June 17, 2022
Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: Request for Public Comment on Proposed Enhancement and Standardization of Climate-Related Disclosures for Investors (Release Nos. 33-11042; 34-94478; File No. S7-10-22)

Dear Ms. Countryman:

The Energy Infrastructure Council ("***EIC***") is a non-profit trade association of companies that develop and operate energy infrastructure, including traditional and renewable energy infrastructure companies; investors in energy infrastructure; service providers; and other businesses and individuals that operate in and around the energy industry. The EIC writes today in response to the U.S. Securities and Exchange Commission's ("***Commission***" or "***SEC***") request for comment on any or all aspects of the rule amendments proposed by the Commission on March 21, 2022 (the "***Proposed Rules***"). We appreciate the opportunity to comment on the Proposed Rules. Due to our significant concerns about the scope of the Proposed Rules and the unnecessary costs and burdens the Proposed Rules would impose on companies, investors and the market, we are addressing our concerns by topic, instead of answering the specifically enumerated questions articulated in the Commission's proposing release.

I. Summary

In summary, the EIC does not believe that the Proposed Rules will provide investors with useful, accurate or comparable information. The federal securities laws are intended to provide disclosure to investors that enables them to make informed investment and voting decisions, and any regulation or guidance promulgated by the Commission under the federal securities laws must not only take this purpose into consideration, it must prioritize this purpose as part of its threefold mandate: Investor protection, the maintenance of orderly markets, and the facilitation of capital formation. Instead of aligning to these core requirements, the Proposed Rules wander so far from these purposes as to be completely untethered from the Commission's prior commitments to a "principles-based disclosure regime." The Proposed Rules would result in significant costs to companies and their investors while simultaneously exacerbating the ever-expanding length of required disclosures that makes it increasingly more difficult for investors to identify the material information relevant to their investment and voting decisions. The SEC's regulations should not require investors to engage in a treasure hunt for relevant and material information. If adopted as

proposed, the Proposed Rules would require companies to comply with vastly complex and prescriptive disclosure requirements that would be, in many respects, even beyond the common requests of more climate-focused investors, while simultaneously diverting capital away from legitimate energy transition efforts.

Respectfully, it is not the role of the Commission to regulate based on what it believes *should* matter to investors, nor is it the role of the SEC to regulate with the aim of redirecting capital to investments or assets that it perceives as environmentally-friendly or as playing a particular role in the energy transition or the mitigation of climate change. Instead, it has been, and should continue to be, the Commission's role to provide companies and investors with the tools necessary to their effective communication and engagement, thereby facilitating capital formation and orderly markets. In direct contradiction to the Commission's mandate to facilitate capital formation, the Proposed Rules will have the impact of actually reducing capital formation as companies struggle under the complexities and significant costs of implementation. Importantly, when regulation fails to protect the assets of companies, and in fact, potentially puts company assets at risk through the creation of unnecessarily burdensome requirements and disclosures that could result in unforeseen risks, such as frivolous litigation, that regulation also fails to protect the investors who invest in those companies. We believe that the Proposed Rules fail both investors and the companies in which they invest.

II. The Proposed Rules Are Not Within the Commission's Mandate

A. The Proposed Rules Appear To Be an Impermissible Attempt to Redirect Capital, Which Is Not Within the Commission's Mandate

The Proposed Rules fail to align to the Commission's central mandates: The protection of investors and the markets and the facilitation of capital formation. It is certainly worth noting that the U.S. Congress has directly authorized one federal agency to regulate greenhouse gas emissions reporting – the U.S. Environmental Protection Agency (the "***EPA***"). The fact that Congress specifically granted this authority should serve as a clear indication of the SEC's regulatory overreach into an arena in which it is neither authorized nor well-positioned to function. Adding insult to injury, the Commission seeks to adopt regulation that would equate climate-related information to financial information, including with respect to the required reporting timing, accuracy, reporting dynamics and relevancy, notwithstanding that climate information is fundamentally different from financial information. The Commission's disregard for the both the scientific nature of climate-related information as well as the evolving nature of the underlying science and scenarios is indicative of a fundamental truth: The Commission is out of its depth and beyond the scope of its mandate.

