6/17/22

To: Mr. Elliot Staffin, Special Counsel
Office of Rulemaking
Division of Corporation Finance
Securities and Exchange Commission

From: Charles Franklin, Senior Director,
Energy, Climate and Environment
American Chemistry Council

Re: American Chemistry Council Comments on Proposed Enhancements and Standardization of Climate-Related Disclosures for Investors (File Number S7-10-22)

Submitted via: https://www.sec.gov/rules/submitcomments.htm and rule-comments@sec.gov.

Dear Mr. Staffin:

Enclosed for your reference are comments from the American Chemistry Council (ACC) in response to the Security and Exchange Commission's Notice of Proposed Rulemaking, Enhancements and Standardization of Climate-Related Disclosures for Investors (File Number S7-10-22), 87 Fed Reg. 21334 (April 11, 2022).

If you have any questions or would like more information, please free to contact me via phone at [redacted] or email at [redacted].

Sincerely,

Charles Franklin

Charles Franklin
Senior Director, Energy, Climate and Environment

cc: Kimberly White, ACC

ACC Comments on the SEC's Proposed Enhancements and Standardization of Climate-Related Disclosures for Investors

(File Number S7-10-22)

6/17/2022

Summary of Comments

ACC appreciates the opportunity to comment on the Securities and Exchange Commission's (SEC's or Commission's) Proposed Enhancements and Standardization of Climate-Related Disclosures for Investors (File Number S7-10-22) (NPRM or Proposal). The ACC provides these comments on behalf of over 190 companies involved in the business of chemistry within the United States. ACC members work to solve some of the biggest challenges facing our nation and our world by providing chemical, plastic, and polymer products and materials used in the institutional, consumer, commercial, and industrial sectors of the U.S. economy.[1]

Our members are key stakeholders and partners in the nation's drive toward a lower emissions future, both as heavily regulated entities and as providers and enablers of the materials, products, and technologies needed to reduce emissions across the larger economy. These include Large Reporters, Reporters, Small Reporting Companies (and equity affiliates thereof), and foreign companies doing business within the U.S. Our publicly traded members recognize their fiduciary duty to provide investors and shareholders with accurate, material, and accessible information on the broad range of risk factors affecting the financial health of their investments.

ACC supports a company-specific, principles-based approach to climate-related information reporting, building off existing climate change frameworks and guided by materiality to focus on disclosures that are relevant and material to investors and shareholders without impeding the competitive marketplace.

Unfortunately, the SEC's proposed rule runs counter to such principles and its own legislative mandate. It is legally unsupportable on both substantive and procedural grounds. Since Congress' passage of the Securities Act of 1933 and Exchange Act of 1934, the Commission has been tasked with "protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation."[2] More than 80 years of experience and precedent in implementing these mandates has reinforced the critical role that materiality must play in determining the scope and granularity of mandated disclosures. The Proposal largely discards the statutory reasonableness and proportionality guardrails as well as its duty to the "reasonable investor," instead repurposing an investor-protection statute to advance regulatory policy. Rather

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[1] In addition to the comments provided herein, ACC directs the Commission to the comments submitted by the following entities: USCIB, US Chamber of Commerce, National Association of Manufacturers, and Dow Chemical.

[2] *See* SEC, *What We Do* (last visited May 4, 2022), available at https://www.sec.gov/about/what-we-do.

than focusing on the material facts a "reasonable shareholder would consider … important in deciding how to vote"[3], however, the proposed rule essentially codifies provisions from the most aggressive voluntary disclosure frameworks, removes the flexibility inherent within them, and then adds additional analytical, substantiation, and attestation mandates. The resulting Proposal would expand federal interference into corporate governance, management, strategy, and competition to a degree not seen with other, far more tangible and material business risks.

Essentially, the Proposal would put climate risks in a classification all by themselves, overshadowing other traditional risk factors, reshaping both S-K and S-X filings, and ballooning the cost of compliance. By the Commission's own conservative estimate, companies already spend more than $3.8 billion annually to report material climate risks and impacts under the current materiality-based, narrative disclosures framework of the 2010 rule. Considering the scope and detail of the expansive new narrative and quantitative reporting requirements proposed, the SEC's estimate of only $6.4 billion in cost increases understates the financial impact on regulated companies from recordkeeping, compliance, and legal costs. When considering the additional indirect (but undeniable) costs on private and unregistered companies and ventures (including equity affiliates), the rule grossly understates the economic impact of the rule.

While the proposed rule would do little to inform the reasonable investor, it would provide benefits to some groups – namely the burgeoning market for climate consultants, auditors, and the securities plaintiffs' bar which Commissioner Peirce aptly names the "climate industrial complex."[4] Indeed, if there is any financial impact and climate-related risk that can be predicted with certainty under the proposed rule, it is the exorbitant cost of compliance with the rule, including staffing, external consultants, and legal fees, and the increased risk of litigation from third parties dissatisfied with the registrant's management of this complex, rapidly evolving and sensitive issue.

For these reasons, ACC recommends the Commission withdraw the Proposal or designate it as an Advanced Notice of Proposed Rulemaking (ANPR) and work with the registrant community and investors to review and address the hundreds of questions raised in the preamble. Alternatively, we echo comments from other commenters who have requested a 180-day review period in which to study the rule and engage with Commission staff on the broad-sweeping facets of the proposed rule. At minimum, if notwithstanding its lack of legal authority and inadequate time to comment, the Commission elects to proceed according to the current schedule, ACC urges the Commission to address some of the most significant legal and substantive deficiencies in the Proposal and offers the below recommendations for consideration.[5] While adopting these suggestions would not cure the fundamental defects with the proposal, they would greatly improve the workability of a final action.

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[3] *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

[4] SEC Commissioner Hester Peirce, *We are Not the Securities and Environment Commission - At Least Not Yet* (March 21, 2022) (Reid Dissent), *available at* https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321,

[5] These recommendations are intended to mitigate some of the most significant flaws and concerns identified to date in the event that SEC disregards calls for additional time for public consultation and/or re-

- Limit quantitative scope 1 emissions reporting to companies already subject to federal reporting, allowing narrative disclosure of financially material emissions for all others.
- Limit scope 2 emissions reporting to narrative descriptions of material financially material categories.
- Limit scope 3 emissions reporting to qualitative narrative description of financially material categories.
- Extend effective date of all compliance deadlines by at least 3 years.
- Exempt proprietary management and strategic information.
- Eliminate the zip-code reporting requirement for any climate information.
- Retain focus on narrative disclosure proportionate with other risks and allow supplemental information to be furnished in a separate stand-alone report.
- Eliminate audit and attestation requirements for expanded disclosure requirements.
- Eliminate line-item reporting on financial statements and one percent de minimis threshold.
- Expand the rule's economic impact analysis to address proprietary, indirect, and third-party impacts and costs.

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proposal. In suggesting these changes, ACC is not conceding that any of the amendments proposed are necessary or appropriate to address alleged deficiencies in the current rule, or that SEC has the appropriate legal authority to regulate in this space.

A. Introduction and Background

ACC serves as the voice of the U.S. chemical manufacturing industry, representing over 190 companies producing tens of thousands of products essential to modern life. ACC members work to solve some of the biggest challenges facing our nation and our world by providing chemical, plastic, and polymer products and materials used in the institutional, consumer, commercial, and industrial sectors of the U.S. economy. Products of chemistry help protect our food supply, air, and water, make living conditions safer, enable lifesaving medical treatments, provide access to efficient and affordable energy sources in the United States and around the globe.

With respect to federal climate policy and the economy, the chemical industry occupies a unique position as both a heavily regulated industry and climate solution provider. Products of chemistry are essential to achieving the nation's climate, environment, and infrastructure goals. U.S. chemical manufacturers supply the products, materials, and inputs used to help reduce the climate and environmental impacts from virtually every sector of the U.S. economy. Our members' products help make the building and construction sector more durable, resilient, and energy-efficient and the transportation sector more fuel efficient. They are investing heavily in innovation to serve emerging and future markets with new, more sustainable products and product chemistries.

From a regulatory perspective, ACC companies and their operations vary in size, sophistication, geographic scope, energy sourcing and inputs, operating requirements, manufacturing technology requirements, emissions characteristics, and supply-chain complexity. Every member product reflects a unique combination of feedstock inputs and sourcing, product chemistries, environmental attributes, and downstream value chain complexity.[6]

Given this diversity, it is difficult to generalize the Proposal's impact on the chemical sector as a monolithic entity. Similarly, the sheer breadth and granularity of the rule precludes a few simple "fixes" to address the many procedural and substantive flaws undermining the Proposal's factual, legal, economic, and policy foundation. Indeed, ACC believes that the most appropriate course would be for the Commission to withdraw the current Proposal or designate it as an ANPR and work with registrants, investors, and other stakeholders to identify a more limited, reasonable, and defensible set of targeted improvements addressing financially material deficiencies in the current disclosure framework. This approach would allow the Commission to fill critical gaps in its analysis, avoid unnecessary and unintended consequences on public markets and private entities, reduce the likelihood of reversal on appeal, and ensure that Commission policy continues to incentivize both market capitalization and voluntary disclosure

[6] *See* ACC, *2021 Guide to the Business of Chemistry* (attached as Exhibit A).

of supplemental climate and ESG information desired by non-financial stakeholder groups for policy and advocacy purposes.[7]

In the event the Commission elects to proceed with the current proposal, ACC respectfully provides the following comments to assist the Commission in identifying some of the major legal, policy, and practical deficiencies of particular concern to chemical manufacturers. Notwithstanding these comments, ACC retains all rights to challenge or seek judicial review of some or all of the provisions of the proposed rule on substantive and/or procedural grounds.

