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June 17, 2022

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

Re: File No. S7-10-22 (The Enhancement and Standardization of Climate-Related Disclosures for Investors) Comments to Release Nos. 33-11042; 34-94478

Dear Ms. Countryman:

Fenwick & West LLP is pleased to submit to the Securities and Exchange Commission (the "*Commission*") comments on the proposed rules (the "*Proposed Rules*") under the Securities Act of 1933, as amended (the "*Securities Act*"), and the Securities Exchange Act of 1934, as amended (the "*Exchange Act*"), relating to the enhancement and standardization of climate-related disclosures for investors per Release Nos. 33-11042; 34-94478 (the "*Proposing Release*"). Capitalized terms used in this letter without definition have the meanings ascribed to such terms in the Proposing Release.

We represent and have represented over the years a large number of publicly-held technology and life sciences companies. Many of our clients have gone public at early stages of their businesses, with limited operations and small management teams. These clients' businesses have had significant potential for future growth, and their initial public listings often have been undertaken to fund the expected rapid expansion of their businesses and operations. Certain of these clients have gone on to become large public companies, while others have either been acquired before achieving such scale or remained smaller businesses for a variety of reasons. The comments we provide in this letter are derived from our experience with this practice.

We respond to certain issues raised by the Proposing Release below. However, before doing so, we would like to provide our overarching perspectives on the Proposed Rules.

As a threshold matter, we acknowledge the societal importance and seriousness of the threat posed by climate-related risks *("CRR*"). We further recognize that all public companies as well as their investors have some degree of potential exposure to these risks. However, individual public companies have vastly different levels of exposure to these risks relative to one another. Accordingly, we do not believe that broad, prescriptive disclosure requirements that apply to all public companies indiscriminately, such as those contemplated by the Proposed Rules, are appropriate to protect investors.

In short, we disagree with the premise that climate change is a subject that is fundamentally and universally material to all reporting companies. Instead, we believe a principles-based, company-specific disclosure approach to CRR and other climate-related matters, focused on the materiality of these topics to a given company, provides investors with the information necessary to facilitate an understanding of that company, taking into account the unique qualities of its business and industry, and to make informed investment decisions. In that regard, we believe that the existing disclosure requirements of Regulation S-K already sufficiently elicit this material climate-related information.

Compelling disclosure without regard to materiality represents a significant departure from the underpinnings of the U.S. public company disclosure regime, and in our view this departure is unmerited notwithstanding the potential economic impact CRR poses. To the extent there are categories of companies where requiring such climate disclosure can be deemed necessary to provide important information about a given company to investors, without considering the particular facts and circumstances of that company's individual business, we believe that such a requirement could be premised on the industry in which that company principally operates. For example, we would be supportive of more detailed climate disclosure requirements akin to the Securities Act and Exchange Act Industry Guides provided for in Regulation S-K Items 801 and 802, provided that the industries have a sufficiently extensive connection to CRR and other climate-related issues. For instance, one can imagine mandating detailed climate disclosure for companies principally operating in a given industry if that industry accounts for a significant level of GHG emissions, like the transportation, energy production and industrial sectors.[1]

We also note that the disclosure requirements contemplated by the Proposed Rules will impose significant additional costs on all public companies and their stockholders and will have a disproportionately negative impact on the cost structures of early stage issuers and their investors. As a result, we believe the Proposed Rules will discourage many private companies from becoming reporting companies and may even motivate certain existing

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[1] *See, for example*, the following information regarding the sources of GHG emissions on an industry basis, on the website of the EPA: https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions.

public companies without a sufficient nexus to CRR to deregister in order to avoid these burdensome and, from their perspective, unnecessary costs, which we respectfully believe will discourage capital formation, deny retail investors access to potentially attractive investment opportunities and neither be in the public interest nor protect investors.[2]

