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June 16, 2022

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

Submitted via email: rule-comments@sec.gov

RE: Proposed Rule Regarding the Enhancement and Standardization of Climate-Related Disclosures for Investors (File Number S7-10-22)

Dear Ms. Countryman:

Jones Day is pleased to submit comments relating to the Securities and Exchange Commission’s (the “Commission”) proposed new and amended rules and forms, as set forth in Release Nos. 33-11042 and 34-94478, relating to enhancement and standardization of climate-related disclosures for investors (the “Proposal”). Jones Day is an international law firm with over 2,300 lawyers practicing in forty-one offices worldwide. The firm advises a variety of participants in the U.S. capital markets, including issuers, investors, financial institutions and financial advisors (both domestic and foreign).

We support the Commission’s mission of protecting investors, maintaining fair and efficient capital markets and facilitating capital formation. That said, we believe that certain elements of the Proposal are untenable for companies to implement and, in fact, undermine the Commission’s stated goal of the Proposal, which is to “provide consistent, comparable, and reliable—and therefore decision-useful—information to investors to enable them to make informed judgments about the impact of climate-related risks on current and potential investments.”¹ As described in this letter, our primary concerns with the Proposal are as follows:

- The Proposal presents significant implementation challenges and costs for companies, including with respect to the lack of definition of key terms and concepts.
- Companies face costly burdens in sourcing, collating, and organizing the required data from third parties to make the required disclosures, and not all such required data is expected to be available (at least through the first reporting cycles).

¹ Proposal at 21335.

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- The reporting and attestation timeframes set forth in the Proposal are not workable for companies and particularly not for large accelerated filers, many of which have multiple business units and operate on a multinational basis.
- The Proposal presents significant audit implementation challenges with respect to analyzing climate impacts on certain financial statement line items, as it would be nearly impossible for companies to identify expenditures specifically associated with climate-related events and transition activities.
- The Proposal addresses climate-related disclosures without consideration of their effect on specific industries and prescribes a “one size fits all” approach to the disclosure requirements (which is generally inconsistent with other frameworks that include industry-specific disclosure standards).
- The burdensome requirements and related risks associated with making the disclosures called for in the Proposal may have a chilling effect on companies’ good faith efforts to develop plans, goals and targets to reduce emissions and other environmental impacts associated with their businesses and operations.
- The Proposal’s requirements for companies to disclose what has typically been considered confidential strategic information, such as scenario planning, carbon pricing and carbon offsets, expose companies to significant potential competitive harm, particularly as applied to companies in the energy industry and relative to private company competitors that would not be subject to these significant disclosure requirements.
- The disclosures contemplated under the Proposal may result in significant and potentially disruptive changes to the way the markets for renewable energy credits (“RECs”) and carbon offsets function, which would be contrary to the Commission’s stated mission to maintain fair, orderly and efficient markets.²
- The Proposal will likely be challenged on the bases of the Commission exceeding its regulatory authority and unconstitutionally compelling speech under the First Amendment of the U.S. Constitution.

Our comments below, which apply equally to both domestic filers and foreign private issuers (“FPIs”), where applicable, address the select issues associated with the Proposal that are of particular concern. We note that FPIs could potentially be disproportionately burdened by the

² See SEC, *Agency and Mission Information* at 9 (2014) (stating that the SEC’s mission is to “protect investors; maintain fair, orderly markets; and facilitate capital formation”).

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Proposal as written, and we suggest certain changes and clarifications for the Commission's consideration.

1. IMPLEMENTATION CHALLENGES AND COST

a. Scope 3 Emissions

The Proposal would require applicable companies to disclose Scope 3 emissions if material, or if the company has set Scope 3 emissions targets.³

(i) Materiality Not Clearly Defined. The Commission provides a highly subjective interpretation of the circumstances in which Scope 3 emissions could be material, offering that Scope 3 emissions are material where they represent a significant risk, are subject to significant regulatory focus, or, consistent with general concepts of materiality, if there is a substantial likelihood that a reasonable investor would consider the Scope 3 emissions important.⁴ The Commission has not provided adequate guidance to clarify what risks would rise to the level of "significant risks," what might be considered "significant regulatory focus" or a method to determine whether it is "substantially likely" that certain types or amounts of emissions are important to investors. Assessing materiality in the context of Scope 3 emissions poses significant challenges for companies to interpret and implement, particularly because "materiality" would vary across industries and jurisdictions. For example, a materiality analysis for a company operating in a low-greenhouse gas ("GHG") emitting industry, such as a software company, would be entirely different from a materiality analysis for a company that operates in the energy industry. Moreover, Europe, Canada and other international agencies continue to develop standards that may have inconsistent definitions of materiality in this context, creating potential uncertainty and competing standards for FPIs or other U.S. companies subject to regulation in multiple jurisdictions.⁵ This ambiguity, particularly in combination with the varying standards across jurisdictions, undermines the Commission's stated objectives of consistency, comparability and reliability and presents difficulties for companies to accurately determine whether Scope 3 GHG emissions fall above or below the materiality threshold.

