Texas Pipeline Association

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President

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Via https://www.sec.gov/ rules/submitcomments.htm
Vanessa A. Countryman
Secretary, Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

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

Dear Secretary Countryman:

The Texas Pipeline Association (TPA) submits the following comments regarding the Securities and Exchange Commission's (SEC) proposed rule regarding requirements for disclosure of information related to climate change, risks, and greenhouse gas (GHG) emissions, published on April 11, 2022.[1] TPA is an organization comprised of 39 members who gather, process, treat, and transport natural gas and hazardous liquids materials through intrastate pipelines in Texas, including numerous public companies that would be affected by this rulemaking. These comments are submitted on behalf of the TPA and do not necessarily reflect the opinions of any individual TPA member.

1. The proposed disclosure requirements regarding GHG emissions and climate-related information are unnecessary and inappropriate. Few dispute the importance of efforts to reduce global greenhouse gas emissions and to limit any negative climate change impacts. Such efforts have been ongoing for years, through thousands of federal, state, and local taxes, tax incentives, mandates, and myriad other programs. In many industries, including ours, voluntary implementation of comprehensive policies is resulting in reduced GHG emissions and is ensuring that operations are conducted in an efficient and environmentally sound manner. Beyond these voluntary steps, our members are heavily regulated at the local, state, and federal level and must comply with stringent regulatory requirements aimed at measuring and reducing greenhouse gas emissions across all segments of our operations. Climate change, its impacts, its risks, its causes, and the amount of GHG emissions produced by companies in our industry, are all subjects that have garnered a substantial amount of public attention and are already heavily regulated and

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[1] 87 Fed. Reg. 21334 (April 11, 2022).

[redacted]

publicly disclosed – without the need for an additional set of reporting requirements as is now being proposed by the SEC.

The proposed GHG emissions disclosure provisions would layer on top of many existing requirements a new and duplicative set of additional requirements – developed and implemented by federal securities regulators – that would require, among other things, assessment and reporting of the kind of information that is already being reported to and collected by the Environmental Protection Agency's (EPA) Greenhouse Gas Reporting Program (GHGRP).[2] Congress has authorized the EPA to collect reports from emission sources and make them available to the public, and the EPA's GHGRP covers over 8,000 facilities and suppliers that report approximately 85 to 90 percent of the country's GHG emissions[3] in an objective and uniform disclosure format. The EPA has been collecting this extensive amount of GHG emissions data for many years, and we see no reason why the SEC should not simply rely on the GHG data collection being conducted by the EPA, which has the expertise and experience in this area, rather than creating an entirely new reporting program. At a minimum, the SEC's proposed GHG emissions reporting program would result in duplicative reporting of GHG emissions under the auspices of two federal agency programs. To the extent that SEC's proposal would require reporting of data different from that collected by the EPA due to differing methodologies and reporting methods, the proposal would not only be unnecessarily burdensome on those reporting companies,[4] it would also be confusing to the investing public, which is the intended beneficiary of these data disclosures. A company's disclosed GHG emissions data could look very different from one program to the other, even though the overall subject matter being addressed – types and amounts of GHG emissions – would be the same.

The proposal under consideration would likely be one of the most expansive regulatory frameworks ever adopted by the SEC, affecting not just public companies but every link in those companies' supply and distribution chains. The SEC should be mindful that the potential burdens

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[2] Similarly, existing SEC rules already require companies to disclose material risks regardless of the source or cause of the risk. *See, e.g.*, 17 CFR § 229.105(a) (requiring disclosure of "material factors that make an investment in the registrant or offering speculative or risky"); 17 CFR § 229.303(a) (requiring disclosure of "material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition"); 17 CFR § 229.407(h) (requiring disclosure of the role of a company's board of directors in risk oversight). In 2010, the SEC issued guidance specifically addressing how the existing disclosure requirements apply to climate change matters. *See* 17 CFR Parts 211 and 231.

[3] *See* https://www.epa.gov/ghgreporting/ghgrp-reported-data.

