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June 16, 2022

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

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

Dear Ms. Countryman:

The Investment Company Institute is writing to provide our views on the Securities and Exchange Commission's proposal to require public companies to provide investors with consistent, comparable, and reliable information related to climate-related risks.[1] Our members, US regulated funds, on whose behalf we write today, hold total assets of $29.7 trillion, serving more than 100 million investors.[2] They clearly have a significant interest in how the nature and availability of climate-related risk information provided by public companies evolves.[3] Fund

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[1] See *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Release No. 33-11042 (March 21, 2022) (Release or Proposal), available at https://www.sec.gov/rules/proposed/2022/33-11042.pdf.https://www.sec.gov/rules/proposed/2022/33-11042.pdf

Throughout this letter, we use the term "companies" to refer to the public companies that are within the scope of the Proposal. As we explain *infra*, we recommend that the SEC exclude business development companies, or BDCs, and all exchange-traded funds, or ETFs, from any final rule.

[2] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia, and other jurisdictions. Its members manage total assets of $29.7 trillion in the United States, serving more than 100 million investors, and an additional $9.3 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

[3] We provided comments to the Commission last year in response to then-Acting Chair Allison Herren Lee's request for public input on climate change disclosures. See Acting Chair Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures* (March 15, 2021), available at https://www.sec.gov/news/public-statement/lee-climate-change-disclosures,and Letter from Eric J. Pan, President & CEO, Investment Company Institute to Vanessa A. Countryman, Secretary, Securities and Exchange Commission (June 4, 2021) (ICI June Letter), available at https://www.ici.org/system/files/2021-06/21_ltr_rfi.pdf.

managers analyze this, and other, information in formulating their investment decisions on behalf of those millions of long-term individual investors.

Executive Summary

Our comments on the proposal are based on our belief that any climate risk disclosure framework should be designed in a manner that:

- provides investors with information that is consistent, comparable, and reliable;
- promotes investors' ability to efficiently allocate capital;
- distinguishes between material and other information;
- reflects an appropriate balance of costs and benefits;
- considers the importance to investors of a global baseline of sufficiently comparable reporting requirements across various jurisdictions to avoid regulatory and market fragmentation; and
- is sufficiently flexible to respond to changing circumstances.

The Commission's proposal advances some, but not all, of these goals. We therefore express support for several elements of the proposal and recommend modifying other aspects to more effectively align with those goals. In addition, in an appendix to this letter, we explain the importance of the Commission adhering to the materiality standard that underlies the federal securities laws in designing any final rules.

We urge the Commission to adopt a final rule that requires a company to file certain climate-risk related information which the company determines is material in annual reports and registration statements (SEC filings) and, to the extent that the company determines this information is not material, to furnish such information and any additional SEC-mandated information in a new climate report (furnished climate report).[4] Under our recommended approach, a company would furnish the climate report to the Commission 120 days after its fiscal year-end. If a company subsequently determines that information included in the furnished climate report (that had not

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[4] In addition to this recommended general approach, we provide more specific recommendations regarding companies disclosing greenhouse gas (GHG) emissions.

been included in the SEC filings) is actually material, it would incorporate it by reference when making its next SEC filing.

We support key components of the proposal, including that a company be required to disclose Scopes 1 and 2 emissions and narrative disclosure consistent with certain aspects of the Task Force on Climate-related Financial Disclosures (TCFD) framework. In our view, how to measure and report Scopes 1 and 2 emissions is now sufficiently developed to provide investors, including fund managers, with reliable, consistent and comparable information that can help them make investment decisions in a cost-efficient manner. We also support requiring companies to obtain limited assurance for their Scopes 1 and 2 emissions disclosures, which should enhance their reliability.

We recommend, however, that the SEC *not* require companies to disclose Scope 3 emissions at this time because of significant data gaps and the absence of agreed-upon measurement methodologies. That said, we do support the Commission requiring all large accelerated filers and accelerated filers[5] that have publicly announced a target or goal to reduce their Scope 3 emissions to describe the amount and intensity only of those Scope 3 emissions.

We recommend that the Commission not adopt the proposed amendments to Regulation S-X that would require a company to provide climate-related financial metrics in a footnote to its financial statements. We believe that investors' information needs will be met more efficiently and effectively through narrative disclosure that discusses whether and how any identified climate risks have affected, or are reasonably likely to affect, the company's consolidated financial statements.

We first provide background on the fund industry generally and specific data about ESG funds. We then provide recommendations on key aspects of the proposal. Our comments are intended to assist the Commission as it considers how best to formulate final rules that will benefit investors and the capital markets.

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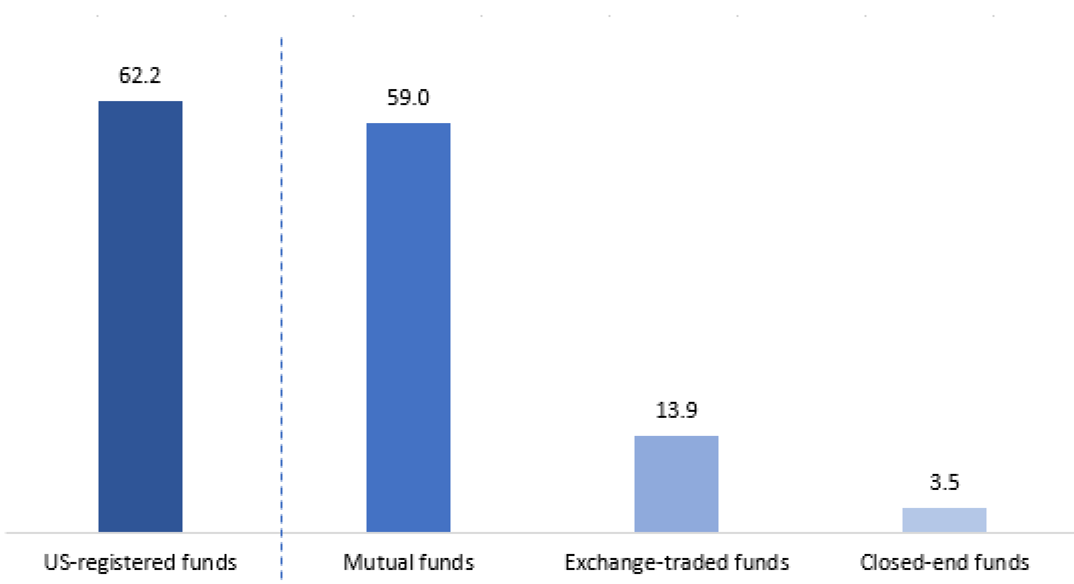
[5] The SEC generally considers any public company with a public float of $700 million or more as of the last business day of the most recently completed second quarter of its fiscal year to be a large accelerated filer and one with $75 million or more but less than $700 million of public float as of the last business day of the most recently completed second quarter of the company's fiscal year to be an accelerated filer (hereinafter referred to as larger companies). See e.g., *Accelerated Filer and Large Accelerated Filer Definitions*, available at https://www.sec.gov/corpfin/secg-accelerated-filer-and-large-accelerated-filer-definitions. See also Rule 12b-2 under the Exchange Act and Proposal at notes 122 and 123 for a more fulsome description.

Background on the Fund Industry

In 2021, nearly half (47.9 percent) of US households owned shares of mutual funds or other US registered investment companies—including ETFs and closed-end funds—representing an estimated 62.2 million households and 108.1 million investors. Mutual funds were the most common type of investment company owned, with 59.0 million US households, or 45.4 percent, owning mutual funds in 2021 (Figure 1). In 2021, 13.9 million US households, or about 11 percent, owned ETFs, and 3.5 million households reported closed-end fund ownership.

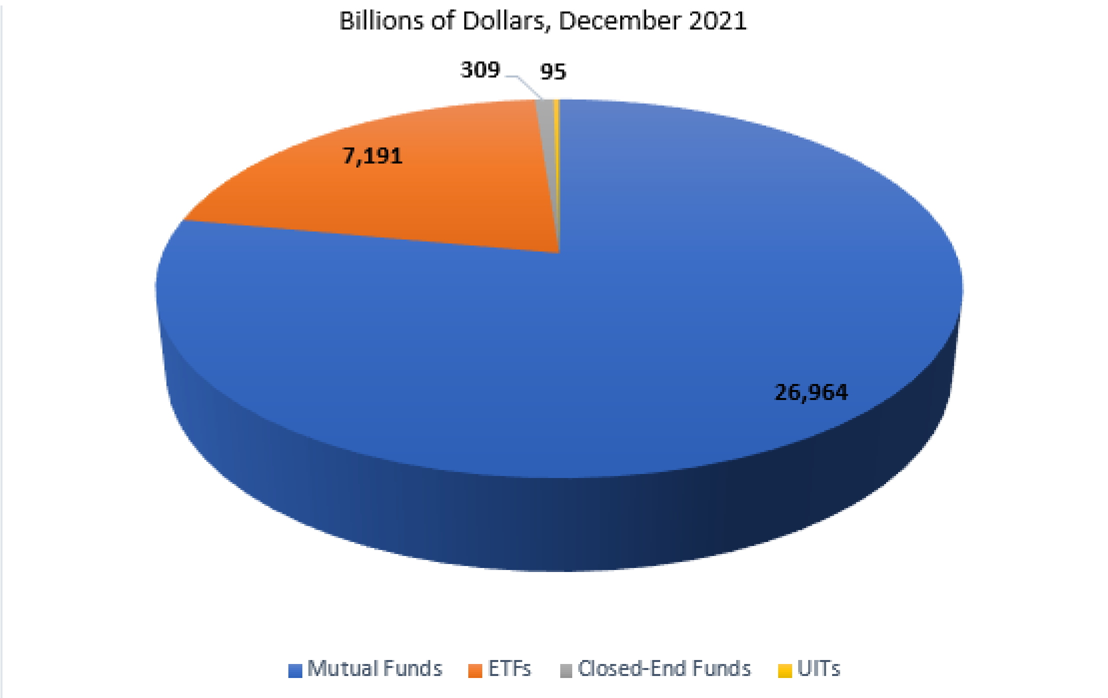
Figure 1
More Than 62 Million US Households Invest in US-Registered Funds
Millions of US households owning mutual funds, ETFs, or closed-end funds, 2021



Note: Households may own more than one type of fund.
Source: Investment Company Institute Annual Mutual Fund Shareholder Tracking Survey

In 2021, mutual funds held almost $27 trillion, ETFs held over $7 trillion, closed-end funds held $309 billion, and UITs held $95 billion of net assets (Figure 2).

