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Ms. Vanessa A. Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090 *Submitted Via Webform: https://www.sec.gov/*

Dear Ms. Countryman:

The American Fuel & Petrochemical Manufacturers ("AFPM") submits these comments on the U.S. Securities and Exchange Commission's ("SEC" or "Commission") proposed rule concerning The Enhancement and Standardization of Climate-Related Disclosures for Investors ("Proposed Rule").[1]

AFPM has serious concerns that the Proposed Rule oversteps the SEC's authority without express congressional direction. The materiality standard ensures the reliability and efficiency of U.S. securities markets, reflects an appropriate balance between First Amendment concerns and SEC's statutory mission to protect investors, and provides for disclosure of much of the information the Commission proposes to mandate with less cost and burden. The remaining proposed disclosures are either not material, outside the control of the registrant, and/or already required by another federal agency with primary authority and expertise on these issues. The Proposed Rule, and its departure from the longstanding materiality standard, is extraordinarily costly, burdensome and ultimately will inundate the average investor rather than achieve the SEC's goals. The SEC should adopt AFPM's recommendations below, which are intended to ensure mandated disclosure remains principles-based and centered around materiality, as Congress intended.

I. AFPM's Interest in the Proposed Rule.

AFPM is a national trade association representing the U.S. refining and petrochemical manufacturing industries. AFPM members support more than three million jobs, contribute to our economic and national security, and enable the production of thousands of vital products used by families and businesses throughout the U.S. AFPM's and its members' interests are directly affected by the Proposed Rule. Many of its members are publicly traded companies or own consolidated subsidiaries and equity affiliates subject to SEC regulation, and many are part of public companies' value chains that may be required to generate substantial additional information due to the Proposed Rule.

AFPM supports transparent and timely disclosure of information shareholders need to make sound investment and voting decisions. AFPM's publicly traded members regularly prepare filings and provide disclosures under Regulation S-K concerning relevant and material aspects of their financial performance and prospects, which may include environmental and climate-related risks and associated policies. Many members also discuss climate-related issues in voluntary fora, such as company web pages and sustainability reports. This information can enrich public discussion, but may not be legally required because it is not material to reasonable investors' investment or voting decisions.

[1] 87 Fed. Reg. 21,334 (Apr. 11, 2022).

AFPM is committed to developing sound policies that enable our members to supply the fuel and petrochemicals that growing global populations and economies need to thrive, and to do so in an environmentally sustainable manner. AFPM's comments should not be taken to express any view on the importance of climate change policies as a general matter, as such issues are the purview of Congress and other executive branch agencies and beyond the SEC's statutory authority, but rather as input on whether the Commission's rulemaking is the most appropriate way to protect investors and ensure market integrity.

II. The SEC Lacks Authority to Promulgate the Proposed Rule on Climate-Related Disclosure.

The disclosure system established under the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") (together, the "Acts") limits disclosure to financial and other essential company information to protect investors from fraud and deception. Under Regulation S-K, materiality is the cornerstone of this system. Materiality reflects this statutory mandate because investors are not protected by requiring disclosure of information for which there is not a substantial likelihood that a reasonable investor would consider important to their investment or voting decisions.

The Acts do not authorize the required disclosures in the Proposed Rule—disclosures with major economic and political significance that would contravene the Major Questions Doctrine. Construing the Acts to authorize these unprecedented disclosures would mean that the Acts unconstitutionally delegate unconstrained power to compel disclosure. Moreover, the Proposed Rule's requirements to discuss climate change would violate the First Amendment by compelling companies to express messages with which they disagree or on which they would rather remain silent—a core First Amendment prohibition. Given all these legal and constitutional infirmities, the SEC should withdraw the Proposed Rule.

A. The Proposed Rule Transgresses the Major Questions Doctrine and Principles of Nondelegation.

Regulation S-K already requires reporting of environmental and social issues that bear on a registrant's financial condition and prospects, including climate-related risks, if material.[2] Mandatory, extremely prescriptive and extensive reporting of climate-related information that is not material is far outside the bounds of anything the SEC has previously required.[3] The Proposed Rule would regulate disclosure of climate-related risk and greenhouse gas ("GHG") emissions. It would regulate new subject-matter on which the SEC lacks expertise and experience, seek to achieve a new objective not authorized by Congress, and radically expand disclosure obligations. Therefore, the authority claimed by the SEC raises a major question that only Congress can answer, not the SEC unilaterally.

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[2] *See* Section II.C., *infra*.

[3] *See generally* Vollmer, The SEC Lacks Legal Authority to Adopt Climate-Change Disclosure Rules, Mercatus Center (April 12, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20123525-279742.pdf' Am. Securities Ass'n, Comments on Proposed Enhancement and Standardization of Climate-Related Disclosures for Investors 1-4 (June 13, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20131037-300856.pdf.

In general, Congress must speak clearly on issues of major economic and political significance for an agency to lawfully regulate that issue.[4] When Congress has wanted prescriptive disclosure of a narrow category of non-material policy-relevant information about registrants, it has required it expressly, such as in Section 1502 of Dodd-Frank, which expressly required the SEC to issue a conflict minerals disclosure requirement.[5] When Congress desired emissions reporting, it specifically mandated it.[6] When Congress desired third party verified disclosures, it expressly authorized it.[7] But it did not expressly provide these authorities to the SEC here.[8]

The Proposed Rule seeks to regulate climate-related information, which is very different than financial information. This new subject matter lacks any clear limiting principle and impacts public companies as well as each company in their supply chain. This subject matter will require the SEC to address climate change science and economics, issues on which the SEC lacks expertise, experience, and knowledge,[9] unlike the SEC's traditional disclosure requirements centering around a registrant's financial performance and prospects. There is also an expert agency, the U.S. Environmental Protection Agency ("EPA"), that already regulates GHGs and requires disclosure of GHG emissions from large emitters using a different framework for calculating and reporting GHGs than what is contemplated by the Proposed Rule.[10] The Proposed Rule thereby second-guesses the expert agency and assumes the inadequacy of EPA's reporting, despite the SEC's own lack of expertise and experience, in moving to standardize disclosures EPA already standardized.

The Proposed Rule also seeks to achieve a new, extra-statutory objective: encouraging substantive business decisions, such as combating potential climate-related risks and transitioning to a zero-emissions economy.[11] The Proposed Rule would require extensive efforts not into opening previously unopened

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[4] *See Ala. Ass'n. of Realtors v. Dep't of Health & Human Svcs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

[5] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (codified at 15 U.S.C. §§ 78m(p), 78m note). *See also* note 35, *infra*.

[6] 42 U.S.C. § 7414. *Brown & Williamson*, 529 U.S. at 133.

[7] Vollmer, *supra* note 3, at 17; *id.* at 17 n. 94 (citing 15 U.S.C. § 77g(a)(1) sch. A(25)-(26); *id.* § 78m(a)(2); *id.* § 7262(b)).

[8] *See Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001). The SEC repeatedly agreed with this position. *See* 81 Fed. Reg. 23,916, 23,970 (Apr. 22, 2016); 40 Fed. Reg. 51,656, 51,657 (Nov. 6, 1975).

[9] *See King v. Burwell*, 576 U.S. 473, 486 (2015); *Gonzales v. Oregon*, 546 U.S. 243, 266-67 (2006).

[10] *See generally Int'l Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979) (ruling that ERISA abrogated the jurisdiction of the federal securities laws and the SEC's regulation).

[11] Exec. Order No. 14030 (May 20, 2021), 86 Fed. Reg. 27,967 (May 25, 2021) (discussing President's Biden's goal to create greater "disclosure of climate-related financial risk" in order to "act to mitigate that risk and its drivers" and "achieve our target of a net-zero emissions economy by no later than 2050"); FSOC, Report on Climate-Related Financial Risk (2021), https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf (discussing what it would take to implement Biden Administration commitment to reduce GHGs); 87 Fed. Reg. at 21337 n. 18, 21,425. Legislation paralleling the Proposed Rule confirms this clear intent. *See, e.g.,* Climate Risk Disclosure Act of 2021, H.R. 1187, 117th Cong. Section 402(8) (2021) ("[R]equiring companies to disclose climate-related risk exposure and

company books and records—the chief object of Regulation S-K and the Acts, which sought to make registrants' financial information transparent and prevent registrants from hiding their financial condition—but collecting information from third parties and developing new information and estimates not kept by the company, including consolidated subsidiaries and equity affiliates.[12] Clothing the Proposed Rule in traditional disclosure language cannot mask this intent.

Furthermore, the Proposed Rule would expand the size and scope of securities disclosure to an extent unseen since the Acts themselves. It would do so on a single subject-matter, threatening to overshadow information on which investors have traditionally relied to make investment decisions, such as financial statement information, core business information, directors and management, and descriptions of securities being sold. Recent Congressional enactments have sought to simplify Regulation S-K to reduce costs and burdens, recognizing that materiality is the essence of the SEC's statutory disclosure authority.[13]

In every respect, the Proposed Rule breaks new ground and imposes significant economic impacts. These impacts are not limited to public companies, as private companies, including innumerable small businesses, also are expected to face inquiries from many SEC-regulated customers because of the rules.

Conversely, the SEC's interpretation that the Acts permit the Proposed Rule relies on statutory grants of improper discretion, which violates principles of nondelegation. Whether registrants should be required to make voluminous, expensive disclosures concerning climate-related information is an important matter that only Congress can decide, not the SEC. If the SEC can require voluminous disclosure concerning potential climate-related risks by perfunctorily citing comparability and consistency, then the SEC has no limits on its disclosure authority at all.

B. <u>The SEC Lacks Statutory Authority to Finalize the Proposed Rule</u>.

The Acts do not provide the Commission an unbridled authority to compel information disclosure; rather, they provide limited disclosure authority on enumerated subject-matters necessary to protect investors.[14] Required disclosure of immaterial climate-related information is "incompatible" with the

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risk management strategies will encourage a smoother transition to a clean and renewable energy, low-emissions economy and guide capital allocation to mitigate, and adapt to, the effects of climate change.").

[12] *See* Vollmer, *supra* note 3, at 16.

[13] JOBS Act Section 108, Pub. L. No. 112-106, 126 Stat. 306 (2012) (requiring the SEC to determine how Regulation S-K could be modernized and simplified to reduce the costs and burdens of compliance for emerging growth companies); Fixing America's Surface Transportation Act, Pub. L. No. 114-94, Section 72002, 129 Stat. 1784, 1784 (Dec. 4, 2015) (ordering the SEC to revise Regulation S-K to reduce the disclosure burden on emerging growth companies and small issuers); *id.* at 72003, 129 Stat. 1784, 1785 (2015) (ordering the SEC to study how to simplify Regulation-S-K requirements "in a manner that reduces the costs and burdens on issuers while still providing all material information.").

[14] *See generally* Vollmer, *supra* note 3; *id.* at 10 n.55.

"substance of Congress' regulatory scheme."[15] The SEC's cursory reading of certain statutory provisions in isolation ignores the statutory context, failing to read the Acts as a harmonious whole.[16]

Section 13 of the Exchange Act provides that the SEC can prescribe information to be included in registrants' periodic reports to the extent "necessary and appropriate for the proper protection of investors and to insure fair dealing in the security."[17] Read together, the concern with protecting investors and ensuring fair dealing in securities evinces a concern with fraud and deception,[18] just like the anti-fraud and other provisions of the Acts. Because these provisions reflect the same concern, "materiality" is just as applicable to the Acts' disclosure provisions. Furthermore, the "necessary or appropriate language" must be read together with the entire provision, including Section 13(b)(1), which prescribes the subject-matter limitations on periodic reporting, namely, accounting items.[19]

Section 7 of the Securities Act provides that the SEC can require disclosure of information in registration statements that is "necessary or appropriate in the public interest or for the protection of investors."[20] Importantly, there is a specific schedule of 32 categories of information required to be in a registration statement, all of which concern essential financial and company information[21] and thus cabin the SEC's authority to subject matter of the same kind.[22] Likewise, Section 12 of the Exchange Act, which provides the procedure for registering securities,[23] provides disclosure authority limited to specific information categories, such as "the organization, financial structure, and nature of the business," "balance sheets," "profit and loss statements," and "any further financial statements which the Commission may deem necessary or appropriate for the protection of investors"[24]—in other words, "financial and essential company information."[25] In another provision, while the language refers to the public interest and "necessary or appropriate,"[26] it applies very narrowly (e.g., to broker or dealer registration applications[27]). Thus, these statutory authorities are constrained by specific subject-matter and other limitations.

