasted and emit greenhouse gases such as methane with much greater global warming potential (GWP), i.e., that produce more CO_2e. This bioenergy displaces the need for fossil fuel-based energy and may be consumed onsite or sold to the electricity grid.

The scientific evidence shows there are enormous greenhouse gas reduction benefits from using forest products manufacturing residuals for energy.

- An extensive, peer-reviewed study by the National Council for Air and Stream Improvement shows that, each year, the bioenergy produced from manufacturing residuals in U.S. paper and wood products industry avoids the emission of approximately 181 million metric tons of CO_2e.[16] (This greenhouse gas reduction benefit is roughly equivalent to removing about 35 million cars from the road.)

- During the Obama Administration, the U.S. Environmental Protection Agency (EPA) conducted an extensive analysis indicating that there are large climate benefits from the bioenergy produced and used by the forest products industry. Specifically, a detailed analysis of a liquid biofuel (typically referred to as pulping liquor or black liquor) produced and used by pulp and paper mills showed that it is at least carbon neutral and could be even better than carbon neutral. As a result, the analysis assigned black liquor a zero to negative biogenic assessment factor[17] (similar in concept to a Global Warming Potential).

- Dr. Timothy Searchinger, a scholar who prompted the discussion about the carbon neutrality of biomass, has stated specifically that "black liquor from paper making" is an "advisable" source of bioenergy.[18] In addition, in a joint

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[15] U.S. Environmental Protection Agency, CHP Benefits, www.epa.gov/chp/chp-benefits ("The average efficiency of fossil-fueled power plants in the United States is 33 percent.")
[16] Caroline Gaudreault and Reid Miner, *Temporal Aspects in Evaluating the Greenhouse Gas Mitigation Benefits of Using Residues from Forest Products Manufacturing Facilities for Energy Production*. Journal of Industrial Ecology (Dec. 2015), at 1,004-05.
[17] U.S. Environmental Protection Agency, Draft Framework for Assessing Biogenic CO2 Emissions from Stationary Sources (Nov. 19, 2014), Appendix D, pp. D21-30.
[18] Dr. Timothy Searchinger and Ralph Heimlich, *Avoiding Bioenergy Competition for Food Crops and Land*. World Resources Institute (2015), at 22 and 24 (Table 3).

> paper with Dr. Searchinger, Dr. Steven Hamburg, the Chief Scientist of the Environmental Defense Fund, and other experts, the co-authors concluded that "biomass should receive credit to the extent its use results . . . from the use of residues or biowastes."[19]

Sustainable Forest Management

It also is important to consider that the demand for forest products helps ensure that U.S. timberlands that supply the fiber for the products are sustainably managed. Recent U.S. Forest Service data indicate that U.S. timberlands grow nearly twice as much wood as is harvested.[20]

Healthy markets for forest products help insulate forests from economic pressure to convert to another land use and reduce excess fuel for forest fires and associated emissions. The greatest threat to forests in the United States is conversion to other land uses. The demand for forest products helps to prevent conversion to other uses.[21] According to a Journal of Forestry article, "Increased demand for wood can trigger investments that increase forest area and forest productivity and reduce carbon impacts associated with increased harvesting."[22]

As the Intergovernmental Panel on Climate Change (IPCC) has noted, "In the long term, a sustainable forest management strategy aimed at maintaining or increasing forest carbon stocks, while producing an annual sustained yield of timber, fiber, or energy from the forest, will generate the largest sustained [climate] mitigation benefit."[23]

As the SEC deliberates on this rulemaking, the Commission should be mindful of all the benefits of the forest-based circular bioeconomy and take care to avoid unintended consequences.

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[19] Dr. Timothy Searchinger, Dr. Steven Hamburg, et al., *Fixing a Critical Climate Accounting Error*. Science (Oct. 22, 2009).

[20] Oswalt, Sonja N.; Smith, W. Brad; Miles, Patrick D.; Pugh, Scott A., Forest Resources of the United States, 2017: a technical document supporting the Forest Service 2020 RPA Assessment. Gen. Tech. Rep. WO-97. Washington, DC: U.S. Department of Agriculture, Forest Service, Washington Office. See Table 36, https://www.fs.usda.gov/treesearch/pubs/57903

[21] NCSSF, Global Markets Forum Summary Report of the National Commission on Science for Sustainable Forestry (NCSSF) (2005).

[22] Miner, Reid A.; Abt, Robert C.; Bowyer, Jim L.; Buford, Marilyn A.; Malmsheimer, Robert W.; O'Laughlin, Jay; Oneil, Elaine E.; Sedjo, Roger A.; Skog, Kenneth E. 2014. Forest Carbon Accounting Considerations in US Bioenergy Policy. J. For. 112(6):591-606.

[23] Climate Change 2007- Mitigation of Climate Change, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, [B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer (eds)], Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, Chapter 9, p. 543.

II. Given the extensive carbon benefits of the bioenergy generated at pulp and paper mills, public companies should be allowed to report biogenic CO_2 emissions separately using existing programs.

Given the extensive carbon benefits of the bioenergy used at pulp and paper mills, public companies should be able to report on the bioenergy generated at pulp and paper mills as they do under EPA's Greenhouse Gas Reporting Rule (as well as the Greenhouse Gas Protocol and the Sustainability Accounting Standards Board (SASB)). Under these methodologies, greenhouse gas (GHG) emissions from bioenergy are reported separately.