B. ACC members support a company-specific, principles-based approach to disclosure.

ACC and its members believe that public investors and shareholders should have access to financial information necessary to assess material investment risks and returns associated with publicly held companies. For over 80 years, the SEC has protected that right through a series of consistent and targeted regulations and policies targeted to the information needs of the "reasonable investor." As the SEC reviews its current regulatory framework, ACC encourages the Commission to develop disclosure policies that:

- Are supported by reliable data, methodologies, and predictive tools;
- Build off existing climate change frameworks;
- Are guided by materiality to focus on disclosures that are relevant and material to financial decision-making investors and shareholders;
- Are consistent and with the SEC's broader disclosure framework and purpose;
- Recognize practical and business constraints including timing constraints, data limitations, consistency with existing procedures, management systems, and accounting procedures, access to internal and external experts; and
- Encourage rather than discourages sustainable management, planning, goal setting, and investment.

While the current SEC climate disclosure framework largely aligns with these principles, the Proposal would mark a significant shift and departure, undermining rather than advancing the interests of investors, shareholders, and registrants.

[7] Alternatively, the Commission could redesignate the Proposal as an advanced notice of proposed rulemaking (ANPR) or extend the comment period on the current Proposal to a full-180 days, providing time for additional industry-specific consultations and dialogue.

C. The SEC has exceeded its statutory authority

1. The SEC's mandate is limited and targeted

The SEC's authority to mandate corporate disclosure of risk factors is rooted in two core federal statutes, section 7 of the Securities Act (information included in registration statements) and section 12 of the Securities Exchange Act (registration requirements for securities).[8] These provisions have been subject to extensive interpretation by federal courts over the past 80 years, as well as detailed federal regulatory requirements. Neither the statutes nor existing regulations and related caselaw support the Commission's broad interpretation of its authority to impose reporting mandates of the scope, granular detail, and political sensitivity required under the Proposal.

This lack of a clear legislative mandate raises fundamental questions about the legality of the rule under the authorizing statutes under both the Administrative Procedure Act (APA) and the controlling statutes, including if the rule violates the Major Question Doctrine. As the Supreme Court has explained this doctrine provides that, "[i]n the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government's view."[9] The Commission has no such mandate.

2. The SEC's mandate does not extend to advancing specific social policies

The Commission is authorized to establish disclosure requirements that are "necessary or appropriate in the public interest or for the protection of investors."[10] While there may be some investors who see investing as a way to advance social policy goals, the SEC has historically recognized that "the principal, if not the only, reason why people invest their money in securities is to obtain a return."[11] At minimum, the clarity and specificity of the SEC's purpose raises the Commission's burden in demonstrating that such onerous and extensive disclosure mandates – inconsistent with and contrary to prior practice - are consistent with legislative authority and congressional intent Had Congress intended the investor protection provisions to provide the SEC with authority to require such broad ESG disclosures and fundamentally change the nature of the information historically provided, one would have expected clearer direction from Congress.[12]

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[8] *See, e.g.,* 15 U.S.C .77g and 78*l*. Other supporting provisions include id. at 77s), 78m, and 78o].

[9] *Indus. Union Dept. v. Amer. Petroleum Inst.*, 448 U.S. 607, 645-646 (1980).

[10] See Securities Act Sections 7, 10, 19(a); Exchange Act, Sections 3(b), 12, 13, 14, 15(d), and 23(a).

[11] See Securities Act of 1933 Release No. 5569 (February 11, 1975) & Securities Exchange Act of 1934 Release No. 5627 (Oct. 14, 1975).

[12] *See Whitman v. American Trucking Assn',* 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

3. Congress granted environmental reporting and regulation to other agencies

This disconnect between the SEC's legislative authority and the proposed rule is particularly apparent in the context of the detailed climate emissions reporting the Commission would require for all industries and registrants. The Commission itself acknowledges in its economic analysis that "[t]here are also state and other Federal laws that require certain climate-related disclosures or reporting," and that "EPA estimates that the required reporting under their rule covers 85-90% of all GHG emissions from over 8,000 facilities in the United States."[13] ACC members--like many other companies across the United States, operate within a mosaic of domestic and international regulatory regimes overseen by the Environmental Protection Agency, the Council on Environmental Quality, the Department of Energy, the Federal Trade Commission, and the Federal Energy Regulatory Commission. These regulatory bodies, which have a specific focus on industries of greatest concern and authority to act, already are addressing (or will likely soon themselves address) risks posed by severe weather events and other climate issues on the chemistry industry.

For example, the Environmental Protection Agency currently has multiple ongoing rulemakings in which it is addressing climate change concerns or taking comment on authority to address climate change concerns, that either directly or indirectly impact the chemistry industry. These include:

- The Clean Water Act (CWA) Hazardous Substance Worst Case Discharge Planning Regulations, where EPA is taking comment on "suggestions and supporting rationale and data on how best to incorporate climate risks into CWA hazardous substance" Facility Response Plans.[14]
- Proposed revisions to the Greenhouse Gas reporting rule, where EPA is taking comment on updating several chemistry industry relevant reporting requirements, including stationary fuel combustion sources, hydrogen production, petrochemical production and suppliers of industrial greenhouse gases. [15] In addition, as part of this rule EPA is taking comment on potential requiring reporting on purchased electricity, from which the EPA indicates it would then calculate indirect GHG emissions.[16]
- Proposed standards regulating existing sources of methane emissions in the natural gas industry, which provides the primary feedstock and energy source for much of our industry's production.[17]

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[13] *Id.* at 21413.

[14] 87 Fed. Reg. 17890, 17909 (Mar. 28, 2022)

[15] Prepublication version available at https://www.epa.gov/ghgreporting/rulemaking-notices-ghg-reporting (visited June 6, 2022).

[16] *Id.* at 397-98.

[17] *See* 86 Fed. Reg. 63,110(Nov. 15, 2021)

- Anticipated updated standards for new natural gas fired power plants and existing fossil fueled fired power plants, which provide grid power for the operations of many of our members. [18]

Likewise, for example, the Federal Trade Commission (FTC) is an agency whose very mission is to protect consumers and competition by preventing anticompetitive, deceptive, and unfair business practices,[19] including environmental marketing claims. The FTC's existing *Guides for the Use of Environmental Marketing Claims* (Green Guides) contains guidance on claims about carbon offsets, ozone-friendly, renewable energy claims, as well as general principles around environmental marketing. The FTC announced plans to review the Green Guides this year, which are expected to include updates or additions to existing guidance governing a range of climate-related marketing claims.[20] The FTC is well-suited to provide this guidance and has experience overseeing advertising claims substantiation. False claims about environmental benefits are already subject to potential FTC enforcement.[21] Some states, such as Maine and Rhode Island, have explicitly incorporated the Green Guides into state law, and others, like California, have enacted their own guidelines for environmental marketing claims while also references the federal guidelines. Even in states without specific environmental marketing laws, state consumer protection statutes abound, sometimes including the option for "citizen attorney general" suits for deceptive marketing practices. Consumers have numerous avenues for legal recourse if they believe a company is misleading in its climate marketing, without the SEC stepping into the traditionally FTC realm of marketing and advertising regulations.

In light of these realities, it is unclear why the Commission would elect to expand its regulatory scope to include disproportionate and duplicative requirements for reporting on climate emissions, corporate climate strategy, and speculative risk and impact assessments, or how such activities would serve the public interests articulated for a securities regulatory agency. While federal securities disclosure policy might offer a seemingly convenient mechanism for driving broader federal climate policy objectives and restructuring the economy, the SEC has neither the authority, structure, nor expertise to advance such social policy goals while achieving its core mission of protecting investors.

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[18] *See e.g.* EPA, Office of Air and Radiation, *Available and Emerging Technologies for Reducing Greenhouse Gas Emissions from Combustion Turbine Electric Generating Units* (April 21, 2022)

[19] https://www.ftc.gov/about-ftc/mission.

[20] *See* 86 Fed. Reg. 35239 (July 2, 2021)

[21] *See, e.g.*, FTC, Environmental Claims Summary of the Green Guides (Oct. 2012); https://www.ftc.gov/news-events/news/press-releases/2022/04/ftc-uses-penalty-offense-authority-seek-largest-ever-civil-penalty-bogus-bamboo-marketing-kohls; https://www ftc.gov/news-events/news/press-releases/2014/04/ftc-sends-refunds-consumers-duped-marketers-who-claimed-fuel-additive-could-drastically-increase; https://www.ftc.gov/news-events/news/press-releases/2013/10/ftc-cracks-down-misleading-unsubstantiated-environmental-marketing-claims; https://www ftc.gov/news-events/news/press-releases/2011/03/ftc-approves-final-order-settling-charges-tested-green-environmental-certifications-were-neither.