The scope of the SEC's authority is not limitless, and to adopt regulation of such substantial economic and political significance without a clear and direct mandate from Congress is at best a distraction, and at worst, a dangerous precedent that puts the Commission's neutrality in question. The impact of this overreach of authority is exacerbated by the fact that such regulation would require companies to disclose subjective, costly and potentially controversial and competitively sensitive information, thereby actively harming companies and their investors while diverting resources and attention from legitimate efforts to navigate changing energy markets. While the Commission's mandate does not technically require it to only establish rules that are directly tied

to the federal securities law definition of materiality, its mandate does require it to consider the impact of its rulemaking on investors, and requiring companies to comply with the Proposed Rules will only result in the investors of those companies footing the bill, without providing any clearly defined benefit.

Specifically, the Commission fails to establish what the benefit is of requiring such exhaustive and extensive disclosures regarding climate change-related matters when (i) existing principles-based rules already require companies to disclose risk- and certain business-related matters that could be material to investors, and (ii) the Proposed Rules will not result in comparable, consistent disclosures, as discussed in greater detail below. Given the lack of an articulation of a clear benefit, we would expect the Commission to at least clearly identify how the Proposed Rules could provide information that would be material to the reasonable investor's investment and voting decisions; however, the Proposed Rules, in several respects, either avoided or misinterpreted the concept of the federal securities law definition of materiality.

For example, while Scope 3 emission data aggregated across the economy, if it could be accurately calculated, could be relevant for an understanding of the complexities of climate change and the systemic risks we face as a civilization, it is impossible to see how an individual company's Scope 3 emission data would constitute information that is material for the reasonable investor's investment and voting decisions. Scope 3 emission data for an individual company, as discussed in greater detail below, is as unlikely to be material (as that term is defined by the federal securities laws and interpreted by the U.S. Supreme Court) as it is likely to be subject to a significant number of factors outside of the scope of the company's control and unrelated to the company's performance. Moreover, Scope 3 emission data is also subject to issues regarding double- or multiple-counting as well as a lack of data integrity or consistency, making the connection between an individual company and its Scope 3 emissions information tenuous at best and misleading at worst. In addition, the fact that the Commission seeks to pull the entire "value chain" of companies into the evaluation of certain climate-related risks in addition to the creation of any required Scope 3 emissions data further reveals the degree to which the Commission is comfortable wandering beyond the scope of its mandate by effectively regulating even nonpublic organizations and organizations functioning completely outside of the U.S. in an attempt to fundamentally reshape the global economy.

Contrary to the Commission's mandate, including the requirement that it consider the impact of its rulemaking on investors, the Proposed Rules appear to represent an attempt by the Commission to regulate based on what it believes *should* matter to investors and thereby an attempt to redirect capital to investments and assets that the SEC perceives as playing a specific role in the energy transition and the mitigation of climate change. The Commission cannot be in the business of picking market "winners" and "losers," particularly in the context of a matter as complex, systemic and interwoven as the potential global impacts of climate change-related risks and opportunities coupled with the complexities and necessities of energy affordability, security and resiliency. The Commission's mandate to protect investors is also a mandate to protect investors' long-term pecuniary interests, and seeking to limit certain industries' access to capital makes the investment of investors in those industries more expensive, again, without providing a corresponding benefit.

B. The Proposed Rules Likely Violate Companies' First Amendment Rights and Represent an Arbitrary and Capricious Abuse of the Commission's Discretion

The Proposed Rules clearly reach beyond the Commission's mandate in order to achieve economic and political ends, and do so while likely failing to appropriately consider companies' First Amendment rights. The U.S. Supreme Court has clarified that the government is subject to less scrutiny in this regard when disclosure requires companies to disclose "purely factual and uncontroversial information."[1] In contrast, when responsive disclosures are not purely factual and uncontroversial in nature, the underlying disclosure regulations should be subject to greater scrutiny. It is hard to imagine a more controversial disclosure regulation than the Proposed Rules, as it is equally difficult to imagine how regulation could venture further outside of the scope of an individual company's financial performance. Given the scope of the Commission's mandate, we believe the only appropriate means for the Commission to create such regulation is in response to a clear and direct mandate from Congress.