[4] Companies subject to EPA GHG reporting are afforded approximately three months from the close of each calendar year to collect operating data, quantify emissions, and prepare GHG emissions reports. SEC's proposal would significantly reduce the time allowed to quantify and report GHG emissions, including third-party review for attestation. Further, many companies operate under a fiscal year that does not coincide with the calendar year. For such companies, the SEC proposal would create two GHG emissions reporting periods. Another burden would be found in the required measurement and reporting of upstream and downstream GHG emissions – data that the agency with expertise in this area, the EPA, has not seen fit to collect. Depending upon the resources of the filer and its ability to obtain upstream and downstream value chain emissions data in the time required for disclosure, reported Scope 3 GHG emissions likely would be inconsistent and non-comparable, causing confusion for the investing public.

of the proposal are not limited to public companies subject to SEC regulation, as private companies, including innumerable small businesses, would also face inquiries from many SEC-regulated customers as a result of the rule. The proposed rule would regulate all of those entities and individuals either directly or indirectly, all in the interest of creating a new quasi-environmental regulatory agency that would run an extensive and intrusive reporting system that would in some instances be duplicative of the EPA's GHGRP and in other instances would go far beyond the EPA's system. We believe the SEC should exercise great caution in trying to expand GHG accounting and reporting when the more mature EPA process, embodied in the GHGRP, still has many issues that the EPA is currently trying to address through additional amendments to the GHGRP.[5]

2. The proposed rule would be beyond the scope of SEC's legal authority. As SEC rules go, the disclosure provisions here proposed are unprecedented in nature and scope, and serious questions exist as to whether such provisions are within the Commission's authority. The Supreme Court has emphasized that it "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[6] There is no indication that Congress delegated to the SEC the power to act as a quasi-environmental agency and to require public companies to disclose vast amounts of climate-related information in areas far removed from the goal of protecting and enhancing the interests of the investing public, particularly where that subject matter is squarely within the jurisdiction of a different federal agency that has been actively exercising that jurisdiction, via the EPA's GHGRP, to require companies to provide the same types of disclosures that the SEC would require here. There is no congressional delegation of power in the Securities Act or the Securities Exchange Act authorizing the SEC to require the sort of reporting at issue here, in contrast to the delegation of power to the EPA that is found in section 114 of the Clean Air Act, 42 USC § 7414.

In addition, the compelled speech regime contemplated by the Commission in this proposal runs up against First Amendment protections applicable to private companies.[7] The Supreme Court has long held that the First Amendment's protection against compelled speech is a "fixed star in our constitutional constellation."[8] While a government agency has some leeway to compel commercial speech when the disclosures at issue are central to protection of the public,[9] its authority to compel speech is constrained when the disclosures at issue involve data that is not material in any traditional sense and when the disclosures involve subject matter areas that are outside of the agency's traditional area of jurisdiction and expertise. *See, e.g.*, *National Association of Manufacturers v. SEC*, 800 F.3d 518, 521, 537 (D.C. Cir. 2015) (vacating an SEC rule requiring disclosures of "conflict minerals" on First Amendment grounds and holding that the SEC could

[5] The latest action in this regard is a rule proposal signed by EPA Administrator on April 29, 2022, that is intended *inter alia* to improve the quality and consistency of the GHG data being collected, streamline and improve implementation processes, and improve existing calculation, recordkeeping, and reporting requirements.

[6] *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (citation omitted).

[7] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[8] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)

[9] *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018).

not compel the disclosures at issue where the SEC had failed to show that the required disclosures would alleviate the harms that concerned the SEC to a material degree).

The same constitutional concerns would apply here. It is entirely unclear that an SEC rule requiring a company to disclose the extent and limits of its efforts to combat and respond to climate change would have any material impact on the issues that have prompted the SEC to issue this proposal. The rule could compel a company to provide fodder to government or advocacy groups seeking to portray it as insufficiently sensitive to climate change concerns, which would be contrary to the D.C. Circuit's admonition in *National Association of Manufacturers* that "requiring a company to publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive, not less so."[10] An agency may have the ability to compel disclosures when the disclosure is uncontroversial,[11] but it is hardly uncontroversial to require corporations to publicly disclose a vast amount of immaterial data related to a subject matter area – climate change-related issues – that has heretofore not been considered within the traditional boundaries of the SEC's jurisdiction. In addition, the Supreme Court has written that, to survive First Amendment scrutiny, a government action that infringes on commercial speech freedoms, such as a compelled speech requirement, requires the existence of a "substantial" state interest and further requires the government to prove that the government action "directly advances" that interest and "is not more extensive than is necessary to serve that interest."[12] A rule requiring companies to submit a second set of GHG emissions disclosures to the SEC, in addition to those already being submitted to the EPA, would likely qualify as a rule that is in fact "more extensive than is necessary" to serve the SEC's interest in ensuring that GHG emissions information is publicly disclosed.