As such, the SEC rules should leverage existing GHG reporting efforts. Many companies already report their Scope 1 emissions under EPA's aforementioned Greenhouse Gas Reporting Rule. In addition, EPA's Center for Corporate Climate Leadership has developed guidance on determining indirect (Scope 2) emissions from purchased electricity. Rather than the SEC developing its own Scope 1 and Scope 2 reporting standards, the SEC rules should be harmonized with EPA's reporting programs, both from a substantive and timing perspective. A new SEC form could be used to track and disclose the information that companies already are providing to the EPA or using EPA tools to determine emissions. For example, the SEC should allow companies providing Scope 1 information to EPA to timely provide the data to the SEC after filing the EPA report. Likewise, the SEC should allow companies that report on Scope 1 emissions outside of the EPA reporting program to timely provide the information to the SEC.[24]

III. The SEC should be mindful of the carbon benefits of recycling.

For example, under the GHG Protocol, avoided emissions associated with recycling may be voluntarily reported separately.[25]

IV. The effective dates of any final rules should be significantly extended to allow practical phase-in periods.

For multiple reasons, the SEC should significantly extend the effective dates of any final rules. The scope and challenges of the proposed rules are vast. Many companies will have to develop new processes, procedures, and controls to assure their compliance with the final rules, and many important provisions currently are being questioned in public comments and are subject to further deliberation or guidance to be provided by

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[24] EPA has a correction process that can extend into August for the prior year reports.
[25] Greenhouse Gas Protocol, Corporate Value Chain (Scope 3) Accounting and Reporting Standard, at 46.

the Commission. Moreover, important guidance on GHG accounting, including guidance particularly relevant to the forest products industry, is still evolving. For example, the Greenhouse Gas Protocol is developing new guidance on accounting for GHG emissions and carbon removals from land use.[26] The Greenhouse Gas Protocol also recently announced a new project to assess the existing guidance surrounding corporate GHG accounting and reporting standards for Scope 1, Scope 2, and Scope 3 emissions.[27] Furthermore, we are concerned that there currently is a shortage of the types of experts who will be needed to assist companies with the major effort that will be required to comply with the rules.

To allow for a reasonable transition to any final rules, the SEC should extend the effective dates of each of the provisions at least two years beyond those the SEC announced with the proposed rules. Moreover, if the Commission retains the complicated quantitative reporting requirements regarding financial statement metrics and Scope 3 emissions (which AF&PA recommends against, as detailed further below), the SEC should provide an additional third year. Given the challenges inherent with mergers and acquisitions, the Commission also should provide an additional third year beyond the acquisition date for reporting related to acquired companies.

V. Given that estimating Scope 3 emissions is a highly complex and evolving endeavor, Scope 3 emissions reporting should be voluntary at this time.

Our companies are potentially impacted in two ways by the proposed requirement to report Scope 3 emissions: first, the Scope 3 emissions for our own company operations, and second, the emissions associated with the manufacture of our products that would need to be disclosed as part of reported Scope 3 emissions for end users of our products. Many of our members serve as manufacturers and suppliers of intermediate products for end users spanning a diverse range of industries including food, health care and hygiene, retail and logistics, printing and publishing, machinery, electronics, home appliances, restaurants, and others.

While we understand that there may be interest among some investors in the disclosure of Scope 3 emissions, it is premature for the SEC to require Scope 3 reporting for public

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[26] *See* The Greenhouse Gas Protocol, "New Greenhouse Gas Protocol Land Sector and Removals Guidance," https://ghgprotocol.org/blog/new-greenhouse-gas-protocol-land-sector-and-removals-guidance.

[27] *See* The Greenhouse Gas Protocol, "GHG Protocol to Assess the Need for Additional Guidance Building on Existing Corporate Standards" (March 31, 2022), https://ghgprotocol.org/blog/ghg-protocol-assess-need-additional-guidance-building-existing-corporate-standards.

companies before complete, consistent, and holistic methodologies, including with respect to quantification and emission factors, have been developed for all emissions categories and for all industry sectors. There are a host of challenges at this time in reporting accurate and reliable calculations of Scope 3 emissions. Moreover, companies commonly do not have control over, nor do they have access to, data from upstream and downstream emissions sources in their value chains. Customers, suppliers, and vendors often have no obligation to share emissions data with issuers, and the number of potential inputs for a Scope 3 emissions calculation can be overwhelming. Supply contracts often span many years and may not be able to be amended to require disclosure of such information. Moreover, negotiating to obtain supplier agreement to provisions requiring this information in new contracts may require companies to accept less favorable terms with respect to commercially or economically important elements of the contract. Companies often must rely on a range of emissions factors, assumptions and methodologies to estimate data that is not readily accessible to them. Finally, in assessing the benefits and costs of a Scope 3 emissions reporting mandate at this time, the Commission should carefully consider that Scope 3 reporting inherently involves double counting. In other words, an issuer's Scope 3 emissions may be its suppliers' and customers' Scope 1 emissions and also the Scope 3 emissions of other entities in the value chain. All of these challenges and limitations call into question the utility of the SEC mandating Scope 3 emissions reporting at this time.

Instead of mandating Scope 3 emissions reporting, the SEC should allow companies to disclose Scope 3 emissions voluntarily as the company determines is appropriate. The GHG Protocol provides companies with flexibility in choosing which, if any, Scope 3 activities to include in their calculation. With the passage of time and the development and maturation of credible methodologies and protocols, the SEC could revisit the issue of whether disclosure of Scope 3 emissions should be mandatory.

The SEC compounds the challenges with Scope 3 reporting by signaling that Scope 3 emissions may be material if they exceed 40% of an issuer's total GHG emissions.[28] This threshold (which the proposal indicates is representative of "a significant portion of . . . overall emissions") suggests that Scope 3 emissions are material if they are quantitively significant compared with that company's Scope 1 and Scope 2 emissions, but under the traditional materiality standard, the focus instead should be on whether Scope 3 emissions are significant to the business. Under the traditional materiality standard, the SEC should only require disclosure of metrics that are material to investors in the business. As the Supreme Court has stated, the question under the materiality standard

[28] *See* proposed rules, 87 Fed. Reg. at 21379.

is whether "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" or invest.[29]

If, despite the many challenges, the SEC retains the Scope 3 emissions reporting requirement, the Commission should make clear that it is subject to the traditional materiality determination, and the SEC should change the commentary in the proposed rules to provide clear guidance that the traditional materiality standard applies and there is not a quantitative threshold test. In other words, Scope 3 emissions only need to be reported if the company in good faith believes there is a substantial likelihood that a reasonable investor would consider Scope 3 emissions important when making an investment or voting decision. If, despite the many challenges, the SEC retains the Scope 3 emissions reporting requirement, the Commission also should make clear that companies are allowed to conduct materiality analyses for specific categories and sources of Scope 3 emissions, and where indicated by those analyses, forego reporting of immaterial categories and sources of Scope 3 emissions.

