



Consumer Federation of America

June 17, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: File No. S7-10-22: The Enhancement and Standardization of Climate-Related Disclosures for Investors

Dear Secretary Countryman:

On behalf of the Consumer Federation of America (CFA),¹ I am writing in strong support for the above-captioned proposal to enhance and standardize climate-related disclosures for investors.² If finalized, these amendments would help to ensure that investors have ready access to comprehensive, comparable, reliable, and decision-useful information about climate-related risks and opportunities. Investors need this information to make fully informed capital allocation decisions, to manage their portfolio risks, and to engage effectively in the oversight of the companies whose shares they own.

Taking these steps is not only well within the Commission's authority, but also essential if the Commission is to fulfill its public interest mission to protect investors, promote fair, orderly, and efficient markets, and facilitate capital formation. We encourage the adoption of the Proposed Amendments without undue delay.

1) Investors are demanding more, better climate-related information, and this proposal is needed to facilitate more informed investment decision-making.

Investors of all types and sizes are demanding more and better climate-related information.³ One reason for this is that investors are increasingly allocating capital toward

¹ The Consumer Federation of America is a non-profit association of more than 250 consumer groups that was established in 1968 to advance the consumer interest through research, advocacy, and education.

² Proposed Rule, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Release Nos. 33-11042; 34-94478 (March 21, 2022), <https://bit.ly/3FqH2w1> [hereafter "Proposing Release" or "Proposal" or "Proposed Amendments"].

³ See, e.g., SEC Investor Advisory Committee, *Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure* (May 14, 2020), <https://bit.ly/38Ly5RJ> ("The message that we have heard consistently is that investors consider certain ESG information material to their

investments that actively consider climate risks as financial risks, for example through sustainable or Environmental, Social, and Governance (ESG) oriented investment funds.⁴ For instance, in the first quarter of 2021 alone, Morningstar wrote that “the U.S. sustainable fund landscape saw nearly \$21.5 billion in net inflows.”⁵ Similarly, in December 2021, Reuters reported that “[a] record \$649 billion poured into ESG-focused funds worldwide through Nov. 30, up from the \$542 billion and \$285 billion that flowed into these funds in 2020 and 2019, respectively,” accounting for “10% of worldwide fund assets.”⁶ Inflows to sustainable funds appear to have slowed moderately since that peak, but demand remains strong.⁷ According to BlackRock, as of January of this year, sustainable investment levels had reached \$4 trillion.⁸ The investment decisions driving this capital allocation should be undergirded by accurate, reliable, and comprehensive climate-related information.

a) Investors need better disclosures as climate change-related risks grow.

In the time since Acting Chair Allison Herren Lee’s 2021 request for input (RFI) on climate-related disclosures,⁹ reports have continued to highlight the growing climate change-related threats that face our country and economy¹⁰ and the continued rise in several key climate change indicators, e.g., greenhouse gas (GHG) concentrations, sea level rise, ocean heat, and

investment and voting decisions, regardless of whether their investment mandates include an “ESG-specific” strategy.”).

⁴ See, e.g., Skadden, *ESG: 2021 Trends and Expectations for 2022* (February 11, 2022), <https://bit.ly/3LO2rBp> (“Current assessments estimate that there are more than \$330 billion in assets under management in ESG funds, with the creation of more ESG funds expected in 2022.”); Oracle and Savanta, *No Planet B: How Can Businesses and Technology Help Save the World?*, at 7 (2022), <https://bit.ly/3se9mfz>; and Ceres, *As 2022 Proxy Season Begins, Record Numbers of Climate Resolutions and Agreements Bode Well for Action* (April 27, 2022), <https://bit.ly/3yGCu2U> (“‘More investors than ever before are focused on climate risk and opportunity and are calling for action,’ said Rob Berridge, senior director of shareholder engagement at Ceres. ‘After last year’s historic proxy season in which 18 climate-related shareholder resolutions won majority votes, many companies and investors are anticipating resolutions to garner significant support, which is one reason for the record number of agreements.’”).

⁵ Alyssa Stakiewicz, *Sustainable Fund Flows Reach New Heights in 2021’s First Quarter*, Morningstar (April 30, 2021), <https://bit.ly/3NWEjO8>.

⁶ Ross Kerber and Simon Jessop, *Analysis: How 2021 became the year of ESG investing*, Reuters (December 23, 2021), <https://reut.rs/3xRUQgw> (citing data from Refinitiv Lipper).

⁷ Alyssa Stakiewicz, *U.S. Sustainable Fund Flows Slid in First-Quarter 2022*, Morningstar (May 2, 2022), <https://bit.ly/3HyO4Qc>.

⁸ Larry Fink, *2022 Letter to CEOs: The Power of Capitalism*, BlackRock (2022), <https://bit.ly/3vYSQCu>, [hereafter “2022 Letter to CEOs”].

⁹ See Acting Chair Allison Herren Lee, U.S. Securities & Exchange Commission, *Public Input Welcomed on Climate Change Disclosures* (March 15, 2021), <https://bit.ly/3xuhc6E>.

¹⁰ See, e.g., Christopher Flavelle and Nadja Popovich, *Here Are the Wildfire Risks to Homes Across the Lower 48 States*, New York Times (May 16, 2022), <https://nyti.ms/3FMMdpW> (“The nation’s wildfire risk is widespread, severe and accelerating quickly, according to new data that, for the first time, calculates the risk facing every property in the contiguous United States.”); Sarah Kaplan and Andrew Ba Tran, *More than 40 percent of Americans live in counties hit by climate disasters in 2021*, Washington Post (January 5, 2022), <https://wapo.st/3lejCjQ> (“More than 4 in 10 Americans live in a county that was struck by climate-related extreme weather last year, according to a new Washington Post analysis of federal disaster declarations, and more than 80 percent experienced a heat wave.”); See also Swiss Re Institute, *The Economics of Climate Change: No Action Not an Option*, at 1 (April 2021), <https://bit.ly/3yqvs2n> (“The world stands to lose close to 10% of total economic value by mid-century if climate change stays on the currently-anticipated trajectory, and the Paris Agreement and 2050 net-zero emissions targets are not met.”).

ocean acidification.¹¹ Many investors are already responding to these risks through portfolio risk management and engagement with companies,¹² but they are also calling on the Commission to respond by requiring more reliable and decision-useful¹³ disclosures from registrants about their level of exposure to climate risks and what companies are doing to manage that exposure.¹⁴

Factors driving demand for better climate-related disclosures can vary, but of principal significance is the “growing consensus that climate change may present a systemic risk to financial markets.”¹⁵ This concern is detailed in the recent report of the Climate-Related Market Risk Subcommittee of the Market Risk Advisory Committee of the Commodity Futures Trading Commission (CFTC).¹⁶ The report was unanimously approved by the subcommittee’s 34 members, representing banks, asset managers, agribusiness, the oil and gas sector, academia and environmental organizations,¹⁷ providing strong evidence that this concern is widely acknowledged across virtually all segments of the economy in general and the financial system in particular.

Both retail and institutional investors are demanding better climate-related disclosures that can inform better investment decision-making. First, institutional investors are explicitly demanding enhanced climate-related disclosures because they know that climate-related risks and opportunities can affect returns. Second, they are demanding enhanced climate-related disclosures so that they can offer investment products and services that meet their clients’ needs and goals. These institutions, including investment companies and investment advisers, often

¹¹ See World Meteorological Organization, *Four Climate Change Records Broken in 2021: WMO State of the Climate Report*, Phys.org (May 18, 2022) <https://bit.ly/3MuZSEK>.

¹² The Proposing Release points to numerous institutional investor initiatives that have collectively urged companies to provide better information about the impacts of climate change. See, e.g., Proposing Release, at 334 (“The 2021 Institutional Investors Survey solicited the views of 42 global institutional investors managing over \$29 trillion in assets (more than a quarter of global assets under management (AUM)) and found that climate risk remains the number one investor engagement priority. A significant majority (85%) of surveyed investors cite climate risk as the leading issue driving their engagements with companies. These institutional investors also indicated that they consider climate risk to be material to their investment portfolios and are demanding robust and quantifiable disclosure around its impacts and the plan to transition to net zero.” (*citing* Morrow and Sodali, *Institutional Investor Survey* (2021), <https://bit.ly/3sWwboy>)); and *id.*, at 14 (“[A]s climate-related impacts have increasingly been well-documented and awareness of climate-related risks to businesses and the economy has grown, investors have increased their demand for more detailed information about the effects of the climate on a registrant’s business and for more information about how a registrant has addressed climate-related risks and opportunities when conducting its operations and developing its business strategy and financial plans.”).

¹³ See Chair Gary Gensler, U.S. Securities & Exchange Commission, *Prepared Remarks Before the Principles for Responsible Investment “Climate and Global Financial Markets” Webinar* (July 28, 2021), <https://bit.ly/3G15Zco> (“In addition to that consistency and comparability, investors benefit most when disclosures are “decision-useful.” What do I mean by that? A decision-useful disclosure has sufficient detail so investors can gain helpful information — it’s not simply generic text. In appropriate circumstances, I believe such prescribed disclosure strengthens comparability.”).

¹⁴ Proposing Release, at 25.

¹⁵ Allianz, *Covid, Cyber, Compliance and ESG Top Risk Concerns for Financial Services Sector* (May 6, 2021), <https://bit.ly/3Qt14xm>.

¹⁶ Climate-related Market Risk Subcommittee, Market Risk Advisory Committee, U.S. Commodity Futures Trading Commission, *Managing Climate Risk in the U.S. Financial System* (September 9, 2020), <https://bit.ly/3Nein0h>.

¹⁷ See Written testimony of Dr. Nathaniel Keohane, Environmental Defense Fund, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, *Hearing on 21st Century Economy: Protecting the Financial System from Risks Associated with Climate Change*, at 3 (March 18, 2021), <https://bit.ly/3z3YZzi>.

invest on behalf of retail investors,¹⁸ who are increasingly demanding investment products and services that incorporate climate-related considerations into their investment decisions. Thus, where there is explicit and robust institutional investor demand for better climate-related information, as is frequently cited in the Proposing Release in support of the proposed rules, that demand is often a direct reflection of the retail investor demand for investment products and services that incorporate climate-related considerations into their investment decisions. Relatedly, research indicates that in certain contexts retail demand for ESG-oriented investing may be underappreciated.¹⁹

b) In addition to facilitating climate-related risk management, better disclosures allow investors to seek climate-related opportunities.