3. The proposal is overbroad and would improperly require disclosure of information that is immaterial or unhelpful to investors. Another troubling aspect of the proposal is that it would dispense with traditional materiality assessments in many instances, so that a broad range of climate-related information would have to be provided regardless of the materiality – or lack thereof – of the data being provided. This once again would be beyond the scope of the SEC's authority, as the SEC itself has previously acknowledged: "The Commission … has determined in the past that disclosure relating to environmental and other matters of social concern should not be required of all registrants unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material."[13]

Numerous provisions throughout the Securities Act and Securities Exchange Act state that the SEC has the power to issue rules and regulations only "as necessary or appropriate in the public interest or for the protection of investors,"[14] or as "necessary or appropriate for the proper

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[10] 800 F.3d at 530.

[11] *Nat'l Inst. of Family and Life Advocates, supra,* 138 S. Ct. at 2372.

[12] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

[13] 81 Fed. Reg. 23970 (April 22, 2016).

[14] 15 USC § 78l(b)(1).

protection of investors and to insure fair dealing".[15] 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 may "accomplish more harm than good." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976). Similarly, in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 384 (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" securities law. 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 disclosure of material information.

The proposed rule, however, would require disclosure of Scope 1 and Scope 2 greenhouse gas emissions regardless of materiality.[16] The proposal also states that Scope 3 emissions need be disclosed only if "material" – but then proceeds to make clear that it considers Scope 3 emissions to be material in almost every case and that companies should err on the side of over-disclosure.[17] 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."[18] The SEC's suggestion that consultants may be better positioned to assess material risks than the registrants' own financial experts raises more questions than it answers.

The SEC also notes that Scope 2 and 3 emissions are "generated from sources that are neither owned nor controlled by the company."[19] However, the SEC does not provide any reasonable explanation for how emissions outside of company control could nonetheless affect the company's financial prospects, particularly when the SEC would require most of those same emissions to be disclosed separately by other companies as part of those companies' own Scope 1 disclosures. Given that Scope 2 and 3 emissions are outside of company control and will be reported by other companies, Scope 2 and 3 emissions reporting should be voluntary. Required reporting of Scope 3 emissions – those created by others upstream and downstream in the reporting company's value chain – would present another set of problems. First and most obviously, it is

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[15] 15 USC § 78m(a).

[16] *See* 87 Fed. Reg. 21345, 21377 (April 11, 2022). The SEC seems to acknowledge that Scope 1 and Scope 2 emissions may not be material, as it states that companies with such emissions "may" face "declines in cash flows" and thus investors might want Scope 1 and Scope 2 information. 87 Fed. Reg. 21434. The SEC seems to reason that there might be "future regulations" that may require reductions in emissions, and thus this information might be material in this scenario. 87 Fed. Reg. 21435. Under this approach, there is no limiting principle to such speculation. This is particularly true for the SEC's required disclosure of "transition risk" that is not based on any existing laws, regulations, or treaties. The proposal's numerous references to transition and its proposed definition of "transition risks," at 87 Fed. Reg. 21466, are so broad and all-encompassing as to be arbitrary and capricious. To the extent any changes in laws, regulations, and market shifts are reasonably foreseeable, they are already included in existing disclosures.

[17] 87 Fed. Reg. 21378 (April 11, 2022).

[18] *Id.* at 21352.