The proposed rules also would require the disclosure of non-material Scope 3 emissions if the registrant has set a GHG emissions reduction target or goal that includes Scope 3 emissions. We respectfully submit that disclosure should only be required if a target or goal is publicly announced, and the traditional materiality standard should apply.

In the event that the SEC nonetheless finalizes the requirement for public companies to disclose Scope 3 emissions, we recommend that, as detailed below, any new disclosure requirements should provide issuers with the flexibility to furnish the disclosures rather than file them.

VI. Rather than the sweeping, granular, and prescriptive approach in the proposed rules, the SEC should adopt a more workable, principles-based approach based on the traditional concept of materiality.

The traditional materiality standard and existing rules can accommodate new disclosures.

In the proposal, the SEC states: "Investors need information about climate-related risks—and it is squarely within the Commission's authority to require such disclosure in the public interest and for the protection of investors—because climate-related risks have present financial consequences that investors in public companies consider in making investment and voting decisions." While indeed numerous provisions throughout the Securities Act of 1933, as amended (Securities Act) and the Exchange Act

[29] *See TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449-50 (1976)

state that the SEC has the authority to issue rules and regulations "as necessary or appropriate in the public interest or for the protection of investors," or as "necessary or appropriate for the proper protection of investors and to insure fair dealing," the Supreme Court has recognized that the "public interest" is not furthered by requiring companies "simply to bury the shareholders in an avalanche of trivial information," which "is hardly conducive to informed decisionmaking" and thus would "accomplish more harm than good."[30] In *Mills v. Electric Auto-Lite Co*., 396 U.S. 375 (1970), the Court held that a "misstatement or omission in a proxy statement" is actionable under 15 U.S.C. § 78n(a) only when the misstatement was "material" because imposing liability beyond that limit "would not further the interests protected by" the statutes. *Id.* at 384. By limiting the SEC's disclosure power to those types of disclosures that further the public interest, Congress was necessarily limiting the SEC to requiring material information.

However, the proposed rules require disclosure of Scope 1 and 2 GHG emissions regardless of materiality. *See* 87 Fed. Reg. at 21345, 21377. The proposal also states that Scope 3 emissions need be disclosed only if "material" -- but then suggests that Scope 3 emissions may be material in almost every case for many companies and that companies should err on the side of over-disclosure. *See* 87 Fed. Reg. at 21378. The proposal acknowledges that Scope 1 and Scope 2 emissions may or may not be material for registrants when referencing that companies with such emissions "may" face "declines in cash flows" and thus investors "may" want Scope 1 and Scope 2 information. *See* 87 Fed. Reg. at 21434. The SEC appears to reason that there might be "future regulations" that "may" require reductions in emissions, and thus this information might be material in this scenario. *See* 87 Fed. Reg. at 21435.

The problem is that the SEC does not adequately explain the "present financial consequences" or what gaps in material disclosure exist; the Commission asserts that they exist and repeatedly references a "transition" and associated "transition risk." The proposal also references some of the current Administration's policy agenda, suggesting that these are the gaps; however, those policies are not grounded in any existing U.S. laws or regulations that would be necessary to calculate and disclose material "present financial consequences." Thus, the proposed rule conflates the investor's interest with the SEC's interest, which is inconsistent with the Supreme Court's decision in *TSC Industries,* and therefore is inappropriate. The SEC should not adopt any proposed disclosures related to a future undefined "transition" that is not grounded in existing law or regulation, as well as any disclosures based on such a potential transition creating

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[30] *See TSC Industries, Inc. v. Northway, Inc*., 426 U.S. 438, 448-49 (1976).

"transition risk." By bundling multiple, hypothetical "transition risks," the SEC itself is directing companies to disclose a risk that the Commission itself perceives.

The SEC argues that even though such information may not be material to a particular company's performance, investors have many investments and will want to compare data across them. *See* 87 Fed. Reg. at 21336, 21368, 21434. As Commissioner Peirce stated, "this justification depart[s] from the Commission's traditional company-specific approach to disclosure," which looks at materiality company-by-company, not across the nearly infinite variety of every single individual investor's personal portfolio; and, relatedly, the proposed rule "suggests that it is appropriate for shareholders of the disclosing company to subsidize other investors' portfolio analysis," which is an impossible task given that every investor will have different information demands for "her own idiosyncratic portfolio." SEC Comm'r Hester M. Peirce, We Are Not the Securities and Environment Commission—At Least Not Yet, Mar. 21, 2022, https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321

The SEC itself concedes that assessing the present materiality of potential consequences of ongoing and future climate change will be difficult, but "climate consulting firms are available to assist registrants in making this determination." 87 Fed. Reg. at 21352. This statement seems at odds with the very title of the proposed rule that speaks to the "standardization" of disclosures. It also raises questions about whether the information to be disclosed is so speculative that the SEC does not have authority to require it to be disclosed. By implying that the standards can only be interpreted by consulting firms, the SEC indicates that neither itself, nor the registrants, have the expertise required to comply with the proposal. Fundamental constitutional principles and principles of administrative law demand that private entities be able to discern what is required of them from the regulations themselves. That the rules' meaning is in flux and unclear suggests the SEC is not in a position to require any GHG emissions disclosures beyond those currently required by EPA (except to the extent that the same disclosures would simply be resubmitted in a new format to the SEC).

When the SEC revises its proposed rules, it should be guided by the Supreme Court's materiality standard.[31] This will ensure issuer and investor confidence in the relevancy of the information required to be disclosed. As detailed in the comments of the U.S. Chamber of Commerce, if qualified by materiality, most of the new disclosures proposed

[31] *See TSC Industries v. Northway, Inc*., 426 U.S. 438, 449-50 (1976) (for purposes of federal securities regulation, information is material if "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" or invest . . . for information to be material, "there must be a substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available").

would be responsive to requirements under the existing rules of the SEC, such as: existing Regulation S-K Item 303(a) and Item 303(b) (management discussion and analysis (MD&A)), existing Regulation S-K Item 407(h) (the board's role in risk oversight), the SEC's 2010 guidance[32] (how existing disclosure rules may require disclosure of the impacts of climate change on a registrant's business or financial condition); and Regulation S-K Item 102 (disclose location and character of principal physical properties, which could result in material disclosures about properties subject to physical risk).