Figure 2
Investment Company Total Net Assets by Type



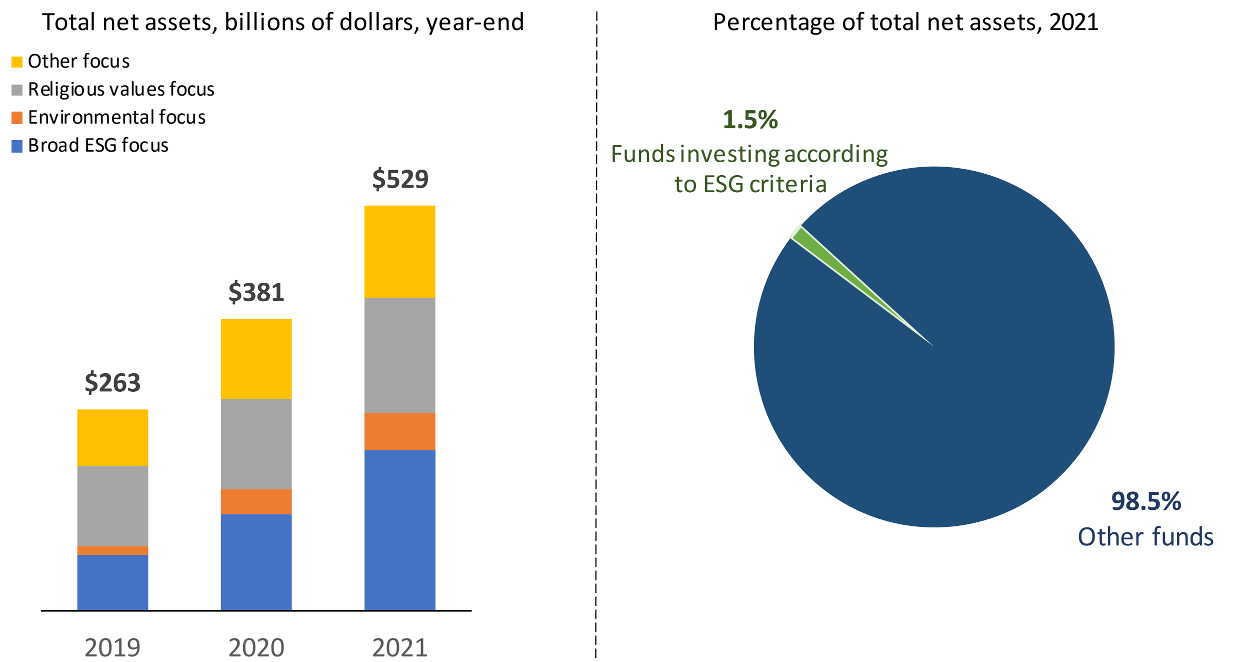
Source: Investment Company Institute

ICI's Research Department examines the prospectuses of funds to classify those that invest according to ESG criteria, reviewing for language indicating that a fund places an important and explicit emphasis on environmental, social, or governance criteria to achieve certain goals. Following this approach, in 2021, 740 mutual funds and ETFs, with assets of $529 billion were classified generally as investing according to exclusionary, inclusionary, or impact investing ESG criteria.[6] Those funds represent slightly over 1.5 percent of the total net assets of US mutual

[6] See *Investment Company Fact Book* (62nd ed.) (2022 ICI Fact Book) at 42, available at https://www.ici.org/system/files/2022-05/2022_factbook.pdf . See also ICI, *Funds' Use of ESG Integration and Sustainable Investing Strategies: An Introduction* (July 2020), available at

funds and ETFs, with the total net assets of environmentally focused funds representing less than 0.15 percent of the total net assets (Figure 3).[7]

Figure 3
Total Net Assets of Funds That Invest According to ESG Criteria and Their Share of Total Fund Assets

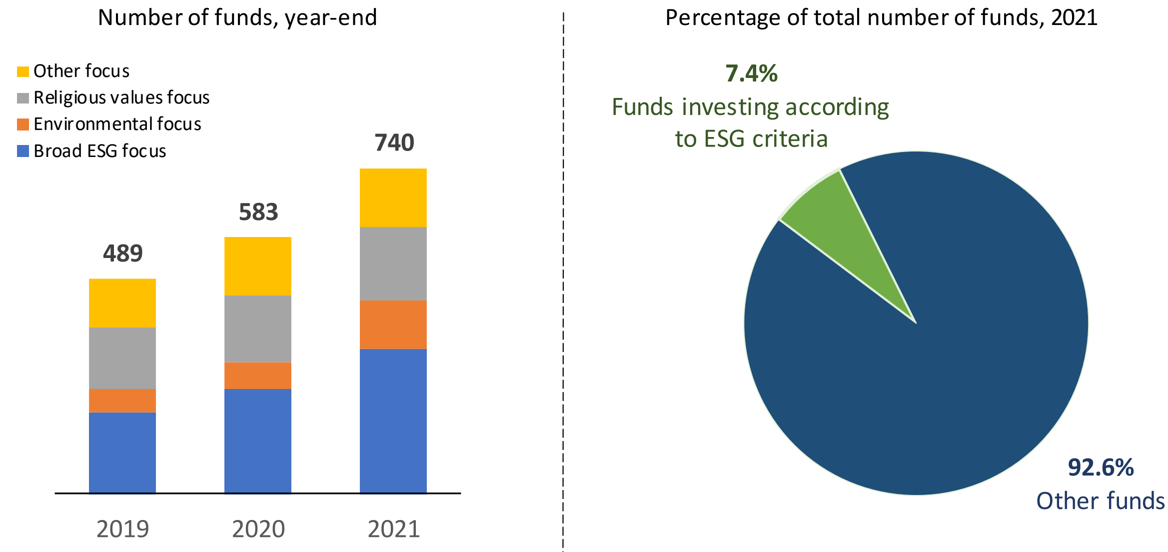


Note: Data include mutual funds and ETFs. Data include mutual funds that invest primarily in other mutual funds and ETFs that invest primarily in other ETFs.
Source: Investment Company Institute

https://www.ici.org/system/files/attachments/20_ppr_esg_integration.pdf and ICI, *ESG and Funds: Frequently Asked Questions* (February 2022), available at https://www.ici.org/system/files/2022-02/22-esg-faqs.pdf.

[7] See 2022 ICI Fact Book. In addition, many fund managers integrate ESG factors into their investment process. They consider climate change-related disclosure, along with other material factors and analysis, to be an important part of that process.

Figure 4
Number of Funds That Invest According to ESG Criteria and Their Share of Total Number of Funds



Note: Data include mutual funds and ETFs. Data include mutual funds that invest primarily in other mutual funds and ETFs that invest primarily in other ETFs.
Source: Investment Company Institute

Section 1: Overview of Disclosure Framework

1.1 Companies Should Provide Disclosure Consistent with the TCFD Framework

The Release explains that the Commission's proposed climate-related disclosure framework is modeled in part on the TCFD's recommendations. The Commission points out that the TCFD framework has been widely accepted by investors and other market participants, and, accordingly, using it as a framework for the rules may facilitate both eliciting better disclosure and limiting compliance costs.

We support the Commission's approach.[8] Building on the long-standing aspects of the TCFD framework would better enable investors to analyze and compare any newly required disclosures. Taking this approach will also position the Commission to participate in discussions with foreign authorities and international standard-setting bodies to promote a global baseline of consistent and comparable sustainability-related disclosure to support the global character of asset managers, other types of companies, and the financial markets.[9]

To this end, we note that the IFRS Foundation's International Sustainability Standards Board (ISSB) also is basing its proposed international standards on the TCFD framework and its work has received strong support from several jurisdictions and the International Organization of Securities Commissions of which the SEC is a member.[10] We believe that the SEC should look

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[8] In a few instances, which we note below, the proposed disclosure requirements go beyond the TCFD recommendations. To promote the consistency and comparability of information globally, and to rely on the well-accepted framework developed over several years by the TCFD, we recommend that the final rule even more closely follow the TCFD framework.

[9] See also, *infra,* Section 7.3 for our recommendations regarding foreign private companies.

[10] We note that several countries (UK, Hong Kong, Japan, Australia) have indicated that they are working toward incorporating or adopting the ISSB standards into their respective corporate reporting regimes. The UK Government's October 2021 publication, *Greening Finance: A Roadmap to Sustainable Investing*, notes that the ISSB standards will form the backbone of future corporate reporting requirements. See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031805/CCS0821102722-006_Green_Finance_Paper_2021_v6_Web_Accessible.pdf, at 12. In Hong Kong, the Securities and Futures Commission (SFC) is working with the Hong Kong Exchanges and Clearing Limited (HKEX) to gather feedback from the industry on how the ISSB's proposed disclosure requirements can be adopted. See https://www.hkma.gov.hk/eng/news-and-media/press-releases/2022/03/20220331-10/. In Japan, the Financial Accounting Standards Foundation (FASF) officially announced the establishment of the Sustainability Standards Board of Japan (SSBJ) to develop local sustainability disclosure standards based on the ISSB standards. See https://www.asb.or.jp/en/wp-content/uploads/news_release_20211220_02_e.pdf. The Australian Government and Australian Accounting Standards Board (AASB) approved a sustainability reporting project in February 2022 with the understanding that the work of the ISSB should be used as the foundation, with modification for Australian

closely at the work of the ISSB and actively engage the ISSB to ensure comparability of the SEC framework with any final ISSB standards.[11]

1.2 The Commission Should Adopt our Recommended File and Furnish Framework

The Commission proposed requiring a company to include climate-related disclosure in Securities Act of 1933 or Securities Exchange Act of 1934 registration statements and Exchange Act annual reports in a separately captioned climate-related disclosure section.[12] The Commission explains that requiring climate-related disclosure to be presented in this manner would facilitate review of the climate-related disclosure by investors alongside other relevant company financial and nonfinancial information. The Commission asks whether it should adopt the proposed approach or instead place the climate-related disclosure requirements in a new report.

We recommend that the Commission require each company to provide material climate-related disclosure in SEC filings and also require a company to furnish that information and any additional mandated information that the company determines is not material in a new climate report.[13] A company would furnish its climate report to the Commission 120 days after its fiscal year-end.[14] If a company subsequently determines that information included in the furnished

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matters and requirements only where it is necessary to do so to meet the needs of Australian stakeholders. See https://aasb.gov.au/media/yujjwb30/212-actionalert.pdf. IOSCO has indicated that its "endorsement of the final [ISSB] standards . . . would support IOSCO members as they consider how to adopt, apply or be informed by the ISSB standards as the baseline for their own sustainable reporting requirements." See https://www.iosco.org/news/pdf/IOSCONEWS638.pdf.

[11] See IFRS Press Release, *ISSB establishes working group to enhance compatibility between global baseline and jurisdictional initiatives* (Apr. 27, 2022), available at https://www.ifrs.org/news-and-events/news/2022/04/issb-establishes-working-group-to-enhance-compatibility-between-global-baseline-and-jurisdictional-initiatives/ (discussing the SEC among members of a working group of global regulators for addressing enhanced compatibility between the ISSB's exposure drafts and ongoing jurisdictional initiatives on sustainability disclosures).

[12] The Commission also proposed requiring financial statement disclosure, which we discuss *infra*.

[13] As we explain *infra,* we recommend a somewhat different approach with respect to disclosure of GHG emissions. In addition, in some cases, we recommend that some information be provided on a comply-or-explain basis.

[14] As discussed *infra*, we recommend that companies be permitted to provide some of this information on a comply-or-explain basis to mitigate the potential chilling effect of mandated disclosures on voluntary practices and to address the uncertainty of the availability of some information.

climate report (that had not been included in the SEC filings) is actually material, it would incorporate it by reference when making its next SEC filing.