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[15] *UARG v. EPA*, 573 U.S. 302, 322 (2014) (quoting *Brown & Williamson*, 529 U.S. at 156).
[16] *See Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989) (citing *United States* v. *Morton*, 467 U.S. 822, 828 (1984)); *UARG*, 573 U.S. at 321.
[17] 15 U.S.C. § 78m.
[18] *See* Barbarino, Gensler Says Climate Rule Part of SEC's Disclosure Mandate, Law360 (Mar. 31, 2022), https://www.law360.com/assetmanagement/articles/1478271 (SEC Chair Gensler describing the SEC's "backbone" as "disclosure and anti-fraud").
[19] Vollmer, *supra* note 3, at 9.
[20] 15 U.S.C. § 77g.
[21] *Id.* § 77aa.
[22] *Cf.* Scalia & Garner, Reading Law: The Interpretation of Legal Texts 195-198 (2012); *id.* at 199-213.
[23] 15 U.S.C. § 77l(b)(1).
[24] *Id.* § 77l(b)(1)(A), (J)-(L).
[25] Vollmer, *supra* note 3, at 9; *id.* ("The statute gives the SEC power to adopt rules governing the information a company must disclose, but this SEC rulemaking power is expressly limited to 13 categories of information and documents.").
[26] *See New York Stock Exch. LLC v. SEC*, 962 F.3d 541, 556 (D.C. Cir. 2020).
[27] 15 U.S.C. § 78o(b)(1).

The SEC's general rulemaking authorities offer no comfort to the SEC either. Section 19(a) of the Securities Act confers the SEC general rulemaking authority "as may be necessary to carry out the provisions of this subchapter,"[28] but this authority is necessarily cabined by the subject matter and other limitations in each Securities Act provision specified above, otherwise it would render those limitations superfluous.[29] Indeed, Section 19 enumerates several specific types of rules that can be promulgated under that provision, which solely involve financial information.[30] Likewise, the similarly-phrased general rulemaking provision of the Exchange Act[31] is necessarily cabined by the statutory context, i.e., the subject matter and other limitations in the other Exchange Act provisions specified above.

The SEC is further required to consider "whether the action will promote efficiency, competition, and capital formation"[32] and "shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this chapter."[33] These operate as additional limits, not independent grants of authority.

The statutory structure[34] demonstrates that the SEC's disclosure authority is limited to financially significant (i.e., *material*) matters[35]—to help protect investors against fraud and deception.[36]

Legislative history confirms that the SEC's disclosure authority is limited to essential financial and company information. Reports from the House of Representatives on the Acts discussed the purpose of disclosure requirements as to disclose "essential facts" and "items indispensable to any accurate judgment about the value of the security"—disclosure is "largely financial in nature" and the disclosure provisions

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[28] *Id.* § 77s(a).
[29] Scalia & Garner, *supra* note 22, at 174-179.
[30] 15 U.S.C. § 77s(a).
[31] *Id.* § 78w(a)(1).
[32] *Id.* § 77b(b) (Securities Act); *Id.* § 78c(f) (Exchange Act).
[33] *Id.* § 78w(a)(2).
[34] *See also* Section II.A., *supra* (explaining that when Congress wanted disclosure of controversial, immaterial information, Congress said so explicitly).
[35] *See* 40 Fed. Reg. at 51,658. And Congress's awareness of the concept of materiality does not defeat this reality, since materiality is recognized as an integral part of Exchange Act § 10, despite no reference to "material" or "materiality." *See generally* 15 U.S.C. § 78j. When Congress desired disclosure of information that was not financially significant, or single out a risk because it was publicly salient, it did so specifically. *See* 15 U.S.C. §§ 77aa (24) (utility contracts), 78m(p), 78m note (conflict minerals); 42 U.S.C. § 6383 (oil and natural gas accounting practices). Congress could hardly have long-acquiesced in the SEC's recent statutory implementations of the Acts under which the SEC required certain disclosures relating to human capital management, executive and non-executive compensation, related-party transactions, and asset-backed securities (which interpretations do not justify the Proposed Rule, in any event). Indeed, when Congress perceived a failure of federal agencies to carry out the Acts, it expressly criticized this failure and remedied the perceived deficiencies itself. *See* Fisch et al., Comments on Proposed Enhancement and Standardization of Climate-Related Disclosures for Investors 8-9 n. 35 (June 6, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20130354-297375.pdf (noting Congress's 1971 criticism of the Interstate Commerce Commission and 1976 repeal of an exemption and enactment of requirements for common carriers).
[36] Furthermore, Section 2 of the Exchange Act lists specific dangers establishing "necessity for regulation," all of which are premised upon protecting investors from fraud and deception. 15 U.S.C. § 78b.

were not intended to give the SEC "unconfined authority to elicit any information whatsoever" because that "would lead to evasions, laxities, and powerful demands for administrative discriminations."[37] This also comports with the SEC's historical understanding, explained in Section II.C.

C. The SEC's Approach to Disclosure Has Been Materiality-Centric, Principles-Based, and Registrant-Specific.

Materiality is the "cornerstone" of the SEC's disclosure system, as the SEC has recognized.[38] The SEC departs from its longstanding approach without acknowledgment or providing good reasons for the changes.[39]

Regulation S-K already requires reporting of environmental and social issues that bear on a registrant's financial condition and business prospects, including some that relate to material climate-related risks. In its 2010 Climate Change Guidance, the Commission identified the key disclosure requirements in Regulation S-K that relate to climate change: Items 101, 103, 105 and 303. Regulation S-K is fundamentally based in materiality, and such materiality determinations depend on each registrant's individual circumstances. Regulation S-K thus acknowledges registrants' diversity and the diverse risks they face—a risk that is material for one registrant may not be material for another. That accords with the SEC's historical "principles-based, registrant-specific approach to disclosure."[40]

Some regulations require disclosing non-material information, such as some executive compensation information,[41] but these requirements stem from specific statutory commands, such as Sarbanes-Oxley and Dodd-Frank.[42] Agencies are creatures of statute,[43] and even repeated exercises of extra-statutory authority do not justify further excesses. Moreover, these requirements to disclose non-material information fundamentally differ from the Proposed Rule's requirements. The Proposed Rule's requirements are far costlier and more burdensome, are not essential financial and other company information, and are unrelated to protecting investors through "oversight of directors' fiduciary duties and loyalty to shareholder interests."[44] And for some, such as the Code of Ethics disclosure requirement, this information is not

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[37] H.R. Rep. No. 73-85, at 3, 7, 18-19 (1933); H.R. Rep. No. 73-1383, at 23 (1934). Similarly, periodic reports required disclosure of financial and accounting information "to give some assurance that reports will not hide the true condition of the company." H.R. Rep. No. 73-1383, at 11-13, 24 (1934).

[38] *See* U.S. Securities and Exchange Commission, Proposed Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,915, 23,924 (Apr. 22, 2016) (hereinafter "2016 Concept Release") (citing *Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission,* Cmte. Print 95-29, House Cmte. On Interstate and Foreign Commerce, 95th Cong., 1st. Sess. (Nov. 3, 1977)); 85 Fed. Reg. 63,726, 63,727, 63,729 (Oct. 8, 2020).

[39] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[40] 85 Fed. Reg. at 63,727/2; *id.* at 63,737/2, 63,740. *See also* Am. Securities Ass'n, *supra* note 3, at 4-6.

[41] *See, e.g.,* Fisch, Letter to Chair Gary Gensler, at 13-14 text and accompanying notes (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8911728-244385.pdf.

[42] 2016 Concept Release, *supra* note 38, at 23,922.

[43] *NFIB v. DOL*, 142 S. Ct. 661, 665 (2022) (per curiam).

[44] Fisch, *supra* note 41, at 13.

required to be filed with the SEC; registrants may post the Code of Ethics to their website and need only explain in their reports whether they have a Code of Ethics and if not, why.

The SEC's approach contradicts its recent modernization of Regulation S-K disclosure, which focused on improving disclosure by making it "tailored to reflect registrants' particular circumstances, and reduce disclosure costs and burdens."[45] The SEC specifically rejected a commenter's climate-related proposal because it was not "principles-based."[46] Its amendments also sought to "reduce the disclosure of generic risk factors and potentially shorten the length of the risk factor discussion, to the benefit of both investors and registrants."[47]

This accords with earlier SEC forays addressing its disclosure authority. The SEC has historically recognized "that its authority was limited to contexts related to the objectives of the federal securities laws. And these laws, in the Commission's view, were designed generally to require disclosure of financial information in the narrow sense only."[48] Rejecting a comprehensive environmental and equal employment practices disclosure proposal, the SEC recognized that requiring disclosure of such "social matters" would "singl[e] out" these causes from a "bewildering array of special causes" despite "no distinguishing feature which would justify" it.[49] Moreover, the SEC explained that if the relevant information "is as significant as . . . contend[ed], then its disclosure is already required under existing rules" governed by materiality.[50]

The Proposed Rule clearly and significantly departs from the SEC's past practice of limiting disclosure requirements to material information. It also departs from past practice of limiting information disclosure to information and operations within the registrant's control, such as by including Scope 2 and Scope 3 GHG emission requirements and risks to a registrant's supply chain.

D. The Proposed Rule Violates the First Amendment.

The Proposed Rule violates the First Amendment's compelled-speech doctrine, which holds that the government generally cannot compel individuals or companies to express specific content.[51] The SEC's proposal violates the First Amendment because it is not appropriately tailored, would not materially reduce the alleged harms cited by the SEC, and compels speech on matters not purely factual and uncontroversial.[52]

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[45] 85 Fed. Reg. at 63,727/3. *See also, e.g., id.* at 63,729, 63,747, 63,754.
[46] *Id.* at 63,734.
[47] *Id.* at 63,740/3.
[48] *NRDC v. SEC*, 606 F.2d 1031, 1039 (D.C. Cir. 1979); 40 Fed. Reg. 51,656, 51,658 to 51,539 (Nov. 6, 1975).
[49] 40 Fed. Reg. at 51,666; *id.* (recognizing such immaterial disclosure would make disclosure "unmanageable").
[50] *NRDC*, 606 F.2d at 1061.
[51] *See Pacific Gas & Elec. Co. v. Pub. Util. Com.*, 475 U.S. 1, 16 (1986).
[52] *See Nat'l Ass'n of Mfrs. v. Securities & Exchange Comm'n*, 748 F.3d 359, 370-71 (2014) ("*NAM I*"); *Nat'l Ass'n of Mfrs. v. Securities & Exchange Comm'n*, 800 F.3d 518, 523-24, 527 (2015) ("*NAM II*"). Ostensible securities disclosure regulations do not receive relaxed scrutiny. *See NAM I*, 748 F.3d at 371. *Cf. Citizens United v. FEC*, 558 U.S. 310, 342-43 (rejecting the argument that the political speech of corporations or other associations should be treated differently under the First Amendment); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 461 (1958) (describing freedom of "speech, press, or association" as "indispensable liberties").

