PLASTICS
INDUSTRY ASSOCIATION

June 17, 2022

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

**Re: Comments of the Plastics Industry Association on the Securities and Exchange Commission's Proposed Rule, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22**

Dear Ms. Countryman:

The Plastics Industry Association ("PLASTICS") appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's ("SEC" or the "Commission") proposed rule, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21,334 (Apr. 11, 2022) ("Proposed Rule"). We also appreciate the extension of the comment period, as the additional time will allow for better informed comments from the regulated community and more thorough guidance to the SEC.

PLASTICS is the only organization that supports the entire plastics supply chain, representing nearly one million workers in the $395 billion U.S. industry. Given that many of our members are SEC registrants, or are suppliers or customers of registrants, PLASTICS and its members have an interest in any additional SEC disclosure requirements proposed by the Commission.

PLASTICS is also proud of the plastics industry's contributions to lowering greenhouse gas (GHG) emissions and driving a more sustainable economy—from dramatically lightweighting automobiles, to keeping food fresher longer and avoiding waste, to being a critical component of electric vehicle batteries and renewable energy technologies. A recent white paper from Citizens for Responsible Energy Solutions (CRES) points out that "plastics is actually the answer to addressing global GHG emissions, particularly if it displaces dirtier overseas production."[1] Sustainability is a top priority, and we continue to encourage the development of strategies to conserve energy and reduce emissions, as well as encourage our members to embrace efficient energy utilization.

Several aspects of the SEC's Proposed Rule raise concerns for our members, and PLASTICS objects to the Proposed Rule for the following reasons:

1. We believe the SEC lacks the authority and subject matter expertise to mandate that all registrants submit climate disclosures to the Commission.

[1] See: https://cresforum.org/wp-content/uploads/2022/05/CRES_WhitePager_Plastics_05132022.pdf; last accessed May 31, 2022.

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2. The SEC has not provided adequate guidance as to which climate risks should be reported and how certain climate risks should be calculated.
3. The SEC has not adequately quantified the benefits of this rulemaking, but there will be significant added costs for the regulated community if the Proposed Rule is finalized in its current form.
4. The SEC proposed a rule that would create new business risks, including exposing confidential information.

In light of these issues, discussed in further detail below, we respectfully request that SEC reconsider mandating climate-related disclosures.

## I. We Believe the SEC Lacks the Authority and Expertise to Mandate Climate Disclosures

While we agree that it is appropriate for SEC to provide guidance, as it did in 2010,[2] to companies that voluntarily choose to make climate-related disclosures, we question whether the SEC has the authority to mandate these types of disclosures. While the SEC cites its "broad authority to promulgate disclosure requirements that are 'necessary or appropriate in the public interest or for the protection of investors,'"[3] as Commissioner Peirce noted in her March 21, 2022 statement,[4] that authority has limits. SEC has proposed to mandate climate-related disclosures, but neither Congress nor the President provided a clear directive. In the absence of legislative or executive action on this issue, we believe it is inappropriate for the SEC to mandate this type of disclosure.

In addition to lacking a directive, we believe the SEC lacks the expertise to evaluate climate-related disclosures. Although several companies have in the past included climate-related information with their SEC filings, the SEC is not the appropriate authority to review climate-related information or mandate that such information be publicly disclosed. Issues related to climate and greenhouse gas ("GHG") emissions are evaluated and regulated by several other agencies, and it does not appear that SEC coordinated with any of those relevant agencies as part of this rulemaking. The U.S. Environmental Protection Agency ("EPA"), which is the primary agency responsible for regulating GHG emissions, does not require the types of disclosures proposed by the SEC.[5]

As raised by other commenters,[6] mandating these disclosures could be viewed as amounting to compelled speech, in contravention of the First Amendment. The SEC correctly notes that companies that currently include climate-related disclosures use different approaches. The diversity with which