While significant investor focus is appropriately centered on the downside financial risks of climate change, it is equally important to highlight the benefits that investors seek via better climate-related information. As contemplated throughout the Proposing Release, the identification of long-term investment opportunities is also a key driver for this Proposal.²⁰ As BlackRock Chairman and CEO Larry Fink stated in his 2022 Letter to CEOs, “[w]e focus on sustainability not because we’re environmentalists, but because we are capitalists and fiduciaries to our clients.”²¹ Opportunities may include “cost savings associated with the increased use of renewable energy, increased resource efficiency, the development of new products, services, and methods, access to new markets caused by the transition to a lower carbon economy, and increased resilience along a registrant’s supply or distribution network related to potential climate-related regulatory or market constraints,” according to the letter.²²

Many institutional investors consider climate-related information, not just as a part of an ESG strategy, but as essential elements in their analysis of both value protection and value creation.²³ According to the Institutional Investors Group on Climate Change’s *Statement to Governments on the Climate Crisis*, for example, “[t]he joint statement [signed by 587 investors representing over USD \$46 trillion in assets] to all world governments urges a global race-to-the-

¹⁸ See Federal Reserve Board, *Balance Sheet of Households and Nonprofit Organizations, 1952 - 2021*, <https://bit.ly/3NqyAMX> (last visited May 25, 2022); See also Jill Fisch, *GameStop and the Reemergence of the Retail Investor* (April 8, 2022), <https://bit.ly/3wKxetW> (“In recent years, most retail investors participated in the capital markets through intermediaries such as diversified mutual funds, retirement plans and professional advisors. The role of these intermediaries was to shelter retail investors from the risks associated with direct investing—the risks of poorly informed trades, insufficient diversification, costly products, and fraud.”).

¹⁹ Greg Bartalos, *Advisors Are Underestimating Retail Demand for ESG Investments*, RIA Intel (April 12, 2021), <https://bit.ly/3zg7Hur>.

²⁰ See, e.g., Proposing Release, at 67.

²¹ Larry Fink, *2022 Letter to CEOs*.

²² *Id.*

²³ See, e.g., State Street Global Advisors, *Comment Letter Re: Request for Public Input on Climate Change Disclosures*, at 3 (June 14, 2021), <https://bit.ly/3Psci2d> (“Integrating sustainability risk into the investment process depends on the availability of robust and reliable sustainability data on investable companies. We have identified four primary uses for such data by investment managers: [t]o effectively execute stewardship duties by identifying and engaging with company boards on emerging risks, particularly for index strategies; [t]o inform the selection of portfolio securities, particularly for “impact investing” or actively-managed investments; [t]o meet growing investor/asset owner demand to understand climate-related risks and opportunities (including scenario analysis) posed to their investment; and [t]o satisfy increasing regulatory demand for greater transparency as to how and where climate-related risks are factored into investment decisions.”).

top on climate policy and warns that laggards will miss out on trillions of dollars in investment if they aim too low and move too slow.”²⁴ Similarly, in its survey of private equity funds, PwC found similar results. “Over the past seven years, PE firms have radically reassessed the importance and value of ESG to their business. It has gone from being considered a tangential area of compliance, or a specialist product for a small minority of investors, to becoming an overarching framework that is informing the strategic thinking of the entire firm,” the survey states.²⁵

c) Investors need better climate-related information for well-informed decision-making.

Where markets and economies are decarbonizing, “both retail and institutional investors need reliable information to determine the effects of this process on registrants.”²⁶ Investors have demonstrated that they need climate-related information when making decisions about how best to allocate their capital, whether to buy, hold or sell a company’s shares, and how to vote their proxies. To do so, they need information about companies’ plans related to climate change and the potential cost of those plans.²⁷

For further evidence in support of that answer, the Commission need not look far, as Acting Chair Lee’s RFI comment file contains ample letters from funds and investment firms that provide detail on how climate-related disclosures are currently used in investment decision-making, and how investors and investment managers need greater standardization and better information.²⁸

In sum, investors would use enhanced climate-related information in the same way that they utilize other relevant and material information, that is to price risk, inform investment and

²⁴ See Institutional Investors Group on Climate Change, *2021 Global Investor Statement to Governments on the Climate Crisis* (2021), <https://bit.ly/31B6kOx>.

²⁵ PwC, *Private Equity’s ESG Journey: From Compliance to Value Creation* (2021), <https://pwc.to/3a7fSOR> (PwC’s survey of general and limited partners from 209 firms found that “value creation” and “value protection” are top drivers of responsible investment or ESG activity, identified as a top three driver by 66% and 40% of survey respondents respectively. Just under half (49%) said they “integrate highly material ESG issues into commercial due diligence when making investment decisions, albeit on an ad hoc basis.” One reason for “this shift from risk mitigation to value creation,” according to PwC, “could be that managing partners have come to realise that ESG offers a real business opportunity, and they don’t want their firms to miss out.”).

²⁶ Larry Fink, *2022 Letter to CEOs*.

²⁷ See Parker Bolstad et al., *Flying Blind: What Do Investors Really Know About Climate Change Risks in the U.S. Equity and Municipal Debt Markets?*, Hutchins Center Working Paper #67, at 2 (Sept. 2020), <https://brook.gs/3sLW17C>. (“Greater disclosure, in theory, could lead to investment and operational decisions that better reflect climate risks that investors and other market players could not, on their own, discover.”); *and id.*, at 1 (“60% of publicly traded firms reveal at least something about climate change, but the largest volumes of information are skewed heavily toward a few industries (e.g., electric utilities, oil & gas, mining) and concern valuation risks due to possible transition away from fossil fuels. By contrast, there is much less disclosure around the physical risks of climate change.”).

²⁸ See, e.g., California State Teachers’ Retirement System, *Comment Letter Re: Public Input on Climate Change Disclosures*, at 2 (June 4, 2021), <https://bit.ly/3yPEu96>; Capital Group, *Comment Letter Re: Input on Climate Change Disclosures*, at 3 (June 11, 2021), <https://bit.ly/3Py9Hnu>; and Federated Hermes, *Comment Letter Re: Request for Public Input Regarding Climate Change Disclosures*, at 1 (June 14, 2021) <https://bit.ly/3LxsdJk>.

proxy voting decisions, pursue greater shareholder value and investment returns, and facilitate the reduction of climate change related risk in our financial system.

2) The current voluntary climate-related disclosure regime has resulted in inadequate and inconsistent information which falls short of investor demands and prevents market participants from reasonably assessing the risks of climate change.

Unfortunately, our current voluntary climate-related disclosure regime does not meet the demands of investors because it does not broadly elicit consistent, comparable, and reliable reporting from registrants. Disclosures lacking these essential qualities impede investors' ability to conduct well-informed investment decision-making or shareholder engagement, whether through proxy voting or other means. Due to the voluntary nature of our current climate-related disclosure regime, investors face a landscape of disparate and varied disclosures, which severely limits their ability to understand registrants' climate-related risks and opportunities, and the management thereof. Current climate-related disclosures vary both in their form and substance, making it very difficult for investors to contextualize the information they are provided, to compare it against other registrants' disclosures or across industries and sectors, or to easily benchmark the available disclosures against relevant performance indicators.²⁹ Ultimately, these limitations frustrate well-informed investment decision-making.

a) The Commission's 2010 Guidance has proven to be inadequate because it is principles-based and voluntary, which has resulted in a climate disclosure framework that is overly discretionary, resulting in climate-related disclosures that vary in form, quality, and usefulness.

The current framework under which registrants disclose climate-related information to the public can be traced back to the Commission's 2010 *Guidance Regarding Disclosure Related to Climate Change*.³⁰ This interpretive guidance provided the Commission's view "on existing SEC disclosure requirements as they apply to business or legal developments relating to the issue of climate change." Importantly, the release did "not create new legal requirements nor modify existing ones, but [was] intended to provide clarity and enhance consistency for public companies and their investors."³¹

What the 2010 Guidance did was to identify potential disclosures that companies may be required to make around risk factors, business description, legal proceedings, and management's discussion and analysis. Specifically, the Commission's interpretative guidance highlighted the potential impacts of legislation and regulation, international accords, indirect consequences of

²⁹ See Proposing Release, at 20 ("Many commenters criticized the current disclosure practice, in which some issuers voluntarily provide climate disclosures based on a variety of different third-party frameworks, because it has not produced consistent, comparable, reliable information for investors and their advisors, who otherwise have difficulty obtaining that information.").

³⁰ U.S. Securities & Exchange Commission, *Commission Guidance Regarding Disclosure Related to Climate Change*, Interpretation (February 8, 2010), <https://bit.ly/3OYQf2M> [hereafter "2010 Guidance"].

³¹ U.S. Securities & Exchange Commission, *SEC Issues Interpretive Guidance on Disclosure Related to Business or Legal Developments Regarding Climate Change*, Press Release (January 27, 2010), <https://bit.ly/3LJmccF>.

regulation and/or business trends, and physical risks associated with climate change.³² As stated in the Proposing Release, “[s]pecifically, the 2010 Guidance emphasized that climate change disclosure might, depending on the circumstances, be required in a company’s Description of Business, Risk Factors, Legal Proceedings, and Management’s Discussion and Analysis of Financial Condition and Results of Operations.”³³

What the 2010 Guidance did not do was to create meaningfully specific or compulsory requirements as to when, where, how, or what climate-related disclosures should be made. As Commissioner Elisse Walter stated at the time: “I believe that it is important for all of us to understand exactly what the guidance we are considering this morning is and what it is not. Let me start by saying what it is not. It is not, and I cannot stress this enough, a new rule or legal obligation for publicly held companies.”³⁴

Thus, while it was commendable for the Commission to formally recognize that climate-related risk disclosure is material to investor decision-making,³⁵ because the 2010 Guidance is largely voluntary and principles-based, it has ultimately fallen short of the needs of investors. Fundamentally, the 2010 Guidance has not kept pace with investor demands for climate-related information because it gives too much discretion to issuers to determine what to disclose and how to do so. Indeed, in a report to Congress two years after its publication, the Commission concluded that it had not seen a noticeable change in disclosure from the year before the 2010 Guidance came out to the year after.³⁶

The limitations of a principles-based approach to eliciting decision-useful ESG-related information were also illustrated during the Commission’s last endeavor to update Regulation S-K disclosures.³⁷ As Commissioners Robert J. Jackson, Jr. and Allison Herren Lee predicted in their joint statement when the rules were proposed, a principles-based approach would produce “inconsistent information that investors cannot easily compare.”³⁸ That concern was supported by the findings of a report from Neri Bukspan and Marc Siegel of Ernst and Young, which analyzed a set of disclosures made by 143 S&P 500 companies following the implementation of the Commission’s amended Regulation S-K disclosure requirements around human capital.³⁹ The analysis identified significant disparities in the resulting disclosures, just as Commissioners

³² *See id.*

³³ Proposing Release, at 15.

³⁴ Commissioner Elisse B. Walter, U.S. Securities & Exchange Commission, *Opening Remarks Regarding Interpretive Guidance Regarding Climate Change* (January 27, 2010), <https://bit.ly/3Pk3cEv>.

³⁵ 2010 Guidance, at 6 (“In addition to legislative, regulatory, business and market impacts related to climate change, there may be significant physical effects of climate change that have the potential to have a material effect on a registrant’s business and operations.”).

³⁶ *See* Madison Condon et al., *Mandating Disclosure of Climate-related Financial Risk*, Institute for Policy Integrity and Environmental Defense Fund, at 21 (February 10, 2021), <https://bit.ly/3HybdCm> (*citing* Government Accountability Office, GAO-18-188, *Climate Related Risks: SEC Has Taken Steps to Clarify Disclosure Requirements* (February 2018), <https://bit.ly/3QullzV>).

³⁷ *See* Commissioners Robert J. Jackson, Jr. and Allison Herren Lee, U.S. Securities & Exchange Commission, *Joint Statement of Commissioners Robert J. Jackson, Jr. and Allison Herren Lee on Proposed Changes to Regulation S-K* (Aug. 27, 2019), <https://bit.ly/39ZC25E>.