The SEC has failed to show that the numerous other options available to it—and that burden speech (as well as registrants) to a lesser degree—are insufficient to protect investors. Regulation S-K already requires the reporting of environmental and social issues that bear on a registrant's financial condition and business prospects, including material climate-related risks.[53] And there are many other more narrowly tailored options available to the SEC, such as, among others, (1) voluntary disclosure through sustainability reports, (2) updating its 2010 guidance to promote more uniform reporting, (3) furnishing the information required under the Proposed Rule, (4) providing more complete safe harbors, (5) publishing climate-related information itself without coopting registrants,[54] (6) relying on higher level descriptions of risk, (7) not requiring disaggregated impacts on financial statement and expenditure metrics given all the other information required under the Proposed Rule, (8) requiring registrants to rely on published emission factors for Scope 3 disclosure; or (9) prescribing specific methods for calculating GHG emissions without mandating disclosure.

Additionally, the Proposed Rule's requirements would chill speech. For example, forcing disclosure of the numerous subjects currently kept privately by registrants to the extent they have them discourages registrants from doing those activities—e.g., making climate or Scope 3 goals and developing transition plans, carbon pricing, and scenario analyses. Furthermore, due to the global nature and complexity of operations of many SEC registrants, the problems highlighted herein would be compounded for registrants who own consolidated subsidiaries and equity affiliates.

The SEC simply has not demonstrated that requiring disclosure of non-material climate-related information will directly and materially protect investors or promote efficiency, capital formation, and competition,[55] and any such benefits are "entirely unproven and rests on pure speculation."[56] Investors cited by the SEC are not claiming that they're being defrauded or deceived in the absence of these disclosures.[57] The SEC has not even attempted to quantify the purported benefits of the regulation,[58] and it frequently describes the benefits as possibilities rather than certainties.

The Proposed Rule's requirements would force registrants to make numerous statements related to climate change, such as how they contribute to, adapt, or mitigate climate change and related risks,[59] which

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[53] See Section II.C., *supra*.
[54] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2376 (2018); *NAM II*, 800 F.3d at 530.
[55] *See* Section III, *infra*.
[56] *NAM II*, 800 F.3d at 525.
[57] *See* Section III.A., *infra*.
[58] *See NAM II*, 800 F.3d at 526.
[59] *See, e.g.,* Why Rebel? Extinction Rebellion, https://rebellion.global/why-rebel/ (last visited May 4, 2022). Activists known as valve turners illegally shut off oil pipelines because pipelines are perceived as causing climate change. *See* Flatt, Washington 'Valve Turner' Activist Sentenced to Prison, OPB (Feb. 6, 2018), https://www.opb.org/news/article/washington-valve-turner-activist-sentenced-to-prison/. Additionally, in 2021, a Swedish lecturer and author published HOW TO BLOW UP A PIPELINE: LEARNING TO FIGHT IN A WORLD ON FIRE. When discussing the book, the author advocated for "destroying machines [and] property associated with

would not involve purely factual, uncontroversial speech.[60] The government does not need apply a label analogous to "DRC conflict free"[61] to achieve the same object with respect to climate change. Even if the information is factual, the clear intent and likely result of the Proposed Rule is to discourage investment in fossil fuel companies.[62] After all, the Proposed Rule one-sidedly[63] ignores many non-weather-related risks associated with energy transition activities, such as how increased electrification in some industries may lead to grid instability, potential increases in blackout volatility, and heightened susceptibility to cybersecurity risks. Likewise, the SEC's one-sided prescriptive approach downplays the risks associated with dependency of a company's (1) product inputs from countries without the U.S.'s strong environmental record and standards, such as the dependency of electric vehicles ("EV") and non-fossil fuel energy on China for minerals, and (2) revenue on government subsidies and future transition-related regulation.[64]

In sum, the SEC crafted the Proposed Rule elicit voluminous disclosures designed to force companies to make remarks about their operations the public will perceive as disparaging, in the guise of investor protection. This is compelled speech on a controversial subject-matter that violates the First Amendment.[65]

III. The Proposed Rule is Unnecessary, Unreasonable, and Unduly Burdensome, Without Benefit to Investors or the Public.

The Proposed Rule is not only unlawful and unconstitutional,[66] it is unnecessary, unreasonable, and unduly burdensome, and will not materially benefit investors or the public.

A. <u>The SEC has not demonstrated a need for its Proposed Rule</u>.

AFPM supports consistent, reliable disclosure of the information elicited under current regulations, including climate-related information. Although the Proposed Rule purports to respond to investor demand for more consistent and reliable climate-related disclosures, the Proposed Rule actually will create substantial compliance costs and burdens, without achieving these ends. Because existing regulations

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fossil fuel infrastructure as part of a campaign of "intelligent sabotage," and explained that "property can be destroyed in all manner of ways or it can be neutralized . . . in a more spectacular fashion as in potentially blowing up a pipeline that is under construction." David Remnick, Podcast: Should The Climate Movement Embrace Sabotage? The New Yorker (Sept. 24, 2021), https://bit.ly/3B7OLeh.

[60] *See NAM II*, 800 F.3d at 530.

[61] *See Id.* at 528 (involving a "DRC conflict free" label).

[62] *See NAACP*, 357 U.S. at 462-63. Given these impacts, the Proposed Rule also violates the First Amendment associational rights of a corporation and their investors. *See Stuart v. Camnitz*, 774 F.3d 238, 245-46 (4th Cir. 2014), *cert. denied*, Walker-McGill v. Stuart, 135 S. Ct. 2838, 2838 (2015).

[63] *See* Cunningham et al., Comment on Proposed Enhancement and Standardization of Climate-Related Disclosures for Investors 20 (Apr. 25, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf (noting that the Proposed Rule heavily cites environmental groups, climate advocacy groups, and non-U.S. entities).

[64] *Id.* at 10 ("The SEC must articulate a reasoned . . . basis to distinguish climate change not only from financial reporting but also from the myriad other risks businesses face, such as war, pandemic, monetary policy or social and political concerns such as transacting with companies in China or Russia.").

[65] *See generally NAM I*; *NAM II*.

[66] *See* Section II, *supra*. Nothing in the foregoing is intended to suggest that the Proposed Rule's requirements, or the less burdensome or more preferable alternatives suggested below, are lawful or constitutional.

already elicit information concerning climate-related risks, any potential benefits from additional disclosure of non-material climate-related information are miniscule, at best, and would accrue to a small subset of influential stakeholders, rather than Main Street investors.[67] The Proposed Rule is a solution in search of a problem. Materiality has protected investors for decades, and its flexibility ensures that it will continue to do so for many decades more. As such, the SEC should not finalize the Proposed Rule.

Materiality springs from the reasonable investor's need to make informed investment or voting decisions. The SEC assumes that those demanding climate-related information are equivalent to the reasonable investor.[68] Although the largest investors and most-specialized funds may desire very granular disclosures from registrants on climate-related topics, the reasonable investor does not need this information because they do not pursue extreme diversification strategies that consider extremely granular information such as the Zip Code of companies' assets (as would be required by the Proposed Rule).[69] Additionally, the reasonable investor in a publicly-traded refining company already understands that the company produces transportation fuels that produce CO_2 when combusted. Other investors wishing to pursue a strategy based around climate-related topics are free to engage current or prospective investees for this information or pay a premium to obtain this information from third parties, as they do now.

Even if those calling for increased ESG disclosure[70] were equivalent to the reasonable investor, the SEC improperly conflates some investors' desire for climate-related information with all investors' need for climate-related information *because it is material to their investment or voting decisions*. Investors[71] run the gamut from workers with pensions or 401(k)s to institutional investors or funds. For social and

[67] Cunningham, *supra* note 63, at 3, 16. The SEC has provided no evidence that Main Street investors care about ESG investing, let alone that they rely on ESG ratings. The study the SEC cites only provides a model of such a hypothetical investor. *See* 87 Fed. Reg. at 21,429 n.845. In fact, evidence points the other direction. *See* Cunningham, *supra* note 63, at 6, notes 20-21; Verret, *supra* note 67, at 8-9. Ironically, the study the SEC cites as evidence that "climate risk is one of the most prominent issues driving their investment decisions" shows a *negative* impact on stock prices from mandatory disclosure, which the SEC characterizes as "associated with aggregate stock price movement." 87 Fed. Reg. at 21,429; *id.* n. 848. The SEC also never rationally connects demand with a stock price impact, which is necessary to demonstrate materiality. *See* Verret, Comments on Proposed Enhancement and Standardization of Climate-Related Disclosures for Investors 10, https://www.sec.gov/comments/s7-10-22/s71022-20130713-299599.pdf.

[68] *See* Mahoney & Mahoney, The New Separation of Ownership and Control: Institutional Investors and ESG, 2021 Colum. Bus. L. Rev, 839, 844, 851-56, 850-66 (2022); Cunningham, *supra note* 63, at 3-5, 7-8; Verret, *supra* note 67, at 8; *Business Roundtable v. SEC*, 647 F.3d 1144, 1152 (D.C. Cir. 2011).

[69] *See* Mahoney, *supra* note 68, at 854-56.

[70] Importantly, the SEC frequently refers to information suggesting support for greater ESG disclosure, which does not tell us the number, direction, or intensity of the desire for climate-related information specifically. *See* Cunningham, *supra* note 63 at 2.

[71] "Investors" is used loosely here, and includes those who invest their own funds and those who help invest funds of others or for the benefit of others. However, the Acts are intended to protect those who benefit from the investments—i.e., those who invest, or charge others with investing, their funds—not all those whose who make investment decisions. *See Id.* at 2, 5-7.

policy reasons, investors and other stakeholders may desire climate-related disclosure.[72] But advancing the current U.S. presidential administration's social or policy goals is not the SEC's role.

Some investors calling for disclosure have an incentive to ask for mandated disclosure to socialize the cost of obtaining this information on all investors,[73] rather than pay a premium for more specialized information.[74] In the end, these investors and other special interests are demanding a subsidy at the expense of most Main Street investors[75] and, ultimately, consumers at a time of high inflation. This demand does not demonstrate that investors need protection or that there are information asymmetries in need of remedy.[76] And since the Proposed Rule increases the costs of registration, companies are less likely to become or remain public, which further benefits large and influential investors who have much greater access to private market investment opportunities than the ordinary investor, who lacks such access.[77] By imposing greater barriers to entry, the Proposed Rule undermines competition.

The Proposed Rule largely assumes that greater disclosure is necessarily desirable. But there are real world compliance and information costs. Requiring disclosure of non-material information can increase investors' information search costs, resulting in reduced efficiency of investment decision making.[78] The SEC mistakenly assumes that information asymmetries are always indicative of market failures that need

[72] Indeed, one study found that for nearly all shareholder climate-change proposals they examined, there was "no statistical basis to conclude the shareholder proposals had any effect on the company share price." FTI Consulting, Comment on Proposed Enhancement and Standardization of Climate-Related Disclosures for Investors, https://www.sec.gov/comments/s7-10-22/s71022-20123592-279832.pdf. *See also* Aubry et al., ESG Investing and Public Pensions: An Update, Boston College Center for Retirement Research (2020) ("The evidence suggests, however, that social investing: 1) yields lower returns; and 2) is not effective at achieving social goals.").

[73] There are around 180 million investors, and those demanding climate-related information tend to invest others' funds, rather than their own. Stock Market, Gallup https://news.gallup.com/poll/1711/stock-market.aspx (last visited May 4, 2022) (polling indicating 55% of Americans own stock); U.S. and World Population Clock (May 4, 2022), https://www.census.gov/popclock/ (U.S. population is estimated in the low 330 millions). As such, if the SEC intends to rely on investor interest as the basis for the Proposed Rule, it should provide estimates of extent of investor interest, as the SEC has done previously, see 40 Fed. Reg. at 51,663/3—specifically, Main Street investor interest—disaggregated for each major requirement of the proposed rule, rather than aggregating all those with some interest in greater disclosure together, which inflates the investor "consensus" for the disclosures. The dollar amount managed by asset managers or invested on behalf of others should not be used as a proxy for assessing the desires of a large number of disaggregated Main Street investors and beneficial owners.