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Comment Period

We supplementally advise the Commission that the short comment period afforded in the Proposing Release, even after taking into account the extension, has affected our ability to respond to the Proposing Release. If we had had from the initial publication of the Proposing Release a longer period with which to work, we would have engaged in more substantial discussions with our clients about their familiarity with the most important concepts contained in the Proposed Rules, about the extent of investor interest expressed to them regarding climate-related matters and about their estimates, to the extent that they have had a chance to develop any such estimates, of the cost of compliance with the Proposed Rules. Further, we would have sought to engage with public accounting firms about the impact of the Proposed Rules on our mutual clients and the likely cost of compliance. We have relationships with venture capital investors with billions of dollars invested in publicly-held companies and companies with the potential to go public and would have engaged in a more comprehensive process to obtain their perspectives on the materiality of the proposed disclosure and on the impact of these new rules on decisions to go public. Finally, we would have sought input from specialty firms that could, for instance, attest to GHG emissions about the costs and availability of such services. We believe that other actual and potential commenters upon the Proposed Rules have been similarly affected, to the detriment of the quality of input that might have otherwise been obtained.

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Disclosure Without Regard to Materiality

For at least the last two decades the Commission has called upon reporting companies to focus on providing material information in their registration statements and

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[2] Commissioner Allison Herren Lee has recently noted that the Commission has taken repeated regulatory actions to encourage companies to go public, see Commissioner Allison Herren Lee, Speech, *Going Dark: The Growth of Private Markets and the Impact on Investors and the Economy* (Oct. 12, 2021). We believe the Proposed Rules will frustrate these efforts.

reports, and to do so in a way that makes that information most accessible.[3] The Commission has in the process noted the potentially negative consequences of presenting immaterial information that can distract investors. We believe that investors are well served by these requirements and related guidance.

The Proposed Rules depart dramatically from this approach. They would require the disclosure, without regard to materiality, of significant amounts of new information, including, but not limited to, requirements to disclose (our emphasis added):

- Total Scope 1 and Scope 2 GHG emissions, both in the aggregate and disaggregated by each constituent gas, regardless of the amount of each such gas emitted;

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[3] *Please see*: *Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations;[Release Nos. 33-8350; 34-48960; FR-72]*: "[C]ompanies should avoid the unnecessary information overload for investors that can result from disclosure of information that is not required, is immaterial, and does not promote understanding."; *Commission Guidance Regarding Disclosure Related to Climate Change; [Release Nos. 33-9106; 34-61469; FR*-82]: at page 18 – "Registrants drafting MD&A disclosure should focus on material information and eliminate immaterial information that does not promote understanding of registrants' financial condition, liquidity and capital resources, changes in financial condition and results of operations."; *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information; [Release No. 33-10890; 34-90459; IC-34100; File No. S7-01-20]*: at page 122 - "Investors could benefit to the extent that the final amendments result in less duplicative disclosure and less disclosure of immaterial information. The final amendments may result in improved readability and conciseness of the information provided, helping investors focus on material information and facilitating more efficient information processing by investors."; *Business and Financial Disclosure Required by Regulation S-K; [Release Nos. No. 33-10064; 34-77599; File No. S7-06-16]*: at page 14 – "There is also a possibility that high levels of immaterial disclosure can obscure important information or reduce incentives for certain market participants to trade or create markets for securities." At page 42 "Limiting prescriptive disclosure requirements and emphasizing principles-based disclosure could improve disclosure by reducing the amount of information that may be irrelevant, outdated or immaterial. Because prescriptive disclosure requirements may result in disclosure that is not necessarily material or important to investors, greater use of principles based disclosure requirements may allow registrants to more effectively tailor their disclosure to provide only the information about their specific business and financial condition that is important to investors."; *Modernization of Regulation S-K Items 101, 103, and 105; [Release Nos. 33-10668;34-86614; File No. s7-11-19]*: at page 94 "For example, the proposed amendments may reduce search costs for certain investors by eliminating information that is not material to those investors. Given that certain investors may have less time to review and analyze registrants' disclosure, elimination of such information may facilitate more efficient investment decision making…The reduction in compliance costs might be particularly beneficial for smaller and younger issuers that are resource-constrained."; Please see also Sections 72003 (a) and (c) of the FAST Act, Pub. L. No. 114-94, Sec. 72003, 129 Stat. 1312, which directs the Commission to conduct a study that, among other things, evaluates "methods for discouraging repetition and the disclosure of immaterial information" and to issue a report to Congress that, among other things, contains recommendations on ways "to discourage repetition and the disclosure of immaterial information."