³⁸ *Id.*

³⁹ Neri Bukspan and Marc Siegel, *Human Capital Disclosures Findings From 2020 10-Ks*, Harvard Law School Forum on Corporate Governance (May 25, 2021), <https://bit.ly/3ILCm11>.

Jackson and Lee had predicted.⁴⁰ “Our analysis shows a wide disparity in the extent and areas discussed, as well as depth and approach that companies used to craft their disclosures, including in their use of measures, quantitative goals and targets, as well as key human capital-related performance indicators,” the report states.⁴¹ One way in which these disparities manifested themselves was in the wide range in the length of the disclosures. Among the 10-Ks analyzed, the report stated that, “we observed a wide range of pages of human capital disclosures, from a single paragraph/quarter of a page to three pages.” At a 2021 NYU School of Law Institute for Corporate Governance and Finance Roundtable, Former Division of Corporation Finance Acting Director John Coates stated that the disclosures the Commission had received to date “displayed quite a range of variation,” including some that provided little if any information on the topic and others that laid out “a full range of qualitative and quantitative information.”⁴²

Disclosure disparities create or exacerbate information gaps, either from lack of robust disclosure or non-comparability between disclosures made. Information gaps create inefficiencies and costs for investors by limiting their ability to accurately assess risk exposure, and in turn, by limiting their abilities to properly allocate capital. Unfortunately, as time and experience has shown, these disparities continue to be the predictable outcome of the principles-based and voluntary regime that was embraced by the Commission’s 2010 Guidance.

b) Voluntary third-party frameworks, standards setters, and service providers have grown to fill the gaps left by the 2010 Guidance, but have failed to elicit comprehensive, comparable, reliable, and decision-useful information from registrants.

Since the issuance of the 2010 Guidance, there has been an evolution of an expansive array of third-party disclosure frameworks, standards, ratings providers, and related service providers,⁴³ which are utilized by various registrants and investors to varying degrees and effect.⁴⁴ Unfortunately, the principal deficiencies of the 2010 Guidance, that it is largely voluntary and the level of disclosure is entirely self-directed by issuers, have endured in this burgeoning third-party driven disclosure system as well. Thus, the primary faults of the 2010 Guidance have not only remained unresolved, they have proliferated. The result has been that climate-related disclosures are often markedly different from one registrant to the next and are provided in different types of reports and in different locations.⁴⁵ Consequently, however well-intentioned they may be, they are still a far cry from being as comprehensive, consistent, comparable, and reliable as would be necessary to truly be decision-useful for investors.

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² NYU Law, Institute for Corporate Governance & Finance and NYU Stern Vincent C. Ross Institute of Accounting Research, Roundtable (April 28, 2021), Session 1. Recording available here: <https://bit.ly/3wShg0P>.

⁴³ See World Economic Forum, *ESG Ecosystem Map* (last visited May 13, 2022), <https://bit.ly/3MgLxeZ>.

⁴⁴ See SEC Investor Advisory Committee, *Recommendation from the Investor-as-Owner Subcommittee of the SEC Investor Advisory Committee Relating to ESG Disclosure*, at 4.

⁴⁵ Catherine M. Clarkin et al., *The Rise of Standardized ESG Disclosure Frameworks in the United States*, Harvard Law School Forum on Corporate Governance (June 22, 2020), <https://bit.ly/3wcvJo7>.

As the Proposal states, “[t]he current regulatory regime leaves substantial uncertainty around the type of climate-related information that should be disclosed and how it should be presented[,]” and because issuers do not always use the same third-party climate reporting frameworks or, alternatively, use them in non-standardized way, “companies often disclose some but not all components, and the components that are disclosed may not be the same across companies.”⁴⁶ Further, “[t]he location, format, and granularity of the information provided may also vary, although the substance may be similar[, which] has resulted in considerable heterogeneity in firms’ existing disclosure practices.”⁴⁷

In practice, many companies utilize a hodgepodge of frameworks and standards to provide disclosures to various stakeholders. And many companies have various stakeholder groups that they hope to reach, which may require leveraging multiple third-party frameworks or reporting standards to do so. Various third-party organizations have emerged to service this demand, of course, with one result being, “different standard-makers address different cross-sections of ESG issues and have different concepts of what factors are material,” and “various standards cover overlapping ESG topics but outline disparate disclosure requirements.”⁴⁸ Unfortunately, while these practices are often the outgrowth of companies’ trying to respond to stakeholder demands, these disparities have the effect of not only adding to the confusion of investors and markets, but also exacerbating uncertainties and costs of issuers.

In its interviews with institutional investors, for example, the Government Accountability Office (GAO) found that most seek out additional ESG disclosures from companies “to address gaps and inconsistencies in companies’ disclosures that limit their usefulness.”⁴⁹ In its own review of companies’ ESG disclosures, the GAO found that, while most companies provided information related to ESG risks or opportunities that was specific to the company, some did not. It found, moreover, that “differences in methods and measures companies used to disclose quantitative information may make it difficult to compare across companies,” citing differences in how companies report carbon dioxide emissions as an example.⁵⁰ Even those involved in developing the voluntary disclosures have acknowledged the issue. The most recent report of the Task Force on Climate-related Financial Disclosures (TCFD), for example, indicates that although support for TCFD continues to grow, “companies’ disclosure of the potential financial impact of climate change on their businesses and strategies remains low.”⁵¹ When companies’ disclosures are inconsistent and incomplete, that imposes significant costs on investors to seek out the additional information they need, and additional costs on companies to respond to those requests.⁵²

⁴⁶ Proposing Release, at 347.

⁴⁷ *Id.*

⁴⁸ *Id.*, at 327.

⁴⁹ U.S. Government Accountability Office, GAO-20-530, *Public Companies: Disclosure of Environmental, Social, and Governance Factors and Options to Enhance Them* (July 2020), <https://bit.ly/3HxeUrM>.

⁵⁰ *Id.*

⁵¹ Task Force on Climate-related Financial Disclosures, *2020 Status Report*, at 4, <https://bit.ly/3wFprfu>.

⁵² See, e.g., Commissioner Hester M. Peirce, U.S. Securities & Exchange Commission, *Scarlet Letters: Remarks before the American Enterprise Institute* (Jun. 18, 2019), <https://bit.ly/3NABAjy> (“A senior counsel from a major insurance company reported her experience at a recent Investor Advisory Committee meeting at the SEC. Her company received approximately 55 survey and data verification requests from ESG rating organizations in the last year. By her company’s estimate, it took 30 employees and 44.8 work days to respond to just one of these surveys.”)

As pointed out in an article by Sullivan & Cromwell attorneys discussing the rise of third-party ESG disclosure frameworks, “[i]n a 2019 report of the Better Alignment Project, the CRD [Corporate Reporting Dialogue] notes the challenges faced by both issuers producing ESG reports and users of ESG information due to disparities in the various standards and the need for greater harmony among frameworks[,]” and also that, “[the CRD] report outlines commonalities and differences with respect to TCFD recommendations among various frameworks and standards developed by its participants, which is intended to assist companies in understanding and implementing those recommendations.”⁵³ Thus, the challenge may not only be the distinct differences between the third-party frameworks themselves, but also in how the frameworks incorporate or interpret other frameworks into their own, namely the recommendations of the TCFD.

These layered challenges, and the discrepancies that inevitably result, hinder effective and efficient disclosure even for those companies that have proactively sought to disclose robust climate-related information to investors. Accordingly, investors and other market stakeholders have continued to call for the standardization of climate-related disclosures.⁵⁴

c) Principles-based, voluntary climate-related disclosures are often incomplete and do not allow adequate comparative analysis by investors or markets.

When climate-related disclosures are left almost entirely to the devices of registrants, with (until recently) little threat of the Commission bringing an enforcement action against climate-related misstatements or omissions, it is a predictable result that the climate-related information that is disclosed will suffer both in quantity and quality. The absence of robust guidance from the Commission has increased the likelihood of that outcome. Indeed, an analysis by Ceres of disclosures of the 600 largest U.S. companies found that “more than half... still don’t provide decision-useful disclosures on climate-related risks[, and] [t]hose that do often provide disclosures that are mere boilerplate, or too brief, and therefore effectively meaningless.”⁵⁵

Commissioner Lee noted these difficulties in a recent speech, stating that “a principles-based standard that broadly requires disclosure of ‘material’ information presupposes that managers, including their lawyers, accountants, and auditors, will get the materiality determination right. In fact, they often do not.”⁵⁶ That is not to say that materiality should not

While this is just one company’s experience with one survey, one could expect that some surveys will go unanswered because of lack of corporate resources.”)

⁵³ Catherine M. Clarkin et al., *The Rise of Standardized ESG Disclosure Frameworks in the United States*.

⁵⁴ McKinsey, *The ESG premium: New Perspectives on Value and Performance*, at 9 (February 2020), <https://mck.co/3Lx9hdw> (“The responses to this survey show a fairly universal desire from investors and executives to improve on the current approaches and create easier-to-use ESG metrics and data standards. It isn’t possible—or worthwhile—to report on everything, but companies can focus on communicating the most critical information in ways that key stakeholders value. Investment professionals especially want ESG data that are more standardized, better integrated with financial data, and readily benchmarked.”).

⁵⁵ Ceres, *Requiring Disclosure of Climate Change Risks Makes Sense for Investors, Companies, and the U.S. Economy* (July 17, 2010), <https://bit.ly/3wJ762w>.

⁵⁶ Commissioner Allison Herren Lee, U.S. Securities & Exchange Commission, *Living in a Material World: Myths and Misconceptions about ‘Materiality’* (May 24, 2021), <https://bit.ly/3wLqquM>.

guide Commission rulemaking, but rather where corporate executives are left to apply a principles-based, voluntary disclosure regime, it's important to consider that they are not disinterested arbiters of whether something is material to investors and that they have an incentive to paint things in the most positive light, and thus may be inclined to under-estimate and understate risks.⁵⁷

Currently, with companies able to decide for themselves where and in what form to provide ESG-related information, the disclosures may be scattered among shareholder reports, integrated reports, sustainability reports, impact reports, regulatory filings, and on various investor relations or communications websites.⁵⁸ Furthermore, as the Center for American Progress (CAP) noted in a recent report on the role of accounting and auditing in addressing climate change, “most companies that voluntarily issue climate reports present them in a way that makes it difficult to assess the company’s performance over time or to compare it to other companies.”⁵⁹ The CAP report goes on to assert that: “[I]t is often impossible for investors to discern how a company’s climate report relates to its financial statements. Climate reports tend to be replete with anecdotes and best-case scenarios. They are not audited, and auditors have no duty even to read them, much less evaluate whether the financial statements are consistent with the assertions in them.”⁶⁰

In his Senate testimony in March 2021, the Environmental Defense Fund’s Dr. Nathaniel Keohane described shortcomings with regard to climate change-related disclosures in greater detail. “Although climate related financial risks are growing, current disclosure regimes in the United States have not kept pace. SEC guidance in 2010 was important and pathbreaking but has proven insufficient, with resulting disclosures lacking in specificity, submitted with boilerplate language, or missing entirely,” he stated.⁶¹ Voluntary standards and frameworks have emerged, including those from TCFD and the Sustainability Accounting Standards Board (SASB), and they “have been critical to advancing climate risk disclosure,” according to Keohane, but “they are insufficient. Recent study has found that although climate risk disclosure has increased, ‘[m]ore firms are disclosing more general information that is essentially of no utility to the marketplace.’ In addition, disclosure varies across sectors and some sectors that are particularly vulnerable to climate impacts, such as agriculture, are lagging in their assessment and disclosure of climate risks.”⁶²

⁵⁷ Madison Condon et al., *Mandating Disclosure of Climate-Related Financial Risk*, at 27 (“Taken together, cognitive biases and mismatched incentives can result in managers underestimating or failing to foresee the risks that climate change poses for the long-term fiscal well-being of their companies.”).