[74] *See, e.g.,* Office of the Illinois State Treasurer, Comments on Proposed Enhancement and Standardization of Climate-Related Disclosures for Investors (May 31, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20129966-296444.pdf (explaining their "direct cost-savings" under the Proposed Rule from avoiding "spen[ding] on specialty databases and service providers"); Davis Polk & Wardwell LLP, Comments on Proposed Enhancement and Standardization of Climate-Related Disclosures for Investors 11 (June 9, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20130934-300028.pdf.

[75] What We Do, U.S. Securities and Exchange Commission, https://www.sec.gov/about/what-we-do (last update November 22, 2021) (mission includes "protecting Main Street" investors). *See* Cunningham, *supra* note 63, at 6 (citing Austin Moss et al., The Irrelevance of ESG Disclosure to Retail Investors: Evidence from Robinhood (2020), https://www.sec.gov/comments/climate-disclosure/cll12-8846307-238327.pdf).

[76] *See* 40 Fed. Reg. at 51,660/1.

[77] Mahoney, *supra* note 68, at 845, 873; Greene et al., The Need for a Comprehensive Approach to Capital Markets Regulation, 2021 Colum. Bus. L. Rev. 714, 742 (decline in public companies).

[78] 85 Fed. Reg. at 63,754/3.

to be remedied. In fact, information asymmetries are a fundamental feature of all real-world markets, and it could not be otherwise, for information is costly. Doctors know more about medicine than patients, lawyers know more law than clients, car dealerships know more about cars than car purchasers, and registrants know more about their business than investors.[79] The materiality requirement, in recognition of this, does not pursue the incredibly costly goal of putting investors in information parity with registrants or fulfilling each investor's idiosyncratic informational desires.[80] Instead, it seeks to avoid inundating investors with information they do not need or over saturating them with more information than they can digest.[81] It does this by having issuers determine materiality, since issuers have the significant advantage of knowing their business better than investors and the SEC.

The trend toward voluntary disclosure demonstrates that when investors demand information, the market will oblige. Sustainability reports supplement information registrants already disclose in their SEC filings; this supplementation provides information that is easier to digest and serves both investors and non-investor stakeholders' desire for this information for social, policy, or other non-investment or voting reasons.

The Proposed Rule assumes that Regulation S-K, and thus materiality, is inadequate to protect investors. The SEC asserts that registrants have made varying amounts of disclosures with inconsistent levels of detail.[82] However, the SEC ignores that this could simply reflect that registrants face vastly different levels and types of environmental and climate-related risks and opportunities to innovate—as they in fact do. Uneven climate-related risk distribution *supports* the existing regime of issuer-determined, principles-based disclosure. Moreover, many of the more substantial potential climate-related risks that are purported to be associated with climate change are predicted to occur decades in the future, with the result that their discounted present value is often too small for the reasonable investor to consider important in their investment decisions. The materiality standard avoids unnecessary, prescriptive speculation on these matters that exposes registrants to litigation risk investors' detriment.

Additionally, the Proposed Rule fails to clearly delineate the SEC's rationale for requiring mandatory climate-related disclosure and the relationship to materiality. While the Proposed Rule in most cases lacks materiality thresholds, Chair Gensler has claimed that "the design of the proposal is consistent with ... concepts of . . . materiality" and that it is "guided by the concept of materiality" and "build[s] on that long

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[79] In other words, asymmetric information arises from the division of labor and specialization, which are fundamental to real-world markets. *See generally* DiLorenzo, A Note on the Canard of "Asymmetric Information" as a Source of Market Failure, 14 QJAE 249 (2011).
[80] *See* 40 Fed. Reg. at 51,659/3.
[81] *See id.* at 51,660/1. *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976).
[82] Commissioner Lee also cites agency costs between managers and investors for the failure to disclose such information, but fails to recognize agency costs apply equally to those supporting mandatory climate disclosure. *See* SEC Commissioner Allison Herren Lee, Living in a Material World: Myths and Misconceptions about "Materiality," https://www.sec.gov/news/speech/lee-living-material-world-052421 (Myth #2).

tradition."[83] If the SEC adopts requirements from the Proposed Rule, it should clarify whether it believes the information mandated under each requirement is material. In many cases, this would mean clarifying that the SEC is requiring the disclosures even though the information is not material. Both lack of clarity and clearly erroneous SEC judgments of materiality risk clouding this concept, which has guided securities law for decades.[84]

The Proposed Rule will undermine efficiency, capital formation, and competition. The Proposed Rule is designed to move the market away from registrants that extract, manufacture, sell, and use fossil fuels.[85] But energy markets are global, and any shift away from domestic fossil fuel extraction and manufacturing will shift investment to nations that lack the same environmental standards, efficiency, and burdensome disclosure regime, resulting in greater GHG emissions (and thus climate-related risk), and undermining U.S. capital formation and registrant competitiveness. [86] Furthermore, the Proposed Rule will increase the relative costs of being or becoming a publicly traded company.[87] The costs and burdens imposed by the Proposed Rule are immense—few companies are confident they have the technology and staffing to provide this kind of information,[88] meaning the Proposed Rule has significant opportunity costs.

The Proposed Rule is also likely to lead to inconsistent and incomparable disclosure.[89] Investors will have to sift through numerous disclosures and footnotes by each issuer before understanding the extent to which climate disclosures compare to their competitors—a prerequisite to ensuring an apples-to-apples comparison. Investors who fail to understand this are likely to be misled by the disclosures and assume they are comparable between issuers. And few investors, even if they had the time, will be able to do this.

B. The SEC Should Not Require Filing of Non-Material Climate-Related Disclosures.

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[83] Chair Gary Gensler, "Building Upon a Long Tradition" – Remarks before the Ceres Investor Briefing (Apr. 12, 2022), https://www.sec.gov/news/speech/gensler-remarks-ceres-investor-briefing-041222. *See also* Chair Gary Gensler, Statement on Proposed Mandatory Climate Risk Disclosures (Mar. 21, 2022), https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321.

[84] *See* Katz & McIntosh, Comments on Request for Public Input on Climate Change Disclosures, Wachtell, Lipton, Rosen & Katz (June 15, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8944064-245710.pdf.

[85] *See supra* note 11.

[86] *See* Business Roundtable, The Materiality Standard for Public Company Disclosure: Maintain What Works 10 (Oct. 29, 2015) (explaining how the high costs of compliance with Dodd-Frank's conflict minerals rule led to companies foregoing business in the Democratic Republic of the Congo).

[87] SEC Chairman Jay Clayton, Remarks at the Economic Club of New York (July 12, 2017), https://www.sec.gov/news/speech/remarks-economic-club-new-york (decline in U.S. listed public companies). To the extent the Proposed Rule seeks to mitigate climate change, these same features undermine that goal by shifting investment to countries without the same efficiency and pollution control standards, as well as discouraging companies with emerging technologies from going public.

[88] Deloitte, ESG executive survey: Preparing for high-quality disclosures at 10, 13 (Mar. 2022), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/audit/us-esg-preparedness-disclosures-reporting-requirements.pdf.

[89] While the Proposed Rule would be unjustifiably burdensome without these flexibilities, the SEC improperly assumes disclosures will be comparable.

Requiring "filing" of the Proposed Rule's non-material climate-related disclosures is unnecessary to ensure the reliability of certain climate-related disclosures, and inadequate to ensure sufficiently reliable disclosures of others. This filing requirement also imposes unnecessary litigation and enforcement risks on registrants without protecting investors. Therefore, the SEC should not require filing of non-material climate-related disclosures.

The SEC claims that requiring filing of climate-related disclosures (1) will improve reliability through the threat of legal liability and enforcement, and (2) would not rely on third party information because most of the information it proposes to require registrants to disclose involves the company's own analysis. Both claims are wrong.

A filing requirement is unlikely to improve reliability and benefit investors more than a furnishing requirement. Furnished information also is subject to several statutory sources of liability under the Acts and SEC enforcement. There will not be any incremental net benefit from additional sources of liability from filing, especially for immaterial information on which investors do not rely and which in many cases is not controllable by the registrant.

Filing is inappropriate because much of the information the SEC is proposing to require relies on third party information, analyses based on third-party information, or speculation and assumptions. This makes these disclosures unlike typical financial disclosures and ill-suited to a filing requirement. The greater a disclosure's reliance on third-party information, the less control the registrant has over the accuracy. And there is no advantage to comparability if the underlying information is less reliable. If anything, the illusion of comparability undermines rather than promotes investor protection. Requiring registrants to file incomparable climate related information is also contradictory to the premise behind the SEC's non-GAAP disclosure rules.

At the very least, the SEC should consider allowing furnishing for the disclosures that rely more on estimates, assumptions, and third-party information, such as Scope 2 and 3 emissions, carbon pricing, scenario analysis, and impacts on financial statement and expenditure metrics.

The SEC should also consider providing for disclosure of climate-related information in a separate report that is furnished and on a different cycle than periodic reports. For example, the SEC could provide for disclosure in a report submitted when companies report GHG emissions under EPA's Greenhouse Gas Reporting Program ("GHGRP"), following the completion of EPA's annual quality assurance reviews of the filings. There is no need for climate-related reporting to occur at the same time as other reporting, as this information does not have an acute impact requiring real-time reporting to investors, unlike financial information. Different timing would reduce the strain on registrant resources without affecting the information's comparability or reliability.

C. Regulation S-K Amendments.

1. Strategy, Business Model, and Outlook.

i. *Material Climate-Related Risks*.

Registrants should not be required to discuss material climate-related risks quantitatively. The SEC should specify that a narrative, qualitative discussion satisfies a registrant's obligation to disclose their material climate-related risks. The SEC's specification in Proposed 17 C.F.R. § 229.1502(d) of a "narrative discussion," while referring elsewhere to "qualitative" disclosures, creates the risk that a quantitative disclosure may be required to satisfy 229.1502(d). A quantitative discussion, especially over the medium and long term, would create problems regarding unreliability and inherently speculative calculation.[90]

ii. *Physical Risks*.

Several of the SEC's specific requirements concerning material physical risks are overly prescriptive, including the requirement to disclose the location and zip codes of assets.[91] Few, if any, investors are making investment decisions based on the Zip code of a registrant's assets facing material risks. Moreover, some registrants have assets located in hundreds of ZIP codes (e.g., pipeline companies), and the benefits to investors of disclosing this information are dubious, at best.

The SEC has not justified singling out risks relating to flooding and high water stress for detailed prescriptive disclosures, which dilutes the importance of other material information. Moreover, flood risk information and high water stress risks are not comparable within a firm, across sectors, and across regions of the country, so investors are unlikely to make investment decisions based on this information.

Without clarifying the SEC's definitions of physical risk, registrants are likely to disclose information that is not comparable as they struggle to address the widespread and varied types of physical risk and determine whether the risks are acute or chronic, even though physical risks need not be acute or chronic.

iii. *Short, Medium, and Long-Term Risks; Transition Risk*.