The recommended approach will allow fund managers to evaluate, for proxy voting and other purposes, in a consolidated source, information sufficiently in advance of a company's annual meeting, promoting well-informed voting.[15] At the same time, it would preserve the legal distinction between, and acknowledge the differences in liability that attach to, information that is filed as compared to furnished.[16]

The recommended "file and furnish" approach is consistent with the TCFD's acknowledgement that the TCFD-recommended disclosures may be included in a company's financial filings if *material* and may be provided outside of a financial filing if they are not. In addition, as the TCFD notes, providing information that could be material in the future outside of a financial filing can facilitate the incorporation of such information into financial filings once climate-related issues are determined to be material to the company.[17]

The remainder of our comments should be read in the context of our recommended furnish and file framework.

1.3 Companies Should Be Required to Provide Narrative Disclosure Regarding Climate-Related Impacts

The proposal would require a company to disclose any "climate-related risk" reasonably likely to have a material impact on the company, which may manifest over the short, medium, and long

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[15] Some companies provide information that would appear in SEC filings or a furnished climate report in sustainability reports today. Sustainability reports typically are available after annual shareholder meetings because companies focus their resources on publishing Form 10-Ks prior to the meeting.

[16] Disclosure that is furnished, but not filed in Form 10-K is not subject to strict liability under Section 18 of the Exchange Act, disclosure controls or procedures, or certifications. The Commission previously has permitted companies to furnish rather than file certain information. See, e.g., Regulation Fair Disclosure, Release No. 34-43154 (August 15, 2000), available at https://www.sec.gov/rules/final/33-7881.htm (where the Commission noted that while Regulation FD requires a company that discloses material non-public information to make that material information broadly available, it recognizes that companies may not always know if the information is material and providing a means to make it available will help to minimize liability concerns).

[17] See TCFD, Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures (Oct. 2021) at 3, available at https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf (TCFD 2021 Framework).

term.[18] We support the Commission using the TCFD's definition of climate-related risk because it is familiar terminology for investors and companies alike and therefore should promote consistent and comparable disclosure across companies.[19]

The proposal would require each company to report climate-related risks using their own definitions of "short-, medium-, and long-term time horizons." To promote comparability across companies, we recommend instead that the Commission require companies to uniformly define the time horizons captured by "short term, medium term, and long term" as one, five, and ten years, respectively.

Because information about how climate-related risks have impacted, or are likely to impact, a company's strategy, business model, and outlook can be important for purposes of making an investment or voting decision, the Commission proposed requiring each company to disclose, in narrative form, impacts of those risks on its:

- Business operations, including the types and locations of its operations;
- Products or services;
- Suppliers and other parties in its value chain;
- Activities to mitigate or adapt to climate-related risks, including adoption of new technologies or processes;
- Expenditure for research and development; and
- Any other significant changes or impacts.

The proposal also would require a company, when discussing climate-related risks, to specify whether they are physical or transitions risks and the nature of the risks presented. We support the Commission requiring companies to provide this information in SEC filings if material and also require companies to provide this information in a furnished climate report, on a comply-or-explain basis, if the company determines it is not material. The recommended approach should elicit more robust and company specific information than that provided today, and we agree with

[18] See proposed Item 1502(a) of Regulation S-K.

[19] The proposal defines "climate-related risks" as the actual or potential negative impacts of climate-related conditions and events on a company's consolidated financial statements, business operations, or value chains, as a whole.

the Commission's observation that while some of this information may be common across companies, other aspects of it will vary by industry and company.

1.4 Companies Should Provide Information about Offsets and Renewable Energy Credits

The Commission would require a company to disclose, if applicable, the role that carbon offsets or renewable energy credits (RECs) play in its climate-related business strategy or if the company used them to meet targets or goals. We support requiring companies to provide the proposed disclosure in the company's SEC filings, if the company determines that it is material and in a furnished climate report, on a comply-or-explain basis, if the company determines the use of offsets or RECs is not material. The degree to which a company uses offsets or RECs will vary, and the recommended approach will generate sufficient information to allow investors to understand how the company uses one or both of them.[20]

1.5 Companies Should Provide Internal Carbon Prices and Scenario Analysis

The Commission would require a company that maintains an internal carbon price to disclose information about the carbon price.[21] Companies providing disclosure related to internal carbon prices would quantify the potential costs the company would incur should a carbon price be put into effect. Information about internal carbon prices can help investors better understand the company's climate-related strategy. We recommend that any final rule require a company that calculates an internal carbon price to either disclose that price or explain the rationale for not disclosing that information (e.g., the limited reliability of the internal carbon price). The recommended approach provides flexibility, recognizing that many companies may not currently track the information called for and a robust carbon market on which to base such a price may not always exist.

Under the Proposal, a company also would be required to describe any analytical tools, such as scenario analysis, that it uses to assess the impact of climate-related risks on its business and consolidated financial statements.[22] We support requiring companies that conduct scenario analysis to either disclose the results of the analysis or explain the rationale for not disclosing

[20] See proposed Item 1502(c) of Regulation S-K (requiring disclosure if RECs or offsets are part of the company's climate strategy); and proposed Item 1506(d) of Regulation S-K (requiring disclosure if they have been used to meet targets or goals).

[21] See Release at 79-83.

[22] See Release at 83-88.

that information (e.g., the uncertainty of forward looking information). Information about scenario analysis can help investors evaluate the resilience of the company's business strategy in the face of various climate scenarios that could impose potentially different climate-related risks. At the same time, the recommended flexible approach avoids imposing a costly requirement on those companies that have not yet undertaken to conduct such analysis.

In addition, a comply-or-explain disclosure requirement would mitigate the potential chilling effect of triggering a disclosure requirement simply by engaging in practices that support robust climate risk management.

Section 2: Proposed GHG Emissions Disclosure

2.1 Companies Should Disclose Scopes 1 and 2 Emissions

The Commission proposed requiring a company to disclose its GHG emissions for its most recently completed fiscal year. The proposed definitions of GHG emissions are substantially similar to the corresponding definitions in *The Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard* (GHG Protocol), which the Commission correctly describes as the leading accounting and reporting standard for GHG emissions.[23] Companies would be required to disclose Scopes 1 and 2 emissions on an aggregated and disaggregated basis.[24]

We support the Commission requiring companies to disclose Scopes 1 and 2 emissions on an aggregated basis and additionally on a disaggregated basis for any particular constituent GHG that is material to the company.[25] We support companies providing this disclosure for the most

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[23] The GHG Protocol is available at https://ghgprotocol.org/corporate-standard. The GHG Protocol provides uniform methods to report the seven greenhouse gasses covered by the Kyoto Protocol. The Kyoto Protocol was adopted in 1997 and implements the United Nations Framework Convention on Climate Change. See Release at note 115.

[24] The Proposal would require a company to disclose each scope of its GHG emissions on an aggregated basis in terms of carbon dioxide equivalent ("CO_2e") and on a disaggregated basis by each constituent GHG (i.e., carbon dioxide, methane, nitrous oxide, nitrogen trifluoride, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride). See proposed Item 1504(a)(1) of Regulation S-K.

For simplicity, we will refer to "GHG emissions" as "emissions" in the remainder of the letter, except where the context requires otherwise.

[25] For example, methane currently accounts for around one-fifth of man-made GHG emissions. It has a shorter lifetime in the atmosphere than carbon dioxide, but a far greater near-term warming potential. Certain industries, such as energy, agriculture, and waste management typically emit methane as part of their operations, and we anticipate methane emissions may be material for companies in these industries.

recently completed fiscal year in a structured format.[26] Doing so would make more consistent, comparable, and reliable data available for fund managers to use in making investment decisions. We agree with the Commission's judgement that "[b]y sharing certain basic concepts and a common vocabulary with the GHG Protocol, the proposed rules should help limit the compliance burden for those companies that are already disclosing their emissions pursuant to the GHG Protocol.[27] Similarly, to the extent that companies elect to follow GHG Protocol standards and methodologies, investors already familiar with the GHG Protocol may also benefit."[28]

We particularly support the Commission requiring companies to disclose Scopes 1 and 2 emissions in gross terms, excluding any use of purchased or generated offsets. Disclosing emissions data in this manner would allow investors to assess the full magnitude of climate-related risk posed by a company's emissions and its plans for managing such risk.

We note that the Commission has repeatedly applied the materiality standard in contexts comparable to those relating to the questions being raised today about climate change-related disclosures. In fact, many prior SEC releases requiring disclosure relating to environmental laws have applied the materiality standard in connection with requiring such disclosures. We recommend that the Commission take that same approach here and indicate as part of any final rule that it has based its requirement that companies disclose Scopes 1 and 2 emissions on an aggregated basis on the materiality of that information to the company.[29]

2.2 It Would be Premature to Require Companies to Provide Scope 3 Emissions

The Proposal would require larger companies to disclose Scope 3 emissions only if those emissions are material, or if the company has set a GHG emissions reduction target or goal that includes its Scope 3 emissions.[30] Scope 3 emissions capture, among other things, emissions

[26] The Proposal would require companies to tag any required narrative and quantitative disclosures in Inline XBRL.

[27] See, e.g., Release at note 97 (citing that 92 percent of companies responding to the CDP in 2016 used the GHG Protocol's standards and guidance).

[28] Release at 148.

[29] This recommendation is consistent with the ICI June Letter at 6. As the Commission notes, an increasing number of investors are either purchasing this information from third-party providers or engaging with companies to obtain the information directly. *See* Release at 154.

[30] The proposal would require large accelerated filers and accelerated and non-accelerated filers to disclose Scope 3 emissions while smaller reporting companies would not be required to do so.

associated with a company's supply chain and those associated with a company's products and services.

A large majority of our members believe that the Commission should not require companies to report Scope 3 emissions at this time,[31] because of significant data gaps and the absence of agreed-upon methodologies to measure Scope 3 emissions. These deficiencies seriously undermine the ability of most companies to report consistent, comparable, and verifiably reliable data.[32]

Any company calculating Scope 3 emissions will have to make a number of assumptions that can vary greatly in magnitude and will use different methodologies.[33] The Commission explicitly acknowledges these shortcomings, stating that

> the evolving and unique nature of GHG emissions reporting involves and, in some cases, warrants varying methodologies, differing assumptions, and a substantial amount of estimation. Certain aspects of GHG emissions disclosure also involve reliance on third-party data…. In particular, it may be difficult to obtain activity data from suppliers, customers, and other third parties in a registrant's value chain, or to verify the accuracy of that information ….[34]

The Commission's proposed solution to these limitations is to allow companies to use estimations and ranges (as long as they also describe the assumptions underlying, and the reasons

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[31] There is a minority view among ICI members that the SEC should require larger public companies to disclose Scope 3 emissions if the emissions are material. These members would prefer to have the opportunity to evaluate any such information as part of their respective investment processes, despite the data gaps and absence of agreed-upon methodologies.