Disclosure of renewable energy credits or emission offsets should be voluntary. Neither RECs nor carbon offsets are mandated or defined under any federal law or regulation. The SEC proposal references a voluntary REC program by EPA, the Green Power Program (GPP), to encourage and recognize the voluntary purchase of renewable electricity. However, EPA does not have statutory authority to define RECs and to regulate them. RECs and offsets include numerous sub-types based on myriad different state-created and third-party standard definitions; therefore, they are not fungible. Even if it were appropriate for the SEC to require disclosure of Scope 3 emissions, RECs and carbon offsets ("global emission reductions at additional, external projects," *see* 87 Fed. Reg. at 21355, n.237) are further removed from the registrant's control. RECs typically do not represent the physical delivery of any non/low-emitting renewable electricity to the company taking credit for the RECs, and a carbon offset typically does not represent the physical reduction, avoidance or sequestration of emissions controlled by the registrant. Moreover, where registrants are mandated by states to generate or surrender specific types of RECs and/or offsets that generate a material impact on the business, those disclosures are already covered by existing SEC disclosure rules. Where registrants are not mandated to generate or surrender specific types of RECs or offsets, any exchange of RECs or offsets is voluntary, like advertising and marketing expenses. Where those costs (or revenues) are material, they will already be disclosed to shareholders under existing SEC requirements.

The FTC enforces federal consumer protection laws that prevent fraud, deception and unfair business practices, enhances informed consumer choice and public understanding of the competitive process, and accomplishes this without unduly burdening legitimate business activity. The FTC has already developed extensive guidance on RECs and offsets. (See, https://www.ftc.gov/sites/default/files/documents/federal_register_notices/guides-use-environmental-marketing-claims-green-guides/greenguidesfrn.pdf). The SEC has not established the need for mandatory disclosure that would merit overtaking the FTC

[32] Release No. 33-9106, Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290 (Feb. 8, 2010).

in regulating the veracity of 'green' claims, including RECs and offsets. The proposal does not acknowledge the wide variety of RECs and offsets and what they represent.

There is a robust voluntary market for both RECs and offsets, as well as state markets all with differing rules. This is made clear by the different prices at which RECs and offsets trade in each of these different markets and geographies, based on the specific attributes of various subsets of RECs and offsets, and the regional supply and demand for these attributes; again, underscoring that RECs and offsets are not fungible. These markets have developed and evolved for decades and will continue to do so as buyers and sellers engage in voluntary exchange.

The SEC should further mitigate registrant liability exposure.
Beyond expanding and strengthening the proposed safe harbor for Scope 3 emissions reporting that is discussed further below, the SEC should do more to limit registrant liability for climate-related disclosures. Without adequate liability protection, the proposed rules unintentionally could discourage enhanced climate-related disclosures. Climate science is highly complex and rapidly evolving, and the future is difficult to precisely predict. By their nature, climate-related disclosures often are grounded in data limitations, long time horizons, impact uncertainties, and ongoing scientific and technological learning. And as discussed above, guidance that is essential for the forest products value chain is still being developed. For example, the Greenhouse Gas Protocol is developing new guidance on accounting for GHGs and carbon removals from land use, and recently announced a new project to assess the existing guidance supporting corporate GHG accounting and reporting standards for Scope 1, Scope 2, and Scope 3 emissions. Furthermore, significant time is required to collect, aggregate and properly analyze GHG emissions data.

The Commission also should be mindful that Scope 2 emission estimates, even if supplied by power and thermal energy suppliers, often rely on uncertain assumptions, such as an inability to know the source of power supplied to the real-time (0-15 minute) markets. While EPA's GHG reporting rule clearly defines the activity data and emission factors that shall be used to calculate Scope 1 emissions, requiring the reporting of Scope 2 emissions will add a level of variability not associated with Scope 1 emission reporting. Utility-specific, regional-specific (typically using EPA's Emission & Generation Resource Integrated Database (eGRID)), or national level emission factors can be used for the calculation of Scope 2 emissions attributed to purchased electricity, and depending upon the choice of emission factor, a wide range of results may be attained.

Any new disclosure requirements should provide issuers with the flexibility to furnish the disclosures rather than file them. The furnished disclosures would remain subject to general anti-fraud liability under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, which provide investors with an appropriate level of protection, while not subjecting registrants to the enhanced liability standards applicable to information that is filed with the Commission. Without such liability protection, the rules could discourage registrants from providing the robust climate-related disclosures they currently provide investors and other stakeholders voluntarily, leading to disclosures of diminished quality and value.

Thus, the SEC should revise the proposed rules to allow companies to provide their GHG emissions data to investors outside of Form 10-K. Taking the GHG emissions disclosure requirement outside of Form 10-K and allowing emissions data to be reported later in the year would reduce feasibility concerns and compliance challenges and improve the reliability of this information for investors. One option, which AF&PA supports and which is specifically detailed in the comments of the National Association of Manufacturers (NAM), is for the Commission to allow GHG emissions disclosure in a stand-alone report – a new "Form GHG" – that would be due after the second quarter of the following year. As the NAM explains, this annual "Form GHG" could be due in August, which would give companies time to collect GHG emissions data after the end of their fiscal year and then take the necessary time to compile the information through their internal control processes, including the external audit required by the proposed rules for Scope 1 and Scope 2 emissions. The Commission should allow this "Form GHG" to be furnished to, rather than filed with, the SEC. This would avoid the heightened liability risk for any material misstatement or omission in statements filed with the SEC, while still providing adequate protection because statements furnished to the SEC that are themselves materially misleading trigger potential liability. This flexibility would help allow public companies to manage the uncertainties and judgment inherent with GHG emissions disclosure.

A second option could be for the SEC to require registrants to make the new climate-related disclosures through a new Form SD for specialized disclosures (similar to the Commission's approach for conflict minerals), which is furnished rather than filed. The Commission could amend Form SD to provide for GHG emissions to be another set of specialized disclosures.

In the event that the Commission nonetheless decides to require GHG emissions to be disclosed in Form 10-K, the final rules should provide at least a one-year lag time for GHG emissions disclosures to afford companies time needed to compile, analyze and

audit their emissions data, including any feedback and quality assurance reviews performed by EPA in response to mandatory GHG reporting.