The Proposed Rule requires registrants to "[d]escribe any climate-related risks reasonably likely to have a material impact on the registrant, including on its business or consolidated financial statements, which may manifest over the short, medium, and long term."[92] The SEC's failure to define short, medium, and long term creates significant uncertainty and litigation risk for registrants. Given that most climate change-related impacts are predicted to occur decades in the future, the lack of clarity creates legal risk that medium term could mean 2050 and long term means 2100. It strains credulity that such a long time horizon is

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[90] *See* Basel Committee on Banking Supervision, Climate-Related Financial Risks—Measurement Methodologies, at 17 (April 2021), https://www.bis.org/bcbs/publ/d518.pdf ("[T]he range of impact uncertainties, time horizon inconsistencies, and limitations in the availability of historical data on the relationship of climate to traditional financial risks, in addition to a limited ability of the past to act as a guide for future developments, render climate risk measurement complex and its outputs *less reliable* as risk estimators." (emphasis added)). AFPM has the same concerns with these requirements as the Regulation S-X amendments, which are provided in Section III.D.
[91] Proposed 17 C.F.R. § 229.1500(k) (defining "Location" as "a ZIP code…").
[92] *Id.* § 229.1502(a).

reasonably foreseeable, particularly within a constantly and rapidly changing investment landscape.[93] Applied together with the broad and uncertain definition of transition risk, which includes undefined and unpredictable "policy risk," registrants are invited to speculate about uncertain and contingent risks occurring decades in the future.[94] This raises vexing questions about how to analyze when such risks are material, as well as the burden involved in analyzing transition risk in many jurisdictions over an unreasonably long time horizon. The resulting disclosures are unlikely to be comparable, particularly if registrants choose different time horizons.

More fundamentally, the SEC cannot assume the existence of material transition risk for all registrants. Just as the SEC cannot assume that registrants face material transition risks from GHG emissions,[95] it cannot assume that registrants face material transition risk from decreased product demand, given that under current laws the U.S. government expects fossil fuel consumption to increase.[96] But the Proposed Rule appears to speculate that registrants face a material transition risk from these types of circumstances despite not demonstrating that these risks are likely to materialize or entail "present financial consequences."[97]

2. Scopes 1, 2, and 3 GHG Emissions.

The Proposed Rule's mandate to disclose Scopes 1, 2, and 3 GHG emissions suffers from several flaws.

This disclosure is inconsistent with the SEC's authority under the Acts, which are centered around disclosure of essential financial and company information. Requiring disclosure of immaterial, non-financial information flouts this limit.[98]

The SEC cannot assume that GHG emissions are material in the absence of a law, regulation, or judicial decision imposing material financial consequences on GHG emissions.[99] Some jurisdictions do so, most do not. After over a decade of debate, neither a carbon tax nor cap and trade are U.S. law. Moreover, after years of litigation, no U.S. court has held energy companies liable for the emissions resulting from combustion of their products. Even if these laws were enacted, many registrants would not face material

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[93] As one commenter states, "[v]aluation professional rarely create [Discounted Cash Flow] models that stretch beyond 5 to 10 years into the future. This is because estimates of expenses or revenues beyond that timeframe are highly unreliable." Verret, *supra* note 67, at 15.

[94] As stated by another commenter, "[t]he SEC's justification for the disclosure is that governments, regulators, or consumers might take action against GHG emissions that might cause a negative financial effect at the company that might be significant to a reasonable investor." Vollmer, *supra* note 3, at 16. *See also* Davis Polk, *supra* note 74, at 11 ("Transition risk . . . would result in intense speculation."). For additional criticism of transition risks, see Sections III.C.2, III.D.1.

[95] *See* Section III.C.2, *infra*.

[96] U.S. Energy Information Administration, Annual Energy Outlook 2022 (March 3, 2022) https://www.eia.gov/outlooks/aeo/pdf/AEO2022_ChartLibrary_full.pdf.

[97] *See, e.g.,* 87 Fed. Reg. at 21,336-7 (citing, inter alia, a Financial Stability Oversight Council report discussing transition risk from a "Clean Electricity Standard" and "public commitments" of "governments around the world").

[98] Because the SEC appears to treat Scope 3 disclosure as a default presumption, particularly for oil and gas manufacturers, materiality is improperly presumed for Scope 3 emissions like it is for Scope 1 and 2.

[99] *See* Verret, *supra* note 67, at 12 (questioning the application of materiality to GHG emissions).

consequences because they have low direct or indirect emissions. In reality, these GHG emissions are authorized under the thousands of federal, state, and local government statutes, regulations, ordinances, and policies permitting these activities for stationary sources, area sources, and mobile sources. Fundamentally, the Proposed Rule never rationally connects GHG emissions to registrants' financial prospects, especially Scope 2 and 3 emissions that are outside registrants' control. By effectively deeming these risks material for all companies nonetheless, the SEC is ultimately requiring disclosure of risks created by the SEC itself.

Scopes 1, 2, and 3 emissions calculations rely on third party information and emission factors. Particularly for Scope 3, which relies on this heavily, a disclosure requirement will layer a false veneer of reliability and comparability on information that is not as comparable or reliable as financial information. While an activist investor may desire this information, the reasonable investor would not rely on a Scope 3 emissions metric as an important factor in their investment decision. Furthermore, since emission factors are developed by third parties and exist in the public domain or can otherwise be acquired, investors can develop or obtain emissions estimates themselves.[100] The SEC has not demonstrated that registrants have a sufficient informational or other advantage relative to such providers to justify disclosure.

The GHG emissions requirement is both duplicative and confusing. It is duplicative, because it requires disclosure of a registrant's Scope 1 emissions, even though such information is regularly reported under the EPA GHGRP and made publicly available. Furthermore, under Subpart MM of the EPA's GHGRP "[s]uppliers of petroleum products must report the CO2 emissions that would result from the complete combustion or oxidation of each petroleum product and natural gas liquid produced, used as feedstock, imported, or exported during the calendar year" and "refiners must report CO2 emissions that would result from the complete combustion or oxidation of any biomass co-processed with petroleum feedstocks."[101] As a result, suppliers of petroleum products and refiners already report many GHG emissions that would fall into Scope 3. Therefore, the Proposed Rule's GHG disclosure requirements will not benefit investors or remedy information asymmetries. Indeed, to the extent that existing requirements or the Proposed Rule's requirements concerning policy risk require disclosure of these risks, GHG emissions disclosure requirements are duplicative since GHG emissions disclosure is premised on transition risk.

Additionally, investors may be confused by the Proposed Rule's Scope 1 GHG disclosures, since they differ from EPA's GHGRP. For example, the Proposed Rule requires Scope 1 GHG emissions to be reported consistent with the scope of the registrant's financial reporting, which may attribute emissions to companies differently than the source-based GHGRP.[102] If reporting is inconsistent with EPA's GHGRP,

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[100] *See, e.g.,* CDP, The Carbon Majors Database, CDP Carbon Majors Report 2017 at 6 (indicating CDP estimated Scope 1 and 3 emissions for companies).
[101] *See* 40 C.F.R. § 98.392.
[102] *See, e.g.,* 87 Fed. Reg. at 31,384-85 (explaining how equity and consolidation can impact GHG reporting under the Proposed Rule). We do not suggest that GHG emission reporting should misalign with the scope of registrants' financial statements, which could also create confusion. Rather, the problems stem from any requirement to disclose GHG emissions. Nonetheless, consistency with the EPA GHGRP is no more confusing for investors, and it is easier to comply with, representing a Pareto improvement.

registrants inefficiently will be forced to maintain two or more GHG tracking or estimation systems. This undermines efficiency.

Some of these problems can be avoided by harmonizing reporting with EPA's GHGRP. For example, the SEC could permit registrants to satisfy any Scope 1 GHG emission reporting requirement by referring to information submitted pursuant to EPA's GHGRP, as well as incorporate a de minimis threshold for reporting, just like EPA's GHGRP,[103] which would reduce some of the compliance costs and burdens.

A Scope 1 disclosure requirement may not yield comparable information or information that is as reliable as financial information. All emissions estimates have inherent uncertainty that is greater than the uncertainty present in financial information, given their reliance on emission factors and other estimation methods. Regarding Scope 1 emissions GHG intensity for oil and gas product manufacturers in particular, intensity figures can be impacted by quarterly fluctuation caused by gas price volatility, since gas prices impact revenue. In other words, GHG intensity per unit of revenue can vary without any change in a registrant's operational efficiency.

Additionally, a Scope 2 and 3 disclosure requirement risks overestimating portfolio or systemic risk, which were never intended in the GHG Protocol to be used in relation to financial materiality or provide comparability between companies.[104] Utility companies and many upstream and downstream companies will be required to disclose Scope 1 emissions under the Proposed Rule, and a registrant's Scope 2 and 3 emissions are already included in other companies' Scope 1 emissions.

Furthermore, Scope 2 and 3 require quantifying emissions that are beyond the registrant's control, which is inconsistent with the registrant's operational boundaries and the scope of registrants' financial statements.[105] Under federal law, states have exclusive authority over the mix of energy used for power generation, which registrants have little to no ability to control or influence. Additionally, to the extent the

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[103] Learn About the Greenhouse Gas Reporting Program (GHGRP), U.S. EPA, https://www.epa.gov/ghgreporting/learn-about-greenhouse-gas-reporting-program-ghgrp (last updated October 6, 2021). Unlike the conflict minerals rule, a de minimis exception would be consistent with the Acts and congressional purpose. EPA's GHGRP captures 85-90% of U.S. GHG emissions, so a de minimis exception would not significantly impact the final rule because leaving unmonitored small quantities of GHGs aggregated over many issuers will not undermine comparability of disclosures or materially impact investors' decisions. *Cf. NAM I* at 365-66.

[104] Greenhouse Gas Protocol, FAQ, https://ghgprotocol.org/sites/default/files/standards_supporting/FAQ.pdf (last visited June 15, 2022) ("The Corporate Value Chain (Scope 3) Standard is designed to enable comparisons of a company's GHG emissions over time. It is not designed to support comparisons between companies based on their scope 3 emissions. Differences in reported emissions may be a result of differences in inventory methodology, company size or structure."). Similarly, the Proposed Rule relies on frameworks like the TCFD, which evolved to reduce compliance burdens with international legal requirements, rather than indicate which information is material and needed by investors, and may contradict securities law goals and principles. *See* Verret, *supra* note 67, at 6, 14; Climate-Related Financial Risk and the Oil and Gas Sector, IHS Markit 5, 11 (May 2017), https://legacy-assets.eenews.net/open_files/assets/2017/05/17/document_cw_01.pdf.

[105] This also suggests there is no information asymmetry between registrants and investors to remedy.

SEC expects registrants to report Scope 2 data using emission factors derived from EPA eGRID data, Scope 2 information likely will be dated and may not reflect the latest (and, often, lowest) emission factors.[106]

The SEC can also ease compliance burdens with a Scope 2 disclosure requirement by allowing registrants to disclose information corresponding to SASB's "Energy Management" disclosure in the Chemicals category in lieu of disclosing Scope 2 emissions.[107] Rather than disclosing GHG emissions, Energy Management requires disclosure of (1) total energy consumed; (2) percentage of grid electricity; (3) percentage renewable energy; and (4) total self-generated energy. The Energy Management disclosure is more reliable than Scope 2, since it does not require estimating emissions. It would also be more consistent with a registrant's operational boundaries, since it centers around energy use, which is within the company's control. SASB's methodology is less burdensome and costly, since the amount of energy used is more readily available to a registrant and removes the additional step of calculating emissions.

The comparative benefits of SASB Energy Management help reveal significant defects with Scope 2 emissions disclosure, which is less reliable,[108] less consistent with registrants' organizational boundaries, and more burdensome to disclose than other financial and company information disclosed in periodic reports.