- GHG intensity of Scope 1 and 2 emissions per unit of total revenue and per unit of production;
- A description of the methodology, inputs and assumptions used to calculate GHG emissions;
- An attestation report for Scope 1 and Scope 2 GHG emissions disclosures for large accelerated filers and accelerated filers;
- Details about the attestation provider;
- The governance information discussed in greater detail in the following section of this letter;
- The actual and potential impacts of any risks that are required to be disclosed, and whether and how these impacts, material or immaterial, are considered in strategy, financial planning and capital allocation, including how any resources are being used to mitigate CRR;
- The resilience of the company's business strategy in light of potential future CRR; and
- Any processes the company has for identifying, assessing and managing CRR.

In a similar vein, the Proposed Rules would add new Regulation S-X Item 14-02 that would require the inclusion of specified climate-related metrics in the audited financial statements. One of these metrics would disclose the impact of certain climate-related events or conditions on any line item in the audited financial statements, including the balance sheet and statements of operations and cash flows, subject to a de minimis threshold such that disclosure would not be required if the sum of the absolute values of all impacts on the particular line item was less than one percent of the total amount of the line item for the particular year. This proposed threshold falls far below any traditional measure of materiality for financial statement disclosures.

By way of a simple example, assume a hypothetical software company with Cost of Sales of 20% of Total Revenue and General and Administrative Expenses of 10% of Total Revenue. If the sum of the absolute values of all climate-related items included in Cost of Sales was 1.5% of Cost of Sales, these metrics would have to be included in the audited financial statements, even though such absolute value was 0.3% of Total Revenue. Further, if the sum of the absolute values of all climate-related items included in General and Administrative Expenses was 1.5% of General and Administrative Expenses, these metrics would have to be included in the audited financial statements, even though such absolute value was 0.15% of Total Revenue.

The Commission, through the efforts of the Staff of the Division of Corporation Finance, has instructive recent experience with the materiality of information being

provided, and not provided, by reporting companies. We have reviewed publicly available correspondence between several companies and the Staff in connection with comment letters issued in September through November 2021 that contain climate-related disclosure comments, consistent, thematically, with the disclosure requirements of the Proposed Rules.[4] In each of these situations, the subject company appears to have provided justification to the Staff for its belief that the type of additional information alluded to in the Staff's comments beyond that provided in the subject reports was not material. We did not observe that amendments to any subject filings, or commitments to make any specific disclosure in future reports, were required to resolve Staff comments.

In closing this discussion, we agree with the Proposing Release that climate-related disclosure is something in which there is significant investor interest, at least when measured by the dollar values of certain investors' assets under management.[5] Accordingly, climate disclosure may well be "material" to certain investors' particular investment or voting decisions. We have observed over the course of our representation of numerous technology and life sciences companies that any number of issues are, or have been, of great interest to some investors and, similarly, are or have been regarded as "material" by them. However, we believe that it is the responsibility of reporting companies, with the help of their advisors, to craft public disclosure that weighs the various requests for information and provides information to which there is a substantial likelihood that *reasonable* investors would attach importance in determining whether to purchase the

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[4] We reviewed comment letter correspondence for the following companies: Under Armour, Inc. regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-33202; Discover Financial Services regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-33378; Matson, Inc. regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-34187; Palo Alto Networks Inc. regarding its Form 10-K for the Fiscal Year Ended July 31, 2021, File No. 001-35594; Cintas Corp. regarding its Form 10-K for the Fiscal Year Ended May 31, 2021, File No. 000-11399; Snap-On Inc. regarding its Form 10-K for the Fiscal Year Ended January 2, 2021, File No. 1-7724; Monster Beverage Corp regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-18761; Meta Platforms, Inc. regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-35551; The Progressive Corporation regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-09518; Target Corp. regarding its Form 10-K for the Fiscal Year Ended January 30, 2021, File No. 001-06049; The Charles Schwab Corporation regarding its Form 10-K for the Fiscal Year Ended December 31, 2020, File No. 001-09700; and Cisco Systems, Inc. regarding its Form 10-K for the Fiscal Year Ended July 31, 2021, File No. 001-39940.

