NRDC

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

Dear Ms. Countryman:

The Natural Resources Defense Council (NRDC) thanks the Securities and Exchange Commission (the Commission) for the opportunity to comment on its proposed rule, "The Enhancement and Standardization of Climate-Related Disclosures for Investors."[1] We encourage the Commission to finalize the proposed rule. We also suggest several modifications to enhance the proposed disclosures. We agree with the Commission that climate change will have significant effects on individual companies and the financial system; that better information about climate change will protect investors; and that the status quo does not supply investors with the consistent, comparable, and reliable disclosures that they need.

We believe that the proposed rule is tailored to elicit relevant information about public companies' vulnerability to financial risks from climate change as well as companies' processes for identifying and managing such risks. The proposed rule builds on the work of two widely adopted voluntary disclosure frameworks: the Taskforce on Climate-Related Financial Disclosures (TCFD) and the GHG Protocol. We support the Commission's decision to integrate these existing disclosure frameworks into Regulation S-K. No disclosure framework is perfect but both are rigorous and helpful to investors.

Our most significant comments concern disclosures of Scope 3 emissions. Those disclosures are financially material and we encourage the Commission to require further Scope 3 disclosures. Doing so will eliminate unintentional loopholes and will reduce the burden on the Commission to define through guidance or enforcement when Scope 3 emissions are material.

NRDC is an international nonprofit environmental organization with more than 3 million members and online activists. Since 1970, our lawyers, scientists, and other environmental specialists have worked to protect the world's natural

[1] 84 Fed. Reg. 21,334 (Apr. 11, 2022).

resources, public health, and environment. NRDC has offices in New York City, Washington D.C., Los Angeles, San Francisco, Chicago, Montana, and Beijing. Through its finance and legal experts, NRDC advocates for financial regulation as it relates to environmental issues. Our work on financial regulation stretches back to the early 1970s, when we petitioned the Commission to require greater disclosure on environmental and social issues from public companies.[2]

I. The Commission has the authority to require the proposed disclosures

The Securities Act and the Securities Exchange Act allow the Commission to require these disclosures. The Commission may require under the Securities Act such "information," and "documents" in registration statements that "the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors."[3] The Commission may require under the Securities Exchange Act disclosures "necessary or appropriate in the public interest or for the protection of investors."[4] "[T]he language in the various statutory grants of rulemaking authority" provides rulemaking authority to the Commission on issues of investor protection.[5]

The legislative history of the Securities Exchange Act demonstrates Congress' recognition that evolving business practices required oversight from the Commission.[6] The Commission has traditionally understood that it "may require disclosure by registrants under the Securities Act and the Securities Exchange Act if it believes that the information would be necessary or appropriate for the protection of investors or the furtherance of fair, orderly and informed securities markets or for fair opportunity for corporate suffrage."[7]

The proposed rule meets this standard. Climate change poses financial risks for companies and standardizing corporate disclosures about climate risk management practices will protect investors. As the Financial Stability Oversight Council stated last year, climate change presents significant risks to the financial

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[2] *See Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm'n*, 606 F.2d 1031 (D.C. Cir. 1979).

[3] 15 U.S.C. § 77g(a)(1).

[4] 15 U.S.C. § 78*l*; *see also* 15 U.S.C. §§ 78m, 78o.

[5] *Nat. Res. Def. Council, Inc.*, 606 F.2d at 1050.

[6] *Id.* (quoting H.R. Rep. No. 1383, 73d Cong., 2d Sess. 6-7 (1934)); *see also id.* (quoting S.Rep.No. 792, 73d Cong., 2d Sess. 10 (1934)).