[19] *Id.* at 21344-45.

hard to see how a company would be able to obtain the data needed to calculate these emissions at all, let alone with the sort of confidence and certainly that has traditionally attended SEC filings. Many if not most of the upstream and downstream entities in a reporting company's supply chain do not keep records of GHG emissions, and those that do may not do so in a manner that is reliable or verifiable. Presumably that is why the proposal would exclude Scope 3 emissions information from the generally required assurance provisions in the rule. But if the data is admittedly so hard to gather and assess to be unworthy of an assurance requirement, what is the justification for requiring companies to go to the great trouble and expense of trying to gather and report it in the first place? The difficulty of gathering the data, and the potential unreliability of the data, are underscored by the SEC itself, in the proposal's exemption of smaller companies from Scope 3 reporting obligations and in its provision of a safe harbor for Scope 3 data. Given the SEC's implicit acknowledgement that the data is likely to be unreliable, it is hard to imagine many members of the investing public placing confidence in, or making investment decisions based on, Scope 3 data. It is equally hard to see the benefit of injecting this sort of uncertain, speculative data into formal SEC reports, which have heretofore tended to be limited to information that can be verified as accurate and reliable, and thus of real value to the investing public.

The proposed limitation on Scope 3 reporting to material information would provide little relief. First, even if Scope 3 information was immaterial, reporting would still be required if the company had set an emissions reduction target that included Scope 3 emissions. But beyond that, the regulatory playing field would be tilted toward a finding of materiality in this context, as the proposal makes clear: "Even if the probability of an adverse consequence is relatively low, if the magnitude of loss or liability is high, then the information in question may still be material."[20] The proposal suggests that Scope 3 data will usually be material and states that reporting companies should resolve close calls in favor of a materiality determination.[21] This sort of guidance would force a prudent company to err on the side of Scope 3 disclosures. And any company still on the fence would likely be finally persuaded by the SEC's proposed test, calling for a determination of materiality "where Scope 3 represents a significant risk, is subject to significant regulatory focus, or 'if there is a substantial likelihood that a reasonable [investor] would consider it important.'"[22] At a minimum, most companies that were potential targets of the Scope 3 disclosure requirement would be forced to go through the extremely burdensome task of estimating their Scope 3 emissions levels, in order to make a determination as to whether Scope 3 emissions were material under the SEC's proposed framework. Even if the answer was no, the company would still have been required to expend the resources needed to make that determination. Indeed, the proposal states that even "[i]f a registrant determines that its Scope 3 emissions are not material, and therefore not subject to disclosure, it may be useful to investors to understand the basis for that determination."[23] Explaining the basis for a non-material determination would presumably require a company to have fully assessed its Scope 3 emissions levels beforehand, once again meaning

[20] *Id.* at 21379.

[21] *Id.* at 21378.

[22] *Id.* at 21379 (citation omitted).

[23] *Id.*

that even companies not reporting Scope 3 emissions information would still be required to spend the resources needed to gather and evaluate Scope 3 data.[24]

With respect to Scope 3 disclosure requirements for downstream activities in the value chain, we believe that companies that do not own or sell products that they are transporting, *e.g.* companies in the midstream pipeline industry, should not be required to consider product end-use GHGs in their disclosures. Such companies will generally have no reason or ability to calculate third-party end-use of oil and gas products that they have transported but do not own and have not sold to others. Industry participants, having identified this issue, are working to develop accounting protocols that could lead to standardized reporting methods for such disclosures. That effort should not be short-circuited by prescriptive SEC requirements that do not fit the particular characteristics of the pipeline industry.

Finally, with respect to reporting requirements, we note that the proposal would require companies to report emissions in terms of GHG intensity, which would be based on a "unit of production" metric.[25] While this might be an appropriate metric generally, it would not be appropriate for companies in the pipeline industry and thus the disclosed information would not be helpful or informative to the investing public. A company in the interstate pipeline industry may neither produce nor own the product that it is transporting. Thus, a "unit of production" approach to measuring intensity for such a company is unworkable and is not aligned with the reality of how such companies conduct their business. An alternative metric, *e.g.* one based on operational throughput, would be more appropriate. In addition, companies in the pipeline industry are developing reporting mechanisms that more realistically account for operational realities in the industry. Such mechanisms should be reviewed and considered by the SEC prior to finalization of any reporting requirements, in order to avoid the imposition of requirements that would be inappropriate for the pipeline industry.