³ See Proposed 17 CFR 229.1504(c)(1) ("Disclose the registrant's total Scope 3 emissions if material. A registrant must also disclose its Scope 3 emissions if it has set a GHG emissions reduction target or goal that includes its Scope 3 emissions.").

⁴ See Proposal at 21379 ("Accordingly, Scope 3 emissions may make up a relatively small portion of a registrant'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.'") (citing *TSC Industries v. Northway*, 426 U.S. at 449).

⁵ In the last six months, there have been substantial developments in the progression of mandatory climate disclosure frameworks, which apply to many companies that are also subject to the Proposal, including, but not limited to, the Canadian Securities Administrators' Proposed National Instrument 51-107 Disclosure of Climate-Related Matters ("[NI 51-107](#)"), the International Sustainability Standards Board's two proposals for new sustainability standards, the expected proposals from the European Financial Reporting Advisory Group and the proposed European sustainability reporting standards.

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Furthermore, this ambiguity is expected to confuse a company's understanding of the efforts and resources it must expend to comfortably disclose emissions with the requisite level of certainty.

In addition, "significant regulatory focus" and the "substantial likelihood" of importance to investors would similarly be appreciably different across jurisdictions, which imposes an additional burden on FPIs and U.S. companies with multinational operations to analyze the significance of their national and/or supranational regulators' and investors' focus on Scope 3 GHG emissions. This could further undermine the Commission's stated purpose of promoting comparability across companies.

The difficulty in determining materiality is further compounded by the broad definition of Scope 3 included in the Proposal as "all indirect GHG emissions not otherwise included in a registrant's Scope 2 emissions, which occur in the upstream and downstream activities of a registrant's value chain"⁶ and "outsourced activities that it previously conducted as part of its own operations."⁷ The lack of definition as to what is "material" coupled with this broad definition of Scope 3 emissions, which includes all indirect GHG emissions (not included in Scope 2 emissions) that occur in the upstream and downstream activities of its "value chain," necessitates an open-ended evaluation of the term "value chain."⁸ This would leave virtually every company with significant uncertainty in connection with determining whether their Scope 3 GHG emissions are material. The Commission states that "value chain" has been included in the definition to "capture the full extent of a registrant's potential exposure,"⁹ which perhaps is a laudable aspiration, but one that must be weighed against the significant costs and the practical difficulties associated with accurately collecting such information, as well as the potential disproportionate effect on companies, particularly those whose third-party providers and other members of the value chain are less likely to be subject to U.S. securities laws and therefore may not collect or make available the required information. It would be an open question as to whether including such a broad and open-ended concept of "value-chain" within the Scope 3 disclosure requirements would render any such disclosures meaningless. Companies that seek to make the most fulsome inquiries of their value chains to determine GHG emissions as accurately as possible may yield Scope 3 GHG emissions that appear "worse" than other companies that consider less thorough analyses to be appropriate. Such inconsistent diligence practices run the risk of rendering Scope 3 emissions calculations baseless rather than offering investors the ability to make well-informed side-by-side comparisons of companies' GHG emissions.

⁶ Proposed 17 CFR 229.1500(r).

⁷ Proposed 17 CFR 229.1504(e)(8).

⁸ See Proposed 17 CFR 229.1500(t) (referring to upstream and downstream activities (the temporal scope of which are unclear, *e.g.*, "initial stages") "related to a registrant's operations" and proposing a list of activities that may be included in connection with a value chain; such examples are neither generally applicable nor industry specific).

⁹ Proposal at 21349.

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Assessing materiality of Scope 3 GHG emissions may also be challenging in light of the Proposal's requirement that companies assess the materiality of risks over the short, medium and long term.¹⁰ The Proposal does not explain or define any parameters around these timeframes or offer a frame of reference for what is considered "short, medium and long term," which creates additional implementation challenges. Further, as an emerging field that has only gained attention in recent years, companies will likely face significant difficulties in predicting what a reasonable investor would consider a "material" disclosure in the long term. If "long-term" is interpreted as meaning 20 years into the future, it would be extremely difficult to predict what climate risks and/or Scope 3 GHG emissions data a "reasonable investor" would consider "material" that far down the road. Indeed, on a long enough time-horizon, any disclosure regarding the breadth, magnitude and probability of climate risk becomes considerably less decision-useful to investors.