[7] Environmental and Social Disclosure, 40 Fed. Reg. 51656, 51660 (Nov. 6, 1975).

system.[8] Investors want information on climate-related risks to individual companies in order to mitigate these risks as they appear in their own portfolios. As the Commission noted in the proposed rule, the market for investments incorporating environmental, social, and governance (ESG) information has flourished in the last twenty years. To offer just two examples: By the first half of 2020, more than 3,000 organizations with over $100 trillion in assets under management had signed on to the Principles for Responsible Investment, a compact to incorporate sustainability information into investment decisions;[9] and forty percent of investment professionals surveyed by the CFA Institute stated that they considered information about climate change when making investment decisions.[10]

Investors have been using voluntary disclosures to evaluate companies' climate-related financial risks, but the trouble with a voluntary system is that companies have incentives to release favorable information and hide or downplay negative information. The TCFD cited "the lack of information on the financial implications" of climate change for companies as "a key gap" in voluntary disclosures, plus "a lack of context for information, use of boilerplate, and non-comparable reporting" as other "major obstacles."[11] In a survey of 1,100 companies that endorsed its disclosure recommendations, TCFD found that on average those companies made less than four of the eleven recommended disclosures.[12] With voluntary reporting, "[c]ompanies are free not only to select which reporting standard, if any, they will adopt, but also to determine what definition of materiality applies, the timing of the disclosure, the boundaries of the reporting entity, and whether or not the report will be independently assured."[13] Investors also have trouble comparing voluntary disclosures. The Government Accountability Office found as much in a 2020 report. "[I]nvestors described challenges such as the variety of different metrics that companies used to report on the same topics, unclear calculations, or changing methods for calculating a metric." When looking at the ESG performance of a single company, "some investors said that companies

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[8] Financial Stability Oversight Council, *FSOC Report on Climate-Related Financial Risk* at 3 (2021) *available at* https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf.

[9] CFA Institute, *Future of Sustainability in Investment Management: From Ideas to Reality* at 3 *available at* https://www.cfainstitute.org/-/media/documents/survey/future-of-sustainability.pdf.

[10] *Id.* at 5.

[11] TCFD Recommendations at 1.

[12] Task Force on Climate-related Financial Disclosures, *2019 Status Report* at 7-8 (June 2019).

[13] Virginia Harper Ho, *Nonfinancial Risk Disclosure and the Costs of Private Ordering*, 55 Am. Bus. L.J. 407, 448 (2018).

may change which metrics they use to disclose on an ESG topic from one year to the next, making disclosures hard to compare within the same company over time."[14] Commercial databases – which not all investors can afford to access – likewise have difficulty standardizing and harmonizing disparate ESG disclosures. A study of MSCI and Sustainalytics found a correlation of 0.2, indicating wide disparities in their ESG scoring.[15] Mandatory disclosures on a level playing field will thus protect investors and facilitate fair, orderly, and efficient capital markets by ensuring that climate change disclosures are consistent, comparable, accurate, and equally accessible to all investors.

Critics of the proposed rule have not articulated a convincing reason why the Commission cannot require disclosure of this financially material information. Our comments on the Commission's earlier request for information addressed the issue of commercial speech and we reiterate that the First Amendment does not prohibit the Commission from requiring the disclosure of factual information from public companies.[16] Critics have argued more recently that the EPA's greenhouse gas emissions reporting authority displaces the Commission's authority to require any emissions disclosure from public companies.[17] The proposed rule and EPA's greenhouse gas reporting program operate independently, apply to different companies, ask for different information, and reach different audiences (investors and regulators, respectively).[18] EPA's program applies only to certain large industrial sources, and only to emissions from facilities in the United States. Further, this argument posits a false conflict between the Clean Air Act and the Commission's statutory authority. One statute limits another statute only if they conflict.[19] But statutes do not conflict simply because they might both cover the

[14] Government Accountability Office, GAO-20-530, Public Companies: Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them 13 (July 2020).

[15] *See* Daniel C. Esty, *Creating Investment Grade Corporate Sustainability Metrics*, in *Values at Work* 51, 52 (Daniel C. Esty & Todd Cort, eds. 2020).