[5] As described in more detail below under "Investor Interest and Materiality," we note that the principal support for the idea espoused in the Proposing Release that there is "significant investor demand" for increased climate-related disclosure stems from the fact that several major institutional investors have signed initiatives adopted by non-investor entities such as political institutions and climate activist organizations. However, there is no discussion of other investor interest in these initiatives in the Proposing Release (for example, the interests of individual investors).

security.[6] We respectfully submit that this is also the responsibility of the Commission in establishing reporting standards.

Investor Interest and Materiality

Undoubtedly, there has been an increased call from certain types of investors for companies to provide more ESG information in general, including CRR. In the Proposing Release, the Commission cites significant demand for climate-related information from a limited number of unidentified large institutional investors. The Proposing Release also cites various initiatives established by political institutions and climate activist organizations to which large institutional investors and asset managers are signatories, which initiatives seek more information regarding how investors are using CRR as part of their investment selection process and the CRR exposure of their portfolio companies. The release further notes that an increasing number of investors incorporate this information, in particular GHG emissions, into their investment selection or voting decisions.[7] However, we contend that this investor interest may not be solely driven by the materiality of the information to individual companies in all cases.

In recent years there has been a marked increase in ESG investing.[8] Asset managers looking to construct or manage ESG funds want accurate and comparable climate-risk data for companies to determine whether they should be included in funds that may be marketed as "ESG" or "sustainable". The desire for climate-related information for these institutional investors may be driven by their desire to market ESG funds or other investment products to investors rather than by a belief that climate-related information is material for all public companies. Having a climate-risk disclosure regime in place that mandates all public companies to provide CRR information regardless of materiality, impact or significance to their operations facilitates the screening process for large asset managers but does not benefit other investors. It externalizes significant costs from institutional investors that market ESG funds to public companies and their other investors.

As we previously stated, certain companies, because of the nature of their products or services or the industries in which they operate, face less exposure to CRR and should not be subject to the same onerous reporting requirements as companies in more carbon-intensive industries. Current reporting practice also indicates a wide variety in climate-

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[6] Please see the definition of "material" under 17 CFR 230.405.

[7] *See* Proposing Release at 27.

[8] According to Bloomberg, money held in sustainable mutual funds and ESG-focused exchange-traded funds rose globally by 53% in 2021 to $2.7 trillion with $596 billion flowing into such funds. *See*, Saijel Kishan, *ESG by the Numbers: Sustainable Investing Set Records in 2021*, Bloomberg (February 3, 2022).

related reporting depending on industry.[9] It is reasonable to assume that the companies that are already publicly reporting on these metrics are doing so because they have determined that a sufficiently significant number of investors are interested in this information to make its production worthwhile. The higher rates of reporting of GHG emissions by companies in certain industries implies that understanding CRR may be of greater interest to investors in those industries. Technology and life sciences companies generally do not have the same impact on the climate or the same associated CRR as do companies in certain other industries such as oil and gas, utilities, agricultural and transportation, to name a few. Yet, the Proposed Rules would largely treat all reporting companies the same.

A recent survey that we conducted of 18 technology and life sciences companies that are similar to the types of companies that we frequently represent also supports the above contention. Only four of 18 companies responded that they believed that CRR had a material impact on their business operations and financial results. When asked how often their investors inquired about CRR or climate-related opportunities, only three of the 18 companies reported that their investors frequently inquired about such risks or opportunities. The vast majority (14 companies) answered that investors rarely (7) or only occasionally (7) asked them about climate-related risks. This further suggests that understanding the CRR of technology and life sciences companies may not be as important to investors in companies in these industries as the Proposing Release suggests.

Disproportionate Disclosure of Climate-Related Matters

Since disclosure has first been required under the Securities Act and the Exchange Act, federal securities statutes and regulations, as well as Commission guidelines, have evolved to elicit a rational presentation of material information about subject companies. This evolution has involved both the addition and elimination of specific disclosure requirements and the refinement of the manner in which information is presented to make material information most accessible to investors. We believe this evolution has led to required disclosures that do indeed present investors with material information in a rational and accessible format.