The SEC's definition of Scope 3 emissions creates significant uncertainty. Scope 3 emissions are defined as "includ[ing]" the 15 typical categories of Scope 3 emissions.[109] This implies that registrants may be required to report novel emissions categories, which would add additional burden and litigation risk, without revealing information about the financial situation and prospects of a registrant. If the SEC later determines other indirect emissions categories are significant and worth including, it can do so at that time without creating uncertainty now. Moreover, the SEC requires disclosure of "total" Scope 3 emissions, as well as any categories of Scope 3 emissions "significant to the registrant."[110] Yet, registrants should "identify the categories of upstream or downstream activities that have been included in the calculation of the Scope 3 emissions."[111] This implies that "total" Scope 3 emissions need not include all Scope 3 categories, but it is unclear. For any registrants with significant quantities of Scope 3 emissions, one or a small handful of categories are likely to comprise the bulk of the registrant's total Scope 3 emissions. There

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[106] *See* EPA, Download Data, eGRID 2020, https://www.epa.gov/egrid/download-data (last updated January 2022 with data from 2020).
[107] Sustainability Accounting Standards Board, Chemicals Sustainability Accounting Standard 14 (Oct. 2018). Although SASB Energy Management disclosure has many advantages over Scope 2, like Scope 2 it may not be consistent with the SEC's statutory authority and assumes the materiality of the information even in the absence of legislation like a carbon tax or cap and trade program.
[108] It is less reliable because calculating emissions has more inherent uncertainty than financial information.
[109] Proposed 17 C.F.R. § 229.1500(r). The SEC should consider the independent merit of including each category for determining financial materiality.
[110] *Id.* § 229.1504(c)(1).
[111] *Id.* § 229.1504(c)(1).

is no benefit to disclosing Scope 3 emissions for insignificant categories,[112] while there is significant cost, burden, and risk to these disclosures, including potential liability from a proliferation of frivolous lawsuits.

The SEC states that Scope 3 emissions are likely material for oil and gas product manufacturers.[113] However, the SEC provides no justification for this conclusion. The statement fails to distinguish between oil and gas manufacturers' categories of Scope 3 emissions, even though a single category makes up the vast majority of their Scope 3 emissions. Investors are well-aware that oil and gas manufacturers' products are usually combusted, producing GHG emissions. It also assumes that registrants bear financial responsibility for Scope 3 emissions, even though registrants do not control Scope 3 emissions. Quantified disclosure of this information will not alter the total mix of information available for such registrants,[114] particularly in the absence of a legal requirement. Nor does the SEC have the expertise to determine when GHG emissions are financially material. In any event, the SEC can reduce some of the burdens of a Scope 3 requirement by allowing refiners to satisfy their disclosure obligations, if any, by referencing their disclosures made under Subpart MM of the EPA GHGRP.[115]

Disclosing Scope 3 emissions would be extraordinarily burdensome. Some registrants have or rely, directly or indirectly, on thousands of suppliers or manufacturing sites. Furthermore, supply chains are extremely complex and ever-changing, as Covid and the Ukraine invasion have demonstrated. It is important that the SEC does not require registrants to attempt to directly gather Scope 3 emissions data before being permitted to use emission factors or other estimates, which would impose all of the burden of being unable to rely on estimates or emission factors while providing none of the benefits of these alternatives. Scope 3 disclosure will also negatively impact privately-held companies in registrants' value chain, who may be required by their registrant suppliers or customers to disclose their GHG emissions as a condition for doing business with the registrant. Indeed, the Proposed Rule must be premised on this occurring, otherwise it is unclear how Scope 3 disclosure would be comparable or meaningfully inform investors.

There are 15 categories of Scope 3 emissions.[116] Disclosure would require significant registrant staff time and/or consultant time and cost to create these estimates and determine materiality. Many companies in the value chain are not public companies and thus have no reason to calculate their GHG emissions. This

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112 Indeed, Scope 3 includes not only insignificant emissions categories, but categories completely irrelevant to understanding a registrant's risk, such as emissions from employee commuting.

113 87 Fed. Reg. at 21,279-80.

114 *See* CALSTRS, Investment Committee – Item 3, Net Zero Strategy – Progress and Planning Update (May 5, 2022), https://www.calstrs.com/files/71bb16ca9/INV-+052022-+Item3.pdf ("Most investors are currently not measuring scope 3 emissions (supply chain and end-use emissions) of their investments. The current market consensus is that the methods of accounting for scope 3 emissions are still under debate, and any emissions data produced would likely not be reliable or useful for decision making. Because of this, staff concluded that measuring scope 3 emissions would not presently add value to our pledge implementation efforts.").

115 Information Sheet, Suppliers of Petroleum Products; Final Rule: Mandatory Reporting of Greenhouse Gases, U.S. EPA (Dec. 2013), https://www.epa.gov/sites/default/files/2015-07/documents/mminformationsheet.pdf.

116 Technical Guidance for Calculating Scope 3 Emissions, Greenhouse Gas Protocol (2013), https://ghgprotocol.org/sites/default/files/standards/Scope3_Calculation_Guidance_0.pdf.

includes many non-public small businesses who would be significantly burdened by the Proposed Rule—impacts the SEC has not analyzed.

Because few suppliers track their Scope 1 emissions, few registrants collect this Scope 3 information from their suppliers. To the extent the Proposed Rule is market forcing, such that registrants force suppliers to collect emissions information or cut ties with them, the Proposed Rule will undermine supplier diversity, increasing risk of supply chain disruptions. Given the cost and burden to smaller and more local suppliers, this could negatively impact the communities in which these suppliers are located.

The SEC has provided no justification for requiring disclosure of Scope 3 emissions from registrants having Scope 3 goals or targets. A company could have a Scope 3 goal for reasons unrelated to whether they face material risks related to Scope 3 emissions. Having a goal or target is a poor substitute for a determination that Scope 3 emissions are material. Such a requirement is likely to deter organizations lacking Scope 3 goals or targets from setting them in the first place, since it would carry with it significant burdens and risks.

3. Carbon Price, Scenario Analysis, Carbon Offsets/Renewable Energy Credits ("RECs").

The Proposed Rule requires disclosing registrants' "Internal carbon price,"[117] "scenario analysis,"[118] and use of "offsets or RECs" in the registrant's business strategy or to achieve climate-related targets or goals.[119] This would require disclosure of confidential business information ("CBI") that undermines capital formation and competition.[120] For example, to the extent a registrant's carbon pricing materially influences their business decisions, such as determining where to locate an asset, it would reveal CBI.[121] It also could indicate the project economics and cost of capital, which would reduce the negotiating leverage for companies that publish a carbon price compared to those that do not. Likewise, the rationale for selecting an internal carbon price could reveal CBI about how a registrant develops their carbon pricing.[122] These reporting requirements would undermine manufacturers' efforts to understand the impact of "climate-related" risk on their business and undermine their ability to plan and innovate.

The Proposed Rule would require registrants to disclose the assumptions pertaining to both internally maintained carbon prices and scenario analyses.[123] Carbon prices and scenario analyses depend on numerous assumptions. Scenario analysis includes assumptions as to consumption of each type of energy, global energy demand, population growth, economic growth, legislation, technological development, competitive landscape, refinery rationalization, consumer preference, and more. Spelling out these

[117] Proposed 17 C.F.R. §§ 229.1500(j), 229.1502(e).
[118] *Id.* § 229.1502(f).
[119] *Id.* §§ 229.1502(c), 229.1506(d).
[120] *See* SEC Release No. 33-6835 (May 18, 1989), https://www.sec.gov/rules/interp/33-6835.htm (interpreting Item 303 not to apply to preliminary merger negotiations, recognizing companies' interest in confidentiality and that confidentiality can benefit investors).
[121] Proposed 17 C.F.R. § 229.1502(e)(2).
[122] *Id.* § 229.1502(e)(1)(iv).
[123] *Id.* §§ 229.1502(f), 229.1502(e).

assumptions will necessitate voluminous disclosures given the significant number of important assumptions, the need to avoid making material misstatements by omitting assumptions or details relating to these assumptions, and the need for the registrant to provide disclaimers to ensure investors are not misled into thinking the registrant believes the modeled scenarios are a projection of the future.[124]

The SEC's claims to comparability are questionable because not all companies maintain carbon prices or undertake climate-related scenario analyses, nor can the SEC require them to do so. There are also dozens of different recognized scenarios registrants could use to assess the resilience of their business strategy that would not yield comparable results. Likewise, for registrants who maintain internal carbon prices, there is no comparability between, for example, a shadow price and a jurisdiction-specific price.

Nor is the information investment decision-useful, since so many assumptions go into carbon pricing and scenario analysis that registrants and investors are unlikely to accord significant weight to this information.[125] Many registrants conduct scenario analyses pursuant to frameworks like the TCFD to satisfy the requests of certain stakeholders, but the scenario analyses often do not materially influence the registrant's business strategy. Such analyses are often not used for business planning purposes because they are too speculative, are based upon too many assumptions, and involve projections many more years into the future than most business plans are capable of contemplating with any reasonable degree of accuracy. To require disclosure of such information could mislead investors about the importance of the disclosed metric to the registrant,[126] and it provides no information that helps protect investors. Also, to the extent disclosure is intended to help investors identify distressed assets, current accounting rules already elicit such information in the appropriate manner. Disclosure of internal scenario analyses and carbon prices might chill assessments of the risk of future potential government mandates, with companies performing less internal analyses or withdrawing TCFD or other analyses to avoid the disclosure requirement.

Although alternative potential requirements—such as a requirement to assess particular scenarios or the impact of certain carbon prices on the registrant—have certain advantages over the Proposed Rule's requirements, these requirements also exceed the SEC's statutory authority and do not yield material information.[127]

[124] For example, a registrant might believe a geographic market will be more resilient than what is contemplated by the scenario analysis or disagree with assumptions about the climate-related impacts. This raises First Amendment concerns.
[125] Detailed, quantitative projections decades into the future speculate on the magnitude of any effects, their timing, and the probability of occurring, much of which is inherently unknowable to a reasonable degree of certainty and often has a small discounted present value.
[126] Indeed, the Proposed Rule describes the principal financial impacts as "projected," which implies that the registrant has some degree of confidence in the results or that the impacts or scenarios are likely to occur.
[127] *See* Mahoney, *supra* note 68, at 851 (explaining why the SEC lacks authority to impose stress tests). Disclosures of scenario analyses or the impact of specific carbon prices on the registrant as a "stress test" also exceed the SEC's statutory authority—both because it is not revealing material information and because it does not further investor protection.

Any disclosure of carbon offsets or RECs must be voluntary. Mandatory disclosure would not yield comparable disclosure between registrants, given that there are numerous sub-types based on various different legal or other definitions, and the production of carbon offsets and RECs are out of registrants' control, since they are produced by third parties. To the extent purchases of carbon offsets or RECs are material, they should already be disclosed under existing SEC requirements.

4. GHG Targets and Goals.

The requirement to disclose information about the registrant's GHG targets and goals is unclear, exposes registrants to unnecessary risks, will mislead investors, and will fail to yield comparable disclosures.

Requiring disclosure of GHG targets and goals, and progress toward those goals, needlessly subjects these goals to liability and SEC enforcement risk. Given the additional risk, the Proposed Rule will likely chill companies from developing GHG targets and goals in the first place.

The Proposed Rule fails to make clear whether registrants are required to disclose internal GHG goals or targets, given that other requirements more clearly specify when internal information is to be disclosed. For many companies, a GHG target or goal can reasonably be a low priority, and thus not worthy of public disclosure. Companies should be free to set low-priority goals internally or externally without facing legal scrutiny from plaintiffs' lawyers and the SEC's enforcement division. The SEC has no expertise in emissions accounting, emissions offsets, emissions allowances, etc., has not proposed any such system of what "counts" toward any particular goal, and is not qualified to review such disclosures.

The disclosures elicited will not be comparable since 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.

Moreover, mandating the prescribed information will not increase reliability. Companies already signal lower reliability or lower prioritization of these goals and targets related to other priorities if they fail to specify this type of information when discussing these goals, whether in sustainability reports or other public statements. What informational benefit is then achieved above this existing market signal?

Requiring prescriptive disclosure of GHG targets and goals gives the misleading impression that these goals are more important than registrants' other goals that, in many cases, are far more important to investment decisions, such as a company's goals relating to penetrating new markets or other competitive strategies.

Additionally, this requirement may be inconsistent with the scope of financial reporting, since goals and targets can be set on either an equity or operating basis.