[16] *See* Letter from Sarah Dougherty, et al. to Hon. Gary Gensler, Chair, SEC (Jun. 11, 2021) at 28-29, https://www.sec.gov/comments/climate-disclosure/cll12-8911361-244299.pdf.

[17] *See* Joseph A. Grundfest, *The SEC is Heading Toward a Climate Train Wreck*, Bloomberg (Apr. 5, 2022), https://www.bloomberg.com/opinion/articles/2022-04-05/the-sec-is-heading-toward-a-climate-train-wreck#xj4y7vzkg.

[18] *See* 40 C.F.R. § 98.2 (listing which companies should report).

[19] *See Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs.").

same subject matter.[20] This is especially true for administrative agencies with different statutory missions. In *Massachusetts v. EPA* the Supreme Court rejected an argument that EPA could not regulate carbon dioxide emissions from mobile sources because doing so would intrude on the Department of Transportation's regulation of motor vehicle mileage standards. "The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency."[21] Here too, the Commission and EPA can "both administer their obligations" and avoid inconsistency.

The Commission is not improperly straying into environmental regulation by adopting the proposed disclosure requirements or assigning itself "decisions of vast 'economic and political significance.'"[22] The proposed rule requires only disclosure. No public company would be required to reduce its emissions or make changes to its operations because of this rule. Registrants would merely have to document and disclose certain information about their greenhouse gas emissions and risk management operations.

The proposed rule is anchored within the Commission's statutory authority to require disclosure for investor protection. It would provide investors information but leave it up to investors to decide how that information influences their investment and voting decisions. The proposed rule is also consistent with the Commission's longstanding view of its statutory authority. The Commission has said since the mid-1970s that environmental risks can be important to investor protection.[23] This is a logical evolution of the Commission's disclosure requirements and depends on authority that the Commission invokes for every disclosure regulation, and which the Commission has said (going back at least to the administration of President Ford) includes disclosure of financially material information about a registrant's environmental record.[24] Nor is this disclosure

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[20] *Morton v. Mancari*, 417 U.S. 535, 550 (1974) ("In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."); *Anderson v. Fed. Deposit Ins. Corp.*, 918 F.2d 1139, 1143 (4th Cir. 1990) ("the more appropriate rule of statutory construction is the principle that a court should, if possible, construe statutes harmoniously. This is especially true if the statutes deal with the same subject matter, even if an apparent conflict exists." (citation omitted)).

[21] *Massachusetts v. E.P.A.*, 549 U.S. 497, 532, 127 S. Ct. 1438, 1462, 167 L. Ed. 2d 248 (2007)

[22] *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

[23] *See supra* n. 7

[24] *See id.*

initiative entirely of the Commission's devising. Many companies disclose this information voluntarily – albeit in a haphazard manner – and the proposed rule would bring order and consistency to the market. That is squarely within the Commission's statutory mandate.

II. The Commission should adopt the proposed disclosures aligned with the TCFD and the GHG Protocol

We recommend that the Commission finalize the proposed disclosures, and that it include those disclosures as part of Regulation S-K. Adding this information to public companies' registration statements and quarterly and annual reports will make it accessible to investors. It is also a more straightforward solution than making these disclosures in a new report.

Aligning climate disclosures with the Taskforce on Climate-Related Financial Disclosures and the GHG Protocol is sensible. As we explained in our response to the Commission's earlier request for information, these are widely adopted and scientifically rigorous frameworks. NRDC staff contributed to the GHG Protocol's Corporate Standard and the Scope 3 Standard, and together they set forth a methodology for a complete inventory of greenhouse gas emissions.[25] The Taskforce on Climate-Related Financial Disclosures are new – they were first published in 2017 – but they have been endorsed by the G7 and G20,[26] and in our conversations with investors they identified the Taskforce on Climate-Related Financial Disclosures reports as being particularly useful. Their advantage is that they "map the connections between climate-related risk and financial impact" and provide general and sector-specific guidance that companies can use when preparing disclosures.[27]