We also note that the Commission's cost calculations for compliance with the Proposed Rules appear to reflect woefully low estimates based on faulty assumptions. While the EIC hopes to provide the Commission with more carefully calculated cost analyses of compliance with the Proposed Rules, undertaking such analyses across our membership requires significantly more time than the comment period provided by the Commission, as amended. As discussed throughout this letter, the Proposed Rules also take a simultaneously incredibly prescriptive and incredibly sweeping approach to climate-related disclosure regulation that (i) ignores industry-specific considerations, and state law considerations with respect to a board of directors' ability to exercise business judgment in directing corporate strategy, overseeing risk management and assessing what is and is not material to their corporation's investors, and (ii) disregards the degree to which the information responsive to such Proposed Rules is likely to be misinterpreted and misread. For all these reasons, we believe that the Proposed Rules fail to meet the standards set forth in the Administrative Procedure Act.

C. The Proposed Rules Fail to Recognize the Complexity and Necessity of Balancing the Need for Energy Transformation with the World's Current and Growing Need for Energy

The developed world and modern civilization, including how we live, work, travel, and access goods and services, are built on an existing system of affordable, reliable and increasingly cleaner energy. Perhaps better than most, EIC members understand the simultaneous complexities of the challenges posed by climate change and the world's expanding need for energy, including energy affordability, reliability, security, infrastructure and access. EIC members have unique insights into these matters, and most EIC members are already providing climate-related disclosures, adopting climate-related goals and targets, or otherwise engaging with their stakeholders on climate-related matters. These disclosures are most often provided voluntarily in response to specific investors' areas of interest and, at times, in SEC filings in response to the

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[1] *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018). Whether the lesser scrutiny applies when, as here, the government seeks to regulate speech that involves something other than "voluntary commercial advertising" or "point of sale disclosures" is a matter of debate. *See, e.g., Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 522-24 (D.C. Cir. 2015).

SEC's existing principles-based disclosure regime. Among members that are providing more detailed levels of voluntary climate-related disclosures, the concerns identified in this letter remain given that (i) the nature of SEC reporting requires a higher level of both cost and internal complexity than that required for voluntary reporting, in part because (ii) the liability standards associated with SEC reporting can be higher than the standards associated with voluntary reporting, and (iii) beyond direct liability considerations, the inclusion of information in an SEC filing carries with it the implication that such information reflects a level of rigor, certainty and precision that, in each case, is likely to be frustrated by the nature of climate-related information which tends to be uncertain; incomplete; reliant on third-party data, estimates and assumptions; and subjective.

The EIC acknowledges that there are certain investors who are particularly interested in detailed climate-related disclosures; however, the interests of certain investors should not become the responsibility of all investors because companies, and thereby their investors, are charged with shouldering the likely significant cost of compliance with such exhaustive rules. While some investors may ask for certain information, it is ultimately up to the Commission to determine what information is worthy of all investors, and specifically, worthy of the cost that the creation of such information imposes on all investors. The proposed requirements for voluminous, subjective and new disclosures, focused solely on climate change, would distort a fair presentation of how publicly traded companies fit into long-term global energy markets as well as how energy companies are tasked with simultaneously navigating the world's expanding needs for energy affordability, reliability, security and access, and the complexity of the transformation of the energy and infrastructure spaces.

III. Compliance with the Proposed Rules Would Fail to Provide Consistent or Accurate Disclosures

A. Emissions Data Will Not Be Consistent, Comparable or Provide Information Indicative of Company Performance

The Commission's aim to produce climate-related disclosures that are consistent and comparable is ultimately an impossibility given the level of subjectivity involved in a significant number of climate-related determinations at this time – not even the Commission with its prescriptive approach in the Proposed Rules can impose enough definition, controls and clarity to produce consistent and comparable results. For example, emissions data in general may not be comparable year over year, even when the data is issued by the same company. On the other hand, financial data that is subject to similar liability is measurable, actualized and consistent across time frames. Therefore, disclosing emissions data adjacent to financial data would imply a level of precision for the emissions data that does not and will not exist.

Much of the data underlying emissions calculations are based on extrapolations that are never actualized. Moreover, methodologies in emissions calculations can change, and companies can experience significant swings in even their Scope 1 and Scope 2 emissions for reasons that are completely outside of their control. Existing methodologies allow for interpretation, and in some

respects require it, and thus emissions are commonly recalculated.[2] Emissions factors also are revised by environmental agencies from time to time, which can meaningfully impact calculations. In such cases, under the Proposed Rules companies would either have to revise historical emissions data or accept that year-over-year emissions may not be comparable. Per the Greenhouse Gas Reporting Program, historical emissions are to be restated to reflect acquisitions and divestitures. All of these factors as well as others mean that the results of Scope 1 and Scope 2 emissions data are often moving targets subject to change and outside of companies' control, and yet their disclosure could expose companies to increased levels of liability, particularly when that data inevitability needs to be amended or restated.