4. The content and prescriptive nature of the rule makes this compelled speech in violation of the First Amendment.

The scope and specificity of the NPRM's disclosure requirements, particularly those governing corporate management, internal operations, and market strategy, raise significant concerns about the Commission's authority to compel disclosure of proprietary information. This is not just a theoretical concern. The Commission acknowledges that the proposed rule may compel companies to disclose information they deem proprietary under their business model.

> Another potential indirect cost is the possibility that certain provisions of the proposed rules may force registrants to disclose proprietary information. Under the proposed rules, registrants would be required to disclose a wide range of climate-related information, including potential impacts on its business operations or production processes, types and locations of its operations, products or services, supply chain and/or value chain. Registrants would be further required to disclose whether they have emissions-related targets and metrics or an internal carbon price, and if they do, what they are. To the extent that a registrant's business model or strategy relies on the confidentiality of such information, the required disclosures may put the registrant at a competitive disadvantage.[22]

This admission highlights a fundamental flaw in the Commission's calculus. As proposed, the rule would compel company officers to speak publicly on sensitive, business-confidential topics on a routine, ongoing basis, including channeling the beliefs and expectations of their company's management and board. It also may force companies and company officials to adopt aggressive public positions on climate policy that may or may not align with shareholder priorities and beliefs.

In her dissenting statement, Commissioner Peirce observed that "[t]his Proposal steps outside our statutory limits by using the disclosure framework to achieve objectives that are not ours to pursue and by pursuing those objectives by means of disclosure mandates that may not comport with First Amendment limitations on compelled speech."[23] As the Commission is no doubt aware, the U.S. Supreme Court long ago settled the fact that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[24] This long-standing prohibition against compelled speech was revisited more recently when the D.C. Circuit Court of Appeals invalidated part of the conflict minerals disclosure requirement under the Dodd-Frank Act because the court determined the challenged portion rose to the level of unconstitutionally compelled speech.[25]

Mandatory disclosures are no less compelled because some companies choose to release such information on a voluntary basis, or because some shareholders, activists, or competitors

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[22] Proposal at 21444 (internal citations omitted).
[23] *See https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321*
[24] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
[25] *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015).

would like access to that information. The extensive and intrusive reporting requirements included within the Proposal, particularly those governing disclosure of corporate governance, internal management, business operations and financial analysis, carbon pricing, market assessment, and strategic planning, step well beyond any reasonable justification of compelled disclosure and should be removed. These include but are not limited to decisions on what products and product lines to make, sell, or phase out, which suppliers and vendors to use, where to operate, and how to conduct internal accounting and investment allocation, including internal carbon pricing.

Registrants may have a variety of reasons for treating this type of information as proprietary and confidential. Disclosure might be used by competitors in appropriating or thwarting development, acquisition, protection, or sale of intellectual property, strategic investments or divestments in business lines, and analysis and forecasting of market and pricing trends. Disclosures could and would be used by third parties to support legal claims and suits, either for financial gain, competitive advantage, or to force corporate conformity with political or policy priorities.

Such outcomes would harm rather than benefit shareholders and investors, undercutting competitive advantages from innovative management, strategy, and market innovation, and increasing rather than reducing financial risk and uncertainty from legal, market, and financial factors outside of the registrant's control.[26]

5. The Proposal conflicts with prior Commission practice and precedent.

The proposed rule is a radical departure from prior Commission rulemaking approaches on multiple levels. The expanded requirement to quantify risks and impacts on a regional and line-item analysis conflicts with the treatment of other, far more salient risks – a fact highlighted by the proposed addition of an entirely new Code section.[27]

Even where proposed rulemakings have focused on particular social issues that were determined to present unique risk attributes important to investors, prior proceedings have taken a lighter hand, and did so with explicit direction from Congress to address the issue. For example, the Dodd Frank Act's focus on mine safety and health disclosures were relatively narrowly tailored to risks unique to the mining industry. The controversial conflict mineral disclosure rules, but for portions that were successfully challenged in court, are also narrowly tailored as compared to the proposed climate risk rules, as the former focuses on the sourcing practices related to specified minerals and apply only to those registrants for which the conflict minerals are necessary to the functionality or production of a product manufactured or contracted

[26] With respect to increased legal risk, for example, even companies adhering closely to the expansive requirements of the proposed rule would have to plan for and incur significant legal fees and costs to prepare for and defend against baseless legal claims as a matter of business – particularly those in industries targeted by third parties for anti-competitive or ideological reasons.

[27] *See, e.g.,* NPRM at 21345, proposing 17 C.F.R.§229.1500–1507 (''Subpart 1500 of Regulation S–K'').

by the registrant to be manufactured. Banks and bank holding companies are subject to enhanced disclosure obligations related to industry-specific risks.

The closest recent example to the proposed climate risk disclosure rule is the Dodd Frank Act's sweeping executive compensation disclosure rule promulgated by the Commission thereunder.[28] Since taking effect, the executive compensation disclosure rules have, for all practical purposes, turned public company annual meeting proxy statements into public referenda on a public company's executive compensation practices. Proxy statements have grown significantly in size and complexity, and public companies dedicate extraordinary financial resources on compensation consultants and other third-party advisors, as well as board and management time, year after year. That said, unlike the proposed climate risk disclosure rules, only public companies are impacted by the executive compensation disclosure obligations, and there is a meaningful demarcation between disclosure obligations for smaller reporting companies and non-smaller reporting companies. Here, however, the proposed rules will impact *all* chemistry industry participants, regardless of size, and even for those not directly subject to public reporting.

Another example of Commission's overreach is the Proposal's mandate to report potential climate risks and impacts at the zip code level.[29] This level of granularity far exceeds the detail any reasonable investor would deem material in making investment decisions. Compare, for example, the Commission's disclosure requirements for registrants engaged in oil and gas producing activities, which states that "*geographic area* means, as appropriate for meaningful disclosure in the circumstances: (1) By individual country; (2) By groups of countries within a continent; or (3) By continent."[30]

There is little to no precedent for requiring mandatory mass disclosure of the types of granular information proposed here, and no risk-based justification for doing so now. Moreover, in some industries, highlighting the specific location of facilities with physical risks could actually increase the physical and financial threat to corporate assets from action by bad third-party actors. Before the Commission proceeds, it should revisit and recalibrate its approach to weighing the materiality and proportionality of the information streams included in the proposed rule.

D. The Proposal departs from traditional and important materiality concepts

One of the most troubling aspects of the proposed rule is its wholesale rejection of materiality and proportionality. The Proposal rejects fundamental precepts of federal securities law, including materiality, proportionality, and a focus on the "average prudent investor" as guardrails for new federal mandates. This not only imposes undue costs on registrants and their shareholders, it creates a securities disclosure regime that disproportionately emphasizes speculative climate risks over traditional risk factors, to the detriment of investors.

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[28] *See* 17 C.F.R. § 229.402.
[29] *See* proposed 17 C.F.R. § 229.1500(k) and § 229.1502(a)(1)(i)(A).
[30] *See id.* §229.1201(d).

The Proposal would impose unprecedented new requirements for information collection, speculative analysis, and detailed public reporting of current and future operational, management, and strategic information in highly regulated legal filings, with little to no consideration of the information's materiality, relevance, reliability, or competitive sensitivity. The Proposal would indirectly mandate scope 3 reporting under a highly subjective and liberal interpretation of materiality to make and defend speculative statements on the impacts of complex supply and value chains for thousands of different products, uses, and markets. Each statement would be subject to extensive substantiation and documentation requirements as well as costly legal review, audits, and in many cases attestation from third-party experts. Companies would face increased administrative, civil, and even criminal enforcement liability, as well as inevitable activist and shareholder litigation over the highly subjective assessments and predictions of the impacts of climate on future corporate performance.

For example, the Proposal would establish entirely new subparts of Regulation S-K and S-X focused solely on climate information, much of which is required regardless of traditional materiality principles.[31] Examples include:

- Mandatory collection, analysis, validation, audit, and reporting of scope 1 and scope 2 GHG emissions *and* emissions intensity, regardless of the nature of the registrant's operation and magnitude of emissions;[32]
- Reporting on scope 3 emissions under the vague and overly inclusive "materiality standard" implied within the Proposal's preamble.[33]
- Requirements for line-item reporting of de minimis climate-related impacts in Financial Statements.[34]
- Reporting on "climate expertise" within the registrant's board and management, regardless of the significant of climate impacts to the registrant's business.
- Costly audit and attestation requirements for many of the new disclosure requirements.[35]

This approach undermines recent efforts by the Commission to make it easier for investors to assess the full range of risks investors face in making investment decisions. Only two years ago the Commission adopted rules governing "Modernization of Regulation S-K Items

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[31] Proposal at 21335.

[32] The issue of "emissions intensity" is particularly problematic when required at an industry-wide level due to the diversity of materials, products, services, and supply chains covered by the rule and the thousands of factors influencing the "emissions intensity" at the product level, let alone a registrant full product or service portfolio. In essence, SEC can mandate reporting on emissions intensity, and even establish a specific methodology (e.g., TonsCO2 per unit of revenue), but the number will have no comparative value or use to investors since every company's number will be influenced by so many unique factors.

[33] As discussed below, while the Proposal purportedly limits scope 3 reporting to "material" emissions, the preamble language suggests a standard that would likely capture many companies for which climate considerations would be immaterial or difficult to preclude without extensive analysis.