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[2] *See* 75 Fed. Reg. 6,289 (Feb. 8, 2010).
[3] 87 Fed. Reg. 21,334, 21,336 (Apr. 11, 2022).
[4] Sec. and Exch. Comm., Comm. Hester M. Peirce Public Statement, *We are Not the Securities and Environment Commission - At Least Not Yet*, available at https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.
[5] *See* 40 C.F.R. Part 98.
[6] *See e.g.*, Comment of Lawrence A. Cunningham et al., *Proposal on Climate-Related Disclosures for Investors* (Apr. 25, 2022), available at https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf.

companies handle these disclosures shows that climate risk is a nuanced and emerging area on which consensus is lacking, but the SEC is mandating the manner and form in which registrants must speak on this issue. This type of compelled speech requires showing that there is "a substantial government interest;"[7] however, no such interest exists or is claimed to exist here. By requiring registrants to disclose information that no other authority—including Congress, the President, or agencies with greater expertise—has decided on as to the appropriate scope or implications, the SEC is compelling registrants to speak on an issue that neither the reporting companies nor the SEC may be qualified to address.

For these reasons, we believe the SEC should not require climate-related disclosures until either Congress or the President directs the Commission to do so. Until then, the SEC can and should continue to provide guidance to companies that voluntarily choose to include such disclosures with their filings. We encourage SEC to coordinate with other relevant agencies, including the EPA, in developing guidance so that companies can take a consistent approach in reporting climate-related information to different agencies.

## II. The SEC Provides Inadequate Guidance as to Why Climate Risks Should be Specifically Reported, Which Climate Risks Should be Reported and How Certain Climate Risks Should be Calculated

Companies are already required to report on material risks, regardless of the source or cause, so it is unclear why the Commission would require companies to parse out risks specific to climate, which the SEC acknowledges may be difficult for some companies to determine.[8] This is particularly true for our members as complex, global factors (*e.g.*, pandemics, port shut-downs, geopolitical tensions, etc.) drive the price of raw materials in the plastics industry, and it is not practical to separate climate-related risks from other factors driving price volatility. Given the range of factors that affect our industry, it is unclear to PLASTICS why climate-related risks warrant specific compelled disclosure, compared to information on other risks.

The Proposed Rule explains that it would require companies to report "material" climate-related risks, but, as Commissioner Peirce notes, the materiality standard as it applies to climate-related risks is not clearly articulated. The requirement for materiality is also not consistently applied. For example, registrants would be required to report on Scope 1 and Scope 2 emissions regardless of materiality. Elsewhere, a one percent threshold, seemingly unrelated to materiality, would apply to financial impact metric disclosures, requiring a registrant to disclose the financial impacts of climate-related risks that affect one percent or more of a total line item.[9] The one percent threshold is significantly below the typical quantitative threshold of five percent used in quantifying financial statement errors, and requires companies to calculate if similar items below one percent exceed the

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[7] *See Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015).
[8] 87 Fed. Reg. at 21,352 ("We recognize that determining the likely future impacts on a registrant's business may be difficult for some registrants.").
[9] *See id.* at 21,366.

one percent threshold in the aggregate—further complicating the data gathering, which likely requires significant modification of financial systems to obtain. Company auditors would be required to audit the financial impact metric disclosures which would include significant qualitative judgments, which in turn is likely to add significant time and cost to audits. Meanwhile, reporting of Scope 3 disclosures would be based on materiality (unless a company sets a GHG reduction target that includes Scope 3 emissions), but registrants subject to this materiality requirement would need to calculate, or at least estimate, their emissions to determine materiality. These calculations, regardless of which methodology is used, are complicated, particularly for an industry like plastics, which can involve multiple suppliers, often leading to duplicative emissions counting. Even after these complicated and costly calculations are completed, it may remain unclear to a registrant if its Scope 3 emissions are material as SEC has not proposed a bright-line threshold for such determinations.[10]