With respect to Scope 3 emissions data, these issues are significantly compounded. First, Scope 3 emissions will in many cases be outside of a publicly traded company's knowledge and control. For example, hydrocarbons are traded in complex markets and suppliers of hydrocarbons often will not know the end use, assuming the end use can even be identified. Many hydrocarbon products can be either blended into fuels that will be burned, or manufactured into chemical products that are not burned and therefore do not release GHG emissions. For companies that supply hydrocarbons to power plants or large industrial consumers, the supplier also will not necessarily know whether the end user has a carbon capture and sequestration system. Scope 3 emissions also will depend on consumer choices and options for specific uses and alternatives. For example, although the carbon footprint of a particular volume of motor fuel may be fixed, the efficiency with which that fuel is used is far more important in evaluating its environmental impact, and that will vary widely depending on the users' vehicle choices and driving practices and distances. This reality reflects the disconnect between the type of information that may actually be useful to investors versus the Proposed Rules' myopic focus on an overly simplistic perspective on climate-related considerations. As another example, many natural gas liquids end up at petrochemical facilities where they are turned into plastics and precursors for other products. Plastics may then be recycled and take on a new life. This represents yet another reality that the Proposed Rules fail to reflect – the full complexity of most value chains and what that complexity means for global emission reduction and energy transition. The judgment required and inherent uncertainty involved with making the determinations regarding these matters, including the estimates and assumptions that go into such determinations, will in all likelihood render these

[2] In addition, in the Proposed Rules the Commission states that relevant data for calculating Scope 1 and 2 emissions should be reasonably available to companies as many of them are required to report this data to the EPA or do so on a voluntary basis in their sustainability reports. Additionally, most of the current emissions reporting is based on the guidance included in GHG Protocol, which allows companies to use financial control, operational control, or equity share in determining their organizational boundaries. The Proposed Rules, however, would "require a registrant to set the organizational boundaries for its GHG emissions disclosure using the same scope of entities, operations, assets, and other holdings within its business organization as those included in, and based upon the same set of accounting principles applicable to, its consolidated financial statements". This requirement may differ from the current methodology adopted under the GHG Protocol as many EIC member companies currently utilize operational control to determine their organizational boundaries for the purpose of GHG emissions reporting. Due to the complexity of ownership structures in the industry, there could be significant differences between emissions reported under the GHG Protocol using the operational control methodology and the Proposed Rules. For those assets that are not operated by the reporting company, they will be required to coordinate and obtain GHG emissions information from third party owners and will have limited ability to validate the information. Consequently, the requirement to follow existing GAAP will trigger a reassessment of prior reporting practices and require a significant amount of time, cost, and effort to gather additional information.

disclosures meaningless for the purposes of comparison. As noted above, including these disclosures adjacent to financial data implies a false and misleading level of precision.

Second, completing Scope 3 emissions data will often require companies to acquire information from counterparties, including counterparties that are not publicly traded and therefore not generally subject to SEC regulation. These counterparties may not have the control structures of SEC registrants. While the Proposed Rules would provide a safe harbor for Scope 3 emissions disclosures such that they would not be deemed to be fraudulent unless it is shown that such disclosures were made or reaffirmed without a reasonable basis or disclosed other than in good faith, it is unclear how companies should form a "good faith" belief in Scope 3 data received from a non-SEC-regulated company, and whether the data provided by such a company would ever reach any meaningful level of precision or comparability.

Third, Scope 3 emissions data reporting also frequently involves the double- or multiple-counting of emissions. For example, with gasoline, the Proposed Rules would seemingly potentially require disclosure of the same GHG emissions from burning the same gasoline by several different companies: (i) the company operating the oil well producing crude oil; (ii) the company(ies) providing pipeline, truck, or rail transportation of the crude oil to a refinery; (iii) the refinery converting the crude oil into gasoline and other products; (iv) the company(ies) providing pipeline, truck, or rail transportation of the gasoline to a wholesale bulk fuel terminal; (v) the wholesale bulk fuel terminalling company; and (vi) the company operating the retail station at which a motorist purchases gasoline for their vehicle. We also note that any transporter of any product, regardless of what that product is, is unlikely to have control or knowledge over the emissions associated with such product, and asking the transporter to attempt to produce disclosures on such figures would be unduly burdensome if not impossible. We believe it is for these and the other reasons articulated in this letter that existing regulatory requirements to address Scope 3 emissions are limited.