[34] Proposal at 17 C.F.R. § 210.14-02(b).

[35] *Id.* at proposed §1505(c)

101, 103, and 105," amending the risk reporting framework to "result in risk factor disclosure that is more tailored to the particular facts and circumstances of each registrant, which should 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*."[36]

The Commission tries to sidestep the traditional materiality requirement by making sweeping generalizations that disclosed information "can have an impact on public companies' financial performance or position and may be material to investors in making investment or voting decisions."[37] But such speculative and conclusory statements cannot be the basis for a mandate of the Proposal's scope without swallowing the entire concept of materiality. In theory, any piece of information about a company's management and operations "can" have an impact on public companies' financial performance, or "may" be material to some investors in their decision-making process. In practice, however, this is not the standard established by the courts and the SEC struggles to articulate the materiality/value proposition for a universally mandated disclosures of any type, let alone the level of detail envisioned in the Proposal.[38] Simply saying information is material does not make it true, nor does the fact that a subset of socially focused investors may prioritize climate information and policy over financial performance.

This disconnect is particularly evident when the Commission strays from long-established precedent. The proposed section § 210.14-01(b), for example, would require reporting of climate-related financial impacts and expenditures for every line item on the financial statement above a one-percent threshold. The SEC requires line-item reporting only sparingly and when it does, it regularly uses a five-percent threshold or higher.[39] The Commission has provided no basis for its assertion that information of the unusual granularity proposed here is necessary or material to support informed investor and shareholder decision making, and the handful of references where a one-percent threshold has been used are inapposite to the current case.[40] Nor does the proposal provide a linkage between the "bright line" one-percent line item reporting requirement and materiality, positing only that the "proposed threshold would provide a bright-line standard for registrants and should reduce the risk of underreporting such information" and "could also promote comparability and consistency among a registrant's filings over time and among different registrants compared to a principles-based approach."

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[36] SEC, Modernization of Regulation S-K Items 101, 103, and 105 (Nov. 20, 2020) (emphasis added), *available at* https://www.sec.gov/rules/final/2020/33-10825.pdf.

[37] Proposal at 21335 and 21462.

[38] *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976) ("fact is material if there is: '*a substantial likelihood* that the ... fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" (Emphasis added).

[39] *See* https://www.ecfr.gov/current/title-17/chapter-II/part-210. 17 CFR § 210.4-08(h)(b)(1) (net impact of timing differences on income tax expenses); *id.*, Note 1 ("Amounts applicable to foreign income (loss) and amounts applicable to foreign or other income taxes which are less than five percent of the total of income before taxes or the component of tax expense, respectively, need not be separately disclosed"); *id.* 17 CFR § 210.4-08(h)(b)(1) (reconciliation of reported income tax expense); 17 C.F.R. § 210.5-02 (Balance sheets).

[40] Proposal at FN 869 (citing §§ 210.5-03.1(a) (excise taxes), 210.12-13 (option contracts), and 229.404(d) (Transactions by smaller reporting companies with related persons).

E. The Proposal's scope 3 reporting provisions are overbroad and ambiguous.

For the chemical industry, one of the most troubling aspects of the Proposal is the vague and overbroad requirements governing quantification and reporting of "material" scope 3 GHG emissions and intensity.[41] While the scope 3 disclosure mandate references materiality, the exception for public reduction targets and the overinclusive materiality test implied in the preamble effectively ensure that most registered companies and their non-public company partners across their value chains will be required to analyze and quantify, if not publicly disclose their own Scope 1-3 impacts.

As a practical matter, there is no consistent, reliable methodology for determining material scope 3 emissions, let alone ensuring comparable disclosures given the diversity of the economy. This task is particularly challenging for chemical manufacturers, which are not only indispensable to the U.S. economy but ubiquitous and diverse, as reflected in a recent report by the Department of Energy's (DOE) Advanced Manufacturing Office.

- "Chemical products are essential to production of a myriad of manufactured products. More than 96% of all manufactured goods are directly touched by the chemicals industry… The industry greatly influences our safe water supply, food, shelter, clothing, health care, computer technology, transportation, and almost every other facet of modern life."
- "The U.S. chemical industry is responsible for more than a quarter of the U.S. GDP, supports the production of almost all commercial and household goods, and is essential to economic growth."
- "The business of chemistry is America's largest exporting sector, supplying an eighth of the world's chemical needs."
- "Nearly all goods in use every day in the U.S. are manufactured using Chemical Sector products. These goods are found in homes, offices, drug stores, and farms across the Nation.
- "Chemicals and related products make up 10 cents of every [dollar] of U.S. exports." [42]

A recent Department of Homeland Security analysis reinforces this challenge, finding that:

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[41] *See* proposed 17 C.F.R. 1500(r) ("Scope 3 emissions are all indirect GHG emissions not otherwise included in a registrant's Scope 2 emissions, which occur in the upstream and downstream activities of a registrant's value chain…"); id. 1504) ("(c) Scope 3 emissions. (1) Disclose the registrant's total Scope 3 emissions if material [or] it has set a GHG emissions reduction target or goal that includes its Scope 3 emissions.")

[42] DOE, AMO, *Chemicals Industry Profile Advanced Manufacturing* (last visited May 19, 2022), available online at https://www.energy.gov/eere/amo/chemicals-industry-profile#:~:text=More%20than%2096%25%20of%20all,touched%20by%20the%20chemicals%20industry.&text=The%20industry%20greatly%20influences%20our,other%20facet%20of%20modern%20life.

- The U.S. Chemical Sector converts raw materials into more than 70,000 diverse products essential to modern life and distributes those products to more than 750,000 end users throughout the Nation.
- Several hundred thousand U.S. chemical facilities—ranging from petrochemical manufacturers to chemical distributors—use, manufacture, store, transport, or deliver chemicals along a complex, global supply chain.
- End users include critical infrastructure sectors, making the uninterrupted production and transportation of chemicals essential for national and economic security.[43]

These reports highlight the diversity of economic activities touched by chemical manufacturers and the challenge of tracing their impacts across their global value chains. This reach and diversity not only makes Scope 3 emissions analyses inherently subjective, it highlights the unprecedented scope of the information collection mandate and complexity of the mandate and the challenge of developing reliable, data-driven analyses suitable for use in investment decision-making.

Even at the company level, the diversity of products, operations, supply chain inputs, and end-uses for products of chemistry is staggering. Most chemical companies manufacture multiple products, each of which may go into dozens of end uses, industries, and links along the value chain from cradle to cradle. Few registrants will have access to the detailed data needed to calculate, or even estimate, the emissions associated with their unique upstream and downstream value chain. While some registrants that dominate their supply chain markets or value chains may have the bargaining power to demand some select suppliers or downstream customers conduct the requisite analyses and provide the needed information, most will lack the market influence to obtain such information, or will be reliant on value chain partners th.at lack the size, sophistication, or resources to comply successfully, if under any circumstances.

Where such data is available, without a clear and consistent understanding of organizational boundaries, supply chain and value chain scoping boundaries, and methodologies to calculate and compare scope 3 estimates, the resulting disclosures will be entirely subjective and lack any value for analyzing or comparing financial performance. Many registrants will be forced to rely on "best estimates," formulas, default data, and industry-wide emissions factors provided by consultants or third-party groups, creating generalized estimates or industry averages with little to no probative or financial value for investors evaluation specific companies.

Such analyses will also be exceedingly costly, both for registrants and their large and small value chain partners. Robust information on what these costs would be is lacking, as reflected in the SEC's lack of reasonable estimates and their request for comment for sources on

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[43] Department of Homeland Security, *Chemical Sector Profile* (last visited May 25, 2022), https://www.cisa.gov/sites/default/files/publications/Chemical-Sector-Profile_Final%20508.pdf

that issue, and[44] the Commission's preliminary estimates almost certainly underestimate the cost when applied to an SEC filing. The Commission offers anecdotal examples of cost estimate provided by stakeholders as placeholders for meaningful analyses, but such estimates are hardly representative or reliable in a compliance context. Scope 3 consultants and disclosure advocates will have strong incentives to understate the cost of conducting scope 3 analyses during the policy development process, recognizing the short-term benefits of encouraging federal action and the lack of any long-term accountability for these estimates. Indeed, even if such estimates reflect the current market cost for conducting voluntary scope 3 analyses, the increased rigor, expanded scope, short deadlines, and likely shortage of trained suppliers will almost certainly drive up the cost.

1. The SEC's purported limits on 3 reporting are belied by the language of the rule and the implied standards for demonstrating non-materiality.

While the Commission frames the Scope 3 reporting requirement as materiality-based, the language of the rule and preamble suggest the opposite. The Proposal demurs on a specific definition but directs registrants to the approach taken by a handful of companies in voluntary reports, stating "[w]hile we are not proposing a quantitative threshold for determining materiality, we note that some companies rely on, or support reliance on, a quantitative threshold such as 40 percent of total GHG emissions when assessing the materiality of Scope 3 emissions."