While no disclosure of climate-related goals or targets should be required, any requirement should also include an express, complete safe harbor for any requirement to disclose this information. Any long-term GHG targets and goals are likely to be based on speculation about innovation and technology that has yet to be developed. Because they rely on speculation, subjecting such disclosures to liability cannot improve their reliability.

5. Safe Harbors.

We appreciate the SEC's attempt to accommodate concerns about liability risk by adopting or acknowledging safe harbors and other accommodations. While safe harbors do not cure the deficiencies of the Proposed Rule, better safe harbors can help reduce risk for registrants arising out of the Proposed Rule.

i. *Forward-looking statements*.

The Private Securities Litigation Reform Act ("PSLRA") safe harbor applies to forward-looking information identified as such and "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement."[128] However, any safe harbor should apply to all business organizations subject to the disclosure requirement, including, for example, limited partnerships, and all forward-looking information the SEC is prescribing in the Proposed Rule.[129]

Nonetheless, the PSLRA safe harbor for forward-looking statements is inadequate. Forward-looking statements accompanied by meaningful cautionary language should face no liability or enforcement absent manifest fraud.[130] It is one thing for companies to choose to disclose information relating to goals and targets, carbon pricing, scenario analysis, etc., and thus voluntarily subject themselves to legal risk. It is quite another to force the disclosure, regardless of materiality, then say that it needs to be subject to frivolous litigation or an SEC enforcement action to protect investors from being misled.

ii. *Scope 3 safe harbor(s)*.

While we continue to oppose the Scope 3 disclosure requirement, the SEC should include a Scope 3 safe harbor. Because of the uncertainty inherent in Scope 3 information, a Scope 3 safe harbor is necessary to protect registrants from unnecessary liability. Also, the SEC should allow the use of any plausible emission factors or similar estimation methods, especially when calculating Scope 3 emissions, and allow emissions to be presented as a range. Most importantly, companies should have complete protection against any enforcement action or liability as long as they act in good faith.[131]

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[128] 15 U.S.C. § 78u-5(c)(1)(A)(i).
[129] *See* 87 Fed. Reg. at 21,352, n.219 (noting the safe harbor does not apply to some organizations and information).
[130] *See Id.* at 21,352 ("[T]he PSLRA does not limit the Commission's ability to bring enforcement actions.").
[131] The burden of proof regarding good faith should be on the party asserting lack of good faith.

Given the similarity in deficiencies among Scope 1, 2, and 3 emissions, the Scope 3 safe harbor should apply to each emission disclosure, as well as all other numerical disclosures, such as impacts on financial and expenditure metrics, which depend on numerous assumptions with varying degrees of reliability, and often on speculation.[132]

The SEC notes that Securities Act Rule 409 and Exchange Act Rule 12b-21 apply to Scope 3 disclosures.[133] However, the SEC gives reason to doubt that registrants may take advantage of these rules. The SEC states that registrants will be burdened very little by the rule because they can rely on consultants if they lack internal expertise, they can rely on emission factors rather than direct measurement, and Scope 3 information will be widely available once the Scope 1 and 2 disclosure requirements are phased in. Taken together, the SEC clearly anticipates that few registrants can legitimately take advantage of this accommodation. It is important that the SEC clarifies what would satisfy this accommodation.

Furthermore, given that some states are considering imposing GHG reporting obligations,[134] any final requirement should expressly preempt state reporting obligations.

iii. *Phase In*.

While phasing in any new climate-related disclosure requirements does not address the Proposed Rule's fundamental defects, phase in is essential to reducing the burden on registrants, giving registrants time to develop internal policies, procedures, and expertise on the subject-matter. Providing registrants additional time to comply with the Scope 3 disclosure requirement is also essential, as required disclosure of Scope 1 and 2 disclosure may marginally lessen the burden to calculate Scope 3 emissions.

However, the existing phase-in periods are inadequate. Each proposed effective date should be extended at least two years from the timelines in the Proposed Rule. The numerous costs, burdens, and implementation problems described above counsel against an ambitious phase in. For example, many companies do not currently track Scope 3 emissions or quantify Scope 3 emissions such that they have sufficient confidence to file this information with the SEC. Likewise, all the specific impacts that need to be assessed to determine a 1% impact on financial statement or expenditure metrics are not currently being tracked and likely will require companies to develop new accounting and other systems to do so. Furthermore, to comply with the example effective dates in the Proposed Rule for financial statement and expenditure metrics, companies would need to already have begun setting up their internal controls over financial reporting, which would improperly impose a de facto legal requirement without a final rule in place and without due process of law. If companies in general cannot comply with the requirements unless they begin compliance before a final rule is issued, the phase in period is unjustifiably short.

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[132] *See* Graber, The SEC's Climate Proposal: Top Ten Points for Comment, Harv. L. Sch. Forum on Corp. Governance (June 11, 2022), https://corpgov.law harvard.edu/2022/06/11/the-secs-climate-proposal-top-ten-points-for-comment/.
[133] These rules apply to information unknown and not reasonably available. 17 C.F.R. §§ 230.409, 240.12b-21.
[134] *See* Proposed SB-260, Climate Corporate Accountability Act, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB260.

6. Board and Management Oversight & Governance.

The proposed rule requires expressly naming "any board members … responsible for the oversight of climate-related risks" and whether that board member "has expertise in climate-related risks," as well as "the frequency by which the board or board committee discusses climate-related risks,"[135] and a list of "management officials" who are "responsible for assessing and managing climate-related risks."[136] 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 an immaterial risk for many registrants.[137] The upshot is that this requirement may unnecessarily push registrants to consider "upskilling" their boards and management[138] to demonstrate greater climate-related risk sensitivity to the SEC, even though the registrant does not face material climate-related risks and the information required is not investment decision-useful. Congress did not bestow the SEC authority to pursue this market-forcing purpose.

D. Regulation S-X Amendments.

Securities law already contains appropriate incentives and penalties to ensure accurate disclosure of material information. Assurance and auditing of climate-related information will not cost-effectively and meaningfully increase reliability and comparability. Nor will it ensure that information is decision-useful to investors, since the metrics to be reported are not clearly defined, incapable of reasonable precision, and have a wider range of inherent uncertainty compared to the precision in company financials. As another commenter stated, comparing climate-related reporting to financial accounting "is less like apples and oranges, and more like apples and quantum computers."[139]

1. Impact on Financial and Expenditure Metrics.

The Proposed Rule's requirements to disclose line-by-line impacts on financials and specific transition and physical impacts on expenditures will yield unreliable estimates of often insignificant impacts at exorbitant cost.[140]

The SEC has pointed to no evidence showing such estimates are capable of being done cost-effectively and reliably, or with the same precision as financial and expenditure figures. The Proposed Rule provides insufficient guidance on how to calculate climate-related impacts and attribute climate to particular impacts,

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[135] 87 Fed. Reg. at 21,359.
[136] *Id.* at 21,360.
[137] *See* Davis Polk, *supra* note 74, at 9.
[138] SEC climate disclosures and your company; How you can prepare today for investor-grade, tech-enabled reporting, pwc, https://www.pwc.com/us/en/services/esg/library/sec-climate-disclosures html (last visited May 3, 2022) (recommending that all registrants consider "[u]pskill[ing] corporate directors").
[139] Verret, *supra* note 67, at 5 (noting modern accounting evolved over the last 100 years, which derives substantially from double entry bookkeeping, a medieval advancement).
[140] *See* Graber, *supra* note 132.

even though Regulation S-X information is premised on a high degree of standardization.[141] Companies will need to hire new staff, which will be difficult and costly in a tight labor market, and will contribute to inflation. And the results are unlikely to be comparable because attributing particular impacts to climate change is an evolving science for which different registrants will have different methods. Additionally, the SEC has not considered the relative costs and benefits of assessing and disclosing line-by-line impacts, which is an inordinately costly and burdensome way to elicit inherently unreliable information.

The SEC failed to justify using absolute climate impacts rather than net climate impacts when assessing if registrants meet the 1% threshold. For example, if a company experiences damage from a climate-related weather event, but that event is fully covered by insurance such that the net impact is zero, the registrant should not need to report the impacts just because the absolute impact surpasses the 1% threshold. Investors care about net impacts on financials. The SEC has no evidence that absolute impacts are important to the reasonable investor's investment decision.

Additionally, the 1% threshold[142] is illusory. Since all registrants will have to make these uncertainty-laden line-by-line calculations to determine whether or not to disclose the impacts, all registrants are significantly burdened by the proposed requirement. These disclosures will also likely vary substantially from year to year, including making no disclosures in certain years for failing to clear the 1% threshold. This can happen even if the underlying climate-related impacts are the same, as the changes may be solely based on unrelated yearly fluctuations in the line item.

Five percent is the threshold used as the starting point to determine material impacts,[143] yet the SEC arbitrarily imposes a 1% threshold that is inappropriate for these disclosures.[144] A 1% threshold likely will require disclosure of a great deal of immaterial impacts—especially for small dollar amount line-items—and confuse investors.[145] This will not serve reasonable investors.

This costly and burdensome requirement necessitates voluminous, non-standardized judgments that will not yield comparable, decision-useful information. To use a more concrete example, increased EV adoption could lead to more electricity sales by power generators that use natural gas or coal, which could represent a climate-related factor under the proposal. A registrant would be required to assess the impact on financial statement line items, such as an increase in revenue from additional power generation sales. But because increased generation could drive up demand and costs for natural gas and coal, power generation companies could see their costs increase. Such increased costs could be passed on to consumers.

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[141] AFPM cannot provide informed comment on the Proposed Rule devoid of this needed specificity.
[142] Proposed 17 C.F.R. § 210.14-02(b)(1) to(b)(2).
[143] Vorhies, The New Importance of Materiality, J. of Accountacy (May 1, 2005), https://www.journalofaccountancy.com/issues/2005/may/thenewimportanceofmateriality html; Verret, *supra* note 67, at 11-12; SEC Release No. SAB 99 (Aug. 12, 1999), https://www.sec.gov/interps/account/sab99 htm.
[144] *See* Deloitte & Touche LLP, Comments on The Enhancement and Standardization of Climate-Related Disclosures for Investors at 4 (May 31, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20129946-296218.pdf.
[145] *Id.*

This, in turn, could cause those consumers to take steps to reduce their power purchases, such as by using solar panels or through efficiencies, which might negatively impact power generation demand. Thus, a single item – increased use of EVs – will tend to have both positive and negative effects on demand and price for power generation. All these effects would need to be disaggregated from the myriad of other factors by the power generators, both climate-related and non-climate-related, that affect power demand and pricing—and therefore costs and revenues for a power generator—at any particular time, then separately quantified. Then all those disaggregated effects would need to be added together on an absolute value basis to determine if the 1% threshold has been met.

It would also be problematic for registrants that own refineries to determine the impact of particular climate-related weather events to refining revenues and cost of revenues. Both line items could be impacted, but it is difficult to determine the impact because there are both positive and negative climate impacts. Revenues could decrease because a refinery is down due to the weather event, but they could also increase to the extent prices rose and a registrant has another refinery for which production was not impacted by the weather event. Furthermore, determining these impacts depends on knowing the unknowable—what prices would have been had the refinery not reduced production or shutdown. The same weather event could also impact refinery feedstock costs. You could also have anomalous results where the revenue impact did not exceed 1% but the cost of revenue did, which could paint a misleading picture of the impact to investors. The result of these tortuous tasks is neither comparable nor material information.

Neither registrants nor the SEC have the expertise to isolate the impacts of different transition or physical risks—for example, the SEC cannot expect registrants to reasonably apportion the financial impacts of a major storm between a weather event and climate change.

Applying the definition of Transition Risks in proposed 17 C.F.R. § 229.1500(c)(4) to the requirements related to financial and expenditure metrics is problematic, particularly for policy risk. All companies face a risk that policy could turn into legal requirements. But until a policy becomes law or regulation, the probability of the risk is entirely speculative and changes constantly. Registrants have no hidden knowledge about the probability that a policy becomes a legal requirement, hence disclosure of policy risks does not remedy any information asymmetries.