B. Disclosures Made in Response to the Proposed Regulation S-X Requirements Will Not Be Consistent, Comparable or Provide Information Indicative of Company Performance

Notwithstanding the prescriptive nature of the Proposed Rules, the number of subjective determinations companies will have to make in order to comply with the rules is nearly limitless. For example, the Proposed Rules' requirement that certain climate-related financial statement metrics and related disclosure be included in a note to a company's audited financial statements is riddled with ambiguities and vague concepts that will require companies to make a myriad of subjective determinations and judgment calls. Given that this disclosure is proposed to be included in companies' financial disclosures, investors are likely to assume a level of precision and objectivity applies to those disclosures that simply will not exist, resulting in disclosure of information that by its nature will be misleading, exposing companies to substantial and unnecessary litigation risk. The Proposed Rules would require a company to disclose the financial impacts of severe weather events, other natural conditions, transition activities, and identified climate-related risks on the consolidated financial statements included in the relevant filing unless the aggregated impact of the severe weather events, other natural conditions, transition activities, and identified climate-related risks is less than one percent of the total line item for the relevant fiscal year. The one percent threshold will elevate the emphasis on climate change over every

other factor that may impact financial performance; exacerbating the issues associated with this disclosure. Effectively, the SEC is dictating that climate-related factors are, by definition, material and more important than other factors that might impact a company's financial performance. The level of distortion that could result from this approach cannot be understated, and we believe that any numerical percentage will frustrate companies' need to assess materiality of climate-related matters in the context of information that is simultaneously complex and completely subjective. In our view, the use of any numerical threshold would have the effect of pushing all companies to attempt to quantify a boundless set of hypotheticals in an effort to document the basis for their compliance with the disclosure requirement.

S-X 5-02 would require SEC reporting entities to separately present individual balance sheet amounts that exceed certain quantitative thresholds. In many cases, companies voluntarily present financial statement line items which are well below these thresholds to provide more granular information to investors and stakeholders. The Proposed Rules would incentivize those companies that provide granular information in their financial statements to combine financial statement line items in order to reduce their sensitivity to a percentage-based trigger, leading to a reduction in transparency in financial reporting. Companies also will be left to determine on their own what constitutes "severe weather events," "other natural conditions" and "transition activities" for the purposes of assessing their potential financial impacts, and just as importantly, companies will also have to determine how these factors should be weighed given the lack of consistent knowledge, data and expectations. Companies will also have to determine what periods are affected by such climate-related matters, notwithstanding that many such matters cannot be easily mapped into a company's reporting cycle.[3]

A basic review of the potential implications of the proposed Regulation S-X disclosure requirements reveals how subjective and inconsistent these disclosures are likely to be in practice. First, the proposed financial statement disclosures and calculations cannot reasonably be applied to companies' routine activities that are not motivated by climate change because the degree to which routine business activities may or may not reflect climate-related risk is impossible to precisely reflect. For example, a company building a new asset is likely to consider flood risk in the asset's location and design, but it would not be possible for any particular project to parse the incremental cost associated with addressing flood risks that might be due to climate change as compared to the flood risks that have always existed in the world. Second, the proposed financial statement disclosures and calculations cannot reasonably be applied to business decisions that have a mixed motivation because the degree to which these decisions may or may not reflect climate-related risk is also impossible to precisely reflect. For example, a company's choice to develop or expand its supply of a low-carbon product or service would presumably be influenced by its overall

[3] In contrast, the existing disclosure framework in which companies have greater flexibility to delineate potentially material issues as they are recognized is more functional than forcing all companies to use broad climate and transition categories. For example, if a company recognizes a material impact due to a severe weather event, that company may be driven to report that impact under existing disclosure rules; no additional benefit arises from requiring the same company to label that as a climate change impact or attempt to determine what portion of the damage was exacerbated due to climate change. Similarly, a company making material capital investments in a renewable energy line of business would presumably make that fact known to its investors under its existing disclosures, with no greater value provided by the Commission's proposal to label that or some portion of it as a transition cost.

forecast of demand, without necessarily determining how much of that demand is due to climate change as opposed to all of the other factors influencing demand.