This approach puts companies into a very difficult position. Having proffered the 40 percent threshold, the SEC must realize that many companies will feel obliged to apply the standard regardless of the materiality of their scope 3 emissions, lest they "get it wrong" in the eyes of the Commission or third-party litigants and courts. The absurd result is that 12 out of the 17 economic sectors tracked by the Carbon Disclosure Project would be deemed to have "material" scope 3 emissions – not based on the significance to their operations but due to their comparatively low Scope 1 and Scope 2 emissions profile. *See* Table 1. Indeed, the only industries not captured under the 40 percent standard would be the five most energy and emissions intensive sectors of the economy: cement, electricity generation, paper and forestry, steel, and transportation.

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[44] NPRM at 214562. Notably, SEC askes for comment on whether their estimates for scope 3 data collection and reporting are accurate. The answer is of course no. In fact, SEC largely aggregates its estimates into data for Scope 1-3 together. While it provides examples of cost estimates provided by individual companies and some providers, it provides no estimates reflecting the full scope and compliance liability associated with the rule's requirements, and its estimates woefully understate the costs, particularly in the context of the upstream and downstream impacts, which the NPRM acknowledges but does not quantify. *Id.* at 21454-21453.

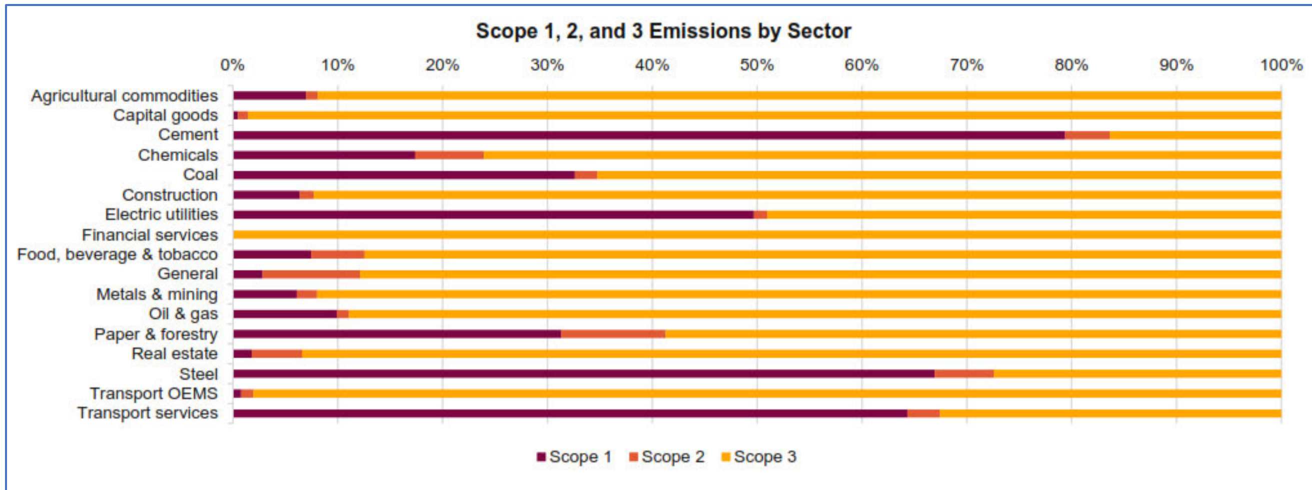

Figure 1: Excerpt from Climate Disclosure Product, CDP Technical Note: Relevance of Scope 3 Categories by Sector, available at [*https //cdn.cdp.net/cdp-production/cms/guidance_docs/pdfs/000/003/504/original/CDP-technical-note-scope-3-relevance-by-sector.pdf?1649687608*](https://cdn.cdp.net/cdp-production/cms/guidance_docs/pdfs/000/003/504/original/CDP-technical-note-scope-3-relevance-by-sector.pdf?1649687608)

For those concerned with heavy industry not reporting, however, not to worry. Having set an implied 40 percent materiality threshold, the SEC goes on to state that "even when Scope 3 emissions do not represent a relatively significant portion of overall GHG emissions, a quantitative analysis alone would not suffice for purposes of determining whether Scope 3 emissions are material."[45] The result is an implied standard for scope 3 reporting that deems both "a lot" or "a little" scope 3 emissions to be potentially material, effectively swallowing the entire concept of materiality. Given the ambiguity, robust scope 3 analysis, documentation, and substantiation will be required regardless of materiality to satisfy the proposal's requirement.

For many companies concerned about risk management, these analyses will require significant investments in staff and management time, consultant and legal fees, and auditing fees, even where relevant climate risks are non-material. The cost to large public companies will not be inconsequential, but it is also important to note that non-public companies within the supply chain and downstream customers will face the same dilemmas as they will have to provide information to enable their customers and suppliers to comply with the requirements. While the Proposal includes safe harbors, these will not eliminate the financial risk and uncertainty associated with enhanced, subjective enforcement and third-party litigation that goes with SEC filings. The assurance that registrants may have a potential defense against such proceedings will not preclude Legal fees and the risk from nuisance suits are no less relevant or financially impactful because companies may have a defense at some point down the road in a litigation proceeding.

The Commission's decision to remove the materiality limitation for companies that make voluntary reduction targets is particularly problematic and illogical from both a financial and policy perspective. Registrants setting public targets or reduction commitments for scope 3 emissions that are financially material will already be subject for mandatory reporting, making

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[45] Proposal at 21335 (internal citations omitted).

the voluntary target exception unnecessary to carry out the Commission's mission. Expanding the onerous reporting requirement to non-material scope 3 emissions targets simply increases the burden and legal risk associated commitments that, by definition, will not inform the average prudent investor's decisions. This will do nothing but discourage registrants from showing leadership through voluntary action to address scope 3 emissions.

F. The new climate regime will require an entirely new field of regulatory, industry, accounting, and legal expertise to appropriately design, operationalize, and implement this program.

Commissioner Peirce, in her dissent, highlights the risk of unintended consequences "when the regulatory complexity is designed to push capital allocation toward politically and socially favored ends, and when the regulators designing the framework have no expertise in capital allocation, political and social insight, or the science used to justify these favored ends.[46] The expertise gap does not end with the SEC. The Commission acknowledges that many in the regulated community "may face significant uncertainty and novel compliance challenges."[47] Moreover, "[t]o the extent this leads to inadvertent non-compliance, registrants may face additional exposure to litigation or enforcement action."[48]

The Commission appears to rely heavily on third-party experts to pick up the slack but even there, its hopes exceed its reality. The Commission notes that:

> *While some experienced assurance providers may be proficient in applying attestation standards to GHG emissions disclosures, other assurance providers may lack GHG emissions expertise. Similarly, some service providers providing assurance may have expertise in GHG emissions but have minimal assurance experience.*[49]

This expertise gap is exacerbated by the fact that climate financial risk assessment and reporting methodologies are still very much in flux. The old cliché that the SEC is trying to build an airplane while flying it applies here. The Proposal presumes that the SEC can craft, finalize, implement, and enforce a massive new disclosure program that promotes consistency and comparability across industries and global jurisdictions, at a time when few, if any registrants, SEC staff, and third-party securities lawyers, accountants, and consultants have experience, let alone expertise, to understand, operationalize, and execute consistent data analysis and reporting at the level of granularity required for compliance, and the entire field of climate reporting continues to evolve. This approach is untenable and unreasonable, particularly under the timeframes anticipated for finalizing and enforcing new requirements. ACC is recommending the Commission extend all deadlines by a minimum of 3 years in order to allow time for development of a functioning climate risk assessment and reporting framework suitable for economy-wide application, rapid expansion of the internal and third-party knowledgebase

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[46] Reid Dissent.
[47] Proposal at 21444.
[48] *Id.*
[49] Proposal at 21394.

needed to adapt new programs to individual companies, and implementation of company-specific compliance plans.

G. The Proposals timeframe for implementing and enforcing the new rule is unreasonable and impracticable.

The Commission has stated it will finalize the Proposal by the end of 2022 and that most of the rule's sweeping new requirements would be phased in for fiscal year 2023, 2024, and 2025 for large accelerated filers, accelerated and nonaccelerated filers, and small reporting companies, respectively, with requirements to calculate and report scope 3 emissions talking effect a year later for each class of registrants.[50] Even presuming the Commission were to meet its promised promulgation timeframe of December 2022, this timeframe is fundamentally unworkable.

Before the financial community can operationalize an economy-wide climate disclosure mandate of this scope and size, it will have to develop a new industry of climate regulatory advisors, trained and certified by accredited entities to provide technical, legal, and accounting advice and oversight of compliance activities. This will require development and approval of:

- Competency criteria for auditors reviewing climate statements and disclosures.
- Guidance/curricula for training organizations.
- Accreditation standards or other methods for ensuring that auditors are deemed competent by a third party before being allowed to audit climate statements.
- An adequate supply and capacity of trained experts, auditors, and supporting infrastructure to meet the time-sensitive demand for legal and auditing services tailored to each industry sector.
- Functional markets to connect certified climate consultants and auditors with the expertise needed to provide attestations for different types of companies and industries.