⁵⁸ See, e.g., Katie Schmitz Eulitt, *Dispelling the Top 11 SASB Myths*, SASB (June 25, 2020), <https://bit.ly/3Giw5g6> (referencing the various locations where SASB-based disclosures may be placed by reporting companies).

⁵⁹ Samantha Ross, *The Role of Accounting and Auditing in Addressing Climate Change*, Center for American Progress (March 1, 2021), <https://bit.ly/3z4azdL>.

⁶⁰ *Id.*

⁶¹ Written testimony of Dr. Nathaniel Keohane, Environmental Defense Fund, before the U.S. Senate Committee on Banking, Housing, and Urban Affairs, *Hearing on 21st Century Economy: Protecting the Financial System from Risks Associated with Climate Change*, at 10 (March 18, 2021), <https://bit.ly/3z3YZzi>.

⁶² *Id.*

Indeed, where the physical impacts of climate change are being felt throughout the country,⁶³ and thus also present in financial markets and registrants' operations, then the level of disclosure should mirror that reality. Under current disclosure practices, that is simply not the case. For both investors and issuers, inconsistent material climate change-related information limits capacities to effectively allocate capital, develop long-term corporate finance and investment strategies, manage financial risks and risk exposure, and realize climate related opportunities.⁶⁴ In a nutshell, inconsistent material information exacerbates market entropy and diminishes the reliability of domestic capital markets.

d) Lagging disclosure leads to mispriced climate-related risks, compounded risk exposure, and potential market instability.

Unfortunately, as the demand for decision-useful ESG information has continued to grow, decision-useful disclosure has lagged.⁶⁵ Recent research indicates that the proportion of climate-related disclosure has remained modest, with one recent report finding that only “54% of the S&P 500 and less than a third of the Russell 3000 report on climate issues[,] . . . [and] disparities among companies of different sizes and in different sectors persist even when looking at other metrics such as greenhouse emissions, supply chain risks, water use, and biodiversity exposure.”⁶⁶ So, not only is the available climate-related information inconsistent across issuers, it is also unavailable from many of them altogether.⁶⁷ And without relevant and standardized disclosures from all registrants, it is nearly impossible for the investment community to understand and act upon the climate-related risks and opportunities to which they are exposed in a meaningful and systematic way. The existing climate-related disclosure regime, whose principles-based and voluntary structure has perpetuated this lack of comparable, specific, and

⁶³ See, e.g., Christopher Flavelle and Nadja Popovich, *Here Are the Wildfire Risks to Homes Across the Lower 48 States*, New York Times (May 16, 2022), <https://nyti.ms/3FMMdpW> (“The nation’s wildfire risk is widespread, severe and accelerating quickly, according to new data that, for the first time, calculates the risk facing every property in the contiguous United States.”); Sarah Kaplan and Andrew Ba Tran, *More than 40 percent of Americans live in counties hit by climate disasters in 2021*, Washington Post (January 5, 2022), <https://wapo.st/3lejCjQ> (“More than 4 in 10 Americans live in a county that was struck by climate-related extreme weather last year, according to a new Washington Post analysis of federal disaster declarations, and more than 80 percent experienced a heat wave.”).

⁶⁴ See, e.g., Wellington Management Company, *Comment Letter Re: Request for Input on Climate Change Disclosures*, at 3 (“[W]e spend considerable time developing proxy data from alternative sources, purchasing data from third-party aggregators, and reconciling partial data from data disclosures to generate our own comparable data. While these efforts can provide us with necessary insights, the data they generate is less accurate and much more difficult to develop than what could be produced by issuers themselves.”).

⁶⁵ See, e.g., Skadden, *ESG: 2021 Trends and Expectations for 2022* (February 11, 2022) <https://bit.ly/3LO2rBp>; and Ceres, *As 2022 Proxy Season Begins, Record Numbers of Climate Resolutions and Agreements Bode Well for Action* (April 27, 2022), <https://bit.ly/3yGCu2U>.

⁶⁶ The Conference Board, *Sustainability Disclosure Practices 2022 Edition: Getting Off the Sidelines*, (January 20, 2022), <https://bit.ly/37JXOd2>.

⁶⁷ See Madison Condon, *Market Myopia’s Climate Bubble*, Utah Law Review, at 108 (2022), <https://bit.ly/3sXirty> (“As of 2018, the average voluntarily complying company provided less than four of the eleven disclosure metrics recommended under the TCFD. Firms have been particularly slow to employ scenario analysis and discuss climate-related operational risk—just 9% discussed the resilience of their business models to climate change. And disclosures are far more likely to dwell on transition risks than discuss physical risks. These voluntary disclosures remain nonstandardized and are difficult for stakeholders to analyze and compare across companies. A large number of companies simply do not report climate risks through voluntary frameworks or otherwise.” [internal citations removed]).

decision-useful climate-related information, has led to the growing consensus that financial markets are failing to account for climate risk.⁶⁸

Boston University School of Law Professor Madison Condon observed in a recent law review article, “[t]here is a large gap between the economy-wide estimates of the impact of climate change in the financial sector (ranging broadly from \$4.2 to \$43 trillion), and the cumulative impacts disclosed by individual companies in their financial reporting.”⁶⁹ As the article notes: “[ECB President] Christine Lagarde recently warned that central bankers ‘will have to ask themselves’ if they are ‘taking excessive risk by simply trusting mechanisms that have not priced in the massive risk that is out there.’ According to one survey, 93% of institutional investors agree with her that climate risk ‘has yet to be priced in by all the key financial markets globally.”⁷⁰

Support for this position can also be drawn from an April 2020 International Monetary Fund report, which assessed the response of equity markets to past extreme weather events and concluded that climate change physical risk does not appear to be reflected in global equity valuations.⁷¹ And with regard to the transition risks of climate change, potential financial impacts to the investment community are staggering, with one recent article estimating “future lost profits in the upstream oil and gas sector exceed US\$1 trillion under plausible changes in expectations about the effects of climate policy[,]” and “[m]ost of the market risk falls on private investors, overwhelmingly in OECD countries, including substantial exposure through pension funds and financial markets.”⁷²

Recognizing that the impacts of underappreciated climate risk across our markets will assuredly be varied, Professor Condon asserts that, “[t]wo types of harms are generated by the under-assessment of climate risk: (1) the negative effects of climate change itself, as the mispricing of climate risk in the present leads to an inefficient allocation of investment capital; and (2) systemic risk to the financial system.”⁷³ The Proposal similarly observes these two effects as likely outcomes of the current voluntary disclosure landscape.⁷⁴

⁶⁸ See, e.g., IMF Blog, *Stock Markets Are Not Pricing in the Risk of Climate Change, Warns IMF* (November 9, 2020), <https://bit.ly/3PGaItA>.

⁶⁹ Madison Condon, *Market Myopia’s Climate Bubble*, at 76 (2022).

⁷⁰ *Id.* at 66. (citing *Climate Change and Artificial Intelligence Seen as Risks to Investment Asset Allocation, Finds New Report by BNY Mellon Investment*, Cision PR Newswire (Sept. 16, 2019), <https://prn.to/3MLXU2N>).

⁷¹ NYU School of Law Institute for Policy Integrity, *Comment Letter Re: Requested Public Input on Climate Change Disclosure*, at 65 (June 14, 2021), <https://bit.ly/3yUhohP>.

⁷² Gregor Semieniuk et al., *Stranded Fossil-fuel Assets Translate to Major Losses for Investors in Advanced Economies*, *Nature* (May 26, 2022), <https://go.nature.com/3M2dEOi>.

⁷³ Madison Condon, *Market Myopia’s Climate Bubble*, at 109.

⁷⁴ See Proposing Release, at 412; and *id.*, at 414 (“There are also important efficiency implications in relation to systemic risks. The increasing frequency and severity of climate events can potentially lead to destabilizing losses for insurance companies, banks, and other financial intermediaries with direct and indirect exposures to different affected industries and assets. Some commentators state that, in addition to physical risks, the financial system could be destabilized also by potentially rapid and unexpected losses to carbon-intensive assets caused by a disorderly transition to a low-carbon economy or a shift in the market’s perception of climate risks. With insufficient and inconsistent disclosures, asset prices may not fully reflect climate-related risks. Consequently, market participants may inadvertently accumulate large exposures to such risks, leaving them vulnerable to considerable unexpected and potentially sudden losses.” [internal citations removed]).

Those observations are echoed by the Financial Stability Oversight Council (FSOC) and the CFTC Subcommittee on Climate-Related Market Risk of the Market Risk Advisory Committee. FSOC’s 2021 *Report on Climate-Related Financial Risk* stated that, “[f]or the first time, FSOC has identified climate change as an emerging and increasing threat to U.S. financial stability.”⁷⁵ And the CFTC’s subcommittee, in its report, *Managing Climate Risk in the U.S. Financial System*, observed: “A central finding of this report is that climate change could pose systemic risks to the U.S. financial system. Climate change is expected to affect multiple sectors, geographies, and assets in the United States, sometimes simultaneously and within a relatively short timeframe. As mentioned earlier, transition and physical risks—as well as climate and non-climate-related risks—could interact with each other, amplifying shocks and stresses.”⁷⁶ In addition, the subcommittee report noted that, “systemic shocks are more likely in an environment in which financial assets do not fully reflect climate-related physical and transition risks[, and] [a] sudden revision of market perceptions about climate risk could lead to a disorderly repricing of assets, which could in turn have cascading effects on portfolios and balance sheets and therefore systemic implications for financial stability.”⁷⁷

The Financial Stability Board also issued a report in late 2020 that identified various threats to our financial system posed by climate change.⁷⁸ As the report points out, “[t]he manifestation of physical risks – particularly that prompted by a self-reinforcing acceleration in climate change and its economic effects – could lead to a sharp fall in asset prices and increase in uncertainty [which] could have a [destabilizing] effect on the financial system, including in the relatively short term[.]” and lastly, “[a] disorderly transition to a low carbon economy could also have a [destabilizing] effect on the financial system.”⁷⁹

Given the potential for climate change to disrupt the economy and the financial system, both acutely and in the long term, the failure to incorporate those impacts into the pricing of investments poses a substantial risk, not just to investors, but to the fair and orderly functioning of our markets. Similarly, to continue under the current voluntary and principles-based climate-related disclosure regime is likely only to amplify these blind spots and facilitate the continued flow of capital towards overly exposed investment assets and mispriced risks.

3) The Proposal appropriately establishes a clear and standardized disclosure framework that would enhance the reliability and consistency of climate-related information to the benefit of investors and markets.

a) This proposal would elicit disclosures that would better inform investment and voting decisions by establishing a climate-related disclosure framework

⁷⁵ See Press Release, *Financial Stability Oversight Council Identifies Climate Change as an Emerging and Increasing Threat to Financial Stability* (October 21, 2021), <https://bit.ly/39j6OWZ>.