The proposed financial statement disclosure requirement also incorrectly assumes that companies will be able to tease out energy use changes resulting from climate change as opposed to market changes that are unrelated to climate change, and also assumes that companies will be able to identify normal variations in weather versus changes that are linked to climate change. The characterization of activities as associated with energy transition also will be subjective at best. For example, although hydrogen is commonly understood as a low-carbon fuel, it has long been used in refining and petrochemical operations, but it would be counterintuitive for companies to have to recast historical spending related to hydrogen as somehow motivated by climate change or made in connection with energy transition. As another example, companies may make choices between types of fuel that have implications for their emissions but may be making those choices for reasons other than transition such as price and availability.

IV. Compliance with the Proposed Rules Would Likely Be Prohibitively Costly and Impose Undue Risks on Companies

Given all of the issues with the Proposed Rules identified above, we posit that the Commission has clearly failed to effectively balance the cost, complexity and potential risks of compliance with these requirements for companies with any perceived benefit of the resulting disclosures. The Commission's failure to effectively consider the costs of complying with rules as prescriptive and detailed as the Proposed Rules is compounded by the speed with which the Commission would expect companies to begin providing responsive disclosures – large accelerated filers would, practically speaking, receive less than a year to create the mechanisms required for compliance – as well as the attestation requirement and the fact that these disclosures would largely be considered "filed" and therefore subject to potential liability under both Exchange Act Section 18 and under the Securities Act through incorporation by reference. The attestation requirement will increase costs for companies and yet the underlying disclosures are not more likely to be accurate, they are simply more likely to be expensive. Each of these factors will have the effect of increasing the cost of and risks associated with compliance without providing investors with any clear benefit. Smaller companies are likely to be particularly disadvantaged, as they are forced to choose between substantial compliance costs and operational burdens or the competitive disadvantages of being unable to provide the information that third parties that are SEC reporting companies demand. Moreover, we remind the Commission that not only do compliance efforts represent additional costs, but also likely reduced capital available for directly addressing climate change and energy transition.

As touched on above, the Proposed Rules do not provide companies with enough time, either initially or on an ongoing basis. Significant internal reporting and disclosure mechanisms need to be created to produce such significant and complex disclosures, and yet the Commission would phase in compliance in a manner identical to significantly simpler rule changes. In addition, aligning compliance with the Proposed Rules to the Form 10-K and proxy statement schedules is highly impractical given the level of detail, including external data sourcing, companies will need to acquire and analyze, assuming the data is even available. To expect companies to produce these disclosures for each year in the same window of time in which companies are already undertaking the significant efforts associated with financial reporting and annual meeting matters, is as

impracticable as it is unnecessary. For example, for companies to determine Scope 1 and Scope 2 emissions, to say nothing of Scope 3 emissions, involves data collection from a wide variety of sources, and this process can become increasingly complex if companies are required to produce Scope 3 emissions data as well – simply put, it is impossible to do within the annual reporting schedule what the Commission is proposing. Even more troubling is the fact that the Commission indicates in the Proposed Rules that material changes to climate information would be required on Forms 10-Q, which could be as burdensome for companies as it would be useless for investors. Even if companies do not identify any "material" changes to their climate information each quarter, they will still be required to undertake the significant internal efforts associated with reviewing their prior exhaustive statements for potential updates. We would also note that the Proposed Rules fail to adequately clarify the degree to which historical fiscal year disclosures will be required in the first year disclosure is required, or whether the historical disclosures could be permitted to be phased in over the same number of years, notwithstanding the accommodations afforded by Rules 409 and 12b-21.

The Proposed Rules would also impose a number of new and unnecessary risks on companies. For example, as touched on above, the Proposed Rules would require companies to engage in a level of guesswork with respect to the Commission's intent for, and their investors' interpretation of, such terms as "extreme temperature," "severe weather," "climate-related," "climate expertise," "physical risks" and "transition risks." However, unsatisfied with simply imposing on companies the potential liabilities associated with creating disclosures that cannot be, by their very nature, consistent, comparable or even complete, the Commission seeks to go a step further by creating the implication that boards and senior members of management should have expertise with respect to climate-related risks and potentially devote a disproportionate amount of their time, in addition to their companies' resources, to the creation of disclosures responsive to the Commission's overly prescriptive requirements rather than the implementation of strategies and opportunities for addressing climate-related matters and energy transition.