The disclosure that would be required under the Proposed Rules will be significantly disproportionate to other more pertinent disclosures that are currently required and made

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[9] In a recent study by MSCI Inc. of 2,565 companies in the MSCI USA Investable Index based on data from 2019 and 2020, only 25% of companies in the information technology sector and 12% in the health care sector disclosed Scopes 1 and 2 GHG emissions compared to 64% and 55% in the materials and utilities sectors, respectively. *See,* MSCI, *Companies May Not Be Ready for SEC Climate-Disclosure Rules*, (Mar. 29, 2022).

by technology and life sciences companies, and by many other companies as well. The Proposed Rules will require prescriptive disclosure of climate-related information regardless of materiality at a significant cost to companies and, indirectly, their investors. In addition, the sheer magnitude and specificity of the proposed disclosure requirements carry the risk of diminishing the perceived importance to some investors of the important company and industry-specific information contained elsewhere in the same filings. We discuss below the most notable of the disproportionate, and potentially confusing, disclosure requirements of the Proposed Rules.

Governance. The Proposed Rules would require "governance" information that includes (our emphasis added):

- Whether the board or a committee of the board is responsible for oversight of CRR;
- The expertise of directors and officers in CRR;[10]
- The processes by which the board or a committee discusses CRR, including the frequency of such discussions;
- Whether and how the board or a committee considers CRR as part of its strategy, risk management and financial oversight;
- Whether and how the board or committee sets climate-related goals or targets;
- Whether management positions or committees are responsible for assessing CRR, and if so (i) the identity of such positions or committees and (ii) the relevant expertise of the position holders or members; and
- The processes by which such positions are informed about and monitor CRR and the frequency with which they report to the board.

Our clients, like many publicly traded companies, pursue business opportunities that involve advanced subject matters, including by way of example, enterprise software, highly-specialized consumer products and services, artificial intelligence, data harvesting and analysis, pharmaceutical products and medical devices. In addition to the intricacies inherent in developing these products and services, there are critical associated issues such as competition, financial liquidity, supply chains and regulation. Beyond the longstanding requirements of Regulation S-K Items 401 and 407 to describe the business experience of

[10] It appears to us that compliance with proposed Regulation S-K Item 1501(a)(ii) would require the express, or at least implicit, identification of any director(s) having expertise in CRR. It is very troubling to us that a director would be so named without the benefit of a safe harbor from liability for being so identified, similar to that afforded to "audit committee financial experts" under Regulation S-K Item 407(d)(5)(iv).

directors and officers and to identify audit committee financial experts, no requirement exists to provide further details about board/management backgrounds in the subject matters so critical to a company's business.[11] Nor does a requirement exist to explain precisely where within a board or management team oversight for critical business matters resides.

Similarly, there exists no requirement to describe matters such as the processes and frequency by and with which the board considers, and management evaluates and reports, the most important aspects of the business. For example, the success, even the survival, of a pre-revenue biotech company will depend on its ability to develop testing procedures that demonstrate the efficacy and safety of drugs under development, the success of the drugs as demonstrated in such procedures and the ability to process the drugs through the relevant oversight agencies. No requirement exists to explain in detail the board's, or a committee's, processes in overseeing such matters or the frequency of doing so. Nor is there a requirement to explain how a board or committee sets targets for these elemental developments. The closest (and not very close at that) analogue to the proposed disclosure is the requirement of Regulation S-K Item 407 for the audit committee of the board to provide a report that includes its discussions with and disclosures from management and the independent auditors regarding the audited financial statements (which are at least material).

As an aside, we note that the Proposed Rules would include climate governance matters in the new item of Part II of Form 10-K created for climate-related disclosures. This governance information will not be required in the annual meeting proxy statement and, of course, will then not be eligible to be incorporated by reference from the proxy statement into the Form 10-K. Accordingly, climate governance matters may be presented entirely separately from the other governance information that is disseminated to stockholders in the proxy statement, impacting a company's internal processes and timing for gathering and reviewing such information and reducing the accessibility of such information to investors. Moreover, this disclosure approach suggests to us a tacit acknowledgment under the Proposed Rules that none of these climate governance matters is material to voting decisions.