The proposed disclosures are prescriptive and detailed, but they need to be to resolve the problem of inconsistent and incomplete disclosures. The Financial Stability Oversight Council has stressed the importance of "consistent, comparable,

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[25] The Greenhouse Gas Protocol, *A Corporate Accounting and Reporting Standard* 108 (2004) *available at* https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf [Scope 1 and 2 Protocol]; The Greenhouse Gas Protocol, *Corporate Value Chain (Scope 3) Accounting and Reporting Standard* 144 (2011) *available at* https://ghgprotocol.org/sites/default/files/standards/Corporate-Value-Chain-Accounting-Reporing-Standard_041613_2.pdf [Scope 3 Protocol].

[26] Taskforce on Climate-Related Financial Disclosures, 2021 TCFD Status Report 6 (2021) *available at* https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Status_Report.pdf.

[27] Harper Ho, *supra* n. 13, at 465.

and decision useful" information for investors.[28] Consistency and comparability require that registrants answer the same questions in the same way. A more open-ended and principles-based approach would undermine this goal.[29] We recognize that in recent years the Commission emphasized the importance of principles-based disclosures,[30] but that was a departure from its traditional balance between principles-based and prescriptive disclosure, with prescriptive disclosure required for items that require consistency and comparability.[31] That is the right approach here.

We also recommend, however, that the Commission revise the proposed rule in several respects.

- The most significant revision concerns registrants' Scope 3 emissions, where we recommend that the Commission require greater Scope 3 disclosure from registrants. At the very least, the Commission should clarify in the final rule that a registrant should make a materiality determination with respect to individual categories of Scope 3 emissions rather than making a single determination about Scope 3.
- We also present some recommendations about additional disclosure around renewable energy credits (RECs) and energy efficiency improvements.
- We suggest that Commission clarify its proposed rule on scenario analysis to avoid creating an unintentional disincentive to undertaking it.
- We recommend that the Commission require that registrants use FEMA data to identify flood risks, although we highlight the importance of forthcoming updates to those maps.
- Finally, we suggest that the Commission include a severability provision to identify the portions of the proposed rule that are meant to operate independently.

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[28] Financial Stability Oversight Council, *supra* n. 8, at 3-4.

[29] The Commission stated in 2016 that "reducing prescriptive disclosure requirements and shifting towards more principles-based disclosure requirements may limit the comparability, consistency and completeness of disclosure. Also, in the absence of clear guidelines for determining when information is material, registrants may have difficulty applying principles-based disclosure requirements, and the disclosure provided may not give investors sufficient insight into how registrants apply different principles-based disclosure thresholds." *Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23,916, 23,927 (Apr. 22, 2016).

[30] *See, e.g.*, *Modernization of Regulation S-K Items 101, 103, and 105*, 85 Fed. Reg. 63,726 (Oct. 8, 2020).

[31] *See* supra n. 29.

We explain those recommendations in greater detail below.

Scope 3 Disclosures

The proposed rule requires disclosure of Scope 3 emissions if a registrant decides that those emissions are material, or if a registrant has set an emissions reduction target that includes Scope 3.[32] We recommend that the Commission revise the proposed rule to require greater Scope 3 disclosures, subject to some exceptions. We have three concerns about the proposed Scope 3 disclosures. First, requiring disclosure of Scope 1 and Scope 2 but less disclosure from Scope 3 may undermine the proposed rule's investor protection purposes by making disclosures less comparable. Second, the proposed rule's Scope 3 disclosure requirements may dissuade companies from including Scope 3 in their emissions reduction targets. Third, the proposed rule will lead to needless disputes between investors and registrants about the materiality of Scope 3 emissions that the Commission's staff or the courts will be called on to resolve.