Finally, the fact that these disclosures will largely be "filed" is problematic given that the Proposed Rules themselves are styled to produce disclosures that are significantly more likely to be misleading than many other disclosures, but through no fault of the companies making the disclosures. As described in greater detail above, the emissions requirements and the proposed Regulation S-X requirements are particularly vulnerable to inconsistencies, and are likely to result in disclosures that are not comparable between companies or year-over-year, or indicative of company performance. However, because these disclosures would be, under the Proposed Rules, included in companies' Form 10-K, investors are likely to assume a level of precision and comparability that simply cannot exist. Moreover, under the Proposed Rules, companies could still be liable for third party data because, while the Commission would apply a reasonable basis/good faith safe harbor for Scope 3 data, companies will need to rely on third parties to, at a minimum, assess and analyze their climate change-related risks (including those in their value chains), measure and report on their Scope 1 and Scope 2 emissions, and measure and assess the financial impacts of severe weather events, other natural conditions, transition activities, and identified climate-related risks on their consolidated financial statements.

V. Recommendations and Conclusion

A. Recommendations

We believe that the Commission's quest for comparable climate-related disclosures is misplaced given the level of complexity, subjectivity and ambiguity in existing approaches to such disclosures. We also believe that the Proposed Rules are problematic in their entirety because they are not within the scope of the SEC's mandate and they represent an impermissible attempt to reallocate capital based on misunderstandings and political points of view with respect to climate-related considerations and energy transition. However, to the extent the Commission does undertake rulemaking beyond existing rules that arguably already address material climate-related matters, we believe the Commission should focus on making rules that result in disclosures that are meaningful to investors' investment and voting decisions and relevant to the performance of the company making such disclosures. In order to realign the Proposed Rules with the Commission's principles-based disclosure regime, and make such disclosures more meaningful and useful, and in order to avoid imposing unnecessary costs, burdens and liability on companies, we recommend that the Commission limit any final rule changes regarding these matters to the following items:

1) Do not require companies to have or discuss the individual climate expertise of members of the board or members of management, but permit companies to discuss their boards' oversight of material climate change-related matters consistent with the Commission's existing approach with respect to board oversight of material strategy and risk-related matters. We note that to take any other approach is to treat climate change-related matters, a subject matter outside of the scope of the Commission's direct mandate, as unique among the matters subject to board oversight;

2) Remove the prescriptive requirements for details on internal decision-making, methodologies and metrics and provide that companies may disclose in a manner consistent with the Commission's prior principles-based approach regarding materiality;

3) Permit companies to report on their climate-related risks and opportunities to the extent material under the federal securities law definition of materiality, and refine the Commission's prior 2010 guidance on climate change-related considerations to address any climate-related transition plans, goals, metrics or targets that companies have voluntarily adopted (including by permitting companies to disclose any such metrics in the manner used (i.e., intensity vs. absolute, revenue vs. volume)) to the extent such matters are deemed material by the company's management and board of directors;

4) Provide that companies may describe any material climate-related impacts on their overall strategy, business model or outlook while acknowledging that the timelines associated with such determinations are unlikely to map to the time horizons traditionally used for assessing materiality;

5) Encourage companies to describe any climate change and/or emissions mitigation strategies to the extent material to the company's overall strategy, business model or outlook, but remove any negative bias with respect to specific methodologies for climate change and/or emissions mitigation, for example avoid any implicit bias with respect to carbon offsets and renewable energy credits, the specific details regarding the use of which are outside of the Commission's mandate and expertise;

6) Do not mandate Scope 1 or Scope 2 emissions disclosure; however, to the extent that any GHG emissions data is required, permit, but do not require, companies to use the GHG Protocol approach to setting organizational boundaries to avoid investor confusion, and permit GHG emissions reporting to be made in a manner consistent with the framework already established by the EPA to avoid inconsistency, confusion and unnecessary cost;