Moreover, as described below, the safe harbor provision should be strengthened so that companies can rely on it when reporting in good faith.

VII. Given the inherent uncertainty and judgment involved in estimating climate-related information, the SEC should expand and strengthen the disclosure safe harbor so that companies can rely on it when reporting in good faith.

While we appreciate that the Commission included a safe harbor in the proposed rules, we are concerned that the proposed safe harbor from Scope 3 emission disclosure liability is both too narrow and does not provide adequate protection. Given the inherent uncertainty and judgment involved in estimating GHG emissions – including reliance on information from unaffiliated third parties and reporting regimes that are still evolving – the safe harbor should not only cover Scope 3 emission disclosures as proposed, but also cover the full scope of the final rules in light of the major challenges and uncertainties that companies must overcome to satisfy the proposed climate-disclosure obligations. The Commission also should clarify that the safe harbor serves as a defense not only to SEC enforcement actions, but also to private securities litigation.

As proposed, we are concerned that the safe harbor will not provide sufficiently robust liability protection and could unintentionally expose companies to liability risks even where their disclosures were made in good faith. The proposed safe harbor clarifies that Scope 3 disclosures would not be deemed a fraudulent statement provided it was: (1) made with a reasonable basis, and (2) disclosed in good faith.[33] Given the common need to rely on uncertain assumptions, estimates, and third-party data, the challenge is how companies could demonstrate compliance with the requirement to avoid statements "made or reaffirmed without a reasonable basis"[34] sufficient to avoid costly enforcement or legal challenges. As raised in the NAM comments, the SEC could address this concern by removing the requirement to make or reaffirm statements "with a reasonable basis" and focus instead on the requirement to make disclosures "in good faith" to provide investors with accurate information.

Because this protection may not be sufficient to avoid counterproductive liability risks for Scope 3 emissions disclosures since they involve unique uncertainties and

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[33] *See* proposed 17 C.F.R. § 229.1504(f)(1), 87 Fed. Reg. at 21469.
[34] *See* proposed rules, 87 Fed. Reg. at 21391.

challenges, the Commission should require that any allegations of fraud, unreasonable basis, or bad faith related to Scope 3 disclosures must be made with "particularity."

These changes are warranted because unfair liability risks for good faith climate-related disclosures could inadvertently discourage, rather than encourage, greater and more useful climate-related disclosures in the future.

VIII. The unnecessary costs and burdens of the rules should be minimized.

The proposed requirement to analyze the impact of climate-related risks, weather events, and transition activities on each of the line items in consolidated financial statements is exceptionally burdensome and impractical – particularly the requirement to report on potential climate-related impacts that may exceed 1% of any line item, which should be removed.

The SEC should not create new financial accounting rules on climate change at this time. As detailed in the comments of the U.S. Chamber of Commerce and the National Association of Manufacturers, Proposed Article 14 of Regulation S-X[35] is extremely far-reaching, granular, complex, and prescriptive, while requiring innumerable assumptions, estimates, and judgments in the face of major data limitations and speculative impacts.

Among the highly burdensome reporting requirements in the proposed rules that we strongly recommend be removed is the requirement to report any potential climate-related impact on 1% or more of a financial line item. The Commission asserts that this "bright-line standard" will promote comparability and consistency over time and among registrants and reduce the risk of underreporting. But the 1% threshold is an impractically low threshold that would greatly exacerbate the challenges of complying with the rules and the complexity of disclosures.

The requirement to disclose potential climate-related effects by financial statement line item, defined at the 1% level applied to each line item, is not practical given the inherent uncertainty in such financial metrics. As explained in comments from the U.S. Chamber of Commerce, the level of granularity and prescriptiveness for this requirement is unreasonable, and the Chamber does not believe any registrants have experience developing the necessary information to disclose the climate-related metrics as proposed at the 1% level considering each financial statement line-item. The Chamber comments also explain that increasing the 1% threshold to a higher numeric threshold or allowing it to be calculated on a net basis would not resolve the

[35] *See* proposed 17 C.F.R. §§ 210.14-01 – 210.14-02, 87 Fed. Reg. at 21464-21465.

unworkability of proposed new Article 14 of Regulation S-X. Accordingly, the 1% threshold should be dropped from the rules.

If a financial statement requirement is maintained, the SEC should allow these disclosures to take place outside of the audit process. Given the degree of judgment needed and likely differences in interpretation, disclosures of financial statement impacts would be more appropriate to include in the new Climate-Related Disclosure section of the 10-K rather than in a footnote to financial statements.

The Commission also should explicitly allow registrants to omit the disclosures for historical comparative periods in the initial period of adoption in light of the great effort and cost this would entail, rather than forcing registrants to rely on Securities Act Rule 409 or Exchange Act Rule 12b-21.

If a requirement is maintained, the proposed rules also should be modified to accommodate situations where a registrant is unable to qualify and provide the disclosure when the impact may be the result of a mixture of factors, or where the cost may be partially incurred toward climate-related matters. In such a case, the company should be able to disclose that it was unable to make the required determination and why, or to make a reasonable estimate and provide disclosure about the assumptions and information that resulted in the estimate.

The proposed rule would also "require that GHG emissions disclosure[s] be subject to third-party attestation," 87 Fed. Reg. at 21,393. Attestation over GHG emissions should be voluntary, not mandatory. The SEC should permit a market-based approach to third-party assurance for climate-related reporting for companies that desire to enhance the reliability of information.

Actual costs of compliance likely are much higher than the estimates in the proposal.
The SEC estimates the costs in the first year of compliance, for non-small reporting company registrants, "to be $640,000 ($180,000 for internal costs and $460,000 for outside professional costs), while annual costs in subsequent years are estimated to be $530,000 ($150,000 for internal costs and $380,000 for outside professional costs)." (87 Fed. Reg. at 21439) If the rules were to be finalized as proposed, we believe actual costs would be much higher than the estimates outlined in the proposal. Indeed, the actions of the "climate consulting firms" the SEC states "are available to assist registrants" (87

Fed. Reg. at 21352) are signaling the rules will have significantly higher costs.[36]

The courts have made clear that the SEC "has a unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation.'"[37] As part of this obligation, the Commission must reasonably estimate and balance costs and benefits, including adequately assessing the baseline level of information already provided under pre-existing law. While AF&PA supports providing material climate-related information to investors, we are concerned that the Commission has not demonstrated the net marginal improvement that would be provided by the proposed rules in light of their very significant marginal costs.