⁷⁶ U.S. Commodity Futures Trading Commission, Market Risk Advisory Committee, Climate-Related Market Risk Subcommittee, *Managing Climate Risk in the U.S. Financial System*, at ii (September 9, 2020), <https://bit.ly/3Nein0h>.

⁷⁷ *Id.*

⁷⁸ Financial Stability Board, *The Implications of Climate Change for Financial Stability* (November 23, 2020), <https://bit.ly/38LE4WZ>.

⁷⁹ *Id.*, at 1.

within Commission rules, based largely on existing and widely accepted third-party climate-related frameworks.

The Commission’s decision to establish enhanced climate-related disclosure requirements within its own rules is, in our view, the most effective approach to eliciting decision-useful information in a way that prioritizes reliability and usability.⁸⁰ The Proposed Amendments, built on the foundation of the Commission’s 2010 Guidance,⁸¹ incorporate robust and specific new climate-related disclosure requirements, made according to a common set of qualitative and quantitative topics. And because the disclosure requirements are written into Regulation S-K and Regulation S-X, and would therefore be included in registrants’ publicly available regulatory filings, the proposed framework would provide more reliable and accessible information to investors and markets.

Specifically, the Proposal would “require a registrant to include climate-related disclosure in Securities Act or Exchange Act registration statements and Exchange Act annual reports in a separately captioned ‘Climate-Related Disclosure’ section and in the financial statements.”⁸² These amendments, as proposed, would effectively formalize and establish regulatory standardization for the growing number of companies that are reporting on their climate and environmental impacts,⁸³ and perhaps more importantly, for those companies that are not.

Importantly, the Proposal would largely preserve registrants’ ability to self-determine many of the climate-related risks and financial impacts which are material to their business. But, unlike the climate-related disclosures contemplated by the 2010 Guidance, the Proposal would require them to be disclosed with sufficient granularity and in such a way (i.e., in a particular location within a registrant’s filings and in machine readable format) as to be of sufficient quantity, quality, and accessibility that they would be useful to investors when deciding whether to buy or sell a particular company’s securities or how to vote on the securities that investors own.⁸⁴

⁸⁰ See CFA, *Comment Letter Re: Public Input on Climate Change Disclosures*, at 61 (June 14, 2021), <https://bit.ly/3F9JAhR> [hereafter “RFI Comment”].

⁸¹ See Proposing Release, at 18 (“The proposals set forth in this release would augment and supplement the disclosures already required in SEC filings. Accordingly, registrants should continue to evaluate the climate-related risks they face . . . as described in the 2010 Guidance.”).

⁸² *Id.*, at 55.

⁸³ CDP, *CDP Reports Record Number of Disclosures and Unveils New Strategy to Help Further Tackle Climate and Ecological Emergency* (October 14, 2021), <https://bit.ly/3w4r9XH> (“The growth in disclosures proves that standardized disclosure works, has global reach and drives environmental action. This should provide further incentive for governments around the world to make environmental disclosure mandatory[.]”).

⁸⁴ See Proposing Release, at 69 (“As defined by the Commission and consistent with Supreme Court precedent, a matter is material if there is a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote. As the Commission has previously indicated, the materiality determination is largely fact specific and one that requires both quantitative and qualitative considerations. Moreover, as the Supreme Court has articulated, the materiality determination with regard to potential future events requires an assessment of both the probability of the event occurring and its potential magnitude, or significance to the registrant.” [internal citations removed]).

Additionally, the Proposal’s requirements reflect important “concepts and vocabulary” from both the recommendations of the TCFD and the emissions accounting methodology established by the Greenhouse Gas Protocol (GHG Protocol),⁸⁵ an approach that many commenters advocated for in letters submitted in response to Acting Chair Lee’s RFI. Several major public companies submitted letters reflecting this view.⁸⁶ Uber’s comment, for example, stated that they, “believe the existing reporting and accounting standards developed by the Task Force on Climate-Related Financial Disclosures (TCFD) . . . provide a comprehensive, tested foundation for developing new or enhanced Commission climate disclosure requirements.”⁸⁷ Uber continued, stating, “[m]any companies have already invested considerable resources in establishing and maintaining voluntary reporting processes based on the TCFD[.]”⁸⁸

The Commission has responded accordingly,⁸⁹ as the Proposed Amendments to Regulation S-K largely track the Core Recommendations of the TCFD.⁹⁰ And in so doing, the Commission has formalized a view that we share, that “[b]uilding 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.”⁹¹ We applaud the Commission for taking this sensible and prudent approach.

Also, as the Proposal states, “[m]any commenters also recommended that we base any GHG emissions disclosure requirement on the GHG Protocol.”⁹² And while we do not profess to be experts in GHG emissions accounting, we do find it wise and likely of utmost tractability for both investors and registrants that the Commission should base GHG emissions reporting requirements on this “widely-used global greenhouse gas accounting standard[,]” one that “has been broadly incorporated into sustainability reporting frameworks, including the TCFD, Value Reporting Foundation, GRI, CDP, CDSB, and the IFRS Foundation’s Prototype.”⁹³

In sum, by proposing new disclosure requirements that are based on a fact-specific and objective materiality standard, the Proposal would elicit baseline climate-related disclosures for all registrants while also preserving registrants’ ability and autonomy to determine the additional climate-related risks and opportunities which should be disclosed due to their material impacts to

⁸⁵ *Id.*, at 476, et seq.

⁸⁶ See, e.g., Dow Inc., *Comment Letter Re: SEC Request for Public Input on Climate Change Disclosures*, at 2 (June 4, 2021), <https://bit.ly/3NJZMt5>; Apple, *Comment Letter Re: Request for Public Input on Climate Change Disclosures*, at 2 (June 11, 2021), <https://bit.ly/3ayN4iD>; Walmart, *Comment Letter Re: Request for Comment on Climate Change Disclosures*, at 3 (June 11, 2021), <https://bit.ly/3x0MpiC>; See also Proposing Release, at 50 (“Many commenters that supported climate disclosure rules recommended that we consider the TCFD framework in developing those rules. Numerous commenters stated that the Commission should base its climate-related disclosure rules on the TCFD framework either as a standalone framework[.]”).

⁸⁷ Uber Technologies, Inc., *Comment Letter Re: Public Input on Climate Change Disclosures*, at 2 (April 27, 2021), <https://bit.ly/3PLBbpL>.

⁸⁸ *Id.*

⁸⁹ See Proposing Release, at 36.

⁹⁰ See *id.*, at 476, et seq.; See also Task Force on Climate-related Financial Disclosures, *Core Recommendations*, <https://bit.ly/3x1BwMr>.

⁹¹ Proposing Release, at 49.

⁹² *Id.*, at 40.

⁹³ *Id.*

their business. Additionally, by requiring disclosure on governance, business strategy, risk management, financial statement metrics, GHG emissions, and targets and goals – the parameters for which are based on widely used and well-understood third-party frameworks – the proposed rules would provide investors with climate-related information that is comparable, reliable, and presented in a way that is already familiar to many, the TCFD and GHG Protocol frameworks being already in significantly widespread use.

b) If finalized, the Proposal would enhance the reliability and decision-usefulness of climate-related disclosures by amending Regulation S-K and Regulation S-X to require inclusion of robust climate-related information in registrants’ periodic filings and financial statements.

As we stated in our RFI Comment, “[p]romoting the reliability of ESG-related disclosures must start . . . with moving these disclosures into the existing SEC disclosure framework via amendments to Regulation S-K and Regulation S-X.”⁹⁴ Both retail and institutional investors would benefit from climate-related information that is provided in a consistent location within filings and provided in a similarly presented form as between registrants. Additionally, requiring disclosures in regulatory filings triggers important safeguards that are critical to ensuring the integrity of the disclosures. Chief among these safeguards is the requirement that disclosures made in the financial statements and footnotes to the financial statements are subject to an independent audit. Indeed, “[u]nless a climate-related disclosure is included in the financial statements, it is outside the scope of the audit, which means it is not tested for accuracy, even if it is financial in nature.”⁹⁵

As the Commission highlights throughout the Proposing Release, “assurance provided by an independent auditor reduces the risk that an entity provides materially inaccurate information to external parties, including investors, by facilitating the dissemination of transparent and reliable financial information.”⁹⁶ Importantly, audited financial statements not only provide the Commission with an avenue for oversight and enforcement against material misstatements or omissions in regulatory filings, it also enables a private right of action for the investing public. This is an especially important mechanism for guaranteeing the reliability of climate-related disclosures going forward. For private liability to serve as an effective deterrent, however, it is important that the required information be filed, rather than furnished. Requiring that disclosures be filed with the Commission comes with enhanced liability in the form of a separate private right of action under Section 18 of the Exchange Act (distinct from the more frequently asserted liability under Section 10-b).⁹⁷ Furthermore, because information that is furnished rather than filed is not automatically incorporated by reference into the registration statements, it may not be subject to the stricter liability standard that applies to registration statements.⁹⁸ Finally, information that is furnished is not subject to certain practices related to non-GAAP financial measures that are prohibited in Commission filings.⁹⁹ Thus, management’s accountability for the

⁹⁴ RFI Comment, at 62.

⁹⁵ Samantha Ross, *The Role of Accounting and Auditing in Addressing Climate Change*.

⁹⁶ Proposing Release, at 252.

⁹⁷ See Wilmer Hale, *Keeping Current with Form 8-K*, at 4 (June 2017), <https://bit.ly/3Qaq6P1>.

⁹⁸ *Id.*

⁹⁹ *Id.*

accuracy of those disclosures, while not entirely eliminated, is dramatically reduced when the information is furnished rather than filed. By requiring climate-related disclosures to be filed with the Commission, rather than simply furnished, the Proposal would therefore help ensure an appropriate level of accountability for the accuracy and reliability of these disclosures.

There are also practical reasons to include the disclosures in Regulation S-K and Regulation S-X mandated filings. Many companies already include some ESG-related disclosures in them. For example, climate change disclosures may be found not only in the discussion of risk factors and the MD&A, but also in the description of business and the discussion of legal proceedings. Human capital disclosures are included in the description of business.¹⁰⁰ In our RFI Comment, we recommended that “new mandatory ESG-related disclosures should be designed to build on and improve the quality of those current disclosures,” and we are encouraged that the Commission has proposed to do so.

In addition, under the proposed rules, climate-related disclosures would be required to use Inline XBRL structured data language.¹⁰¹ Tagging of climate-related disclosures would greatly benefit investors by making them more readily available for analysis, comparison, and filtering, among other reasons. Tagging offers significant benefits to both institutional and retail investors. The former may be able to use the tagged data to set up proprietary systems to compare companies with regard to risks or issues of particular importance to them. Even retail investors who do not have the same capacity to conduct that analysis directly would still benefit from tagging if, as we expect, independent third parties use the data to analyze companies’ performance on climate-related criteria and communicate their findings broadly to the investing public. By enhancing the ability to conduct data analysis and comparison, Inline XBRL tagging helps to create more accountability around disclosures, provides more actionable information to investors and markets, and facilitates better capital allocation and financial system stability.

i) Reg S-K requirements:

Turning to the proposed Regulation S-K amendments, the Proposal would require registrants to identify climate-related risks likely to have a material impact on a registrant’s business or financial statements over the short, medium, and long-term and describe the actual and potential impacts of those risks on their business,¹⁰² and to include this information in a “separately-captioned ‘Climate-Related Disclosure’ section” of filings made pursuant to Regulation S-K.¹⁰³ According to the Proposal, climate-related risks are those that include, in part, “the actual or potential negative impacts of climate-related conditions and events on a registrant’s consolidated financial statements.” For each registrant, the Proposal would also supplement narrative climate-related disclosures with the disclosure of a registrants’

¹⁰⁰ RFI Comment, at 61.