4. The proposed rule would improperly subject companies to unnecessary risks, force policy choices, and put investors in the position of making decisions based on incomparable or immaterial information. The proposal to require disclosure regarding the registrant's GHG targets and goals, as well as the use of any GHG emission offsets and renewable energy credits (RECs) to achieve those goals, would expose registrants to unnecessary risks, mislead investors, and fail to yield comparable disclosures. Requiring disclosure of GHG targets and goals, and progress toward those goals, needlessly subjects companies to liability and SEC enforcement risk. Given the additional risk, the proposed rule would likely have a chilling effect on companies that were considering whether to develop GHG targets and goals in the first place and were considering whether to voluntarily invest in offsets and RECs. The disclosures elicited would not be

[24] If the SEC does require Scope 3 GHG emissions to be reported other than through EPA's GHGRP, SEC should establish a clear boundary around upstream and downstream value chain reporting and clearly define materiality and significance. Clearly defining materiality and significance, as well as limiting the extent of value chain reporting, would limit the additional burden of the proposal and level expectations for the benefit of reporting companies and the investing public. Due to the inherent quantity of assumptions and generalized methodologies associated with Scope 3 GHG emission estimates, SEC should reconsider requiring reporting of Scope 3 GHG emissions altogether.

[25] *See*, *e.g.*, 87 Fed. Reg. 21382, 21469 (April 11, 2022).

comparable because the baseline and other features of the goal or target are set by the registrant. Some registrants will not have a goal or target, and many will have different, incomparable targets, baselines, and other features. For example, companies that invest in voluntary emission offsets often do so recognizing the offsets are based on rough estimates of emissions reduced or avoided from a remotely located project, outside of their control, using estimates based on a third-party protocol that has never been reviewed let alone adopted by any federal authority. The SEC has no demonstrated expertise in emissions accounting, emissions offsets, or emissions allowances, it has not proposed any system of what would count toward any particular goal, and is not qualified to review such disclosures in any event.

In addition, RECs and carbon offsets are even further removed from the registrant's control than Scope 2 and 3 emissions because 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 proposed rule also 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,"[26] and a list of management officials who are "responsible for assessing and managing climate-related risks."[27] By requiring disclosure of the information related to board and management oversight and governance concerning climate-related risk, the SEC gives outsized importance to one type of risk that may be immaterial for most registrants. This requirement may unnecessarily require registrants to overemphasize climate-related risk sensitivity, even when the registrant does not face material climate-related risks and the information required is not useful in making investment decisions.

Congress did not bestow upon the SEC – whose mission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation – the authority to pursue this market-forcing purpose. Yet the proposed rules would have the inevitable effect of improperly forcing policy choices upon reporting companies and putting the investing public in the position of making investment decisions based on incomparable information. Investors, inundated with the disclosed data, could be persuaded to economically punish companies whose policies were unfairly deemed insufficiently climate-friendly or insufficiently attentive to future climate-based risks, regardless of materiality to the company's business. In other words, the probative value of the "evidence" required to be disclosed, especially in the case of Scope 3 data, would be substantially outweighed by its potential for unfairly prejudicial effects. Choice-forcing regulations have no place in the law, particularly when the choices at issue are being forced upon companies by an

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[26] *Id.* at 21359.

[27] *Id.* at 21360.

agency with no environmental or scientific expertise. Climate change, its causes, and the ways it might be minimized and responded to are all very complex issues that are impacted by choices made across the globe. At a minimum one would think that the agency that is forcing choices in this sort of an area would be one with a deep base of scientific and technical expertise in climate issues, as opposed to the SEC. It may be within the jurisdiction of other federal organizations, *e.g.* the EPA, to wade into and make policy choices regarding complex science-based issues such as climate change, but heretofore the role of the SEC has been to focus on finance and markets, *i.e.* to address issues related to enhancement of investor interests, not global climate conditions. To the extent this proposal would divert corporate (and regulatory) resources away from protection and enhancement of shareholder value to climate disclosures, it would work as a detriment to the investing public.

For the foregoing reasons, TPA respectfully requests that the SEC reconsider the above-referenced aspects of its proposed disclosure requirements. We have reviewed the comments being submitted by the Energy Infrastructure Council and we endorse and incorporate those comments as if fully stated herein. We appreciate the opportunity to submit these comments.

Yours truly,

Thure Cannon
President