Strategy, business model and outlook. The Proposed Rules would require a highly-specific discussion of CRR that is likely to have a material impact on the company. The

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[11] We acknowledge that on March 9, 2022, the Commission proposed rules in Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Release Nos. 33-11038; 34-94382; IC-34529; File No. S7-09-22, that, among other things, would require SEC-registered companies to disclose whether any board member has expertise in cybersecurity and descriptions of the nature of such expertise in their proxy statements or information statements in connection with the election of directors, and in their Forms 10-K. We have similar reservations regarding that proposal.

proposed disclosure would fractionalize such discussion into physical risks, both acute and chronic, and transition risks, based on a list of potential factors. It would further require a discussion of the impact, without express regard to materiality, of these risks on strategy, business model and outlook, once again with a list of potentially affected aspects of the business. The Proposed Rules go even further to then require:

- disclosure of how these detailed "impacts" are considered as part of the company's strategy, planning and capital allocation;
- an MD&A-like discussion of how these matters affect the company's consolidated financial statements; and
- a description of the resiliency of the company's strategy in light of potential future changes in CRR.

Without repeating the observation from the governance discussion above, the proposed discussion of climate-related matters would require a discussion of these matters on strategy, business and outlook that is dramatically out of proportion to a discussion of much more important factors of which investors should be aware.

Risk management. The Proposed Rules would require a detailed description of processes the company has for identifying and assessing CRR and how these processes are integrated into overall risk management. Once again, the required disclosures are extremely asymmetrical with disclosures about much more significant risks faced by our clients and most companies, and not aligned with information traditionally sought by their investors. For example, enterprise software companies face critical challenges in, among other things, navigating a highly-competitive environment, attracting and retaining qualified employees and continuing robust product enhancements. There exists no requirement, nor are we aware of any significant investor demand, that these companies disclose how they determine the relative significance of these key risks or how they determine their materiality. Similarly, there is no requirement or, as far as we are aware, request to disclose how processes to identify any particular classes of risk are integrated into the overall risk management system.

As would be the case with the governance and strategy, business model and outlook disclosures discussed above, the discussion of risk management required by the Proposed Rules is very unlikely to result in the provision of any additional information that is material to investors under the established understanding of materiality. We believe the upshot of all of these new disclosure requirements will be lengthy boilerplate disclosure that provides nothing material to investors and distorts the presentation of otherwise material information.

Redundancy with Existing Disclosure Requirements

As noted above, the Proposed Rules will create new Regulation S-K Items 1502 and 1503 requiring disclosure about a company's strategy, business model and risks that must be contained in the separately captioned "Climate-Related Disclosure" section. One could assume that the premise underlying the addition of a separate section to registration statements and annual reports containing this disclosure is that material information regarding climate matters of this nature is not otherwise required in such documents. This is hardly the case. We do not believe that the new risk disclosure requirements of proposed Regulation S-K Item 1502(a) and certain parts of proposed Regulation S-K Item 1503 differ from disclosure already required under Regulation S-K Item 105. Similarly, we do not believe that proposed Regulation S-K Item 1502(b) will elicit material information beyond that required by Regulation S-K Item 101, which requires a description of the business done and to be done by the company, including the status of development of products and services, the sources and availability of raw materials, the material impact of compliance with environmental and other government regulations, and human capital resource matters. We also do not believe that proposed Regulation 1502(d) will produce material disclosure beyond that required by Regulation S-K Item 303, which requires a discussion of the company's financial condition and operating results to allow investors to view the company from management's perspective.

From our perspective, it is difficult to understand how investors (other than large asset managers with ESG funds and products) will be expected to process the proposed highly-specialized climate-related data along with the information that is already required in Securities Act registration statements and Exchange Act reports. Is the investor to assume that climate-related risk factors typically discussed under Item 105 and climate-related business matters typically discussed under Item 101 will not be discussed in response to those items but rather will be provided in the proposed Climate-Related Disclosure section? A similar question arises for the proposed financial-impact disclosure and existing Item 303. Or will investors, quite properly, ascertain that climate-related matters will continue to be discussed under the traditional disclosure requirements to the extent material? Might they further ascertain, again quite properly, that the information in the new Climate-Related Disclosure section is either redundant with the traditional sections of the registration statement or report or not significantly material to merit discussion in those sections?