The expansive regulatory framework proposed by the SEC is unprecedented, and vastly greater than any reporting ever required by EPA, affecting not just listed companies but every link in those companies' supply and distribution chains, down to the everyday customer. The SEC should carefully consider that the potential burdens of the proposal are not limited to public companies subject to SEC regulation, as private companies, including innumerable small businesses, also are expected to face inquiries from many SEC-regulated customers as a result of the rules. The proposed rules regulate all of those entities and individuals either directly or indirectly, and thus there may hardly be a company that is not affected by the proposed rule.

We respectfully request that burdens on both public and private companies be carefully analyzed and minimized. For example, one simple burden reduction measure would be to require climate-related disclosure less frequently than annually. In many respects, the effects of climate change occur over significant time periods, which may make annual reporting unnecessary. Companies should be provided the flexibility to report less frequently than annually, so long as material known changes and elements of climate-related disclosures responsive to other existing SEC rules and disclosure items (such as risk factors of management's discussion and analysis (MD&A)) are disclosed in the interim.

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[36] For example, Pricewaterhouse Coopers has stated it will hire 100,000 new employees—and invest $12 billion—over the next 4-5 years to help meet its clients' reporting requirements. (https://www.reuters.com/business/sustainable-business/pwc-planning-hire-100000-over-five-years-major-esg-push-2021-06-15/) And, within days of the SEC proposal, Deloitte, one the largest climate consulting firms in the U.S. announced a $1 billion expansion of its climate practice. (https://www2.deloitte.com/id/en/pages/about-deloitte/articles/deloitte-announces-1-billion-investment-in-global-sustainability-climate-practice.html).
[37] *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quoting 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c)).

The SEC should provide greater clarity.

Finally, the final rules should provide greater clarity in distinguishing between permissive and mandatory reporting requirements. The Commission also should provide clear guidance on how companies should report on joint ventures as well as assets located outside of the U.S.

IX. The SEC should revise the reporting requirements related to the oversight and governance of climate-related risks by the registrant's board and management, and internal carbon pricing and scenario analysis, to align with well-established practice.

The proposed rules' requirements related to oversight and governance of climate-related risks[38] go beyond current requirements and are counterproductive. The proposed rule requires expressly naming "any board members . . . responsible for the oversight of climate-related risks" and whether that board member "has expertise in climate-related risks," as well as "the frequency by which the board or board committee discusses climate-related risks," 87 Fed. Reg. at 21359, and a list of "management positions or committees" who are "responsible for assessing and managing climate-related risks." 87 Fed. Reg. at 21360.

The proposed requirements for registrants to disclose whether any member of its board has expertise in climate-related risks is not consistent with other existing or potential SEC requirements to disclose specified board (e.g., cybersecurity, audit committee financial experts).

More specifically, the proposed rules do not:

- Make clear that identification of a director as having climate-related expertise or responsibility for assessing and managing risk in registrant disclosures would not result in the director being deemed an "expert" for purposes of Section 11 of the Securities Act and impose specific duties or liabilities on the director;
- Make clear that such disclosures would relieve other directors of any of their respective obligations for climate-related matters and disclosure; and
- Provide a definition, or proposed guidance for, the meaning "expertise in climate-related risks."

If any final rules retain a requirement to identify board members with expertise in climate-related risks, the SEC should clarify that such disclosure will not render

[38] *See* proposed 17 C.F.R. §§229.1501 – 229.1503, 87 Fed. Reg. at 21467-68.

identified directors as "experts" for purposes of Section 11 liability nor otherwise burden them with any new responsibility. Moreover, the rules should provide a definition or guidance on the meaning of "expertise in climate-related risks."

The proposed rules also require the disclosure of the processes and frequency for board discussions of climate-related risks. We believe it should be sufficient to disclose that there is a process at the board level, disclose whether management has an executive responsible for the area of climate-related risks, and disclose any public targets or goals. The particular risks and the processes and frequency by which the board manages them could vary significantly by company. The disclosure of detailed information about the board's deliberations and oversight process not only would fail to provide meaningful or comparable information to investors, but also would unduly intrude into the deliberative process of the board and is inconsistent with other SEC disclosure rules which do not require registrants to disclose the processes and frequency by which the board discusses the many other material risks. Indeed, intruding into how a company manages climate-related risks could risk disclosure of proprietary and confidential business strategies and arrangements with customers or suppliers that provide competitive advantage to the company and thus inadvertently could chill climate-related innovations. Accordingly, we recommend that the SEC remove this requirement in any final rules.

The proposed rules also would require an issuer to disclose information about any internal carbon prices it maintains, any scenario analyses it uses, and any transition plans it adopts. AF&PA is concerned that these reporting requirements would expose competitive information to the marketplace and potentially undermine manufacturers' efforts to understand the impact of "climate-related" risk on their business and undermine their ability to plan and innovate. This provision would compel registrants to make voluminous disclosures of incomparable, unreliable, draft, incomplete, unvetted, and potentially inaccurate information. We respectfully encourage the SEC to reconsider and rescind these requirements.

X. The SEC should revise the definition of a renewable energy credit (REC) to allow registrants complying with state definitions of RECs and other industry-accepted definitions of RECs to also comply with the SEC rule.

We recommend that the SEC revise the definition of a "renewable energy credit" (REC) to align with existing programs. Accordingly, we recommend the following proposed

change to the rule text at proposed 17 C.F.R. § 229.1500(n):[39]

> (n) *Renewable energy credit or certificate* (''*REC*'') means a credit or certificate, for renewable energy, recognized under an existing government program or an industry accepted climate-related reporting framework. ~~representing each megawatt-hour (1 MWh or 1,000 kilowatt hours) of renewable electricity generated and delivered to a power grid.~~

AF&PA's proposed changes to the definition of REC are intended to synchronize the definition of REC in SEC regulations with the various definitions of REC with which registrants regularly comply. Some registrants purchase or generate RECs that comply with the state definitions of RECs in state renewable portfolio standard statutes and regulations. Some registrants purchase or generate RECs that comply with industry accepted climate-related reporting frameworks. The proposed changes are intended to allow registrants to include in their reporting RECs that comply with widely accepted definitions of RECs.