¹⁰¹ See U.S. Securities & Exchange Commission, *Inline XBRL*, online resource, <https://bit.ly/3GZQY0f> (“Inline XBRL is a structured data language that allows filers to prepare a single document that is both human-readable and machine-readable, so that filers need only prepare one Inline XBRL document rather than generate an HTML document of their financial statement information or risk/return summary information and then tag a copy of the data to create a separate XBRL exhibit. For data users, Inline XBRL provides an easier way to view, access, and explore the contextual information of the underlying data.”).

¹⁰² Proposing Release, at 55.

¹⁰³ See *id.*, at 357.

disaggregated GHG emissions, to be included in the same separately-captioned Climate-Related Disclosures section to Regulation S-K filings. Certain registrants must also include an attestation report attesting to the accuracy of disclosed scope 1 and scope 2 GHG emissions.¹⁰⁴

More specifically, pursuant to the Proposed Amendments to Regulation S-K, registrants would be required to make disclosures relating to the following topics: climate-related impacts to strategy, business model, and outlook; governance by registrants' boards of directors and management of climate-related risks; risk management process for identifying, assessing, and managing climate-related risks; GHG emissions metrics; attestation of scopes 1 and 2 emissions disclosures; and climate-related targets and goals.¹⁰⁵ The Proposed Amendments also enumerate detailed subtopics within each of the broader topics listed above, providing registrants with a robust framework to guide their climate-related disclosures.¹⁰⁶

The result of these proposed enhancements would be that investors could better identify and assess how climate-related risks may affect a registrant's businesses and operations, its strategic and financial planning, its supply chain management, its adaptation and mitigation activities, its climate-related research and development, its acquisitions and divestments, and finally, would provide a critical view into a registrant's access to capital. Investors would gain insight into how climate-related risks may serve as an input to the registrant's financial planning process and the time period(s) used for this process, which could allow investors to assess a registrant's financial performance (e.g., revenues, costs) and financial condition (e.g., assets, liabilities) in the face of a changing climate and increasing climate-related risks, both physical and transition risks. With better climate-related information, investors would be better equipped to independently assess the quality of registrants' climate-related risk management practices. Registrants and investors alike would also be better informed of alignments or misalignments between investors' and registrants' preferences, priorities, and specific time horizons, which could ultimately facilitate better investor relations and more efficient stakeholder communication.

Further, as a result of climate-related governance disclosures, investors would be better able to understand and evaluate the organizational processes and systems that registrants employ to inform management of climate-related risks, and similarly, how management monitors and manages those climate-related risks. More specifically, investors would be better equipped to monitor and oversee management's actions with respect to climate change, including how they assess risk, implement risk management policies and performance objectives, review and approve climate-related investments, and oversee major capital expenditures, acquisitions, and divestitures.

Additionally, the Proposal identifies certain activities that would trigger further disclosure. For example, if a registrant uses carbon offsets or renewable energy credits (RECs), the proposed rules would require it to disclose specific information around the role that the

¹⁰⁴ See *id.*, at 47 (“The proposed rules would require an accelerated filer or a large accelerated filer to include, in the relevant filing, an attestation report covering, at a minimum, the disclosure of its Scope 1 and Scope 2 emissions and to provide certain related disclosures about the service provider.”).

¹⁰⁵ See *id.*, at 476, et seq.

¹⁰⁶ See *id.*

offsets/RECs play in the registrant’s climate-related business strategy. The same would occur if a registrant uses an internal carbon price, i.e., the Proposal would require “information around the boundaries for measurement of overall CO₂e, the price per metric ton of CO₂e, as well as how the total price is estimated to change over time, if applicable.” And, “to the extent that the registrant uses analytical tools such as scenario analysis, the proposed rules would require a description of those analytical tools, including the assumptions and methods used.”¹⁰⁷

In our RFI Comment, we recommended that the Commission issue requirements for registrants to disclose “risk analyses, risk management strategies and methodologies, the costs to issuers represented by these risks, and the climate change-related assumptions and conclusions used by issuers in determining these risks and associated impacts.”¹⁰⁸ The Proposal nearly accomplishes the full breadth of this recommendation, but does stop short of requiring all registrants to disclose the climate scenario analysis that they use to draw conclusions about their risk exposure to climate change. And while we encourage the Commission to consider whether the rules should be expanded to include specific disclosure requirements with respect to the climate change scenarios and assumptions on which registrants base conclusions about their risk exposure, we also view the Commission’s decision to require these disclosures only if a registrant has engaged in this activity to be a reasonable and thoughtful alternative. The Commission’s decision on this point represents a sensible calculus that balances the benefits of enhanced climate-related disclosures with the costs of certain activities to registrants, especially smaller reporting companies.

Similarly, we also support and agree with the Commission’s decision to require disclosure of all registrants’ scopes 1 and 2 GHG emissions. This information is critical for investors; it would allow for better understanding of registrants’ vulnerabilities to climate risks (particularly transition risks), facilitate better benchmarking of registrants’ progress toward meeting emissions targets or other climate-related commitments, and provide a better view of how registrants may be contributing to climate-related risks in our markets and financial systems.¹⁰⁹ We discuss certain specifics, and areas for possible further enhancement, of the Proposal’s GHG emissions disclosure requirements in more detail below.¹¹⁰

ii) Reg S-X requirements:

The Proposal would “amend Regulation S-X to require a registrant to include disaggregated information about the impact of climate-related conditions and events, and transition activities, on the consolidated financial statements included in the relevant filing, unless such impact is below a specified threshold.”¹¹¹ These new disclosure requirements would operate in conjunction with, and be informed by, the enhanced disclosures made pursuant to Regulation S-K, as discussed above. Specifically, the disclosures would be required in any filings that include disclosures made pursuant to the Regulation S-K amendments (and that also

¹⁰⁷ *Id.*, at 357-8.

¹⁰⁸ RFI Comment, at 32.

¹⁰⁹ *See* Proposing Release, at 155.

¹¹⁰ *See* Section (3)(b)(iii), et seq.

¹¹¹ Proposing Release, at 123.

requires the registrant to include audited financial statements),¹¹² and where registrants find that a particular line item in their audited financial statements would be impacted (by at least one percent of the value of that line item) by that climate-related risks. So, not only would investors gain a view of the climate-related risks to a registrant’s business, they would also see the projected financial impacts of these risks in a note to the financial statements.¹¹³

Regulation S-X disclosures would generally fall under the following three categories of climate-related information: financial impact metrics; expenditure metrics; and financial estimates and assumptions.¹¹⁴ For each type of financial statement metric, the proposed rules would require the registrant to describe how it derived the metric, including a description of significant inputs and assumptions used, and if applicable, policy decisions made by the registrant to calculate the specified metrics.¹¹⁵

Required disclosures would also include: contextual information; financial impacts of severe weather events and other natural conditions; financial impacts related to transition activities; expenditure to mitigate risks of severe weather events and other natural conditions; expenditure related to transition activities; financial estimates and assumptions impacted by severe weather events and other natural conditions; financial estimates and assumptions impacted by transition activities; impact of identified climate-related risks; and impact of climate related opportunities.¹¹⁶ The Proposal provides that registrants would be required to include financial information from consolidated subsidiaries and clarifies that a “registrant would be required to apply the same set of accounting principles that it is required to apply in preparation of the rest of its consolidated financial statements included in the filing, whenever applicable.”¹¹⁷

The TCFD states in its implementation guidance that, “[b]etter disclosure of the financial impacts of climate-related risks and opportunities on an organization is a key goal of the Task Force’s work.”¹¹⁸ Thus, mandating climate-related disclosures in Regulation S-X would help to ensure that companies continue to disclose the financial and other business effects of their climate-related risks and risk management decisions over time, which is essential if investors and other users of financial statements are to receive concrete and comparable information with which to make their decisions. In our view, the framework that the Commission has developed to guide climate risk disclosure, and to require registrants to clearly indicate and explain how those risks impact their financial statements, is prudent, well-designed, and consistent with the Commission’s other reporting requirements for financial performance and position.

Additionally, and most importantly, by requiring registrants to include climate-related information in their financial statements, this information would be subject to audit. The above-cited report from the Center for American Progress (CAP) on the role of accounting and auditing

¹¹² See *id.*, at 116. (“For example, the climate-related note to the financial statements would not be required in a Form 10-Q filing.”)

¹¹³ See *id.*, at 471.

¹¹⁴ See *id.*, at 53.

¹¹⁵ *Id.*, at 117.

¹¹⁶ See *id.*, at 471, et seq.

¹¹⁷ *Id.*, at 118.

¹¹⁸ Task Force on Climate-related Financial Disclosures, *Recommendations of the Task Force on Climate-related Financial Disclosures*, at 8 (June 2017), <https://bit.ly/3aqV2uc>.

in the climate disclosure context pointed to several important considerations for Commission rulemaking on this subject.¹¹⁹ Namely, a well-conducted audit has the potential to bring greater rigor to climate-related disclosures because of the auditor’s “inside access to management records” and “opportunity to probe, test, and challenge all of managements’ assertions” in the financial statements, “including both line items and footnote disclosure.”¹²⁰ As the CAP report explains, “[a]uditors can play a key role in probing companies’ accounts in a way that disciplines disclosure and strengthens the through line from the physical risks of climate change and the economic impact of the global energy transition to the estimates that underlie the company’s current financial results and position.”

Because of the critically important role entrusted to auditors to ensure the accuracy of financial disclosures, we are encouraged by and supportive of the Commission’s proposal to require climate-related financial information to be reflected and described in registrants’ audited financial statements.

iii) The Proposal would require certain registrants to obtain an attestation report for disclosed scopes 1 and 2 GHG emissions to ensure accuracy and comparability of the information.

The Proposal would require registrants that are large accelerated filers and accelerated filers to provide an attestation report for the registrant’s scopes 1 and 2 GHG emissions disclosures, including certain related disclosures about the provider of attestation services.¹²¹ Providing attestation reports for scopes 1 and 2 emissions disclosures would be particularly important for ensuring the reliability, accuracy, and comparability of quantitative GHG emissions information. Additionally, as stated in the Proposal, “subjecting climate-related disclosures to assurance would require the assurance provider to assess the risk of material misstatements related to the estimates and judgments, including through evaluation of the method of measurement and reasonableness of the assumptions used, and an understanding of management’s risk management processes, including the risks identified and the actions taken to address those risks.”¹²²

The proposed rules would require the attestation report to identify, among other things, the criteria against which the subject matter was measured or evaluated, the level of assurance provided, the nature of the engagement, the attestation standard used, and whether the attestation engagement is subject to oversight and record-keeping.¹²³ Because the proposed rules do not prescribe a particular attestation standard, the standard used must meet certain objective criteria and “the standard used must be publicly available at no cost and have been established by a body or group that has followed due process procedures, including the broad distribution of the framework for public comment.”¹²⁴ The proposed rules would also require that the attestation report be prepared and signed by a provider with expertise in GHG emissions accounting, and

¹¹⁹ See Samantha Ross, *The Role of Accounting and Auditing in Addressing Climate Change*.