Compliance Costs

The costs for compliance with the Proposed Rules are uncertain and could be significant regardless of whether CRR is material to a company. The Commission estimates that costs to comply with the Proposed Rules for non-SRC companies will be $640,000

(including $180,000 for internal costs and $460,000 for outside professional costs) in the first year and $530,000 annually ($150,000 for internal costs and $380,000 for outside professional costs) in subsequent years. The Commission's estimated costs for SRCs are somewhat lower at $490,000 and $420,000, for the first year and annually in subsequent years, respectively. However, the Proposing Release also acknowledges that "costs related to preparing climate-related disclosures are generally private information known only to the issuing firm, hence such data are not readily available to the Commission. There is also likely considerable variation in these costs depending on a given firm's size, industry, complexity of operations, and other characteristics, which makes comprehensive estimates difficult to obtain."[12] Further, the Commission concedes that direct costs of compliance with the Proposed Rules could potentially be significant and indirect costs may include heightened litigation risk and the potential disclosure of proprietary information.[13]

In response to the Commission's request for commenters to provide relevant data or empirical evidence related to the costs of preparing climate-related disclosures, as noted above, we surveyed technology and life sciences companies. When asked how they would describe the impact of compliance with the Proposed Rules, 15 out of 18 of the responding companies believed that they would have a "material or substantial" impact in terms of costs, time and resources. The three remaining companies thought that it would have a "minor" impact on their costs and none of the respondents thought it would not have an impact. Presumably, the three companies that believed they would have a minor impact are already performing some degree of climate-related reporting and have developed internal structures and appropriate processes and controls to collect, verify and report on CRR.[14] In the Proposing Release, the Commission notes the number of companies providing climate-related disclosures has increased in the last several years, including through voluntary ESG reporting[15] and speculates that to the extent that companies' current climate-related disclosures overlap with the Proposed Rules, they may face lower incremental compliance costs. However, as previously noted, the Commission also states that its projections regarding the costs for compliance are difficult to ascertain, so its estimates could significantly understate the true costs of compliance. Unfortunately, the relatively short comment period for the Proposed Rules (even taking into account the extension), will hamper the ability of companies and their advisors to gather the necessary information to formulate accurate estimates regarding compliance costs.

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[12] *See* Proposing Release *at* 333.
[13] *See id. at* 371.
[14] The survey respondents were anonymous, so we were unable to verify whether these three companies are already reporting or have reported climate-related information.
[15] *See* Proposing Release *at* 309.

According to a study by TCFD, only 50% of companies reviewed disclosed their alignment with at least three of the eleven recommended disclosures of the TCFD framework[16], on which the Proposed Rules are largely based. Companies reporting to the TCFD framework, or another voluntary framework or standard have flexibility with respect to the climate-related information that they provide, which may be reflected in the cost estimates noted above. Because reporting under the TCFD framework is voluntary, whereas the Proposed Rules will require disclosures that are more extensive than the recommended disclosures of the TCFD framework, the costs to provide disclosure under the Proposed Rules could be substantially higher than the costs that they currently incur in connection with the TCFD framework or other voluntary climate-related reporting.

Currently, there appears to be a link between company size and the prevalence of climate-related reporting, and, accordingly, we expect the Proposed Rules will impose a disproportionate burden on smaller companies that may struggle with the cost of complying with their requirements. According to a survey by the Conference Board there is a strong correlation between company size and climate disclosure practices.[17] For example, 69% and 68% of S&P 500 companies disclose Scope 1 and Scope 2 GHG emissions, respectively, compared to just 20% of Russell 3000 companies. Similarly, among companies in the 2021 Fenwick – Bloomberg Law SV 150 List (the "*SV 150*"), an annual ranking of the largest public technology and life sciences companies in Silicon Valley by revenue, approximately 80% of the top 50 technology and life sciences companies (revenues ranging from $2.65 billion - $294 billion in 2020) currently disclose Scopes 1 and/or 2 GHG emissions compared to approximately 19% of the bottom 50 companies (revenues ranging from $265 million - $694 million in 2020) on the SV 150 list.[18] The discrepancy in Scope 3 reporting between the top 50 SV 150 companies and the bottom 50 SV 150 is even more pronounced with approximately 71% and 6% of the top 50 and bottom 50 companies on the list reporting, respectively. Not surprisingly, companies with more revenue have more internal resources to establish the infrastructure and bear the costs of external climate reporting, which is reflected in the high number of larger companies currently disclosing climate information compared to smaller companies. These larger companies are also more likely to be included in the investment portfolios of sustainable mutual funds and ESG-focused exchange-traded funds, which may be another reason why these companies may be willing to prepare such disclosures, even if the information is immaterial.