The proposed rule would (if it works according to plan) provide investors with information on Scope 3 if the company determines that the information is material to investment or voting decisions or if a registrant has committed to emissions reductions and investors need Scope 3 disclosures to track the registrant's progress towards that goal. However, the GHG Protocol, like any emissions accounting system, cannot work as intended if it is followed only in part. And as drafted, the proposed rule may create loopholes that would deprive investors of information that they need.

Scope 3 is the largest category of emissions for many companies, and emissions disclosures will be incomplete if Scope 3 is not included.[33] Further, it would open a loophole in the disclosure results, allowing a company to reduce its reported emissions by outsourcing processes. In a plausible limiting case, the production of emissions-intensive components or supplies would gravitate to a few firms that becoming a dumping ground for high impact supplies, allowing all other producers to report reductions in emissions that never show up in national inventories. We have seen dramatic evidence in the last two year of the adverse consequences of not considering supply chains, and ignoring Scope 3 emissions would invite similar problems in evaluating climate risk. The value chain emissions data captured by Scope 3 is necessary to a complete picture of a registrant's transition risk (including its reputational and operational risk) and its

[32] Proposed Rule, 87 Fed. Reg. at 21,345.

[33] Scope 3 Protocol, *supra* n. 25, https://ghgprotocol.org/standards/scope-3-standard ("In fact, the majority of total corporate emissions come from Scope 3 sources, which means many companies have been missing out on significant opportunities for improvement.").

ability to meet climate commitments. Companies often downplay their overall environmental impact by either leaving out Scope 3 emissions.[34] There are at least three good reasons for the SEC to require registrants to disclose this information.

First, requiring Scope 1 and Scope 2 emissions data but making Scope 3 contingent undermines the comparability of disclosures. The difference between direct emissions in Scope 1 and value chain emissions in Scope 3 often comes down to how companies structure their operations. For example, an oil and gas company that conducts its own drilling operations would report emissions from drilling under Scope 1; an oil and gas company that contracts out drilling operations would report those emissions under Scope 3. Without full Scope 3 disclosure, an investor may not be able to identify that disparity. And depriving investors of full Scope 3 disclosures could perpetuate an unequal playing field, because large institutional investors may be able to demand this information from management while small investors cannot.

Second, the proposed rule may unintentionally dissuade registrants from setting an emissions reduction target including Scope 3 if doing so would trigger a requirement to disclose Scope 3 emissions that the registrant would not otherwise have. Alternatively, registrants who have previously set Scope 3 emissions reduction targets might withdraw them. While the Commission has no obligation to ensure that registrants are setting emissions reduction targets, its rules should not serve as a disincentive for companies that are inclined to do so. Setting a more inclusive baseline for Scope 3 disclosures avoids this perverse incentive.

Third, a registrant and its potential investors may disagree about the materiality of Scope 3 emissions to the value of and risks associated with investments. Absent a rule from the Commission, those conflicts would have to be resolved by enforcement action from the Commission or through litigation between investors and registrants.[35] The uncertainty concerning the rules for determining materiality may itself amplify investor risks. This is another problem the Commission can avoid by revising the proposed rule.

We recognize the difficulties of requiring greater Scope 3 disclosure. The Commission has options to address them. For example, the Commission could set a magnitude cutoff for Scope 3 emissions disclosure or exempt certain small

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[34] *See* Esty, *supra* n. 15, at 56.

[35] *See* Alexandra Thornton & Todd Phillips, *The SEC's Scope 3 Climate Emissions Rule Should Not be Based on Materiality*, Center for American Progress (Feb. 18, 2022) *available at* https://www.americanprogress.org/article/the-secs-scope-3-climate-emissions-rule-should-not-be-based-on-materiality/ ("Subsequently, if a failure to disclose is challenged in court, judges decide if a company's materiality decision was valid. It can take years of litigation on a case-by-case basis to flesh out the specific disclosures that are needed to meet a materiality standard.").

registrants from Scope 3 disclosures. The Commission could also require that the largest registrants disclose Scope 3 emissions in categories with established calculation methodologies. As the GHG Protocol releases further guidance for categories of Scope 3 emissions, the Commission could expand required disclosures.[36]