The range of definitions of RECS with which registrants regularly comply underscores the need for flexibility in the definition of RECs in any SEC-adopted regulations.[40] For example, the GHG Protocol provides the following with respect to a definition of REC: "A type of energy attribute certificate, used in the U.S. and Australia. In the U.S., a REC is defined as representing the property rights to the generation, environmental, social, and other non-power attributes of renewable electricity generation."[41] By comparison, more than 35 states have adopted some form of renewable portfolio standards ("RPS") and no uniform definition of REC exists among the states that have adopted an RPS. Here is a sample of the various definitions of RECs that exist in states that have adopted an RPS:

- Oregon
  - "A Renewable Energy Certificate, also referred to as a REC or "Green Tag," represents one megawatt hour ("MWh") of renewable energy generation delivered to the grid. RECs represent the environmental, economic [,] and

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[39] *See* 87 Fed. Reg. at 21466.

[40] AF&PA is including the various definitions of RECs from state RPS statutes and industry-accepted climate-related reporting frameworks not to connote AF&PA's endorsement of, or support for, any particular REC definition in such sources, but merely to highlight the wide variety of REC definitions that demands flexibility in the definition of REC in any SEC Final Rule.

[41] "GHG Protocol Scope 2 Guidance", p. 206 (available at: https://ghgprotocol.org/scope_2_guidance) (last visited June 9, 2022).

social attributes of the power produced from renewable energy projects and may be traded independently of transactions for the associated electricity."[42]

- California
  - Renewable Energy Credit
    - "A certificate of proof associated with the generation of electricity from an eligible renewable energy resource, issued through the accounting system established by the Energy Commission pursuant to Section 399.25, that one unit of electricity was generated and delivered by an eligible renewable energy resource."[43]
    - "[I]ncludes all renewable and environmental attributes associated with the production of electricity from the eligible renewable energy resource, except for an emissions reduction credit issued pursuant to Section 40709 of the Health and Safety Code and any credits or payments associated with the reduction of solid waste and treatment benefits created by the utilization of biomass or biogas fuels."[44]
- Vermont
  - Tradeable Renewable Energy Credits[45] – "means all of the environmental attributes associated with a single unit of energy generated by a renewable energy source where:
    - Those attributes are transferred or recorded separately from that unit of energy;
    - the party claiming ownership of the tradeable renewable energy credits has acquired the exclusive legal ownership of all, and not less than all, the environmental attributes associated with that unit of energy; and
  - Exclusive legal ownership can be verified through an auditable contract path or pursuant to the system established or authorized by the Commission or any program for tracking and verification of the ownership of environmental attributes of energy legally recognized in any state and approved by the Commission."
- Pennsylvania
  - Alternative Energy Credit – "one alternative energy credit shall represent one megawatt hour of qualified alternative electric generation, whether self-generated, purchased along with the electric commodity or separately

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[42] OR. Admin. R. 330-140-0020(37)(2022).
[43] Cal. Pub. Util. Code. § 399.12(h)(1)(2022).
[44] *Id*. at (h)(2).
[45] Vt. Stat. Ann. 30 § 8002(26)(A)-(C).

through a tradable instrument and otherwise meeting the requirements of commission regulations and the program administrator."[46]

- North Carolina
  - Renewable Energy Certificate – "means a tradable instrument that is equal to one megawatt hour of electricity or equivalent energy supplied by a renewable energy facility, new renewable energy facility, or reduced by implementation of an energy efficiency measure that is used to track and verify compliance with the requirements of this section as determined by the Commission."[47]
- Arizona
  - Renewable Energy Credits
    - "One Renewable Energy Credit shall be created for each KWh derived from an Eligible Renewable Energy Resource."[48]
    - "The unit created to track KWh derived from an Eligible Renewable Energy Resource of kWh equivalent of Conventional Energy Resources displaced by Distributed Energy Resources."[49]
    - Biogas is considered an "eligible Renewable Energy Resource".[50]
- New Mexico
  - Renewable Energy Certificates
    - Renewable Energy Certificate "means a certificate or other record, in a format approved by the commission, that represents all the environmental attributes from one megawatt-hour of electricity generated from renewable energy."[51]
- Minnesota
  - Renewable Energy Credits
    - "A Renewable Energy Credit ("REC") represents 1 MWh of renewable energy."[52]
    - "To facilitate compliance with this section, the commission, by rule or order, shall establish by January 1, 2008, a program for tradable renewable energy credits for electricity generated by eligible energy technology. The credits must represent energy produced by an eligible energy technology, as defined in subdivision 1. Each kilowatt-hour of renewable energy credits must be treated the same as a kilowatt-hour

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[46] 73 Pa. Cons. Stat. § 1648.3(e)(4)(ii).
[47] N.C. Gen. Stat. § 62-133.8(6)(2022).
[48] Ariz. Admin. Code § R14-2-1803(A)(2022).
[49] Ariz. Admin. Code § R14-2-1801(N)(2022).
[50] Ariz. Admin. Code § R14-2-1802(A)(1)(2022).
[51] N.M. Stat. Ann. § 62-16-3(G)(2022).
[52] 2014 Minn. PUC LEXIS 154, *3-4 (Minn. P.U.C. July 22, 2014).

> of eligible energy technology generated or procured by an electric utility if it is produced by an eligible energy technology. The program must permit a credit to be used only once. The program must treat all eligible energy technology equally and shall not give more or less credit to energy based on the state where the energy was generated or the technology with which the energy was generated. The commission must determine the period in which the credits may be used for purposes of the program."[53]

Flexibility in the definition of RECs in any final rules is necessary to allow registrants to continue complying with various state definitions of RECs and other industry-accepted definitions of RECs while simultaneously complying with the reporting obligations in the final rule. Accordingly, AF&PA respectfully requests that the SEC adopt the changes suggested above.