Once this necessary compliance framework is in place, companies will face the daunting task of adapting their operational, legal, accounting, and information management systems and procedures to manage the new federally enforceable requirements. This will require significant revisions to corporate procedures independent of any experience companies may already have with voluntary reporting.[51]

ACC's Responsible Care® (RC) program provides an apt illustration of the practical challenges and time associated with developing and amending even voluntary reporting programs. Through implementation of Responsible Care®, ACC member companies demonstrate their commitment the health and safety of their employees, the communities in which they operate and the environment as a whole. Participation in Responsible Care is a

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[50] *Id.* at 21412

[51] SEC's economic analysis largely ignores the fact that converting from voluntary reporting to mandatory reporting, particularly in SEC filings, will fundamentally change the nature and cost of climate and sustainability reporting activities, particularly for U.S. based companies.

mandatory for all ACC members and Responsible Care Partner companies, all of which have made CEO-level commitments to the program. The Responsible Care Management System (RCMS) is an integrated health, safety, security and environmental management system based on the principles of Responsible Care and the Policy-Plan-Do-Check-Act continual improvement cycle.[52] ACC members and Responsible Care Partners are required to demonstrate conformance to this technical specification . . . or conformance to the RC14001® technical specification as part of their overall Responsible Care obligations. Conformance is determined through an independent third-party audit conducted according to established ACC procedures.[53]

ACC completed the applicable standards for RC compliance and related auditing in 2003. It took more than 18 months, however, before a sufficient number of auditing companies and individual auditors were accredited to conduct audits for our members/RC Partners.

When updating existing RC program Codes, ACC gives members 1.5 to 2 years to implement the changes, conduct workshops/trainings for auditors, and develop and distribute guidelines to auditors well in advance. Many auditing models provide up to 3 years for introduction of new auditing requirements to allow all parties – organizations being audited, auditing firms, individual auditors, etc. – to fully understand and prepare. For example, during the last major revision to the ISO 14001 environmental management system (EMS standard), a three-year transition process was adopted due to the significant changes made to the standard's requirements[54]. When the ISO 45001 OHS standard was introduced, organizations once again had three years to transition from a previous Occupational Safety MS standard known as OHSAS 18001.[55]

Building a new industry of auditing experts and information management systems is likely to be harder looking forward. The auditing community, like many other industry sectors is going through a transition as many people are retiring, and fewer newcomers are entering the auditing ranks. Auditors that may need training vis-à-vis climate statements must obtain this training while still maintaining their current schedule of audits, meaning it may take many months before an individual can make the time to attend training, let alone schedule specific auditing assignments.

Given the extensive prefatory steps needed to create a mandatory climate reporting architecture of the magnitude envisioned under the Proposal, the SEC's proposal to initiate reporting for FY 2024 is not only unreasonable, but also likely impossible for many registrants.

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[52] American Chemistry Council. *RCMS®: 2019 Responsible Care Management System®*, Technical Specification Document Number: RC101.06 (Issue Date: May 10, 2019), at 4, available at www.Responsible-Care-Management-System-Technical-Specification.pdf.

[53] *Id.*

[54] ISO, *ISO 14001:2015 Environmental Management Systems*, *available at* https://committee.iso.org/sites/tc207sc1/home/projects/published/iso-14001---environmental-manage.html.

[55] ISO, *ISO 45001 Is Now Published* (March 12, 2018), available at https://www.iso.org/news/ref2272 html. Examples in other policy areas include the phase-in times provided for environmental regulations under the Clean Air Act, which often provide for a 3-year implementation timeframe. See, e.g., 42 U.S.C. §7410, *Id.* § 7412.

The Proposal would impose significant rewriting of issuer disclosure controls and procedures, disclosure vetting and governance practices and timelines, and increase the employee- and financial-resources tied to same, the last of which we have discussed in other portions of this letter. Public issuers operate under detailed, highly cadenced processes for vetting material items, issues, events, and risks for public disclosure. Adapting to the proposed rule will, for many companies, necessitate a significant and perhaps wholesale rewrite of those internal processes and a resetting (or acceleration) of the timeline for engaging with supply chain constituents and third-party consultants, auditors and other service providers. In sum, the Commission has historically taken a much narrower approach to addressing social issues through disclosure, and we wish to underscore the considerable changes to internal systems, policies, procedures, and practices the rule will necessitate and the equally significant diversion (away from day-to-day business operations) of officer and director attention such efforts will require.

The requirement to include expanded climate information in annual S-K and S-X filings is also unreasonable and inconsistent with the practical constraints companies face in preparing these filings. The March deadline for the filings is entirely impracticable given the time that will be needed to gather data, compile GHG emissions, report and provide limited/reasonable assurance. It also ignores the need to accommodate ongoing mergers and acquisition activities and the challenges that will be required to operationalize complex requirements at newly acquired facilities.[56]

H. The Commission adopts a false equivalence between the voluntary ESG disclosures and practices of some companies and economy-wide mandatory requirements

Throughout the Proposal, the Commission alludes to the maturity of the voluntary climate reporting marketplace to downplay the significance of the mandated requirements.[57] This presumption of transferability and scalability of existing reporting frameworks across the whole economy is misplaced.

The voluntary disclosure space includes an incredibly diverse set of frameworks and metrics that meet the unique needs of different sectors or audience. These frameworks (like SASB or GRI) have developed multiple versions of their standards over the years. Ongoing efforts to develop and consolidate various voluntary frameworks illustrate the complexity of different industrial sectors, individual companies, and regional geography that have made even the most flexible frameworks difficult to align.

The Proposal acknowledges that "[a]n International Sustainability Standards Board (ISSB) has recently been created, which is expected to issue global sustainability standards,

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[56] With respect to Request for Information #180, Proposal at 21040, transitional relieve will be an absolute necessity.

[57] *See, e.g.*, Proposal at 21346 ("We have modeled the proposed disclosure rules in part on the TCFD disclosure framework. Building on the TCFD framework should enable companies to leverage the framework with which many investors and issuers are already familiar, which should help to mitigate both the compliance burden for issuers and any burdens faced by investors in analyzing and comparing the new proposed disclosures.")

including climate-related disclosure standards."[58] As part of that process, the ISSB will look to consolidate multiple third-party disclosure frameworks developed by *SASB/VRF, the Climate Disclosure Standards Board (CDSB), Climate Disclosure Project (CDP), International Integrated Reporting Council (IIRC), Task force on Climate-related Financial Disclosures (TCFD), and Global Reporting Initiative (GRI).* That consolidated system is expected to encourage a more flexible approach known as the "building block" disclosure strategy rather than seeking entirely standardized reporting as reflected in the Proposal.

The proposed rule goes the other way, proposing a one-size-fits-all standard without the flexibility, deliberation, or expertise provided through the evolving consensus process. Indeed, despite assertions that the rule would promote consistency and integration across industries and frameworks, the Proposal essentially picks one framework and runs with it, citing the TCFD framework 247 times without ever mentioning the building block approach currently under development within the voluntary disclosure community.

It will be difficult to establish a singular "gold-standard" no matter how narrow the scope or specificity of the disclosure due to the sheer diversity of different operational contexts. The context surrounding a disclosure can heavily influence the actual impact, if any, on the financial health of the disclosing company. These issues, among others, have made it extremely difficult to assess disclosures across varying sectors, companies, or regions, or find consistent approaches for validation. Leading disclosure efforts (such as the ISSB), are still unable to provide guidance around assuring non-financial disclosures or certifying to the use of their standards. Currently, consumers of non-financial data have discussed ESG's current state as "equal parts Art and Science."[59] While this practice continues to evolve, the SEC should be exceedingly careful not to and undermine efforts by the private, voluntary disclosure market to address these challenging issues.

Just as there is no one perfect climate reporting framework, there is no single approach to adapting a chosen frameworks to a company's unique climate risk profile. Many ACC members and other registrants do use voluntary climate reporting methodologies as a complement to their SEC material risk climate risk disclosures, using sustainability reports and other non-filed public documents to provide information of interest to a broad range of non-financial stakeholders. As such, and by the design of the various voluntary reporting systems available to companies, reporters are not subject to the rigid content, audit, attestation, and liability standards commonly applied to financial risk information.

Mandating disclosure in SEC filings would fundamentally change the nature of such programs, as well as the cost and complexity of the management systems needed to ensure compliance, including impact on consolidated subsidiaries and equity affiliates. It would also take voluntary reporters into uncharted waters.

For example, the organizations that developed the GHG Protocol (WBCSD and WRI) do not certify or audit disclosure against the GHG Protocol methodology. As a result, it is very

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[58] Proposal at 21410.
[59] *See, e.g.*, Joel Makower, *The secret life of ESG ratings*, GreenBiz (May 9, 2022).

difficult to validate consistent interpretation of the GHG Protocol methodology across reporting companies – one of the key justifications the SEC offers for their approach. Adjudicating issues that companies will have in applying the GHG Protocol or other methodologies to their specific organization is incredibly resource intensive – particularly if the default resolution method is federal enforcement or third-party litigation.

I. The Proposal could conflict with existing international reporting regimes.

Any new financial disclosure requirements for climate risk should be consistent with and be no broader than relevant climate provisions of international regulatory mandates in place or under development in trade partner jurisdictions. In addition to the evolving nature of the voluntary financial disclosure marketplace, a number of key trading partners are in the process of developing new disclosure requirements for climate and other ESG considerations. The uncertainty caused by these developments create a significant risk that new, prescriptive US standards could conflict with requirements developed in other jurisdictions. The Commission can reduce this risk by avoiding overly expansive and prescriptive requirements, and by focusing on financially-material disclosures.