[32] The TCFD recognized the gaps in methodologies for measuring Scope 3 emissions, making reliable and accurate emissions data difficult to calculate in its *2020 Status Report: Task Force on Climate-related Financial Disclosures* at 65, available at https://www.fsb.org/2020/10/2020-status-report-task-force-on-climate-related-financial-disclosures/. Likewise, in 2021, in its *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures* at note 62, the TCFD recognized the data and methodological challenges associated with calculating Scope 3 emissions. Despite that realization, it strongly encouraged companies to disclose Scope 3 emissions. The Report is available at https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf.

[33] For example, a company may have to use estimates and make assumptions with respect to private entities (which are not directly subject to the rule) if they are in a public company's value chain.

[34] See Release at 220, 229.

for using, the estimates and ranges) and to choose any methodology they "deem fit" to calculate Scope 3 emissions.[35] We are concerned that this approach will generate data that will not be consistent, comparable, or verifiably reliable.

We therefore recommend that rather than requiring companies to report Scope 3 emissions, the Commission promote the development of reporting practices, including assumptions, models, and methodologies.[36] In fact, as more companies make their Scopes 1 and 2 emissions data publicly available, these data can serve as the input for other companies' Scope 3 calculations. Mandating Scope 3 emissions after companies and investors gain experience with Scopes 1 and 2 reporting therefore ultimately will allow for more accurate reporting that will redound to the benefit of investors.

That said, our members do support the Commission requiring any larger company that has publicly disclosed a GHG emission reduction target or goal that includes its Scope 3 emissions to disclose only those Scope 3 emissions. The proposed requirement, if adopted, could assist investors in tracking the company's progress toward reaching its particular target or goal, and, at the same time, encourage companies to carefully calibrate any such target or goals.

According to one source, 68 percent of companies with revenues of greater than $50 billion, 43 percent of S&P 500 companies, and 13 percent of S&P MidCap 400 companies report some information about their Scope 3 GHG emissions.[37]

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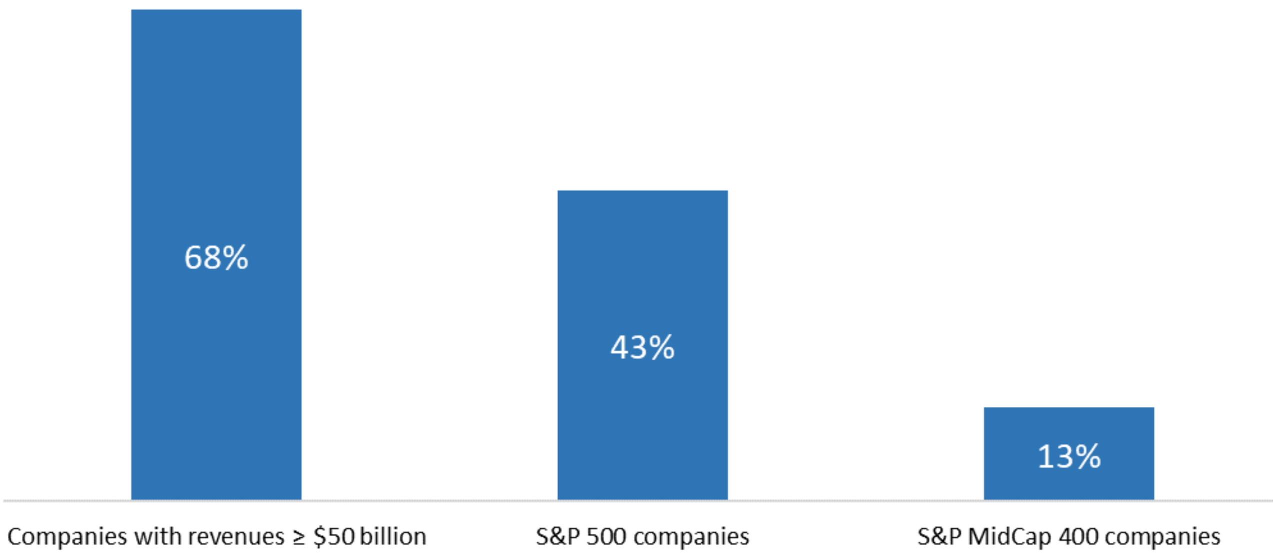
[35] See Release at 355, note 880 ("[i]n calculating Scope 3 emissions, registrants have the flexibility to choose a methodology they deem fit, however, the specific methodology must be disclosed. Estimates or ranges are permitted.").

[36] If the Commission ultimately requires Scope 3 emissions reporting, we recommend, at a minimum, that the Commission also require companies to comply with SEC-mandated limits or parameters around any ranges they use to report their Scope 3 emissions. The recommended course may make the data more comparable across companies.

[37] See The Conference Board, *Sustainability Disclosure Practices in the Russell 3000, S&P 500, and S&P Midcap 400* (2022 edition) citing ESGAUGE data. To be included in the S&P MidCap 400 index, a company must have a total market capitalization that ranges from $3.7 billion to $14.6 billion and therefore would be considered a large accelerated filer.

Figure 5
Percent of Companies Disclosing Scope 3 GHG Emissions
By selected categories



Source: ESGAUGE, 2021

In addition, our members believe that companies that currently are providing investors with Scope 3 emissions information should not be prohibited or discouraged from doing so. Voluntary reporting could foster a more informed understanding of climate-related risks and opportunities and improve Scope 3 reporting over time.[38] We support companies being permitted to provide this disclosure in a furnished climate report or by other means because of its importance to investors.

We provide the comments below in Sections 2.3 and 2.4 in the event that the SEC does not agree with our members that oppose the SEC mandating disclosure of Scope 3 emissions at this time and ultimately requires companies to report Scope 3 emissions.

[38] For example, an energy company voluntarily reporting reduced Scope 3 emissions could demonstrate to investors that it is shifting its production mix towards lower carbon sources of energy.

2.3 The Commission Should Clarify that Scope 3 Emissions Do Not Include Managed Assets

With respect to the case in which an asset manager is also a reporting company, the Commission should clarify that the investments category of Scope 3 emissions does not include investments that are not on a company's balance sheet, such as those of registered funds managed by an asset manager ("managed assets"). The proposed rule text and the Release suggest that the Commission does not intend for Scope 3 emissions information for an asset manager to include managed assets, and we urge the Commission to make this intention clearer.

In the proposed rule's examples of Scope 3 downstream activities, it lists "investments *by a registrant*" (emphasis supplied), which suggests the inclusion of investments by the registrant on its *own* behalf, not on behalf of others. Similarly, the proposed definition of "value chain," which states that it is the "upstream and downstream activities related to a *registrant's operations*" (emphasis supplied), indicates the intention that Scope 3 emissions relate to the registrant's operations.[39]

This clarification would make the proposed rule consistent with the GHG Protocol, which states that whether an organization is required to report on investments "depends on whose capital is being invested."[40] Under the GHG Protocol, asset owners investing their own capital are *required* to report emissions from equity investments but asset managers, who are investing clients' capital, "may *optionally* report on emissions from equity investments managed on behalf of clients (e.g., mutual funds)."[41]

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[39] The Release's discussion of the purpose of Scope 3 emissions disclosure also reflects the intention that the disclosure relate to a company's operations. It states that "Scope 3 emissions disclosure may be necessary to present investors a complete picture of the climate-related risks – particularly transition risks – that a registrant faces and how GHG emissions from sources in its value chain . . . may materially impact a registrant's business operations and associated financial performance." See Release at 167. Regarding companies that have set targets or goals, the Proposing Release states that the disclosure "would enable investors to understand the scale and scope of actions the registrant may need to take to fulfill its commitment to reduce its Scope 3 emissions and the potential financial impact of that commitment on the registrant." See Release at 175.

[40] GHG Protocol, *Technical Guidance for Calculating Scope 3 Emissions (version 1.0); Supplement to the Corporate Value Chain (Scope 3) Accounting & Reporting Standard*, at 141, Box 15.1, available at https://ghgprotocol.org/sites/default/files/standards/Scope3_Calculation_Guidance_0.pdf.

[41] *Id*. (emphasis supplied). It further stated: "[I]t should be noted that mutual funds and other funds managed on behalf of clients are not the primary audience for the calculation methods described here and some of their specific

In addition, the TCFD has observed that, in the case where an asset manager is a public company, it has two distinct audiences for its climate-related financial disclosures. It notes that the first audience is its shareholders, who need to understand enterprise-level risks and opportunities and how these are managed, and the second audience is its clients, for whom product-, investment strategy-, or client-specific disclosures are more relevant.[42] The Commission's proposed new reporting requirements are for the *former* audience: a company's shareholders. As such, the required reporting obligations of asset managers in this context should be for the benefit of the asset manager's shareholders.

Excluding managed assets from any Scope 3 emissions disclosure requirements of an asset manager also would appropriately reflect the parameters of an asset manager's exposures and the limits of its control. A fund, for example, is a separate legal entity, the assets of which are separate and distinct from its asset manager. An asset manager itself does not take on the risks inherent in the securities or other assets it manages for funds or other clients. Those are investment risks that appropriately are borne by the funds or other clients. Moreover, an asset manager does not control the GHG emissions of portfolio companies held by funds or other clients. An asset manager must manage a fund's assets consistent with the fund's investment objectives and strategies, which may or may not include strategies related to GHG emissions reduction. Any disclosures about an asset manager's activities for the intended audience of advisory clients are more appropriate for the adviser's disclosures. Likewise, disclosure about a fund's investment objectives and strategies for the intended audience of fund shareholders is more appropriate for fund regulatory documents.[43]

The costs of requiring asset managers to include managed assets in any Scope 3 emissions disclosure would greatly exceed any possible benefits. First, even with a future Commission rule that US companies report Scopes 1, 2 and 3 emissions, there would continue to be large gaps in

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issues have not been addressed, including the business goals relevant to a fund manager and the appropriate use of inventory results."

42 See TCFD, *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures* (Oct. 2021), at 44, available at https://www.fsb.org/wp-content/uploads/P141021-4.pdf. The TCFD states that its guidance addresses considerations for asset managers when reporting to their clients.

43 We note that the Commission has proposed new disclosure requirements for funds and advisers relating to environmental, social, and governance matters and which would include, for some funds, required reporting of aggregated GHG emissions information. See Securities and Exchange Commission, *Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices*, Release No. IA-6034; IC-34594 (May 25, 2022), available at https://www.sec.gov/rules/proposed/2022/ia-6034.pdf.

data available for asset managers to calculate Scope 3 emissions (e.g., foreign companies, private companies), and there are no standardized calculation methodologies for certain asset classes (e.g., government securities, municipal securities, derivatives, and other financial instruments). Second, reporting by asset managers and issuers of the portfolio securities could result in double-counting. [44] Third, because a fund's risk exposures are distinct from those of its adviser's, such reporting by the asset manager could be confusing and possibly misleading, particularly if managed assets are large in relation to the asset manager's own assets.

Accordingly, we urge the Commission to clarify that a company that is required to disclose Scope 3 emissions is not required to include managed assets in its Scope 3 emissions disclosure.