XI. The SEC should not require disclosure of competitively sensitive or granular information that is counter to or beyond the purpose of the rules.

The number and detailed level of disclosures required by the proposed rules, including those related to business strategies, energy-related expenditures, operational vulnerabilities, and details regarding an entity's asset base, raise significant concerns. For example, if a company were to use a virtual power purchase agreement as part of its carbon reduction strategy, disclosure of the financial arrangement details could create competitiveness concerns. The proposed language on research and development related expenditures may raise a similar concern depending on the level of details needed to make an appropriate disclosure.

While the locations where a company does business are not confidential, we have a significant concern that this aspect of the proposed rule may result in companies being forced to cast a shadow over certain facilities within their manufacturing networks. This could result in customers "cherry picking" production facilities in a manner that has the potential to cause significant supply chain disruptions and inefficiencies, which themselves would increase GHG emissions. Further, this requirement would put companies in the position of having to make decisions about climate-related impacts in small-scale environments without sufficient scientific information necessary to support these determinations. A company's quantification of these risks in the financial statements and their general discussions of them in the MD&A section should be sufficient for investors' purposes.

[53] Minn. Stat. § 216B.1691(4)(a)(2022).

We also are concerned that the proposed rules may create a de facto obligation to disclose water-related information in financial statements, regardless of why a water-related goal was established. Companies are setting water sustainability goals for a variety of reasons, some of which are unrelated to climate change. For example, if a company were to focus on water usage reductions as a cost-saving measure, that should be outside the scope of what is required to be reported to the SEC pursuant to the proposed rules and only should be required to be reported to the extent responsive to existing rules.

XII. The SEC should avoid unintended consequences.

Climate change mitigation, energy security and sustainability have become increasingly important in policy development. As GHG reduction has played a more central role in U.S. and international policy agendas, policymakers and regulators have looked to existing tools, such as life cycle assessment, to address new or more complex questions. Such tools have emerged as instrumental to quantify and account for environmental impacts in a product life cycle and have served regulatory and permitting needs for decades. Policies that focus only on climate impacts may inadvertently fail to consider other important co-benefits or environmental impacts after use, thus neglecting benefits that may positively contribute to the circular economy.

As described in the introduction of these comments, the paper and wood products industry's role in supporting a circular economy is present along the entire value chain, providing substantial climate and other benefits. Our industry contributes to a circular economy by sourcing renewable raw materials from sustainably managed forests; producing carbon beneficial bioenergy from residuals of the manufacturing process; optimizing product design and maximizing efficient manufacturing processes to reduce waste; and improving recycling of our industry's products to keep materials in use – all while providing essential products that are integral to our quality of life. Applications include printing and writing, packaging, towel and tissue, and a variety of other products that are important in our daily lives. The use of forest-derived products is one way to alleviate issues concerning the use of fossil fuels. Further, paper products can be recycled, composted, and effectively disposed of in a safe and convenient way when necessary. Additionally, due to the high recycling rate and biodegradable nature of our products, there are benefits in terms of reduced impacts on ocean life and other wildlife.

XIII. The SEC should avoid a one-size-fits all approach.

While climate challenges, impacts, and materiality vary significantly among various industries, the proposed rules do little to differentiate among them. In deliberating on the final rules, the SEC should consider the differences among industries and provide sufficient flexibility to allow for an appropriate fit between the disclosures a company must make and actual climate-related risks and impacts that are material to the company. The SEC should allow registrants to use sector-specific standards when available, such as from the International Sustainability Standards Board (ISSB) and the Global Sustainability Standards Board (GSSB). For the forest products industry, we ask for flexibility to utilize credible methodologies for calculating the GHG impact of our products. This could be subject to disclosure requirements for end users of our products. Additionally, companies should have flexibility in making operational boundary designations so that compliance can be aligned with companies' existing sustainability reporting processes to the extent possible.

XIV. Given the breadth and granularity of the proposal, the SEC is at risk of exceeding its authority.

We caution the Commission that concerns have been raised that the proposed rules exceed the longstanding concept of materiality that for many decades has advanced the best interests of investors, encouraged capital formation, and has helped ensure the integrity of capital markets. While AF&PA supports providing material climate-related information to investors, we are concerned that the Commission has not demonstrated that the breadth and specificity of climate-related disclosure requirements, as proposed, are material to investors' investment decisions. Instead, the proposed rules would require the disclosure of granular climate-related information that in many cases may not be material under the standard provided by the Supreme Court.[54] Just a few examples include the proposed requirement to disclose the financial statement impacts on a line item by line item basis of severe weather events, other natural conditions, transition activities, and identified climate-related risks unless the aggregated impact is less than 1% of the total line item for the relevant year; the SEC's suggestion that a 40% quantitative threshold may determine the materiality of Scope 3 GHG emissions; and the degree and granularity of climate-related governance disclosures that the Commission proposes for the board of directors and management. Materiality embodies the expectation that investors would

[54] *See TSC Industries, supra*.

make better decisions with the benefit of the information, but the many details that the SEC would mandate and their inherent uncertainty may create unintended consequences and conflict with the longstanding materiality standard.

Questions have been raised about whether the Commission has exceeded its statutory authority to require disclosure of financial information necessary for investors to assess a security's value and necessary and appropriate for investor protection or the public interest (especially in mandating Scope 3 emissions reporting and line item by line item reporting of climate-related risks, weather events, and transition activities if the aggregate impact exceeds 1% of a given line item). Finally, concerns have been raised that the SEC has exceeded the Constitutional limitations related to the separation of powers, including under the major questions doctrine[55] and the non-delegation doctrine, as well as the First Amendment's limits on government compelled speech. We urge the Commission to carefully avoid these pitfalls in any final rules.

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We close by again expressing our appreciation to the Commission for the opportunity to comment on the proposed rules. Our nation's free enterprise system plays a fundamental role in creating innovative solutions to address great national and global challenges, including our changing climate. It is essential that government and the private sector collaborate to achieve a sustainable path forward. If you have any questions, please feel free to contact me at [redacted].

Best regards,

Paul Noe
Vice President for Public Policy

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[55] *See National Federation of Independent Business v. OSHA*, 595 U.S. ___ (2022).