ACC supports the Commission's decision to focus the proposed rule on climate-related considerations rather than the broader realm of "ESG" factors, as that would only exacerbate the legal, jurisdictional, materiality, and practical concerns already in play under the current scope. Still, the level of detail required in the Proposal, as well as the short implementation timeframe, are likely to create inconsistencies between the US and foreign financial reporting regimes, undermining the SEC's stated goal of ensuring consistency and potentially discouraging companies from registering as U.S. companies.

The Commission should ensure that the core content requirements provide the flexibility needed to align with the policies being developed under the European Commission's Corporate Sustainability Due Diligence Directive, proposed by the European Commission in February 2022,[60] and the United Kingdom's Climate-Related Financial Disclosure Regulations. The effective date for any new requirements should be no earlier than the dates established under the CSDD Directive, to allow companies affected by both to develop consistent and complementary response strategies.

J. The proposed rule would discourage companies from accessing public markets, inhibiting capital formation and growth.

Public capital markets are critical economic drivers, providing companies with access to the capital required to expand, create jobs, allow members of the public to participate in wealth creation, and in many cases, encourage more sustainable, transparent, and well-governed

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[60] *See* Corporate Sustainability Due Diligence Directive proposed by the European Commission in February 2022.

economic activities.[61] Yet, the Commission acknowledges the Proposal could discourage companies from going public:

> *[I]f compliance costs with the proposed rules are high, this could influence the marginal firm's decision to exit public markets or refrain from going public in the first place in order to circumvent the disclosure requirements. Firms may choose this strategy if they believe the potential compliance costs from the proposed rules outweigh the benefits of being registered public company. Uptake of this avoidance strategy may widen the transparency gap between public and private firms, negatively affecting capital markets' information efficiency, and potentially reduce the size of the stock market.*[62]

This would have the unintended result of encouraging companies to opt out of any of the governance obligations – the opposite of its mission. This impact will be most significant for small companies that may need public funding the most, but which may be most sensitive to incurring sweeping new regulatory reporting and oversight obligations.

The Commission's recognition of this risk reinforces the conclusion that the Proposal is focused on climate policy rather than investor protection and capital investment. Yet, the kinds of projects required to improve the environment – moving to renewable energy, investing in new technologies, etc., are among those most likely to require capital investments through public markets. Discouraging companies from going public is antithetical to the SEC's mission and should be clear evidence of regulatory overreach.

K. The filing, audit, and attestation requirements are unreasonable and impracticable.

The Commission exacerbates the adverse impact of the proposed rule by requiring that the information be filed with registration statements and financial statements, increasing the legal liability registrants face with respect to calculating and filing required information. The SEC has adequate authority to enforce against false, misleading, or inadequate disclosures without such obligations.[63] The SEC should eliminate the attestation requirements in the proposed rule for any expanded reporting requirements.

The Commission's justification for requiring filed rather than furnished disclosures rely heavily on theoretical benefits that "may" occur:

> *Another alternative would be to permit Scopes 1, 2, and 3 emissions disclosures to be considered "furnished" instead of "filed," which may limit the incremental risk of being*

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[61] Although SEC is not a covered executive branch agency and this rulemaking may not be subject to the express requirements of OMB Circular A-4, the practices established thereunder constitute best practice for federal rulemakings, however, and provide a minimum threshold for administrative procedure in the context of such a complex and impactful rulemaking.

[62] Proposal at 21448.

[63] *See, e.g.,* 17 C.F.R. Subpart A (Manipulative and Deceptive Devices and Contrivances); SEC, Division of Enforcement, *Enforcement Manual* (November 28, 2017).

held liable under Section 18 of the Exchange Act for these disclosures. This may also benefit some registrants as their Scopes 1 and 2 emissions disclosures would not be automatically incorporated into Securities Act registration statements and thereby not be subject to Section 11 liability. We note that this could have a lower incremental impact on Scope 3 emissions disclosures since Scope 3 emissions disclosures are covered under a proposed safe harbor provision and hence already afforded other liability protections. However, reduced liability in general may lead to the applicable disclosures being perceived as less reliable by investors, which could have adverse effects on registrants' stock liquidity or costs of capital. For these reasons, the Commission is not proposing to permit emissions disclosures to be furnished at this time.[64]

ACC encourages the Commission to revisit its decision to mandate filing of requested information rather than furnishing as is currently the norm.

L. The Commission's economic analysis is incomplete and substantively flawed.

We evaluated the SEC's economic analysis of its Proposal against long-established federal criteria for analysis of economically significant rules. Our review of the Commission's economic analysis reveals significant deficiencies with the proposed rule, which are detailed below.

1. The Commission fails to justify the need for the expansive information collection, analysis, and reporting requirements.

The Commission has developed guidance on the conduct of economic analysis in SEC rulemakings. [65] This guidance "draws on principles set forth in" Executive Order 12866 on regulatory review, Executive Order 13563 on improving regulation and regulatory review, and OMB Circular A-4, Circular A-4 (September 17, 2003) on regulatory analysis, and acknowledges that statutory provisions and caselaw require the Commission to "consider efficiency, competition, and capital formation whenever it is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest."[66] These authorities "expressly call for consideration of several broad economic issues in addition to the protection of investors, including the impact that any rule promulgated under that Act would have on competition.[67]

From a financial policy perspective, the need for the rule is questionable. It is clear from the economic analysis that there is no material failure of private markets as defined by Circular

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[64] Proposal at 21449

[65] SEC, *Memorandum on Current Guidance on Economic Analysis in SEC Rulemaking*s (March 16, 2012) (Economic Analysis Guidance).

[66] *Id. at 4.*

[67] *Id.* Executive Order 12866 states that "Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people."

A-4 (externality, information asymmetry, or market power).[68] The Commission is correct by not identifying asymmetric information as a market failure. The amount of climate-relevant information available to investors continues to increase year after year, as the Commission notes. Although it is apparent that a subset of investors (ESG investors) would like to have better information on climate-related risks, this interest falls short of a compelling public need or the standard of "materiality" under the reasonable investor test.

Cost benefit analysis is a well-accepted policy tool, regularly used in federal rulemaking involving environmental, social, and financial matters. Circular A-4 recommends that regulators, "to the extent feasible, . . . quantify all potential incremental benefits and costs." It also recommends monetizing quantified benefits and costs. Such a comparison and discussion is central to regulatory analysis and should be included in the economic analysis as an economically significant rule under EO 12866 and a major rulemaking under the Congressional Review Act.[69]

While the proposed rule does offer a partial estimate of the rule's costs in its Paperwork Reduction Act (PRA) analysis, it is incomplete and fails to quantify and monetize the benefits in any meaningful way, preventing a reasonable assessment of the rule's overall value.

2. The Commission failed to fully quantify and monetize incremental costs to registrants and unregistered entities.

According to Commission guidance, a rule's economic analysis "should consider compliance costs, direct costs, and indirect costs." For example:

- Compliance costs "*may include in-house personnel time and resources and outside accounting or legal fees.*"
- *Direct costs "could include costs arising from intended changes to the behavior of regulated firms or persons in response to the reporting requirement.*"
- *Indirect costs "could include costs arising from changes to the behavior of regulated firms or persons beyond those that the rule was intended to achieve, or costs arising from changes in behavior by parties other than regulated firms or persons…,[O]ther types of indirect costs can include, but are not limited to: the*

[68] Circular A-4 identifies three market failures: externality, asymmetric information, and market power. The problem identified by the Commission—lack of perfect information to a subset of investors—does not rise to the level of a material failure of markets, nor does it constitute an information asymmetry.

[69] The CRA defines a major rule as "any rule that the Administrator of the Office of Information and Regulatory Affairs [OIRA] of the Office of Management and Budget [OMB] finds has resulted in or is likely to result in—(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act." 5 U.S.C. §804(2).

distributional and competitive effects of the rule; negative collateral consequences, such as the potential misuse of newly created rights; [and] a misallocation of resources resulting from regulatory arbitrage (race to the bottom).[70]

In the current proposal, all such costs are triggered under the rule but few beyond the most basic compliance costs are incorporated into the Paperwork Reduction Act analysis or quantified in any meaningful way.

Even with these omissions, the cost of the rule is substantial. The PRA analysis calculates an incremental annual reporting burden of 24.7 million hours at an annual cost of $6.38 billion and this estimate most likely significantly underestimates the actual costs of the rule. The Proposal acknowledges that this estimate may understate the rule's total economic impact by disregarding a number of indirect costs:[71]

[T]he proposed rules may result in additional litigation risk since the proposed climate-related disclosures may be new and unfamiliar to many registrants.[952] *The proposed rules would significantly expand the type and amount of information registrants are required to provide about climate-related risks. Registrants unfamiliar preparing these disclosures may face significant uncertainty and novel compliance challenges. To the extent this leads to inadvertent non-compliance, registrants may face additional exposure to litigation or enforcement action.*[72]

In addition to these acknowledged impacts, the rule, as proposed, will have a direct material financial impact not only on companies listed on the national securities exchanges (including equity affiliates), but also on privately-owned and operated businesses that are beyond the Commission's regulatory mandate. The requisite disclosure obligations will create a daisy chain of probing inquiries and disclosure and data assurance obligations up and down the chemistry industry's value chain, regardless of whether an industry participant is listed on a national securities exchange, and will introduce new sources of cost and risk to ACC member companies.