2.4 The Commission Should Apply a Robust Safe Harbor to Scope 3 Emissions

The Commission acknowledges that calculating and disclosing Scope 3 emissions could represent a challenge for certain companies, in particular those that do not currently report such information on a voluntary basis.[45] To address this concern, the Commission proposed, among other accommodations, a safe harbor for Scope 3 emissions disclosure, which would deem Scope 3 emissions "by or on behalf of the registrant 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."[46]

While we support the Commission accompanying any Scope 3 reporting requirement with a safe harbor from liability, we recommend strengthening the proposed safe harbor. In particular, the Commission should replace the proposed safe harbor with one that hews much more closely to the safe harbor for forward-looking statements provided by the PSLRA, which precludes liability for certain categories of forward-looking statements that (i) are identified as such and "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially" or are otherwise immaterial or (ii) were not made with

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[44] The Commission has proposed that certain funds report the aggregated GHG emissions of its portfolio securities (see id.), in which case, the same emissions would be counted three times.

[45] Release at 209-210.

[46] Release at 211.

actual knowledge that the statement was false or misleading. Doing so should promote more fulsome disclosure.[47]

2.5 Any Final Rule Should Not Include a Quantitative Threshold for Materiality

The Release requests comment on whether the Commission should require companies to use a quantitative threshold, such as a percentage of total emissions (e.g., 25%, 40%, 50%) when assessing the materiality of Scope 3 emissions for purposes of determining their disclosure obligations.[48] We recommend that the Commission not include in any final rule, or reference in any adopting release, such a quantitative threshold.[49] Basing a mandate to disclose Scope 3 emissions on its relationship to overall aggregated emissions would require so many assumptions and caveats that ultimately it will be of little or no value for investors. Further, our members are concerned that if the Commission were to adopt the 40 percent threshold referenced in the Release, it effectively would encompass almost all companies, even financial services firms, given the wide breadth of emissions sources in a company's value chain.

2.6 Companies Should Provide Emissions Data for Historical Periods Unless It Is Not Reasonably Available

The Proposal would require a company to provide emissions data for its most recently completed fiscal year and for the historical fiscal years included in its consolidated financial statements in the relevant filing, to the extent such historical GHG emissions data is reasonably available.[50] The Commission reasons that "requiring historical emissions data, to the extent available, would provide useful information for investors by enabling investors to track over time the registrant's

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[47] This recommendation is explained more fully in *Appendix: Materiality-Related Considerations*.

[48] Release at 176.

[49] The Release states that "[w]hen assessing the materiality of Scope 3 emissions, registrants should consider whether Scope 3 emissions make up a relatively significant portion of their overall GHG emissions. While we are not proposing a quantitative threshold for determining materiality, we note that some companies rely on, or support reliance on, a quantitative threshold such as 40 percent when assessing the materiality of Scope 3 emissions. However, even when Scope 3 emissions do not represent a relatively significant portion of overall GHG emissions, a quantitative analysis alone would not suffice for purposes of determining whether Scope 3 emissions are material. Consistent with the concept of materiality in the securities laws, this determination would ultimately need to take into account the total mix of information available to investors, including an assessment of qualitative factors. Accordingly, Scope 3 emissions may make up a relatively small portion of a company's overall GHG emissions but still be material where Scope 3 represents a significant risk, is subject to significant regulatory focus, or "if there is a substantial likelihood that a reasonable [investor] would consider it important." Release at 173.

[50] See proposed Item 1504(a) of Regulation S-K.

exposure to climate-related impacts represented by the yearly emissions data, and to assess how it is managing the climate-related risks associated with those impacts."[51] The Commission asks whether it should instead only require GHG emissions metrics for the most recently completed fiscal year presented in the relevant filing.[52]

We support the requirement to provide both current and historical period Scopes 1 and 2 emissions and agree that it will allow investors to analyze trends. We recognize, however, that providing emissions for prior periods at implementation may be difficult. Accordingly, we also support the accommodation in the proposal that allows companies to provide this information on a going-forward basis (i.e., excluding historical information "that is not reasonably available without unreasonable effort or expense").[53]

2.7 Companies Should Follow a GAAP-Based Approach to Determine Organizational and Operational Boundaries

The Proposal would require a company to describe the methodology, significant inputs, and significant assumptions used to calculate its emissions. As proposed, the description of the company's methodology would be required to include the company's organizational boundaries,[54] operational boundaries,[55] calculation approach, and any calculation tools used to calculate the company's emissions. The Commission states that "[t]his information should help investors understand the scope of a registrant's operations included in its emissions metrics and how those metrics were measured. With this information, investors could more knowledgeably compare a company's emissions metrics with the emissions metrics of other companies and make more informed investment decisions." The Commission requests comment on whether

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[51] Release at 183.

[52] Release at 185. Under the proposal, a large accelerated filer would first comply with the proposed emissions metrics disclosure in its annual report covering the 2023 fiscal year (filed in 2024). In addition, such a company would provide Scope 1 and 2 emissions corresponding to the 2021, 2022, and 2023 fiscal years.

[53] See Release at 113 (referring to Rule 409 under the Securities Act of 1933 and Exchange Act Rule 12b-21).

[54] Organizational boundaries would be defined to mean the boundaries that determine the operations owned or controlled by a company for the purpose of calculating its GHG emissions. See proposed Item 1500(m) of Regulation S-K.

[55] Operational boundaries would be defined to men the boundaries that determine the direct and indirect emissions associated with the business operations owned or controlled by a company. See proposed Item 1500(l) of Regulation S-K.

prescribing this method of determining organizational boundaries would result in more robust guidance for companies and enhanced comparability for investors.

We support the Commission following a GAAP-based approach for determining organizational and operational boundaries when calculating Scopes 1 and 2 emissions. Under the proposed approach a company would be required to include all the emissions from an entity that it consolidates and a proportionate share of the emissions from an equity method investee. We prefer this approach because it would better align the company's financial and emissions disclosures and provide investors with a consistent view of the business. Requiring companies to follow the scope of reporting used in their financial statements should also enhance comparability across companies when compared with the multiple options for boundary setting available under the GHG Protocol.

2.8 Companies Should Obtain Limited Assurance of Scopes 1 and 2 Emissions Data

The Proposal would require a company that is a large accelerated filer or accelerated filer to obtain, and include in the relevant filing, an assurance report covering the disclosure of its Scopes 1 and 2 emissions and to provide certain related disclosures about the assurance provider. The Commission proposed a transition period for companies to obtain these assurances.[56]

We support subjecting Scopes 1 and Scope 2 emissions data to limited assurance. We believe that the emissions data being subject to a company's disclosure controls and procedures and limited assurance will be sufficient to ensure the reliability and accuracy of the data by requiring that a company maintains appropriate processes for collecting and communicating the necessary information by which to formulate the climate-related disclosures.[57]

While the Commission also proposed subjecting Scopes 1 and 2 emissions to reasonable assurance, we believe that the costs associated with reasonable assurance would outweigh the associated benefits.[58] We also support the phased approach to limited assurance and believe that

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[56] The Release explains that if the proposed rules are adopted with an effective date of December 2022, a large accelerated filer with a December 31 fiscal year-end would be required to provide Scopes 1 and 2 emissions for fiscal year 2023 (filed in fiscal year 2024) and obtain limited assurance for fiscal years 2024 and 2025 (filed in fiscal year 2025 and 2026 respectively). Accelerated filers would have an additional year to meet the same assurance requirements. Release at 216-266.

[57] See Rules 13a-15 and 15d-15 under the Exchange Act.

[58] Release at 229-230 explains the difference between limited assurance (the conclusion is expressed in the form of negative assurance regarding whether any material misstatements have been identified) and reasonable assurance

it provides appropriate time for companies to develop robust reporting practices and assurance providers to scale up their capacity to meet demand for assurance services.

2.9 Assurance Providers Should be Required to Disclose Their Qualifications

The Proposal would require the assurance provider to prepare and sign the GHG emissions assurance report.[59] While the Commission does not prescribe specific attestation standards, it would require that attestation standards be publicly available, established with appropriate due process, and subject to public comment.[60] Further, the company would be required to provide disclosure about the assurance provider intended to inform investors about his or her qualifications including: (i) any licensing or accreditation standards; (ii) any record-keeping obligations and their duration; and (iii) whether the assurance provider is subject to any oversight inspection program and, if so, which program.

We support the proposed approach. The information describing the assurance provider's qualifications would enable investors to evaluate each provider, and the proposed independence and expertise requirements would ensure that the assurance provider is free from conflicts and sufficiently qualified to perform the engagement.[61] We view the proposed independence requirements as particularly important so as to ensure that the provider cannot concurrently consult or advise on emissions reduction strategies and provide assurance on the company's emissions.

(expressing an opinion on whether the subject matter is in accordance with the relevant criteria, in all material respects).

[59] An assurance provider would have to be (i) an expert in GHG emissions by virtue of having significant experience in measuring, analyzing, reporting, or attesting to such emissions, and (ii)) independent from the company and its affiliates. The assurance report would have to include specific information such as the attestation standards used, management's responsibility for the information, identification of the level of assurance provided, and a statement that the assurance provider is independent.

[60] The proposal indicates that standards adopted by the Public Company Accounting Oversight Board, American Institute of Certified Public Accountants, and the International Auditing and Accounting Standards Board would satisfy these requirements. This framework is similar to that required for management's reporting on the company's internal control over financial reporting (i.e., COSO).

[61] We understand that many companies already are obtaining assurance on emissions data and that, many obtain assurance from providers other than audit firms. See Center for Audit Quality, Assurance by Public Company Auditors (August 2021), available at https://www.thecaq.org/sp-500-and-esg-reporting/.

Section 3: Governance Disclosure

3.1 Disclosure Should Address the Board's Oversight Process, and Not Individual Expertise

The Commission proposed requiring a company to disclose certain information concerning the board's oversight of climate-related risks, as applicable, including:

- the identity of any board members or board committee responsible for the oversight of climate-related risks;
- whether any director has expertise in climate-related risks, with disclosure in such detail as necessary to fully describe the nature of the expertise;
- the processes by which the board or board committee discusses climate-related risks, including how the board is informed about climate-related risks, and the frequency of such discussion;
- whether and how the board or board committee considers climate-related risks as part of its business strategy, risk management, and financial oversight; and
- whether and how the board sets climate-related targets or goals, and how it oversees progress against those targets or goals, including the establishment of any interim targets or goals.

We support the disclosure that is consistent with the TCFD framework regarding a board's process, whether the board considers climate-related risks as part of its oversight, and its oversight of any targets or goals.

We recommend, however, that any final rule not require companies to disclose "the identity of any board members or board committee responsible for the oversight of climate-related risks" and whether any director "has expertise in climate-related risks, with disclosure detailed enough to fully describe the nature of the expertise."[62] These two aspects of the proposed requirement are particularly unnecessary given that boards provide oversight and rely on experienced employees or outside advisers for advice on such technical matters. The proposed approach may cause companies to create larger, and possibly less cohesive, boards to the detriment of the

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[62] See proposed Item 1501 of Regulation S-K. If the Commission ultimately adopts this requirement, we recommend that it provide a safe harbor identical to those provided to other expert directors (e.g., directors who are audit committee financial experts). See Item 407 of Regulation S-K.

company's investors.[63] In addition, the Commission adopting such requirements would be inconsistent with, and go beyond, the TFCD's framework for governing climate risk.