¹²⁰ See *id.*

¹²¹ See Proposing Release, at 47.

¹²² *Id.*, at 379.

¹²³ See *id.*, at 497.

¹²⁴ *Id.*, at 266.

that the provider is independent from the registrant and any of its affiliates, for whom it is providing the attestation report. These qualification and independence requirements should help ensure that the attestation provider can exercise informed, objective, and impartial judgment.

We agree, as the Proposal states, that, “[b]y eliciting disclosure with respect to the procedures undertaken by the attestation provider, such as inquiries and analytical procedures, and the methodology used in the attestation process, the proposed provision would enhance the transparency of the GHG emissions attestation quality, thus allowing investors to gain a better understanding of the emission related information[, which] could help investors process emission related information more effectively.”¹²⁵ We also agree with the Proposal’s assessment that required attestation of registrants’ GHG emissions is a reasonable and attainable standard by which many registrants already adhere to some extent.¹²⁶

The independence, oversight and record-keeping, and disclosure requirements, as relating to attestation and assurance of emissions information, are critical to the reliability and utility of the information contained in registrants’ disclosures and accompanying attestation reports. Our RFI Comment emphasized the importance of independence and oversight with respect to the accounting and auditing processes for registrants’ financial statements. In our comment, we also identified several significant shortcomings that have plagued the accounting profession.¹²⁷ We encourage the Commission to benefit from these observations, apply lessons learned, and to proactively employ strong investor-focused protections in its attestation framework for GHG emissions disclosure.

- iv) If the Proposal is finalized as is, Commission rules would include phase-in periods for emissions attestation and assurance and would provide a safe harbor for certain disclosures made regarding Scope 3 emissions. The Commission should reconsider limiting these accommodations where appropriate.**

The proposed rules would also provide specific transition periods for providing attestation reports and would phase in assurance requirements for them, with the associated level of assurance for emissions attestation reporting becoming more stringent in subsequent reporting years.¹²⁸ The Proposal states that its timelines are designed to alleviate the costs and burdens of the new disclosure requirements. We agree that the Proposal appropriately considers the compliance burdens that accompany new disclosure requirements. But, as a general matter, the importance to investor protection and the public interest of eliciting all material information, including scope 3 emissions information, with reasonable assurance of accuracy, shouldn’t be overlooked or sidestepped for the sake of compliance burdens alone. Thus, we ask that the

¹²⁵ *Id.*, at 381.

¹²⁶ In support of the Proposal’s provisions relating to attestation, the Commission’s proposal points to evidence it’s possible to provide assurance: “80 percent of S&P 100 companies currently subject certain items of their ESG information, including climate-related disclosures such as greenhouse gas emissions, to some type of third-party assurance or verification. And more than half of S&P 500 companies had some form of assurance or verification over ESG metrics, including GHG emissions metrics.” (*citing* Center for Audit Quality, *Comment Letter Re: Public Input Welcomed on Climate Change Disclosures*, at 7 (June 11, 2021), <https://bit.ly/3zgt2Uo>).

¹²⁷ See RFI Comment, at 68-70.

¹²⁸ See Proposing Release, at 47.

Commission reconsider: whether strengthening the Proposal’s rules for attestation of GHG emissions to require reasonable assurance from the start would be appropriate; requiring inclusion of scope 3 emissions information in registrants’ GHG emissions attestation reports; and limiting the duration of the currently proposed scope 3 emissions safe harbor. Our principal considerations revolve around whether these measures and their associated benefits to investors would outweigh their costs, and we think they likely do.

Beginning with the level of assurance for disclosed emissions required of a registrant, we are of the view that reasonable assurance, as opposed to limited assurance, would enhance the reliability of GHG emissions information, which would then also enhance the reliability of the other proposed climate-related risk disclosures under both Regulation S-K and Regulation S-X. As the above-cited CAP report observes about current, voluntary GHG emissions disclosure, “[e]normously important investment decisions are made based on what companies say about their GHG emissions[, and] [y]et investors must take those assertions on faith alone.”¹²⁹ That principle, that prudent investment decision-making is impeded by potentially unreliable information, should also guide the Commission’s rulemaking here. And where GHG emissions data can be made more reliable, that path should be taken. For that reason, we believe that requiring reasonable assurance of the accuracy of a registrant’s GHG emissions (and assurance of the sufficiency of the processes relied upon to calculate those emissions) would be of great benefit to investor decision-making and to the overall quality of climate-related disclosures.

Relating to scope 3 emissions, as we stated in our RFI Comment,¹³⁰ while we recognize the associated challenges of reporting scope 3 emissions, we also consider this information to be squarely relevant to investors’ ability to analyze climate-related risks and impacts, especially transition risks, and disclosure of this information should be required under the Commission’s rules. We are therefore strongly supportive of the Commission’s decision to mandate scope 3 emissions disclosure where that information is material to investors. However, we are also of the view that where this information is required to be disclosed, registrants should be required to do all that is reasonably possible to provide assurance of its accuracy. We appreciate that, as the Proposal points out, there are considerations that are unique and specific to scope 3 emissions, namely that disclosure of accurate scope 3 emissions relies heavily on accurate accounting and disclosure of GHG emissions from external entities and third parties organizations.¹³¹ Nonetheless, as the Proposal prudently observes, “[s]cope 3 emissions disclosure is an integral part of both the TCFD framework and the GHG Protocol, which are widely accepted[, and] [i]t also has been widely recognized that, for some companies, disclosure of just Scopes 1 and 2 emissions could convey an incomplete, and potentially misleading, picture.”¹³²

¹²⁹ Samantha Ross, *The Role of Accounting and Auditing in Addressing Climate Change*.

¹³⁰ See RFI Comment, at 35.

¹³¹ See Proposing Release, at 221 (“While we are not proposing a broad safe harbor for all climate-related disclosures, many of which are similar to other business and financial information required by Commission rules, we are proposing a targeted safe harbor for Scope 3 emissions data in light of the unique challenges associated with this information. The proposed safe harbor would provide that disclosure of Scope 3 emissions by or on behalf of the registrant would be deemed not to be a fraudulent statement unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.”).

¹³² *Id.*, at 182.

It therefore seems appropriate to include scope 3 emissions in a registrant’s attestation report, thereby providing an additional level of assurance that this information is accurate and that the methods used to calculate it are sufficient.

Similarly, as stated in our RFI Comment (in the context of whether climate-related disclosures should be furnished or filed),¹³³ we expressed serious skepticism at the use of safe harbors for disclosures made under Commission rules for climate disclosure. We therefore ask that if the final rule retains the proposed safe harbor for scope 3 emissions, that the Commission consider whether this safe harbor should be retired/sunsetted at a point in time deemed reasonable and appropriate, as determined by the Commission.

Finally, the Proposal seeks comment on whether to exclude Securities Act registration statements filed in connection with a registrant’s initial public offering, asking, “[w]ould such an accommodation help address concerns about the burdens of transitioning to public company status?” It is our view that companies that are going public should be held to the same reporting and disclosure requirements of all other public companies. The Proposal includes a safe harbor with limited reach, phase-in periods for compliance, and reasonable boundaries for disclosure, and the Commission should not expand or loosen these accommodations.

4) The Commission is properly exercising its authority to meet the needs of investors and markets and should move forward with the Proposal.

a) The Commission has both the responsibility and the authority to elicit material, decision-useful climate-related disclosures from registrants.¹³⁴

As we discussed above, the Commission’s proposal is a thoughtful and reasonable regulatory response to growing calls from investors for better information about the risks faced by their investments and what registrants are doing to manage them. And because disclosure is a principal mechanism with which the Commission carries out its investor protection mandate, as one comment letter to this Proposal states, “[t]he Commission’s statutory authority over disclosure is broad.”¹³⁵ Then Commission Chair Jay Clayton said it well in 2018, “[d]isclosure is at the heart of our country’s and the SEC’s approach to both capital formation and secondary liquidity[, and] [a]s stewards of this powerful, far reaching, dynamic and ever evolving system, a key responsibility of the SEC is to ensure that the mix of information companies provide to investors facilitates well-informed [decision-making].”¹³⁶ And as we stated in our RFI Comment, when “information is not . . . being disclosed in a consistent, decision-useful form[,] [t]his gap

¹³³ See RFI Comment, at 65.

¹³⁴ See Commissioner Allison Herren Lee, U.S. Securities & Exchange Commission, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk* (March 21, 2022), <https://bit.ly/3L9VF7Q> (“[Footnote 5] See 15 U.S.C. 77g(a)(1) (“Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.”); see also 15 U.S.C. 78m(a); 15 U.S.C. 78l(b); 15 U.S.C. § 78o(d).”).

¹³⁵ Jill Fisch et al., *Comment Letter Re: Re: Enhancement and Standardization of Climate-Related Disclosures for Investors*, at 1 (June 6, 2022), <https://bit.ly/3Q9GsYj>.

¹³⁶ Chair Jay Clayton, U.S. Securities & Exchange Commission, *Remarks at Meeting of the Investor Advisory Committee* (Dec. 13, 2018), <https://bit.ly/3wV4UnB>.

between investor needs and company practices is precisely the sort of market failure that demands SEC intervention.”¹³⁷

The Commission has a long history of amending its disclosure rules to adapt to the evolving needs of investors and changing market conditions, and ample research supports this authority.¹³⁸ Current Commission Chair Gary Gensler emphasized this history recently to the Commission’s Investor Advisory Committee, observing that: “Over the generations, the SEC has stepped in whenever there has been a significant need for the disclosure of information relevant to investors’ decisions. As technology and markets evolve, and with them the types of information relevant for investors’ decisions, this agency often has updated our disclosure regimes in kind.”¹³⁹ Going further, he stated: “We did that in [the] 1960s when we added disclosure about risk factors. We did that in the 1970s when we first added environmental-related disclosures, which the Commission has elaborated upon over the decades. Recently, in the latest stage of this long tradition of disclosures, we put out a proposal concerning climate-related disclosures.”¹⁴⁰

Further support for the Commission’s authority is provided in the above-cited comment letter which was submitted to this Proposal by 30 securities and corporate law professors, wherein the authors observed: “Relying on its delegated power, the Commission has in Regulations S-K and S-X built out a detailed disclosure regime aimed at protecting investors and the capital markets. As the economy and financial markets have grown in size and complexity, the Commission has continuously updated the disclosure framework.”¹⁴¹ The letter also observed that this continual modernization of the Commission’s disclosure rules has included both expanding and narrowing required disclosures.¹⁴² Examples of expanded disclosure include required information on human capital, executive compensation, related-party transactions, and asset-backed securities.¹⁴³ Conversely, the Commission has limited registrants’ required

¹³⁷ RFI Comment, at 25.