An overarching issue with the Proposal, as described in the comment letter submitted by Dimensional Fund Advisors LP ("Dimensional"), an investment advisor that, together with its affiliates, has approximately \$659 billion in global assets under management, is that the Proposal applies prescriptive climate change disclosure requirements to many companies for which climate change is not a material risk to their businesses.¹¹ In the view of this significant institutional investor, whom these disclosure rules are meant to assist in making investment decisions, "if a company has not identified climate change as a material risk to its business, the costs of requiring that company to disclose specific climate-related information will outweigh benefits to shareholders."¹² The prescriptive nature of the Proposal assumes that climate change and climate-related impacts are material to all public companies and imposes substantial costs, including the costs of gathering, assessing and reporting Scope 1 and Scope 2 GHG emissions disclosures on all public companies regardless of the materiality of such risks and impacts.

(ii) Significant Obstacles and Costs in Obtaining Scope 3 Data. The Proposal presents additional significant timing and logistical challenges for companies to collect, assess and accurately report Scope 3 GHG emissions. A company's Scope 3 GHG emissions data collection and calculations would be dependent on its access to Scope 1 and Scope 2 GHG emissions data from the entities within its value chain. However, many companies' value chains include private and/or foreign entities that may not be subject to the Proposal, if adopted, and therefore would not be required to track and disclose their Scope 1 and Scope 2 GHG emissions. Even if private or foreign entity value chain members do track and voluntarily disclose Scope 1 and Scope 2 GHG emissions data, the methods of measurement, use of carbon offsets, different regulatory compliance requirements, if any, and lack of formal third party attestation or certification requirements would pose significant hurdles not only in collecting and determining the accuracy of such data, but also in ascertaining and verifying the "methodology, significant

¹⁰ See Proposal at 21352; Proposed 17 CFR 229.1502(b)(2).

¹¹ See Dimensional comment letter to the Proposal, dated May 13, 2022 ("Dimensional Comment Letter").

¹² *Id.* at 2.

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inputs, and significant assumptions used to calculate”¹³ Scope 3 GHG emissions as called for by the Proposal. Even if a company were to use “reasonable estimates”¹⁴ or estimates its Scope 3 GHG emissions using a “range”¹⁵ as permitted under the Proposal, there would still be substantial uncertainties relating to such data collected largely from third parties. All of these underlying timing and logistical challenges undermine each of the Commission’s stated objectives of consistency, comparability and reliability.

Additionally, from a cost perspective, even if a company were to obtain contractual commitments from entities within its value chain to provide the Scope 3 GHG emissions data, the costs associated with collecting and verifying that data may go well beyond the company and extend to its value chain business partners. The Proposal, if adopted, would compel emissions data collection and verification from private and foreign companies that may not be subject to the Proposal, thereby increasing such entities’ costs and the company’s costs to ensure methodology and verification mechanisms are in place in connection with such data, and would ultimately significantly increase the costs of compliance for the market as whole—well beyond the estimates included in the Proposal. The Dimensional Comment Letter made the further point that, given the significant costs associated with value chain business partners collecting this data, the Proposal “could have unintended detrimental consequences for small-business formation, because it would make GHG emissions reporting another barrier to entry for companies looking to become a supplier to, or otherwise do business with, a large public company subject to Scope 3 disclosure requirements.”¹⁶

Further, the Proposal presents significant timing challenges for companies to meet their disclosure deadlines in reporting Scope 3 GHG emissions after completion of the phase-in periods provided in the Proposal. If calculation of one company’s Scope 3 GHG emissions data is dependent on another company’s Scope 1 and 2 GHG emissions reporting, there would be many circumstances in which such dependent company would not have sufficient time to review, assess and publish Scope 3 GHG emissions data collected from the other company’s annual report. For example, consider two companies that are large accelerated filers that report on a calendar year-end basis and must file their respective Annual Reports on Form 10-K within 60 days of December 31. If one company is dependent on the Scopes 1 and 2 GHG emissions data from the other company in order to calculate its Scope 3 GHG emissions data, and such other company files on the 59th day of such 60-day period, the company dependent on such data would not be able to obtain and assess such data to file its Annual Report on Form 10-K on a timely basis with the Commission. From a practical standpoint, it is unclear how companies are expected to report Scope 3 GHG emissions data when the company and value chain member are both reporting companies and required to file their respective annual reports by the same

¹³ Proposed 17 CFR 229.1504(e)(1).