3.2 Disclosure Should Address Management's Role and Not Individual Expertise

The Commission also proposed requiring a company to disclose certain information concerning management's role in assessing and managing those risks, including the following, as applicable:

- whether certain management positions or committees are responsible for assessing and managing climate-related risks and, if so, the identity of such positions or committees and the relevant expertise of the position holders or members in such detail as necessary to fully describe the nature of the expertise;
- the processes by which such positions or committees are informed about and monitor climate-related risks; and
- whether and how frequently such positions or committees report to the board or a committee of the board on climate-related risks.

Similar to our comments in connection with disclosure regarding the board's role, we recommend that the required disclosure regarding management's role follow the TCFD framework more closely by addressing the process and not require disclosure of the relevant expertise of committee members or managers.

Section 4: Risk Management Disclosure

4.1 Companies Should Describe Processes for Identifying, Assessing, and Managing Climate-Related Risks

The Proposal would require a company to describe any processes it has for identifying, assessing, and managing climate-related risks. When describing the processes for identifying and assessing climate-related risks, the company would be required to disclose, as applicable, how it:

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[63] Indeed, one can envision a board populated with disparate experts, given that the Commission recently took a similar approach in its proposal, *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure* (March 9, 2022) (where it proposed that a public company disclose the cybersecurity expertise of its directors, if any) available at https://www.sec.gov/rules/proposed/2022/33-11038.pdf.

- determines the relative significance of climate-related risks compared to other risks;
- considers existing or likely regulatory requirements or policies, such as GHG emissions limits, when identifying climate-related risks;
- considers shifts in customer or counterparty preferences, technological changes, or changes in market prices in assessing potential transition risks; and
- determines the materiality of climate-related risks, including how it assesses the potential size and scope of any identified climate-related risk.

When describing any processes for managing climate-related risks, a company would be required to disclose, as applicable, how it:

- decides whether to mitigate, accept, or adapt to a particular risk;
- prioritizes addressing climate-related risks; and
- determines how to mitigate a high priority risk.

We support the Commission requiring such information following our recommended file and furnish framework. This type of information would help investors evaluate whether a company has implemented adequate processes for identifying, assessing, and managing climate-related risks. It also should allow investors to make better informed investment and voting decisions. We also support companies being required to disclose whether and how climate-related risks are integrated into the company's overall risk management system or processes. This disclosure should help investors assess how the company handles climate-related risk as compared to other risks.

4.2 Companies Should Provide Disclosure about Transition Plans

The Proposal would require a company that has adopted a transition plan as part of its climate-related risk management strategy to describe the plan, including the relevant metrics and targets used to identify and manage any physical and transition risks and how it plans to mitigate or adapt to any transition risks as part of its climate-related risk management strategy. We support this disclosure as it would inform investors of the nature of the risks and the company's actions or plans to mitigate or adapt to them. To mitigate any chilling effect mandated disclosure might have on companies' adoptions of transition plans, however, we recommend that the Commission require companies to provide the information on a comply-or-explain basis.

Section 5: Financial Statement Metrics

5.1 Companies Should Not be Required to Provide Financial Statement Metrics

The proposed amendments to Regulation S-X would require companies to disclose, in a footnote to the financial statements, the material impacts of climate-related events, including severe weather events such as flooding, drought, wildfires, extreme temperatures, and sea-level rise; and transition activities, including efforts to reduce GHG emissions or otherwise mitigate exposure to transition risks. For both climate-related events and transition activities, the footnote disclosures would include financial impact metrics,[64] expenditure metrics,[65] and a discussion of whether the estimates and assumptions that were used to prepare the financial statements were impacted by exposures to climate-related events and transition activities. The proposed disclosures would be provided for the most recently completed fiscal year and for the historical fiscal year(s) included in the financial statements. The disclosures would be subject to management's internal control over financial reporting and independent audit.

We believe the proposed financial statement metrics will not be useful to investors and we do not support them. First, we believe that the proposed one percent disclosure threshold[66] is too low and risks overloading investors with inconsequential information that will complicate their analysis of the company's operations and financial condition. Second, we believe the requirement to identify the financial statement impacts of severe weather events and other natural conditions will require companies to make calculations that are highly judgmental and

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[64] Companies would be required to separately disclose in the proposed financial statement footnote (i) all negative and all positive impacts of climate-related events and (ii) all negative and all positive impacts of transition activities. These disclosures would be required for each affected financial statement line item if on an aggregated basis the absolute value of all such impacts exceeds one percent of the related line item. Line items affected by climate-related events could include, for example, changes to revenues or costs from disruptions to business operations or supply chains; changes to loss contingencies or environmental reserves; and impairment charges to assets such as inventory, property, plant, and equipment. Line items affected by transition activities could include, for example, changes to revenue or cost due to a new emissions pricing scheme; regulations resulting in the loss of a sales contract; or changes to the estimated useful life of property, plant, and equipment attributable to announced GHG reduction goals.

[65] Companies would be required to separately disclose (i) the aggregate expenditure expensed and the aggregate costs capitalized to mitigate the risks from severe weather events and (ii) the aggregate expenditure expensed, and the aggregate costs capitalized to reduce emissions or otherwise mitigate exposure to transition risks. These disclosures would not be required if such amount is less than one percent of the total expenditure expensed, or costs capitalized. Such expenditures could include, for example, expenditures to reduce emissions or increase energy efficiency; and expenditures related to disclosed reduction goals.

[66] See proposed Rule 14-02(b) of Regulation S-X.

therefore raises comparability concerns (i.e., companies interpreting similar circumstances differently). Finally, the proposed disaggregated line-by-line presentation is inconsistent with the manner in which investors consider and evaluate climate-related events and transition activities. Instead, we believe investors would benefit from the proposed requirements for a more holistic narrative discussion of the effects of climate-related events and transition activities.

Accordingly, we support the proposed narrative discussion of whether and how any identified climate-related risks have affected or are reasonably likely to affect the company's consolidated financial statements[67] and recommend that it be adopted in lieu of the proposed financial statement metrics. If, notwithstanding our recommendation, the Commission adopts the proposed financial statement metrics, the Commission should require disclosure of financial impacts that are greater than five percent (rather than one percent or greater as proposed).[68]

Section 6: Targets and Goals

6.1 Companies Should be Required to Disclose Information Regarding Publicly Set Climate-Related Targets and Goals

Under the proposal, a company that has set *any* targets or goals related to the reduction of GHG emissions, or any other climate-related target or goal would be required to disclose the targets or goals, including, if applicable, certain features of the targets or goals, such as the unit of measurement (e.g., absolute or intensity) and the time horizon by which the target is intended to be achieved, and information about its progress toward meeting the target or goal.[69]

We support requiring a company that has *publicly* set a target or goal to provide information under our recommended file and furnish framework. In contrast, we do not believe a company that has set internal targets or goals should be required to make that information public and provide the proposed information about those targets and goals. It is when a company has made a public commitment that investors are interested in understanding the scope of the commitment

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[67] See proposed Item 1502(d) of Regulation S-K.

[68] The "greater than five percent" recommendation is consistent with Regulation S-X's disclosure thresholds in other instances. See Rule 5-02, Item 8 of Regulation S-X (requiring a separate statement of other current assets in the balance sheet or a note thereto any amounts in excess of five percent of total current assets).

[69] See proposed Item 1506 of Regulation S-K.

and its progress toward meeting it. Therefore, we recommend that any final rule be modified to clarify that it applies only if a company publicly sets a goal or target.

Section 7: Scope of Proposal

7.1 Any Final Rule Should Exclude BDCs and ETFs

The Release proposed requiring companies, including ETFs that are registered only under the Securities Act[70] and business development companies, or BDCs[71] to provide certain climate-related information in their SEC filings.[72]

The Commission asks if BDCs should be excluded from some or all of the proposed climate-related disclosure rules.[73] We recommend that the Commission exclude them from any final rule requirements because they typically do not have physical operations or employees, making the calculation of any GHG emissions wholly unnecessary. We recommend that the Commission exclude ETFs that are registered only under the Securities Act for similar reasons. In addition, the Commission's recent proposal for enhanced ESG-related disclosures by funds is the more appropriate vehicle for addressing fund disclosures for the benefit of fund investors.[74]

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[70] The proposed rules appear to technically apply to ETFs that are registered only under the Securities Act because those ETFs register their shares on Form S-3 and file reports on Form 10-K. See Release at 275-276.

[71] A BDC is a closed-end investment company that has a class of its equity securities registered under, or has filed a registration statement pursuant to, Section 12 of the Exchange Act, and elects to be regulated as a business development company. See Section 54 of the Investment Company Act of 1940. The proposed rules technically would apply to BDCs simply because they register under Section 12 of the Exchange Act.

[72] Specifically, companies that have Exchange Act reporting obligations under Sections 13(a) or 15(d), including companies that file Forms S-1, F-1, S-3, F-3, S-4, F-4, S-11, 10, 10-K, or 20-F.

[73] See Release at note 699.

[74] See *Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices* (May 25, 2022) (ESG Disclosure Release), available at https://www.sec.gov/rules/proposed/2022/ia-6034.pdf (where the Commission states its belief that the GHG emission disclosure it proposed for ESG focused funds, including BDCs, carbon footprint and WACI together would provide investors in environmentally focused funds with a comprehensive view of the emissions associated with the fund's investments, both in terms of the footprint or scale of the fund's financed emissions and in terms of the portfolio's exposure to carbon-intensive companies).

7.2 Smaller Reporting Companies Should Have More Time to Comply

The Release proposed allowing smaller reporting companies (SRCs) more time to provide certain climate-related information in their SEC filings and exempting them from any Scope 3 reporting requirements.[75] We support these aspects of the Proposal. We also support providing emerging growth companies (EGCs)[76] with additional time to comply with any final rules.[77]

In addition, we support the Commission not proposing generally to exempt SRCs or EGCs from the entire scope of the proposed climate-related disclosure rules because climate-related risks may pose a significant risk to the operations and financial condition of smaller companies. At the same time, providing them with more time than other companies to comply with any new requirements could mitigate the Proposal's compliance burden for smaller companies by giving them additional time to allocate the resources necessary to compile and prepare climate-related disclosures.

7.3 The SEC Should Play a Leading Role in Shaping a Global Baseline for Climate-Related Disclosure

The Commission proposed to require foreign private issuers that file Form 20-F to make climate-related disclosures consistent with those of domestic companies. ICI members are global firms, and, as a general matter, we strongly support consistent requirements being applied to companies, domestic and foreign, to foster appropriate cross-border interoperability. As the SEC recognizes, however, many other jurisdictions have already moved forward with their own climate change disclosure regimes, including the home jurisdictions of some foreign private

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[75] A SRC is an issuer that is not an investment company, an asset-backed issuer, or a majority-owned subsidiary of a parent that is not a smaller reporting company and that: (1) had a public float of less than $250 million; or (2) had annual revenues of less than $100 million and either: (i) no public float; or (ii) a public float of less than $700 million. See Securities Act Rules 10(f)(1) and 405, and Exchange Act Rule 12b-2.