¹³⁸ See, e.g., Cynthia Williams, *Letter to SEC Chair Gensler*, at 1 (June 11, 2021), <https://bit.ly/3aSrsxR>. (Referring to her article, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 *Harvard Law Review* 1197-1311 (1999): “In undertaking that research, I sought to answer two questions: Does the Commission have the statutory authority to promulgate disclosure requirements concerning what we now call environmental, social, and governance (“ESG”) data, in order to promote corporate social transparency, comparable to its well understood authority to enact disclosure requirements to promote corporate financial transparency? And if it has the authority to promote corporate social transparency, should it do so as a matter of well-informed, thoughtful policy? I answered both questions in the affirmative in this Article.”); Alexandra Thornton and Tyler Gellasch, *The SEC Has Broad Authority To Require Climate and Other ESG Disclosures*, (June 10, 2021), <https://ampr.gs/3xddmi2> (“The SEC has the ability and responsibility to require disclosures, including ESG-related disclosures, that would further its mission to protect investors; promote more fair, orderly, and efficient markets; promote capital formation; and protect the public interest.”); and Jill Fisch et al., *Comment Letter Re: Re: Enhancement and Standardization of Climate-Related Disclosures for Investors*, at 6 – 10.

¹³⁹ Chair Gary Gensler, U.S. Securities & Exchange Commission, *Remarks Before the Investor Advisory Committee*, (June 9, 2022), <https://bit.ly/3H9IROH>.

¹⁴⁰ *Id.*

¹⁴¹ Jill Fisch et al., *Comment Letter Re: Re: Enhancement and Standardization of Climate-Related Disclosures for Investors*, at 7.

¹⁴² *Id.*

¹⁴³ *Id.*

disclosures about material contracts, determining that the benefits from those disclosures were outweighed by the costs.¹⁴⁴

Keeping with that tradition, this Proposal is in direct response to changing market conditions and outmoded disclosure requirements. Indeed, the Proposal appropriately reflects the current level of demand for climate-related information, the need to repair deficiencies in the current voluntary and principles-based disclosure paradigm, and the need for a regulatory response to the overwhelming evidence that climate change presents acute and systemic risks for investors, registrants, and our capital markets. In doing so, the Commission squarely adheres to its statutory mandate to protect investors, maintain fair and efficient markets, and facilitate capital formation. Without the changes contemplated by the Proposal, deficient climate-related disclosures would continue to frustrate the Commission’s responsibility and ability to do so.

Additionally, the Proposal’s focus on materiality to guide climate-related risk disclosure brings the Proposed Amendments even further under the umbrella of Commission authority.¹⁴⁵ Mandating the disclosure of material climate-related information falls well within Commission authority, and much of the information that falls within the meaning of “climate-related” – whether related to physical and transition risks, risk management and corporate governance practices, or GHG emissions – is clearly material to the decisions investors make about how to allocate their capital, whether to buy, hold, or sell a particular security, and how to vote their proxies. In addition to informing investors directly, these disclosures also inform other stakeholders, including financial institutions, credit rating agencies, and financial regulators, in ways that are critically important to the fair and orderly operation of our markets.

It is also important to note, as we have stated previously and as many legal scholars have observed in articles and regulatory comments, the Commission’s authority to establish disclosure requirements is not bound solely to that which is squarely financially material.¹⁴⁶ However, with this Proposal, the Commission has, in exceptional detail, explained and demonstrated that the contemplated climate-related disclosures are directly relevant to registrants’ financial well-being, and thus, where the Proposal seeks to require disclosures about climate-related information because it can have an impact on public companies’ financial performance or position, the Commission has taken a measured, and perhaps even circumspect, approach to this rulemaking.

b) The Proposal is not climate policy. Rather, it is a thoughtful and appropriate response to investor demands for decision-useful climate-related information.

¹⁴⁴ *Id.* (referencing Cydney Posner, *SEC’s Amendments to Simplify Disclosure for Public Companies*, Harvard Law School Forum on Corporate Governance (Apr. 9, 2019), <https://bit.ly/3lSubtn>).

¹⁴⁵ See Proposing Release, at 1.

¹⁴⁶ See RFI Comment, at 20; see also, e.g., Jill Fisch et al., *Comment Letter Re: Re: Enhancement and Standardization of Climate-Related Disclosures for Investors*, at 7; and Regenerative Crisis Response Committee, *Comment Letter Re: Public Input on Climate Change Disclosures*, at 3 (June 14, 2021), <https://bit.ly/3mv4Zte> (“In response to the SEC’s recent efforts to mandate ESG disclosures, two inter-related questions have been raised with respect to the agency’s authority: (1) are ESG disclosures material enough to require disclosure?; and (2) does the SEC have the statutory authority to mandate ESG disclosures (especially if these disclosures are not material)? These questions reflect a misunderstanding of the agency’s mandate and statutory authority and are unfounded assertions with respect to the Commission’s ability to require disclosures as it deems necessary to further its mission. Despite being formulated as two questions, the answer to both is the same: the SEC has the authority to require ESG disclosures, regardless of whether these disclosures are deemed ‘material.’”).

In addition to discussing what the Proposal is, it is also important to discuss what it is not – the Proposal is not an imposition of climate policy by the Commission. On the contrary, the Proposal is agnostic to the politics of climate change. If finalized, the Proposal would not prohibit registrants from engaging in climate warming activities, it would simply require them to disclose to investors that they are engaged in those activities and in what ways they are engaged in them.¹⁴⁷ The Proposal would also inform investors of registrants’ activities to manage climate-related risks, risks that may present a substantial threat to the global economy.¹⁴⁸ As such, the Proposal’s contemplated disclosure requirements about registrants’ GHG emissions are relevant and material for investors to understand how registrants are exposed to and contributing to climate-related risk, and it is therefore critical to well-informed decision-making that this information is publicly available, reliable, and consistent. This view is shared by BlackRock’s Larry Fink, too, for whom the purpose of obtaining better climate-related information is not to save the planet, but rather is necessary to properly manage known financial risks in a well-informed and meaningful way.¹⁴⁹

So, while this Proposal would not require companies to change behavior as it relates to emissions released or environmental impacts, what it would do is to require registrants to provide information to investors and markets that will allow better-informed economic and non-economic decision-making about these activities. For investors, this can mean whether to invest in companies that either are or are not actively managing climate-related risks or minimizing impacts to climate change.¹⁵⁰ And for markets, this can lead to more accurate valuations of registrants, better pricing of their equity shares and debts, and increased stability and liquidity.

In sum, the Proposal is not intended to meet the needs of non-investors or the “woke Left,” as some critics have asserted,¹⁵¹ but rather is squarely focused on facilitating decision-relevant material information from registrants about their financial risks and risk management strategies. Certainly, there are significant external environmental benefits that may result from

¹⁴⁷ See Jill Fisch et al., *Comment Letter Re: Enhancement and Standardization of Climate-Related Disclosures for Investors*, at 10 (“In line with the Commission’s historical approach, the Proposal simply requires disclosure and does not seek to establish substantive operational requirements[.]”).

¹⁴⁸ See Swiss Re, *World economy set to lose up to 18% GDP from climate change if no action taken, reveals Swiss Re Institute's stress-test analysis* (April 22, 2021), <https://bit.ly/3NQxgGL> (“Climate change poses the biggest long-term threat to the global economy. If no mitigating action is taken, global temperatures could rise by more than 3°C and the world economy could shrink by 18% in the next 30 years.”).

¹⁴⁹ See, e.g., Larry Fink, *2022 Letter to CEOs*. (“We focus on sustainability not because we’re environmentalists, but because we are capitalists and fiduciaries to our clients. That requires understanding how companies are adjusting their businesses for the massive changes the economy is undergoing.”); See also Andrew Ross Sorkin and Michael J. de la Merced, *It’s Not ‘Woke’ for Businesses to Think Beyond Profit, BlackRock Chief Says*, *New York Times* (January 17, 2022), <https://nyti.ms/3wMv6lp>.

¹⁵⁰ See, e.g., Adam Fleck, CFA, and Kristoffer Inton, *Professor Damodaran’s Latest ESG Takedown Overlooks One Important Group of Investors* (April 1, 2022), <https://bit.ly/39FwBc4>. (“Understanding financially material risks that consumer choices, increasing regulation, and scrutiny of management governance practices have on a company’s future cash flows is a prudent part of a holistic investment decision, not a foolish endeavor meant to “do good” or bilk clients.”)

¹⁵¹ See Minority Press Release, U.S. Senate Committee on Banking, House, and Urban Affairs, *Toomey Presses SEC on New Climate Enforcement Task Force* (March 25, 2021), <https://bit.ly/3m86e1v>.

this Proposal,¹⁵² but they are neither the drivers nor bases for it. In the 2021 report, *Mandating Disclosure of Climate-related Financial Risk*, the authors effectively explained this point, stating: “Disclosure is essential for allowing investors to make accurate valuations of corporations, which in turn supports efficient allocation of capital across industries and individual corporations. . . . When companies properly disclose their risks, investors can reduce their own uncertainty and stabilize the economy by diversifying their portfolios.”¹⁵³

5) Conclusion

In our RFI Comment, we made clear our view that in drafting any regulations to mandate climate and other ESG-related disclosures, the Commission would need to use all the tools available to it to ensure the disclosures are complete, accurate, and fairly presented. Our perspective, and one that is shared with many of the Commission’s stakeholders, is that the reliability of disclosures should be the principal driver of where and how the Commission decides climate-related disclosures should be made, whether those disclosures are filed or furnished, and what level of assurance, if any, will apply to them. We believe the Commission has thoughtfully responded to this call and has put forth a commendable and sensible proposal. Indeed, the Commission’s responsibility to amend its rules such that registrants will provide adequate climate-related disclosures to the public is no easy task, but on the whole, we find the Proposed Amendments to be an exceptionally well-constructed framework to accomplish it, and we commend this incredibly important action.

The Proposed Amendments to Regulations S-X and S-K would provide investors with the climate-related information needed to better understand registrants’ financial condition, to make prudent and informed investment decisions, and to understand registrants’ potential impacts to our capital markets and their stability. Importantly, the proposed rules would not require or encourage investors to make certain investment decisions, nor would they require registrants to change their climate-related behaviors. Rather, the Proposal would merely require registrants to disclose information about activities and risks that are already occurring or are likely to occur due to ongoing activities of registrants.

Without adoption of the Proposed Amendments, investors would continue to remain hamstrung from fully considering or understanding the climate-related risks that may impact their investments. Without these amendments, investors would remain unable to accurately determine the costs that they are currently paying to incur these risks, and markets would remain unable to determine what those costs should be. In addition to these shortfalls, capital allocation would continue to be misguided, market efficiencies would continue to suffer, and systemic risks would continue to grow yet remain underappreciated and/or undetected.

Ultimately, without the adoption of the proposed rules, the Commission would continue to fall short of meeting the requirements set forth by our securities laws to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

¹⁵² Steven Mufson, *Cutting Air Pollution from Fossil Fuels Would Save 50,000 Lives a Year, Study Says*, Washington Post (May 16, 2022), <https://wapo.st/3wxgSTX>.

¹⁵³ Madison Condon et al., *Mandating Disclosure of Climate-related Financial Risk*, at 30.

Accordingly, it is of critical importance that the Commission adopt this Proposal, with our suggested reconsiderations, without undue delay.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Dylan Bruce', with a stylized, cursive script.

Dylan Bruce
Financial Services Counsel