¹⁴ Proposed 17 CFR 229.1504(e)(4)(i).

¹⁵ Proposed 17 CFR 229.1504(e)(4)(ii).

¹⁶ Dimensional Comment Letter at 3.

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deadline. We recommend that if the Commission includes the Scope 3 GHG emissions disclosure requirement in the final rules, it should grant additional time to applicable companies to disclose annual Scope 3 GHG emissions and any other emissions-related data that is not available or cannot be adequately verified by the time of the applicable filing.

(iii) Scope 3 Safe Harbor Concerns. The Proposal also includes a federal securities law safe harbor, which is intended to shield companies from liability for allegedly false or misleading Scope 3 GHG emissions disclosures unless the disclosure was made without a reasonable basis or disclosed other than in good faith.¹⁷ The Scope 3 safe harbor is similar in structure and language to the forward-looking statement safe harbors set forth under Commission Rules 175 and 3b-6.¹⁸ The Commission has previously acknowledged criticism that the safe harbor set forth in those rules, “is infrequently raised by defendants, perhaps because it compels judicial examination of reasonableness and good faith, which raise factual issues that often preclude early, pre-discovery dismissal. Thus, critics state that the safe harbor is ineffective in ensuring the quick and inexpensive dismissal of frivolous private lawsuits.”¹⁹ Congress sought to address some of these criticisms when it passed the Private Securities Litigation Reform Act (“PSLRA”),²⁰ which sets forth a safe harbor for forward-looking statements that does not necessarily require considering a defendant’s state of mind.²¹

The Commission should consider providing a Scope 3 GHG emissions safe harbor exclusion that does not turn on a defendant’s state of mind. The Commission should also consider instructing that any allegedly false or misleading Scope 3 GHG emissions disclosure

¹⁷ See Proposed 17 CFR 229.1504(f)(1) (“A statement within the coverage of paragraph (f)(2) of this section that is made by or on behalf of a registrant is deemed not to be a fraudulent statement (as defined in paragraph (f)(3) of this section), unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.”).

¹⁸ See 17 CFR 230.175—Liability for certain statements by issuers (stating that a forward-looking statement “which is made by or on behalf of an issuer or by an outside reviewer retained by the issuer shall be deemed not to be a fraudulent statement . . . unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith”) (“Commission Rule 175”); 17 CFR § 240.3b-6—Liability for certain statements by issuers (stating that a forward-looking statement “which is made by or on behalf of an issuer or by an outside reviewer retained by the issuer shall be deemed not to be a fraudulent statement, unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.”) (“Commission Rule 3b-6”).

¹⁹ Concept Release and Notice of Hearing, 59 F.R. 52723, 52728 (Oct. 19, 1994).

²⁰ See Conference Committee Report, H. R. REP. NO. 104-369, at 43 n. 29 (Nov. 28, 1995).

²¹ See *Slayton v. American Express*, 604 F.3d 758, 766 (2d Cir. 2010), see also 15 U.S.C. § 78u-5(c)(1)(A) (stating that forward-looking statements are protected if the plaintiff fails to prove that the forward-looking statements were made with actual knowledge that they were false or misleading.); see also 15 U.S.C. § 78u-4(b)(2)(A) (stating that the “plaintiff must state particular facts giving rise to a strong inference that the defendant issued the allegedly misleading statement knowing that it was false at the time it was made.”).

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must be viewed in context alongside the entirety of a defendant's Scope 3 GHG emissions disclosures.²²

b. Length of Attestation Period and 2022 Applicability to Select Companies

Proposed Regulation S-K, Item 1504(a) would require companies to disclose GHG emissions data with respect to each year for which financial statements are included in the filing.²³ For large accelerated filers, this would generally require three years of GHG emissions data to be disclosed in an Annual Report on Form 10-K after completion of the phase-in periods.²⁴

In addition, proposed Item 1505 would require accelerated filers and large accelerated filers, including FPIs, to include an attestation report from an independent attestation service provider covering Scopes 1 and 2 GHG emissions disclosures.²⁵ The Proposal contains a phase-in period under which filings with respect to the first fiscal year after the compliance date would not require attestation, then the next two years would require attestation at a "limited assurance" level, while the fourth fiscal year after the compliance date and onward would require attestation at a "reasonable assurance" level.²⁶ Such assurance obligations appear to apply to all data presented, including data for historical periods.²⁷