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[16] *See* TCFD, Task Force on Climate-related Financial Disclosures 2021 Status Report, (Oct. 2021) *at* 28.

[17] *See* The Conference Board, Is Your Company Ready for Scope 3?, (February 2022).

[18] We reviewed the public disclosures of 140 of the 150 companies in the SV 150 as some of the companies had been acquired or were otherwise no longer public since the date of the list's original publication. The 2021 Fenwick-Bloomberg Law SV 150 List *is available at* https://www.fenwick.com/2021-fenwick-bloomberg-law-sv-150-list.

Similarly, one can infer that a larger company would be better able than a smaller company to absorb the costs that would likely be required to develop new systems, processes and controls and to hire additional staff and consultants to produce the data mandated under the Proposed Rules. Any benefits or cost mitigation from already reporting under a voluntary climate disclosure framework or standard would be enjoyed by larger and more established companies. On the other hand, many smaller and earlier stage companies, including companies considering IPOs, would have to bear all of the initial costs of compliance with the Proposed Rules in a relatively short amount of time. We regard this as an unfortunate irony, as it implies that the companies for whom climate related information is least material will incur the greatest incremental costs to comply with the Proposed Rules.

Even though there is a materiality qualifier for Scope 3 GHG emissions, most companies (including smaller companies that are not SRCs) would still have to conduct an extensive analysis to determine whether their Scope 3 emissions would be considered material. These costs could be substantial, particularly as a smaller company may lack the internal resources to make these determinations on its own and would have to engage an outside consultant to provide such services.

Impact on Companies' Decisions to Enter the Public Reporting Regime

We believe there is a substantial likelihood that the lack of materiality thresholds and industry specific guidance coupled with the magnitude and associated costs of the new required disclosures pursuant to the Proposed Rules will result in many private companies delaying or forgoing opportunities to list publicly. The significant additional costs associated with complying with the Proposed Rules on early-stage companies that would not otherwise have determined that much of this disclosure was material because of their industry, the nature of their businesses, their interactions with their investors or otherwise will have a significant impact on their capital formation decisions and may ultimately result in fewer public listings and, therefore, less available information and a reduction in investing options for the public.

We note that under the Proposed Rules, there is no additional transition period for compliance for newly-public companies. Companies considering an IPO or listing would be forced to incur substantial costs related to climate disclosure along with the myriad of new compliance costs associated with both preparing to go public when successful completion of the process is substantially uncertain and, assuming their IPO or listing is consummated, being a public company. The Commission has already acknowledged in other contexts that the financial and resource costs associated with certain public company disclosure requirements are immense and have therefore made them subject to a phase-in or

otherwise provided exemptions or accommodations based on factors including the size of the issuer and time since initial listing. Yet no such phase-in, accommodation or exemption is included in the Proposed Rules. For example, our sense is that the costs of complying with the requirements of the Proposed Rules would be as, if not more, burdensome than complying with the requirements of Section 404(b) of the Sarbanes-Oxley Act of 2002 ("*SOX*").

We believe that, just as with the requirements of SOX 404(b), emerging growth companies ("*EGCs*") and SRCs (outside of particular enumerated industries that are deemed to have a sufficiently extensive interconnection to CRR and other climate-related issues) should benefit from exemptions and accommodations from the requirements of the Proposed Rules that are akin to those that apply to SOX 404(b). We believe that such exemptions and accommodations should extend beyond the current termination period for EGCs, which terminates for many newly public companies in their second year due to the public float test. We believe such an approach could mitigate the detrimental and disproportionate impact on new issuers and early stage companies that might otherwise push them away from the public markets.

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If the Commission's Staff would care to discuss any of the comments contained in this letter, please contact David Bell, Co-Chair, Corporate Governance at [redacted], and Robert Freedman, Co-Chair, Capital Markets & Public Companies [redacted]

Very Truly Yours,

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