7) If a company determines it is appropriate and material for it to disclose its Scope 1 and/or Scope 2 emissions, or if a company has adopted a target or goal directly relevant to its Scope 1 and/or Scope 2 emissions, permit that disclosure regarding Scope 1 and/or Scope 2 emissions data, as relevant, be made via a Form SD to avoid the perception this emission data is as precise as financial information, and provide that such emission data will be furnished rather than filed;

8) Permit, but do not require, companies to acquire attestation of Scope 1 and Scope 2 emissions data, or any other climate-related information. The Commission could also ask companies that provide Scope 1 and/or Scope 2 emission data without attestation to clarify why attestation has not been sought and/or acquired;

9) Do not mandate Scope 3 emissions disclosure; however, to the extent the Commission does mandate Scope 3 emissions data to be disclosed, permit that such disclosure may be made via a Form SD to avoid the perception that this emission data is as precise as financial information, and provide that such emission data will be furnished rather than filed. In addition, to the extent the Commission does mandate Scope 3 emissions disclosure, we would encourage the Commission to include a clear articulation of how a company may determine that Scope 3 emissions data is material for that company under the federal securities law definition of materiality as established by the U.S. Supreme Court;

10) Remove the proposed Regulation S-X requirements. Do not prematurely require climate-related metrics in financial statements before methodologies for assessing such metrics in objective and financial terms are developed by authorities that understand both the specific climate science and the accounting implications and auditing requirements. However, to the extent the Commission does adopt any requirements with respect to financial statement reporting:

    a. Reject a one percent threshold, or any fixed numerical threshold, for the reporting of inherently subjective and imprecise estimates of financial impacts associated with climate-related data and determinations and return

to the principles-based approach of materiality in a manner consistent with existing U.S. federal securities laws; and

b. Remove the requirement to provide historical data for periods occurring prior to the compliance date to provide companies with time to begin collecting and tracking this information.

11) Provide companies with a longer transition period for complying with any rules that the Commission does ultimately adopt, as well as a longer time to report on a periodic basis. For example, provide large accelerated filers with at least two full fiscal years to reflect any rule changes that are adopted, and provide that companies may provide responsive disclosures as responsive data becomes available during the course of the year, provided that companies clarify when they expect such information to be available (i.e., no later than the deadline for filing their third quarter Form 10-Q) in their annual report or annual proxy statement;

12) Provide companies with additional safe harbors for (a) information with significant estimates and assumptions (including with respect to any emissions data), (b) information that has been provided in prior years to avoid retrospective assessment of past disclosures under new standards, and (c) information that is acquired from or reliant on information acquired from third parties; and

13) Continue to defer to boards of directors, in the areas of corporate strategy and oversight risk management. While the Proposed Rules do not purport to expressly direct boards on these matters, the burdens they would impose will effectively require a dominant focus on climate-related matters regardless of state law, which requires boards to act in accordance with their fiduciary duties consistent with the business judgment rule. For companies to function effectively and in a manner consistent with good governance, boards' authority to determine what is material for the purposes of their companies' operations and financial statements, including with respect to the degree to which climate-related matters are reflected in a company's financial statements, must not be violated. The Proposed Rules, if adopted, would effectively seek to replace the business judgment of boards with what appears to be a politically-motivated attempt to redirect capital.

B. Conclusion

In conclusion, the federal securities laws are intended to provide disclosure to investors that enables them to make informed investment and voting decisions, and the usefulness of all disclosure is jeopardized when any required disclosure wanders from this purpose. The disclosures required by the Proposed Rules will depend on issues having nothing to do with an individual company's performance. Not even the SEC can create rules that address all of the ambiguities and complexities of climate change-related information, thus the Commission has to eventually rely on companies' own knowledge of their businesses and operations, and it is EIC's position that doing so earlier in the process of climate change-related disclosure will actually produce more effective and consistent disclosures.

We ask that the Commission carefully consider our recommendations when determining how to proceed with respect to climate change-related disclosures and the potential adoption of regulation. We would be happy to discuss our comments or any other matters that you believe would be helpful. Please contact me at [redacted] if you have questions or wish to discuss our comments.

Sincerely,

Lori E. L. Ziebart
President & CEO
Energy Infrastructure Council

cc: Gary Gensler, Chair of the SEC
Hester M. Peirce, Commissioner
Allison Herren Lee, Commissioner
Caroline A. Crenshaw, Commissioner