At a minimum, the Commission should clarify that registrants are expected to examine distinct categories within Scope 3. There are 15 separate categories of activity –it includes emissions from investments (category 15) and use of sold products (category 15) as well as emissions from employee commuting and travel (categories 6 and 7) and emissions from purchased goods and services (category 1).[37] Some registrants may have relatively trivial emissions from employee commuting and business travel but significant emissions from investments or use of sold products. In such a case, registrants should not be free to omit categories with significant greenhouse gas emissions on the rationale that, taken together, Scope 3 emissions are not material. Clarifying that registrants should determine materiality with respect to the categories within Scope 3 would eliminate this ambiguity. The Commission could also modify the disclosure obligation for companies that have adopted an emissions reduction target for Scope 3 and require that registrants disclose particular categories of Scope 3 emissions for which they have adopted emissions reduction targets.

<u>Disclosures regarding use renewable energy credits and efficiency improvements to meet emissions reduction targets</u>

The proposed rule would require a registrant with climate-related goals or targets to "discuss how it intends to meet its climate-related targets or goals" which "could include a strategy to increase energy efficiency" or take other steps such as "purchas[ing] carbon offsets or RECs."[38] We agree with the Commission that "[u]nderstanding the role that carbon offsets or RECs play in a registrant's climate-related business strategy can help investors gain useful information about the registrant's strategy, including the potential risks and financial impacts."[39] Many companies have announced climate-related goals but said very little about how they intend to meet them.[40] We agree that for renewable energy credits, registrants

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[36] *See* GHG Protocol, *Scope 3 Calculation Guidance*, https://ghgprotocol.org/scope-3-technical-calculation-guidance.

[37] *See* Scope 3 Standard, *supra* n. 25, at 32; *see also* Scope 1 and 2 Protocol, *supra* n. 25 at 31-32 (how to account for leased and outsourced operations).

[38] Proposed Rule, 87 Fed. Reg. at 21,406.

[39] *Id.* at 21,355.

[40] *Id.* at 21,406.

should discuss "the amount of generated renewable energy represented by the RECs," their source, the location of the underlying project generating the RECs, and how the RECs are authenticated. The Commission should also ask for disclosure about whether registrants use 24/7 matching of renewable energy. The goal of 24/7 matching is to source "electricity from the same regional area where the consumer's electricity consumption occurs," and thus to "drive investments in the technologies required to realize a zero-carbon electricity grid by optimizing carbon free electricity procurement from a time and location perspective."[41] Information about 24/7 matching gives investors an insight into a registrant's management of its electricity consumption, its resilience to disruptions in energy supply, and its ability to manage future changes in energy policy.

We of course agree that an investor's ability to evaluate a registrant's climate-related targets or goals requires information about how the company "intends to meet" them.[42] We encourage the Commission to provide guidance about the details companies are expected to make in those disclosures. For example, companies could provide further insight into their energy use by disclosing whether they currently comply with the ISO 50001 standards for establishing, implementing, maintaining and improving an energy management system.[43] Compliance with ISO 50001 demonstrates significant energy savings and investments in energy efficiency, and requires a plan to continually improve energy performance in future years. Registrants could disclose whether they comply with ISO 50001 – or describe their efforts toward compliance – when discussing their climate-related goals. Similarly, with respect to water use, companies could disclose whether their water management complies with any published standards. Those specific disclosures would assure investors that companies are making progress toward their goals.

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[41] EPA, *24/7 Hourly Matching of Energy*, https://www.epa.gov/green-power-markets/247-hourly-matching-electricity. The Biden Administration has set a goal for the federal government to source at least 50 percent of its electricity consumption through 24/7 hourly matching of renewable energy by 2030. *See* Executive Order 14057, *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability*, § 203, 86 Fed. Reg. 70,935 (Dec. 8, 2021). We also note that 24/7 matching can occur two ways: it can be achieved by an appropriate selection of renewable resources and also from matching the organization's consumption of electricity to the availability of renewable power both on site and from the grid.