The material adverse financial impact will not be isolated to the expense side of the income statement. Private chemistry companies may be unable or unwilling to provide the sort of access and information required by registrant companies in order to make the mandated disclosure. This could lead to unintended and harmful constriction in the chemistry industry and beyond, and cause direct financial harm (*i.e.,* the loss of business, the shuttering of the business, increased litigation risk, and disruption of supply chains across the economy).

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[70] Economic Analysis Guidance at 11.

[71] Proposal at 21443 ("*In addition to the direct costs of preparing climate-related disclosures, the proposed rules could also lead to indirect costs.")*

[72] *Id.* at 214444.

The Commission should include these costs in its economic analysis, along with a reasonable estimate of the significant costs the rule will impose on non-public companies within the registrant's value chain, in its analysis of paperwork burden under the PRA.

3. The proposal's baseline and alternatives analysis are insufficient.

It is unclear whether the proposed requirements would have any material impact on how publicly traded firms manage their own GHG emissions. The SEC EA Guidance recommends the establishment of a baseline that can be used to estimate the incremental costs and benefits of the Proposal.[73] Specifically, economic "this normally will be a 'no action' baseline: what the world will be like if the proposed rule is not adopted."[74] In its analysis, however, the Commission fails to provide any quantifiable estimate of the benefits to investors from the additional information, or any net incentive for registrants to reduce GHG emissions compared to the baseline. Indeed, the proposal fails to provide any conclusive evidence that the requirements to provide any net benefits to investors or the environment.

The Commission also fails to provide any alternatives significantly less stringent than its preferred alternative. Circular A-4 recommends identification of a "manageable number" of alternatives that differ in terms of stringency. According to Circular A-4: You should study alternative levels of stringency to understand more fully the relationship between stringency and the size and distribution of benefits and costs among different groups.

Unfortunately, the 15 alternatives vary only slightly from the stringency of its Proposal. Essentially, the Commission is seeking comment on a narrow range of alternatives, all of which are relatively stringent. Where are the alternatives that represent the most incremental change from the status quo? None are reflected in its 15 alternatives. The commission should reduce the number of alternatives while adding one or two imposing a low incremental burden from the baseline (status quo).

As noted previously, the commission should estimate the incremental cost of each alternative. The PRA analysis already conducted by the Commission could be used to quantify the incremental cost of each element of the Proposal and this information can be aggregated to estimate the incremental cost of each alternative, where the alternatives span a wider range of relative stringency.

M. Conclusion and Recommendations

ACC members are leaders in the worldwide chemistry industry and face extraordinary international competition throughout the value chain. They are important and committed partners in economy-wide fight to reduce carbon emissions. Finally, they support efforts to promote informed investment in public capital markets.

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[73] *SEC EA Guidance at 4.*
[74] *Id.* at 6.

For reasons described above, we believe the rule would undermine rather than advance the Commissions mission and stated goals. We urge the Commission to withdraw the Proposal, designated it as an Advanced Notice of Proposed Rulemaking, or, at minimum, extend the comment period to 180 days to allow additional direct consultation with affected industries and traditional investors. Absent such action, ACC recommends the following:

- **Limit quantitative scope 1 emissions reporting to companies already subject to federal reporting, allowing narrative disclosure of financially material emissions for all others:** Only companies subject to existing greenhouse gas reporting requirements under 40 C.F.R. part 98 should be required to provide emissions data. For registrants with emissions falling below this threshold, mandatory scope 1 reporting should be limited to a narrative description, to the extent financially material.
- **Limit scope 2 emissions reporting to narrative descriptions of material financially material categories:** The SEC should eliminate all requirements for quantitative reporting of scope 2 emissions. Mandatory scope 2 emissions reporting should be limited to a narrative description, to the extent financially material.
- **Limit scope 3 emissions reporting to qualitative narrative description of financially material categories:** The SEC should eliminate all requirements for quantification of scope 3 emissions, and limit scope 3 assessment and reporting to a narrative disclosure of specific categories of scope 3 emissions within the supply and value chain where such emissions present specific sources of material financial risk.
- **Extend effective date of all compliance deadlines by at least 3 years:** Extend the effective date of the rule by 3 years to allow time for registrants and members of the scope 2 and 3 supply chain to develop systems for information collection, analysis, validation, and reporting within the legal and liability framework of SEC filings.
- **Exempt proprietary management and strategic information:** Eliminate requirements to report on confidential business information and competitive strategy, including but not limited to internal climate risk and impact assessment methodologies, internal risk analysis, comparison, and mitigation policies, carbon pricing policies, details of proprietary transition plans, including potential new products, services, and suppliers.
- **Eliminate the zip-code reporting requirement for any climate information:** Eliminate requirements to report on facility locations at the zip-code level, limiting areas reporting to the state-level or higher, and only where directly material to financial performance and risk.
- **Retain focus on narrative disclosure proportionate with other risks and allow supplemental information to be furnished in a separate stand-alone report:** Narrative reporting on climate risks and impacts should be included in applicable registration sections used for other risk factors at the same level of detail and materiality. Any supplemental information proposed in the amendments beyond that traditionally required for other risk factors should be supplied under a furnished standard as part of a separate

stand-alone report required no more than annually after the deadline for S-X and S-K reports.

- **Eliminate audit and attestation requirements for any expanded disclosure requirements:** Eliminate any attestation requirement for supplementary disclosure information required under the amended standard, relying instead on the SEC's traditional oversight of furnished information.
- **Eliminate line-item reporting on financial statements and retain the five percent de minimis threshold for any financial reporting.** Eliminate requirement to estimate and report climate-related impacts at a line-item level and raise the reporting threshold under S-X from one percent to a minimum of five percent.
- **Expand the rule's economic impact analysis to address proprietary, indirect, and third-party impacts and costs:** Analyze the economic impact and costs of contract negotiation, information collection, data management, analysis, reporting, and legal review that will be required by domestic and foreign members of each registrant's supply chain and downstream value chain to support compliance with the broad scope 3 reporting mandate and other requirements. Also quantify other indirect costs identified within the NPRM including "heightened litigation risk and the potential disclosure of proprietary information," the potential loss and/or dislocation of suppliers or customers, and potential for increased cost of capital.[75]

[75] *See* NPRM at 21458 ("a firm may choose to change some suppliers or disengage with certain clients due to the effect that they may have on the firm's Scope 3 emissions. This may be particularly relevant for certain financial institutions that are impacted by their portfolio firms' emissions or climate-related risks. These financial institutions may be less willing to extend credit to firms for which it is difficult to measure climate risk exposure information, potentially increasing the cost of capital for these firms."); id. 21449 ("costs may include the revelation of trade secrets, the disclosure of profitable customers and markets, or the exposure of operating weakness to competing firms, unions, regulators, investors, customers or suppliers. These costs are commonly referred to as ''proprietary costs.')"

THE BUSINESS OF CHEMISTRY
BY THE NUMBERS

Chemistry is essential to our economy and plays a vital role in the creation of ground-breaking products that make our lives and our world healthier, safer, more sustainable and more productive.

THE BUSINESS OF CHEMISTRY IS A **$486** BILLION ENTERPRISE

THE BUSINESS OF CHEMISTRY PROVIDES **529,000** SKILLED, GOOD-PAYING AMERICAN JOBS

THE BUSINESS OF CHEMISTRY SUPPORTS OVER **25%** OF THE U.S. GDP

THE BUSINESS OF CHEMISTRY ACCOUNTS FOR OVER 9% OF U.S. GOODS EXPORTS, $125 BILLION IN 2020, AND IS AMONG THE LARGEST EXPORTERS IN THE U.S.

AS THE SECOND LARGEST PRODUCER, THE U.S. CHEMICAL INDUSTRY PROVIDES **13%** OF THE WORLD'S CHEMICALS

CAPITAL INVESTMENT BY THE BUSINESS OF CHEMISTRY WAS MORE THAN **$27 BILLION** IN 2020, INCLUDING INVESTMENTS IN STRUCTURES AND EQUIPMENT

MORE THAN **96%** OF ALL MANUFACTURED GOODS ARE DIRECTLY TOUCHED BY THE BUSINESS OF CHEMISTRY

THE BUSINESS OF CHEMISTRY ACCOUNTED FOR **41%** OF TOTAL CONSTRUCTION SPENDING BY THE U.S. MANUFACTURING SECTOR IN 2020

946 MILLION TONS OF PRODUCTS WERE TRANSPORTED IN 2020, MAKING THE BUSINESS OF CHEMISTRY ONE OF THE COUNTRY'S LARGEST SHIPPERS

THE AVERAGE ANNUAL PAY IN THE BUSINESS OF CHEMISTRY IS **$90,000**

THAT'S 23% HIGHER THAN THE AVERAGE MANUFACTURING PAY

CHEMICAL COMPANIES INVESTED MORE THAN **$10 BILLION** IN RESEARCH AND DEVELOPMENT IN 2020

FOR EVERY JOB CREATED BY THE BUSINESS OF CHEMISTRY, 6.8 ARE GENERATED ELSEWHERE IN THE ECONOMY, TOTALING OVER **4.1 MILLION JOBS**

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