In addition to not providing clear guidance on what would qualify as "material" for the purposes of climate-related disclosures generally, the Proposed Rule does not provide clear guidance on calculating Scope 3 emissions. Although the Commission cites the desire to "provide consistent, comparable, and reliable—and therefore decision-useful—information to investors,"[11] the Proposed Rule does not provide a consistent methodology for calculating Scope 3 emissions. Scope 3 disclosures will not be "consistent, comparable, and reliable" unless all registrants adhere to the same reporting standard. Given the difficulty in calculating Scope 3 emissions, and that not even EPA has mandated their disclosure, we oppose mandating these disclosures for any size of registrant, not just smaller reporting companies ("SRCs"). If SEC choses to move forward with this rulemaking and mandate disclosures of Scope 3 emissions, we appreciate that the Commission has proposed an additional phase-in period and agree that the Scope 3 compliance date should be extended to at least one year after the compliance dates for Scope 1 and Scope 2 reporting. We also ask that the SEC consider timing reporting deadlines to coincide with those of existing reporting platforms. The extended phase-in period will provide registrants with adequate time to choose the methodology that best fits their individual circumstances and develop processes by which to calculate Scope 3 emissions for reporting to SEC.

## III. The SEC Inadequately Quantified the Benefits and Costs of This Rulemaking

The Commission acknowledged in the preamble to the Proposed Rule that it is "unable to reliably quantify…potential benefits and costs."[12] The SEC explains that "[t]he primary benefit of the proposed rules is that investors would have access to more comparable, consistent, and reliable disclosures with respect to registrants' climate-related risks."[13] However, as the Proposed Rule lacks consistency, we do not believe it would provide its stated primary benefit.

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[10] *See id.* at 21,381 ("We also have not proposed a bright-line quantitative threshold for the materiality determination as suggested by some commenters because whether Scope 3 emissions are material would depend on the particular facts and circumstances, making it difficult to establish a "one size fits all" standard.").
[11] *Id.* at 21,335.
[12] *Id.* at 21,428.
[13] *Id.* at 21,429.

Instead, we believe the costs would be significant and we have concerns with SEC's proposed one percent disclosure threshold for "financial impacts of severe weather events, other natural conditions, transition activities, and identified climate-related risks."[14] Our members anticipate that there would be significant cost to track information at this threshold as it is not specifically captured in integrated enterprise resource planning systems. Companies are already required to report significant impacts in the Management Discussions and Analysis ("MD&A") section of quarterly reports, so this additional disclosure requirement at such a low threshold seems unnecessary. To support this threshold, the SEC points to other contexts where a one percent threshold is used.[15] These situations are not equivalent, however, as climate-related risks are not in the same vein as statements of comprehensive income, open option contracts, or transactions between an SRC and related persons, all of which can be calculated without reliance on expensive modeling software or third-party consultants.

PLASTICS also has concerns with the attestation requirement for Scope 1 and 2 disclosures submitted by accelerated filers. This process goes beyond typical auditing procedures, as it would require affected registrants to hire independent attestation providers. This obligation would present a significant new cost, requiring registrants to not only obtain an attestation provider but to first identify an appropriate one. Given the limited number of independent attestation providers with expertise in GHG emissions, registrants may have difficulty finding an attestation provider with availability to take on new clients. Even once an attestation provider is secured, the Proposed Rule would allow such provider to pick the attestation standard, which could add variability to costs and reporting methodology, thereby undermining the Proposed Rule's claimed goal of promoting consistency. Thus, there are issues in addition to cost associated with the SEC's proposed attestation mandate.

While Scope 1 and 2 disclosures would impose a costly attestation requirement, Scope 3 disclosures would come with their own burdens, some of which are discussed above. These costs would be borne not just by registrants. The Proposed Rule would impose costs on non-registrants if they were part of the value chain for a registrant with a Scope 3 goal, as Scope 3 disclosures require calculations of upstream and downstream emissions. It is foreseeable that registrants will push the costs of calculating these emissions onto their suppliers and customers, who would then need to dedicate additional resources to calculating emissions. For smaller companies in the value chain, the associated costs could be an undue burden, but the SEC does not appear to factor in these costs as part of its analysis. The SEC also does not appear to factor in other difficulties that could arise. For example, some of our members have toll partners, to which members send materials for processing. These toll partners are typically private companies that do not share their GHG emissions information. Many of our members also use foreign manufacturers that currently do not gather GHG emissions information. Obtaining Scope 3 emissions information where these companies are involved could thus prove difficult.