[76] An EGC is a registrant that had total annual gross revenues of less than $1.07 billion during its most recently completed fiscal year and has not met the specified conditions for no longer being considered an EGC. See Securities Act Rule 405 and Exchange Act Rule 12b-2.

[77] As explained in Section 2.2, *supra*, we do not believe that any company, including SRCs and EGCs, should have to disclose Scope 3 emissions.

issuers.[78] Such disclosure regimes may be largely aligned with the Proposal and with certain international standard setter recommendations, like those of the TCFD and ISSB.

We urge the SEC to move forward and prioritize work with the ISSB and other jurisdictions towards developing common global baseline standards in order to mitigate fragmentation and provide investors with useful and generally consistent disclosure. In this regard, we encourage the SEC to do its part, in concert with market participants and regulators around the globe, to permit foreign private issuers to fulfill their climate-related disclosure obligations by complying with the ISSB standards.[79]

Section 8: Compliance Periods

8.1 Companies Should be Required to Provide Certain Newly-Required Disclosure in Accord with the Proposed Timelines

The Commission provides a series of proposed compliance dates for companies to provide any newly-required climate-related disclosure in SEC filings.[80] We expect that companies will be able to comply with the Commission's proposed timeframes if any final rule reflects our recommendations.[81] If the Commission goes forward with requiring financial statement

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[78] See Release at 299-300 (discussing the climate-related disclosure requirements implemented or expected to be implemented in the European Union, United Kingdom, Japan, and other jurisdictions.)

[79] The ISSB standards, which were proposed for feedback on March 31 and are expected to be finalized by the end of 2022, are expected to require companies to provide material information on all significant sustainability-related risks and opportunities necessary to assess enterprise value, pursuant to proposed General Sustainability-related Disclosure Requirements, and require companies to disclose material information about significant climate-related risks and opportunities, pursuant to proposed Climate-related Disclosures. See generally Exposure Draft—Snapshot, IFRS Sustainability Disclosure Standards (March 2022), available at https://www.ifrs.org/content/dam/ifrs/project/general-sustainability-related-disclosures/snapshot-exposure-draft-ifrs-s1-general-requirements-for-disclosure-of-sustainability-related-financial-information-and-exposure-draft-s2-general-sustainability-related-disclosures.pdf. The ISSB disclosure standards, like the Proposal and many other jurisdictions' current and proposed requirements, are rooted in the TCFD's framework for climate-related financial reporting.

[80] See Release at 290 for a table with the relevant compliance dates. The table assumes, for illustrative purposes, that the proposed rules will be adopted with an effective date in December 2022, and that the company has a December 31 fiscal year-end.

[81] Because we do not support the Commission requiring companies to obtain reasonable assurance on their GHG emissions disclosures, we have not included, and do not express a view on the sufficiency of, the related proposed compliance periods.

disclosures in annual reports, we recommend that the Commission extend the compliance date for this aspect of any final rule for at least an additional year.

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We appreciate the opportunity to provide feedback on the proposal and look forward to further dialogue with you on this important and timely matter. If you have any questions, or if we can be of assistance in any way, please contact us at eric.pan@ici.org or ddonohue@ici.org or Annette Capretta, Associate General Counsel, at acapretta@ici.org.

Sincerely,

/s/ Eric Pan

Eric J. Pan
President & CEO

/s/ Dorothy Donohue

Dorothy M. Donohue
Deputy General Counsel, Securities Regulation

cc: Chair Gary Gensler
Commissioner Hester Peirce
Commissioner Allison Herren Lee
Commissioner Caroline Crenshaw

Renee Jones, Director
Division of Corporation Finance

William Birdthistle, Director
Sarah ten Siethoff, Associate Director
Division of Investment Management

Appendix: Materiality-Related Considerations

This appendix provides commentary on the importance of fidelity to the materiality standard that underlies the federal securities laws in any climate-related disclosure that the Commission ultimately requires in any SEC filings. By requiring companies to disclose in SEC filings information that the SEC believes to be "decision-useful" without regard to whether the information is material to the company, the Commission would undermine the important protections provided by the traditional materiality standard. The prevailing standard for determining whether allegedly misstated or omitted information is material has long been established by the Supreme Court, subsequently applied by federal courts across the country, and repeatedly affirmed by SEC staff guidance.[82] Under the established framework, such information is "material" if there is "a substantial likelihood" that it "would have been viewed by a reasonable investor as having significantly altered the total mix of information available."

A departure from this standard will expose companies to unnecessary litigation risk. In the event the final rule purports to prescribe disclosures without regard to materiality in SEC filings, the rule should at the very least make clear that any required disclosure of non-material information is not intended to change the long-established materiality standard for liability in the event of litigation over alleged misstatements or omissions.

Climate-Related Filing Requirements Must Be Rooted in Materiality

As the SEC recognizes in the Proposal, the materiality standard is the touchstone of the securities disclosure regime. Certain of the proposed disclosure requirements are consistent with this historical approach. For example, the Proposal would require companies to disclose "whether any climate-related risk is reasonably likely to have a *material impact* on a registrant" (emphasis added). This language and recognition of the materiality framework are consistent with the SEC's prior rulemakings in the environmental regulation context, which have hewed more closely to traditional notions of materiality.[83]

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[82] See *TSC Indus., Inc. v. Northway, Inc*., 426 U.S. 438 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224 (1988); see also, *Dalberth v. Xerox Corp*., 2014 WL 4390695, at *10 (2d Cir. 2014); *Petrie v. Electronic Game Card, Inc*., 761 F.3d 959, 970 (9th Cir. 2014); see also *Staff Accounting Bulletin No. 99*, Release No. 99, Materiality (Aug. 12, 1999); see also *Notice of Commission Conclusions & Rulemaking Proposals in the Public Proceeding Announced in Release No. 33-5569* (Feb. 11, 1975) *Regarding (1) Such Further Disclosure, If Any, of Env't Matters in Registration Statements, Rep. & Other Documents Required to Be Filed or Furnished to Investors Pursuant to the Securities Act of 1933 & the Securities Exchange Act of 1934 As May Be Necessary, Consistent with the National Policy*, Release No. 5627 (Oct. 14, 1975).

[83] See, e.g., Release No. 33-5170 (1971) (requiring disclosure of the financial impact of compliance with environmental laws, based on the materiality of the information); Release No. 33-5386 (1973) (requiring disclosure of the material effects that compliance with environmental statutory provisions may have upon capital expenditures, earnings, and the company's competitive position); Release No. 33-570 (1976) (requiring disclosure of any material estimated capital expenditures for environmental control facilities); and Release Nos. 33-9106; 34-61469 (2010)

However, many of the requirements in the Proposal would prescribe disclosure in SEC filings without regard to whether it is material to the company, based on the SEC's view that these types of information are "decision-useful" to investors. For example, the Proposal would require disclosure in filed reports of the company's process for identifying and evaluating climate-related risks, scenario analyses of business strategy resilience in the face of such risks, and descriptions of the company's climate-related goals or objectives, without tying any of these to a materiality standard. Significantly, the Proposal lacks crucial clarifying language that would make clear that any required disclosure of non-material information is not intended to alter the established materiality standard for liability in the event of litigation over alleged misstatements or omissions.

The sections that follow provide an overview of the traditional materiality framework that underpins the securities laws, and then addresses in turn the potential negative consequences threatened by the Proposal's departures from that standard.

1. Overview of the Materiality Framework

Companies are required to disclose information that is likely to be "material" to the informed decision-making of a reasonable investor. Companies can thus be held liable for misstatements or omissions of material information that appear in their public materials. The materiality standard is a touchstone of the federal securities regime, affirmed and shaped by case law and regulatory guidance. This existing regulatory framework has "for many decades [] undergirded consistent, comparable, and reliable company disclosures."[84]

The materiality standard was largely established through two seminal Supreme Court cases[85] and their progeny and has been consistently endorsed by the SEC. The courts and the SEC share the understanding that information is "material" if there is a "substantial likelihood" that it would have been viewed by a reasonable investor as having "significantly altered the total mix of information made available."[86] A piece of information need not be outcome-determinative to be

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(including a reminder that climate-related disclosures are important and that material impacts should be disclosed to comply with existing SEC rules).

[84] Hester M. Pierce, *We are Not the Securities and Environment Commission – At Least Not Yet* (Mar. 21, 2022), available at https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321#..

[85] See *TSC Indus., Inc. v. Northway, Inc.,* 426 U.S. 438 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

[86] *TSC Indus. Inv.*, 426 U.S. at 445 (internal citation omitted).

material;[87] however, if it can be shown that a reasonable investor *could not* have been influenced by an alleged misrepresentation or omission in light of the total mix of information available, a court may determine that the alleged misrepresentation or omission is immaterial as a matter of law.[88] This is an inherently fact-specific inquiry.[89]

A company, when deciding whether a given piece of information is material in light of the case law background, must consider the perspective of a "reasonable investor." While there is no universally affirmed definition of this term, judicial guidance has widely suggested that he or she is a "rational actor" possessing, at minimum, a modest level of financial sophistication. For instance, case law has made clear that the reasonable investor "grasps market fundamentals" such as "the time value of money, the peril of trusting assumptions, and the potential for unpredictable difficulties to derail new products."[90]

Importantly, it is typically left to the discretion of the company, who is most intimately aware of the particulars of the company, to determine in the first instance what pieces of information a reasonable investor would find material in evaluating that company. The basic disclosure regime is not primarily prescriptive, but instead leaves to the company's discretion the data points and level of detail that a reasonable investor would require, when complying with categorical information requirements in SEC rules. The company's decisions in this regard are of course subject to later challenge via securities litigation, at which point they will be evaluated against the Supreme Court's materiality standard.

This approach makes good practical sense, as the company is uniquely situated to make the initial decision of materiality. While the ability of the SEC to prescribe certain *categories* of disclosure is not in dispute, the SEC should continue to exercise restraint (as it has historically) in prescribing more detailed disclosure requirements, in order to respect the expertise of companies which are better equipped to apply overarching principles to their particular

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[87] *In re Kidder Peabody Sec. Litig.*, 10 F. Supp. 2d 398 (S.D.N.Y. 1998) (citing Securities Exchange Act of 1934, § 10(b), 15 U.S.C.A. § 78j(b); 17 C.F.R. § 240.10b–5). See *also TSC Indus. Inv.*, 426 U.S. at 449; *Folger Adam Co. v. PMI Indus., Inc.*, 938 F.2d 1529, 1533 (2d Cir.1991).

[88] *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546 (8th Cir. 1997) (citing *Hillson Partners Ltd. Partnership v. Adage, Inc.*, 42 F.3d 204, 211 (4th Cir.1994)).

[89] See, e.g., *Basic Inc.*, 485 U.S. at 236; *In re Barclays Bank PLC Sec. Litig.*, 756 F. App'x 41, 44 (2d Cir. 2018), *as amended* (Nov. 20, 2018); *Hutchison v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 485 (2d Cir. 2011); *Labul v. XPO Logistics*, 2021 WL 1056828, at *8 (D. Conn. Mar. 19, 2021); *Dodona I, LLC v. Goldman, Sachs & Co.*, 847 F. Supp. 2d 624, 637 (S.D.N.Y. 2012).