[42] Proposed Rule, 87 Fed. Reg. at 21,406.

[43] *See* Department of Energy, ISO 50001 Energy Management Standard, https://www.energy.gov/ISO50001.

Disclosures of scenario analysis

We appreciate the Commission's decision to require registrants to disclose whether they conduct scenario analysis. It is a powerful risk management tool if it is done in a rigorous manger –preferably including at least one scenario with a rapid and disorderly transition from fossil fuels. Scenario analysis can also improve the registrant's resilience to climate risks by allowing company management to plan for those risks before they arise.

The Commission acknowledges that requiring disclosures about scenario analysis can have a significant drawback: If registrants are required to produce too much information, including sensitive business information, it may dissuade them from conducting scenario analysis in the first place.[44] As we understand the proposed rule, however, companies would not necessarily be expected to disclose such information. We understand the Commission's description of the disclosure requirement to encompass: (1) whether the registrant conducts scenario analysis; (2) information about the assumptions and parameters behind the scenarios considered; and (3) the *principal* risks identified under each scenario.[45] Registrants would not be required to file the entire scenario analysis – an impractical requirement that would bury the Commission and investors in paper. Requiring registrants to describe how they conduct scenario analysis and the principal risks identified would elicit relevant information about a registrant's risk management without dissuading them from undertaking the analysis. If the Commission is looking to further clarify or streamline this disclosure, it may even suggest that registrants disclose the principal risks identified by scenario analysis only if those risks are not otherwise identified and disclosed as part of another risk management disclosure.

Adopt FEMA Definition of "Flood Hazard Area" Subject to Forthcoming Revisions

We agree with the Commission that registrants should disclose the locations of assets exposed to flood risk from climate change. Flood risk from extreme weather and sea level rise is a source of substantial physical risk.[46] We do not recommend that the Commission allow registrants to use their own definition of "flood hazard area," because doing so would undermine the comparability of disclosures (registrants will not use the same definition) and allow some registrants

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[44] *See* Proposed Rule, 84 Fed. Reg. at 21,359.

[45] *See* Proposed Rule, 84 Fed. Reg. at 21,357

[46] Melissa Denchak, NRDC, *Flooding and Climate Change: Everything You Need to Know*, Apr. 10, 2019, https://www.nrdc.org/stories/flooding-and-climate-change-everything-you-need-know.

to diminish their risk by adopting a restrictive definition. If the Commission uses an objective standard, the FEMA flood maps are an acceptable option. They are far from perfect, however. In response to a request for information earlier this year, NRDC pointed out that FEMA has not updated its maps to reflect flood risk from climate change, despite FEMA's legal obligation to incorporate relevant information from the National Oceanic and Atmospheric Administration.[47] FEMA may correct that deficiency in future maps. To ensure that disclosures reflect risk from climate change, registrants should be required to use the most recently updated FEMA maps to identify physical assets at risk of flooding.

<u>Add a provision governing severability</u>

The Commission should include a provision concerning the severability of these amendments to Regulation S-K in the final rule. A severability provision – or at least a substantial discussion of severability in the preamble to the final rule – will, in the event of a successful legal challenge to some part of a final rule, ensure that the remainder of the rule will work as intended. Whether an administrative agency's order or regulation is severable depends on the issuing agency's intent."[48] A court will not ordinarily sever amendments if it has "'substantial doubt' that the agency would have adopted the severed portion on its own."[49] If, however, "the rules function separately," then a reviewing court may be "satisfied" that the Commission would have adopted them on their own and will leave them in place.[50]