[14] *Id.* at 21,366.
[15] *Id*. at fn. 347.

In short, the SEC's cost-benefit analysis is incomplete. The benefits are unclear, and several costs, including those potentially passed up and down the value chain, are not accounted for in the Commission's calculations.

## IV. The SEC Proposed a Rule That Would Create New Business Risks

On top of creating new obligations, the Proposed Rule would create new business risks. First, the proposed disclosures could expose companies' confidential information, as the Proposed Rule does not explicitly provide for protections of such information. Indeed, the SEC notes that "certain provisions of the proposed rules may force registrants to disclose proprietary information." Thus, if finalized in its current form, the Proposed Rule would put many companies in a compromising position, choosing to either disregard their regulatory obligations or disclose information that would put them at a competitive disadvantage. As an example, in the plastics industry, the internal price of carbon has long been treated as confidential information, and the SEC has in the past recognized that companies may need to protect confidential information in filings. For example, SEC allows registrants to redact information from exhibits filed with period reports and registration reports.[16] SEC has also long allowed companies to use Securities Act Rule 406[17] and Exchange Act Rule 24b-2[18] to object to the public release of confidential information that is otherwise required to be filed. We assume these two provisions could be used to protect confidential information related to climate disclosures; however, there is no explicit discussion of such protection in the Proposed Rule. If the Commission goes forward with its rulemaking, it should provide assurances to the regulated community that the protections allowed in the past will apply to new mandatory disclosures.

The second risk would be from potential litigation or enforcement. The Proposed Rule would require companies to speculate as to climate-related risks, but should those guesses be wrong, there are limited protections against the threat of litigation or enforcement. The SEC's reference to "climate-related risks" should also not be used as a proxy for "environmental risks;" focusing on climate does not paint a full and accurate picture of a company's environmental impact, and may suggest that a company's practices are environmentally worse than they are and create an undeserving target for litigation.

The third risk is the likely negative impact on acquisition and investment opportunities, as the new rules do not allow companies to defer including climate-related disclosures until they have had time to review them; this contrasts with the rules on internal control over financial reporting which allow companies to exclude newly acquired entities for a period of one year. If the SEC were to provide this accommodation, the impact would still be felt given the added complexity of companies seeking investments or to be acquired having to meet the expansive new requirements.

[16] *See FAST Act Modernization and Simplification of Regulation S-K*, 84 Fed. Reg. 12,674 (May 2, 2019).
[17] 17 C.F.R. § 230.406.
[18] 17 C.F.R. § 240.24b-2.

Although the Proposed Rule identifies two safe harbors, these are limited and could only be relied on once litigation is already underway. The first safe harbor would apply only to Scope 3 disclosures, which would not be deemed fraudulent "unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith."[19] The second is the Private Securities Litigation Reform Act ("PSLRA") safe harbor for forward-looking statements. However, there are several limitations to this safe harbor, including that it does not apply to forward-looking statements made in initial public offerings.[20] PSLRA also would not prevent the Commission from bringing an enforcement action.

The risks and costs associated with this rulemaking are high, but the benefits remain unclear. Accordingly, we strongly encourage the SEC to reconsider this rulemaking.

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We appreciate this opportunity to comment on the SEC's Proposed Rule. If you have any questions or concerns regarding this letter, or if we can provide additional information on any of our comments provided above, please do not hesitate to contact us.

Respectfully submitted,

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[19] 87 Fed. Reg. at 21,391.
[20] *Id.* at 21, 352.