The SEC states that companies in jurisdictions with a GHG reduction commitment likely face a transition risk. To the extent the SEC is suggesting goals not enshrined in law or regulation are material transition risks, this is false. Hundreds or thousands of bills are introduced yearly and legislators and regulators adopt numerous policies, any of which could materially impact registrants if enacted, but the vast majority of these are never enacted and do not translate into legal requirements. Cap and trade and carbon pricing/taxation have been legislative possibilities for well over a decade. Many commentators have thought this legislation was likely to be enacted, and yet neither have become legal requirements. In the same vein, President Biden announced a 50% EV sales target by 2030, yet this is not a legal requirement. There are thousands of federal, state, local, and foreign laws concerning environmental, climate change, or ESG-related issues that investors have already priced into public markets.[146] Layering on additional, speculative, and often inaccurate information is likely to be duplicative and burden registrants. This undermines the SEC's core mission without any appreciable impact on the total mix of information. Additionally, Registrants should not be required to assess the impact of each bill on their companies and provide it to the public, because such disclosure conveys a false impression that these proposals are sufficiently likely to be enacted and that they are material. Moreover, many registrants are international companies subject to sometimes hundreds of jurisdictions, whether local, state, national, or international, both in the U.S. and abroad. Specifying the policy risk related to all these jurisdictions would be overly burdensome (and in many respects unworkable) and necessarily require reporting voluminous immaterial information.

The Proposed Rule requires disclosing line-by-line aggregate positive and negative impacts of efforts to reduce GHG emissions or mitigate transition risks,[147] which includes events such as, among others, the "loss of a sales contract."[148] Lost sales are not kept and reported in the ordinary course of business and registrants are unlikely to know whether lost sales are transition-related. This requirement will be burdensome and likely yield inaccurate and incomparable information.

The Proposed Rule would require disclosure of historical fiscal year data in the consolidated financial statements in the filing.[149] This requirement is unnecessarily burdensome and is difficult to comply with given the limited time frame expected to be available under the Proposed Rule, and the data needed to analyze these impacts will almost certainly be unknown and not reasonably available, since this information will only be available after implementing new accounting and other systems.

2. Scope 1 & 2 Attestation.

The Proposed Rule would require independent provider attestation of registrants' Scope 1 and 2 GHG emissions, beginning with limited assurance and moving to reasonable assurance.

Both limited and reasonable assurance requirements are overly burdensome and costly. While the Proposed Rule ostensibly allows expert providers that are not auditors to provide assurance, imposing audit-style assurance requirements will render the approach taken by many non-auditor consultants inadequate,[150] leaving few firms that are qualified to provide this assurance.[151] This effectively cartelizes the market for assurance by imposing a regulatory barrier to entry that undermines competition. The limited supply of providers able to provide assurance for climate-related information under audit-like requirements is simply incapable of fulfilling the extraordinary demand for the services the Proposed Rule would create.

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[146] *See* Mahoney, *supra* note 68, at 846 n.19.
[147] Proposed 17 C.F.R. § 210.14-02(d).
[148] *Id.* § 210.14-02(d)(1).
[149] *Id.* § 210.14-01(d).
[150] Harder et al., Attestation: Practical Reflections on What the SEC Climate Proposal Will Require, Bracewell (Apr. 12, 2022), https://bracewell.com/insights/attestation-practical-reflections-what-sec-climate-proposal-will-require.
[151] Moreover, there is reason to doubt that financial statement auditors can provide assurance on GHG emissions data. *Id.*

Additionally, GHGRP reports submitted to EPA are already subject to electronic validation and verification checks, with filers required to explain potential errors and correct their GHG submissions.

The SEC provided no justification for its requirement of reasonable assurance, for which compliance is difficult and inordinately costly. The SEC has provided few examples of registrants that sought and obtained reasonable assurance concerning their GHG emissions, and has not demonstrated these companies are representative of accelerated and large accelerated filers generally. And the SEC provided no evidence demonstrating that reasonable assurance would increase the reliability of disclosures above limited assurance, let alone that such benefits would outweigh the additional costs, burdens, and risk.

Furthermore, GHG emissions, which are an imperfect proxy for long-term transition risk, are subject to greater measurement challenges than most financial metrics and are subject to greater uncertainty. There is little benefit to greater certainty regarding emissions, since it concerns an inherently uncertain future risk.

The timeline to implement Scope 1 and 2 attestation is also unduly aggressive, especially in light of longer phase-in periods for certain other new requirements such as those imposed under Sarbanes-Oxley and those implemented by the Financial Accounting Standards Board.

E. Regulation S-T Amendments.

The Proposed Rule would require a registrant to tag climate-related disclosures in Inline eXtensible Business Reporting Language ("Inline XBRL") in accordance with 17 CFR 232.405 (Rule 405 of Regulation S-T) and the EDGAR Filer Manual. Inline XBRL should not be required for climate-related disclosures proposed by Subpart 1500 of Regulation S-K as currently only (1) a filer's financial statements (which includes the face financial statements and all footnotes) and (2) all schedules set forth in Article 12 of Regulation S-X (§210.12-01 through 210.12-29) related to the electronic filer's financial statements must be tagged.

Proposed Subpart 1500 of Regulation S-K is for Item 6 of Form 10-K or Item 1B of Form 10-Q, both of which are outside of the registrant's financial statements or schedules required by Article 12 and do not differ from other Items of Form 10-K or Form 10-Q that are currently not required to be tagged using Inline XBRL. Investors and other market participants who need to extract and analyze the data and/or the disclosures proposed by Subpart 1500 of Regulation S-K can perform the same search manually by using the appropriate Item reference as is done for current searches.

If Inline XBRL is deemed to be required for disclosures proposed by Regulation S-X, then prior to implementing this proposed rule, the XBRL taxonomy needs to be approved and updated by the SEC for the new elements to be used to identify (1) the block text tag of narrative disclosures and (2) the detail tag elements of quantitative amounts disclosed within the disclosures in Regulation S-X; otherwise registrants will create their own extensions, which defeats the purpose of using uniform structured data.

F. Costs and Benefits of the Proposed Rule/Paperwork Reduction Act.

The SEC significantly overestimates the benefits and underestimates the cost of the Proposed Rule. The benefits are overestimated for the numerous reasons listed above. Simply put, the Proposed Rule will not create reliable, comparable disclosures of decision-useful information, let alone enough such benefits to justify the costs. Tellingly, the SEC failed to even attempt to quantify the benefits, which any reasonably prudent decisionmaker imposing billions of dollars in costs should endeavor to do.[152] Indeed, the SEC frequently indicates it is uncertain whether any alleged benefits will occur, yet it does not appear the SEC has incorporated these uncertainties by discounting benefits.[153] The SEC's failure to quantify these benefits is ironic, since the SEC asks registrants to quantify numerous categories of climate-related information and impacts under the Proposed Rule. Given that major auditors alone plan to invest billions of dollars in climate risk assessment, these market signals suggest that the SEC likely has significantly underestimated the monetary costs of the Proposed Rule.[154] The SEC also ignores the potential negative impact SEC enforcement of the Proposed Rule would have, given the lack of expertise, experience, and knowledge pertaining to climate change. The SEC ignores the potential cost of short-circuiting further development of climate reporting and benefits stemming from the intermediary role played by proxy advisors.[155] The SEC also failed to consider the reasonably foreseeable, significant burdens and negative economic impacts from requiring Scope 3 reporting, especially on privately held companies in registrants' supply chains. The SEC should analyze and quantify these impacts just as it analyzed the impacts on smaller reporting companies.[156] Moreover, the SEC must demonstrate that each element of the Proposed Rule is material as part of its cost-benefit analysis, which the SEC has not done.[157] Indeed, given that most of the Proposed Rule depends on speculative transition risk, especially policy risk, the SEC should provide its estimate of the probability and magnitude of such transition risks and discount its benefit analysis by that probability. Furthermore, the SEC must consider registrants' serious reliance interests and familiarity with the current disclosure regime, which it has not done.[158] Nor has it provided more detailed justification for reversing its fact-based cost-benefit analysis concluding that a principles-based approach had greater net benefits than a prescriptive approach.[159]

Nor does the SEC state that the benefits of the Proposed Rule outweigh the enormous costs of the Proposed Rule. The SEC cannot serve the public interest by imposing a net harm on the public. This is

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[152] *Cf. Michigan v. EPA*, 567 U.S. 743, 743 (2015) (holding that EPA violated its statutory mandate to consider whether power plant regulation was "appropriate and necessary" by refusing to consider cost when making its decision).
[153] Cunningham, *supra* note 63, at 16.
[154] *See* Maurer, PwC to Spend $12 Billion on Hiring, Expanding Expertise in AI, Cybersecurity, Wall St. J. (June 15, 2021), https://www.wsj.com/articles/pwc-to-spend-12-billion-on-hiring-expanding-expertise-in-ai-cybersecurity-11623758400; Deloitte announces $1 billion investment in global Sustainability & Climate practice, Deloitte (April 12, 2022), https://www2.deloitte.com/sg/en/pages/about-deloitte/articles/deloitte-announces-1-billion-investment-in-global-sustainability-climate-practice.html.
[155] Verret, *supra* note 67, at 7.
[156] 87 Fed. Reg. at 21,391.
[157] *See* Verret, The Securities Exchange Act is a Material Girl, Living in a Material World, 3 Harv. Bus. L. Rev. 453, 457-61 (2013).
[158] *See* Am. Securities Ass'n, *supra* note 3, at 6.
[159] *See id.* at 6-7 (citing 85 Fed. Reg. at 63,747-754); *Fox*, 556 U.S. at 515.

particularly true given the SEC's statutory mandate to protect investors, who are intimately concerned with ensuring the companies they invest in create rather than destroy value. Likewise, the SEC is charged with "promot[ing] efficiency, competition, and capital formation," which indicate Congress's concern with ensuring that the SEC maximize the net benefits of its regulatory approach. The SEC's (underestimated) $10.2 billion price tag undoubtedly exceeds the purported reliability and comparability benefits of the Proposed Rule, which are largely illusory.[160]

Unlike with the conflict minerals disclosure requirement, which Congress expressly required, the "[i]nab[ility] to readily quantify"[161] the benefits of the Proposed Rule should counsel strongly against its adoption, given the enormous costs it will impose, and the Commission cannot fall back on a Congressional judgment that such "costs [a]re necessary and appropriate in furthering the goals" of the Acts.[162]

Conclusion

AFPM supports the SEC's goal of maintaining fair, orderly and efficient markets through transparent and timely disclosure of material information. AFPM urges the Commission to withdraw its proposal in light of the SEC's statutory and constitutional limits on its authority. Existing requirements applying the longstanding rubric of materiality to climate-related risk adequately protect investors. Beyond that, the widely-varying non-financial interests of millions of investors are best served by a robust, flexible and dynamic public discourse in which companies participate to the extent their corporate objectives and strategies dictate.

AFPM thanks the SEC for the opportunity to comment on the Proposed Rule. Please contact the undersigned if you wish to discuss these issues further.

Respectfully submitted,

Tyler Kubik
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[redacted]

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[160] *See, e.g.,* Verret, *supra* note 67, at 3-4 (noting that there is little benefit from consolidating climate-related information in one place, since investors do not read annual reports like a narrative). Given the lack of information the SEC provided concerning the estimated benefits and costs of the Proposed Rule's various disclosure requirements, AFPM cannot provide informed comment on the Proposed Rule's costs and benefits.
[161] *NAM I*, 748 F.3d at 369.
[162] *Id.* at 369-70 (quoting 77 Fed. Reg. 56,274, 56,350 (Dec. 23, 2010)).