[90] Margaret V. Sachs, Materiality and Social Change: The Case for Replacing "the Reasonable Investor" with "the Least Sophisticated Investor" in Inefficient Markets, 81 TUL. L. REV. 473, 475-79 (2006) (citing Levitin v. PaineWebber, Inc., 159 F.3d 698, 702 (2d Cir. 1998); Itarris v. Ivax Corp., 182 F.3d 799, 807 (11th Cir. 1999); Hillson Partners Ltd. Partnership v. Adage, Inc., 42 F.3d 204, 1213 & n.7 (4th Cir. 1994)).

enterprise. The Supreme Court has expressly rejected a definition of materiality that asks only what a reasonable investor "*might* consider important,"[91] defending the more rigorous materiality standard against litigation arguments for mandated disclosure of more granular information. The strictness of this standard exists to protect investors. Irrelevant and unnecessarily detailed information impedes the ability of investors to make informed decisions by burying them in an "avalanche of trivial information"[92]—the reality of which the SEC has long recognized.[93]

2. Contrast to Decision-Usefulness

Unlike the materiality standard, the concept of "decision-usefulness" comes from the financial reporting realm and is not a recognized legal standard.[94] The term is largely self-defining, and reflects the idea that a given piece of information may prove useful to a potential investor in making investment decisions. This concept, though perhaps attractive in its simplicity, interjects unsustainable ambiguity into a company's disclosure obligations. In a complex market, there are potentially limitless data points that may arguably prove "useful" to a given investor's decisions regarding a given company. The SEC must make very clear that the prescription of "decision-useful" information is not intended to change the long-established application of the materiality standard for purposes of litigation liability over alleged misstatements or omissions.

The decision-useful concept, if left untethered to the materiality standard, is unhelpful and potentially damaging to investors. In order to protect the interests of investors, the integrity of the markets, and the well-developed legal regime of materiality, the SEC must be rigorous in its terminology and ensure that the term, "decision-useful" does not appear in any final rule (or accompanying Release) without sufficient limiting language to ground "usefulness" in the materiality standard.

3. Departures from the Materiality Standard in the SEC's Proposing Release

The Commission has proposed several required disclosures in SEC filings that it believes are decision-useful, regardless of whether those specific pieces of information are actually material to a given company.[95]

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[91] *TSC Indus. Inv.*, 426 U.S. at 445 (emphasis added).

[92] *Basic Inc.*, 485 U.S. at 236.

[93] SEC Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations (Dec. 29, 2003).

[94] See George Staubus, The Decision Usefulness Theory of Accounting (2000).

[95] The SEC acknowledges in the Release that certain categories of information the Proposal would prescribe are based on a decision-useful threshold, without endeavoring to attach such a requirement to the materiality framework.

a. Process-Based and Other Qualitative Disclosure Requirements

The Proposal contains a number of proposed amendments to Regulation S-K that would require companies to disclose qualitative information in Form 10-K all without any apparent tie to a materiality standard, including disclosure of: (i) the company's processes for identifying, assessing, and managing climate-related risks and whether any such processes are integrated into the company's overall risk management system or processes (Item 1503); (ii) elements of a company's transition plan if the company has adopted a transition plan as part of its climate-related risk management strategy (Item 1504(c)(1)); (iii) details around any scenario analyses used to assess resilience of business strategy to climate-related risks (Item 1502(f)); and (iv) detailed information about a company's climate-related targets or goals (Item 1506), including information about carbon offsets and RECs (Item 1506(d)).

While certain of these items could be material to *some* companies under *some* circumstances (depending in particular on the nature of their business), it is difficult to imagine that these types of information are material to all companies in all circumstances. Without further clarification from the SEC, a plaintiff's lawyer could assert in the future that a company which inadvertently failed to timely update a change in its process for identifying, assessing, and managing climate-related risks or inadvertently failed to disclose one of its climate-related targets or goals, is in violation of the federal securities laws for making a material misstatement or omission. Although the company could argue that such information was not material in light of the total mix of information available to investors, a plaintiff could be expected to counter that the rule's express requirement of this information (without qualification) reflects the SEC's view that it is necessarily material. Given the requirement that plaintiffs' allegations be taken as true at the pleading stage, and the somewhat inconsistent treatment of materiality in the Proposal, companies might face a challenge in getting such claims dismissed. Crucially, claims under Sections 11 and 12(a)(2) of the Securities Act of 1933 – common claims asserted in challenging prospectuses – are "strict liability" claims, such that plaintiffs are not required to establish that the defendants acted with "scienter" (i.e., intent to mislead investors) when making allegedly misleading disclosures.

Accordingly, any prescribed qualitative disclosure requirements in SEC filings should be expressly tied to materiality, or at the very least, the rule should make clear that the prescribed

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See Release at 23-24 ("Although current accounting standards require registrants to consider how climate-related matters may intersect with, and affect, the financial statements, including their impact on estimates and assumptions, *the nature of the climate-related events and transition activities discussed in the proposed rules, which may manifest over a longer time horizon, necessitate targeted disclosure requirements to elicit decision-useful information for investors in a consistent manner.*").

categories of information are not deemed by the SEC (solely by operation of its rule) to be *per se* material to any given company.

b. Quantitative Disclosure Requirements

The SEC has also proposed the disclosure in SEC filings of certain quantitative information, including about the impact of climate-related events (like severe weather events or other natural conditions) and transition activities on the line items on the company's financial statements. For example, the Proposal "would require a registrant to separately aggregate amounts of (i) expenditure expensed and (ii) capitalized costs incurred [toward climate-related events] during the fiscal years presented."[96] And more specifically, the Proposal "would require a registrant to disclose the financial impacts of severe weather events, other natural conditions, transition activities, and identified climate-related risks on the consolidated financial statements included in the relevant filing unless the aggregated impact of the severe weather events, other natural conditions, transition activities, and identified climate-related risks is less than one percent of the total line item for the relevant fiscal year." The disclosure of any impact estimated to be above one percent of the company's total line item would be required regardless of whether such impact is considered by the company to be material to its business or not.

While we oppose the Commission adopting these proposed requirements as part of any final rule, we provide the comments below in case the Commission goes forward with adopting such a requirement.

While certain of these quantitative measures could be material to *some* companies under *some* circumstances (depending in particular on the nature of their business), it is difficult to imagine that this type of information will be material to all companies in all circumstances. The Proposal appears to abandon the notion of materiality on these disclosures altogether. In the requests for comment on this section, the SEC asks: "Instead of including a quantitative threshold… should we just use a materiality standard?"[97]

As with the prescribed qualitative disclosures discussed above, the proposed quantitative disclosures, without being tied to materiality, increase the litigation risk that companies face in connection with those disclosures. First, without further clarification from the SEC, a plaintiff's lawyer might allege based on the rule that a company which miscalculated the aggregate amounts of expenditures expensed and/or capitalized costs due to climate-related events for any given fiscal year is in violation of the federal securities laws for making a material misstatement

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[96] *Id.* at 132.

[97] *Id.* at 137; see also *id.* at 144.

or omission – even if the dollar amounts in question were very small in relation to the company's aggregate expenses. Although the company could argue that the calculation error is not material to its overall financials, a plaintiff could be expected to point to the rule as signifying the SEC's views of the *per se* materiality of these line items, regardless of the relative size of the error. Here again, given the requirement that plaintiffs' allegations be taken as true at the pleading stage, and the somewhat inconsistent treatment of materiality in the Proposal, companies might face a challenge in getting such claims dismissed in the face of such arguments. Second, by establishing a rule that purports to require quantifiable precision in assessing the impact of various climate-related events and transition risks (i.e., one percent threshold), companies are exposed to increased litigation claims based on second-guessing in hindsight that they inaccurately assessed the quantum of risk. This heightened litigation exposure is made more acute by the inherent difficulties in objectively applying the one percent threshold in practice to estimate the impact of such speculative events as severe weather events and other natural disasters, particularly over the short-, medium-, and long-term the Proposal would require.

Accordingly, any prescribed quantitative disclosure requirements in SEC filings should be expressly tied to materiality, or at the very least, the rule should make clear that the prescribed categories of information are not deemed by the SEC (solely by operation of its rule) as being *per se* material to any given company.

c. Scope 3 GHG Emissions

While we oppose the Commission requiring companies to disclose Scope 3 emissions at this time (except that we support that a company that has publicly disclosed a GHG emission reduction target or goal that includes its Scope 3 emissions to disclose only those Scope 3 emissions that are included in the emissions reduction target), we provide the comments below in case the Commission goes forward with adopting such a requirement.

The SEC's proposed safe harbor for Scope 3 emissions, though a welcome and necessary start, is insufficiently protective in light of the unique nature of Scope 3 emissions, which are by definition outside of the company's control. Should the final rule require disclosure of Scope 3 emissions, any accompanying safe harbor should hew much more closely to the safe harbor for forward-looking statements provided by the Private Securities Litigation Act ("PSLRA"), which precludes liability for certain categories of forward-looking statements that (1) are identified as such and "*accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially" or are otherwise immaterial, or (2) were not made with actual knowledge that the statement was false or misleading*. 15 U.S.C. § 78u-5(c)(1) (emphasis added).

Courts have already recognized the usefulness of the PSLRA in providing harbor to statements that do not explicitly fit the statutory categories contained therein but which have substantially similar effects, including statements about the collectability of change orders[98] and lists of factors underlying economic projections.[99] Climate-based disclosures are similarly appropriate for such a framework, as they are inherently forward-looking and thus suffer the same pitfalls endemic to predictive statements.

The final safe harbor should follow the PSLRA by containing language that clarifies the sufficiency of accompanying meaningful cautionary statements for gaining protection. The recommended approach is necessary to avoid frivolous litigation and great expense to companies and the overall markets. In addition, the proposed "reasonable basis" standard is vague and will provide fodder to opportunistic plaintiffs. The standard should instead require plaintiffs to allege that an officer of the company affirmed the statement with *actual knowledge* of its falsity (as required by the PSLRA) – a higher bar that is more appropriate to the dynamic nature of climate-based claims. Among other things, companies should be protected against insufficient or erroneous information provided to them by the third parties in their supply chains who are outside of the company's control.[100]

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[98] *GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 242 (3d Cir. 2004) ("because the statement about collectability is a prediction of the likelihood of collection on change orders and claims, it is a classic forward-looking statement").

[99] *Harris v. Ivax Corp*., 182 F.3d 799, 807 (11th Cir. 1999) (classifying a full list of factors underlying an economic projection as a forward-looking statement).

[100] The reach of the PSLRA is limited, as it does not apply to statements made in connection with an initial public offering, 15 U.S.C. §78u-5(b)(2)(D), or to statements made by an investment company, *id.* (b)(2)(B), among other exclusions. Given the particular risks inherent in climate-based disclosures, the safe harbor included in the final rule should create more protection than is currently afforded under the PSLRA.