Many of these proposed amendments to Regulation S-K could operate independently. The disclosures based on the GHG Protocol and the disclosures based on the TCFD, for example, have independent value because they are modeled on two voluntary disclosure frameworks whose disclosures are complementary but independent. Within those frameworks, the TCFD-based disclosures operate in broad categories – governance, strategy, risk management, and metrics and targets – and elicit valuable information independent of the other disclosures. The governance disclosures, for example, are valuable to investors even without accompanying disclosures on risk management or metrics and targets. These

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[47] NRDC, *Comments in response to the Request for Information on the National Flood Insurance Program's Floodplain Management Standards for Land Management and Use, and an Assessment of the Program's Impact on Threatened and Endangered Species and their Habitats; Docket ID: FEMA-2021-0024* at 15-20 (Jan. 27, 2022) *available at* https://www.nrdc.org/sites/default/files/comments-nfip-floodplain-mgmt-standards-20220127.pdf.

[48] *North Carolina v. FERC*, 730 F.2d 790, 795–96 (D.C. Cir. 1984).

[49] *Davis Cnty. Solid Waste Mgmt. v. EPA*, 108 F.3d 1454, 1459 (D.C. Cir. 1997).

[50] *Verizon v. FCC*, 740 F.3d 623, 659 (D.C. Cir. 2014).

disclosures provisions can stand on their own and the Commission should clarify that they could have been adopted on their own.

III. The Commission should issue guidance to registrants for identifying and discussing climate-related opportunities and risks in the Management Discussion and Analysis

The proposed rule asks whether encouraging registrants to identify climate opportunities will encourage greenwashing.[51] In our view, the Commission can avoid greenwashing – the phenomenon where companies trumpet low-impact environmental commitments – by encouraging registrants to disclose climate-related opportunities that are concrete and incorporated into the registrant's strategic planning. We suggest that the Commission issue guidance to registrants about how to incorporate discussion of climate opportunities into the Management Discussion and Analysis in Item 303 of Regulation S-K.[52] The Management Discussion and Analysis identifies trends "relevant to an assessment of the financial condition and results of operations of the registrant."[53] Climate-related opportunities that meet this standard – i.e., that have material impacts on the financial condition of the registrant – would likely clear the threshold for being more than greenwashing.

We also encourage the Commission to issue updated guidance about when registrants should discuss current climate-related risks in the Management Discussion and Analysis. As we stated in our comments on the request for information, both physical risks and transition risks have current financial impacts on registrants.[54] Those risks, which could include the effect of extreme weather events on operations and on large customers or suppliers, the effect of any enacted climate change legislation or regulations (and in particular recently-enacted legislation or regulations) on the operations of the registrant, or the effect of any climate-related change in consumer behavior or demands, will at times warrant further discussion in the Management Discussion and Analysis in addition to being disclosed through the proposed rule's amendments to Regulation S-K.

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[51] Proposed Rule, 87 Fed. Reg. at 21,353. The Commission has stated that a registrant may "disclose, as applicable, the actual and potential impacts of any climate-related opportunities it is pursuing." *Id.* at 21,349.

[52] *See* 17 C.F.R. § 229.303.

[53] *Id.* § 229.303(a).

[54] *See* Letter from Sarah Dougherty, et al. to Hon. Gary Gensler, Chair, SEC (Jun. 11, 2021) at 25-26, https://www.sec.gov/comments/climate-disclosure/cll12-8911361-244299.pdf.

IV. The Commission should announce plans to study further updates to its disclosure rules and to monitor their effects

We reiterate our recommendations from the request for information about the process that the Commission should follow for updates to these disclosure regulations. First, the Commission should issue regular guidance on best practices in disclosure, including industry-specific guidance on effective disclosure practices. Second, the Commission should charter a federal advisory committee on climate-related disclosures to assess how companies are responding to a mandatory disclosure regulation and to recommend updates or improvements to the regulations and the Commission's implementation of the regulations. Finally, the Commission should regularly update its regulations as disclosure practices evolve.

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We thank the Commission for its consideration of our comments and we would be glad to follow up if you wish to speak with us about any aspect of them.

Sincerely,

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