Assuming that the effective date of the Proposal is in December 2022, and that, for the 2024 fiscal year, large accelerated filers would be required to disclose Scope 1 and Scope 2 GHG emissions data, the Proposal appears to provide that they would be required to include a limited assurance attestation report in the Annual Report on Form 10-K filed in 2025 disclosing Scope 1 and Scope 2 GHG emissions for years 2024, 2023 and 2022. Since 2022, the current year, appears to be covered by limited assurance attestation, the Proposal would essentially compel many companies to establish procedures and hire qualified consultants now to ensure that emissions data disclosed for 2022 can be sufficiently reviewed and assessed and meet applicable standards for a qualified attestation firm to provide the limited assurance attestation report. Additionally, the Proposal appears to require certain companies to start incurring the costs of

²² See 15 U.S.C. § 78u-5(e).

²³ See Proposed 17 CFR 229.1504(a).

²⁴ See Proposal at 21455 ("Following a one-year phase-in period in which no attestation report would be required, for filings made for the second and third fiscal years following the compliance date for the GHG emissions disclosure requirement, large accelerated filers would be required to obtain an attestation report for their Scopes 1 and 2 emissions disclosure, at minimum, at a limited assurance level.").

²⁵ See Proposed 17 CFR 229.1505(a)(1).

²⁶ *Id.*

²⁷ *Id.* (stating that a "registrant that is required to provide Scope 1 and Scope 2 emissions disclosure pursuant to § 229.1504 and that is an accelerated filer or a large accelerated filer must include an attestation report covering such disclosure in the relevant filing.").

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hiring qualified attestation firms now in order to have appropriate procedures in place to collect Scope 1 and Scope 2 GHG emissions data, even before the rules are in effect.

Although the Proposal would not require that such GHG emissions attestation provider be a registered public accounting firm, such firm would have to be an expert in GHG emissions by virtue of having “significant experience in measuring, analyzing, reporting, or attesting to GHG emissions.”²⁸ Further, the attestation provider would be required to be “independent”²⁹ from the company and its affiliates during the “attestation and professional engagement period”³⁰ (as such terms are defined in the Proposal). Furthermore, the company would be required to disclose whether the attestation provider has a license to provide assurance (identifying any such licensing or accreditation body),³¹ is subject to any oversight inspection program (identifying any such program)³² and is subject to record-keeping requirements with respect to the engagement (identifying any such requirements and their duration).³³ The Proposal would require companies to incur significant cost and administrative burdens to identify a firm that meets the qualifications set forth in the criteria, and companies would further need to retain such firms now, before the Proposal becomes effective.

It is also not clear that there will be a sufficient number of qualified firms to provide these services for companies to comply with the attestation requirements.³⁴ The independence requirement applicable to such attestation firms may further limit the number of qualified providers for some companies. If the Commission determines to require such an attestation report in the final rules, similar to Item 407(e)(3)(iii)(A) of Regulation S-K,³⁵ instead of requiring that the attestation firm be independent, the Commission should provide that if the firm retained by the company is providing other services to the company (in addition to the attestation services) in excess of \$1 million (for example) during the last completed fiscal year, then the company must provide disclosure of the aggregate fees for the attestation services and for such additional other services provided to the company for such year. This would enable companies

²⁸ Proposed 17 CFR 229.1505(b)(1).

²⁹ Proposed 17 CFR 229.1505(b)(2).

³⁰ *Id.*

³¹ *See* Proposed 17 CFR 229.1505(d)(1).

³² *See* Proposed 17 CFR 229.1505(d)(2).

³³ *See* Proposed 17 CFR 229.1505(d)(3).

³⁴ *See Attestation: Practical Reflections on What the SEC Climate Proposal Will Require*, JD SUPRA (Apr. 13, 2022) available at <https://www.jdsupra.com/legalnews/attestation-practical-reflections-on-1884461/> (“Although the proposed rules state that an attestation provider need not be a registered public accounting firm, few ESG advisory companies are likely to have the requisite environmental knowledge and industry experience needed to perform the attestation to meet both the SEC’s standard and the company’s expectation. In essence, the attestation requirements in the proposed rules will drive a major expansion in the marketplace, with the likely result that the universe of qualified attestation providers will lag behind the demand necessitated by the adoption of these rules.”).

³⁵ *See* 17 CFR 229.407(e)(3)(iii)(A).

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to have access to a greater pool of qualified firms to choose from for the provision of GHG emissions attestation services.

c. Audit Challenges with Financial Statement Footnote Disclosure

The Proposal would require companies, including Smaller Reporting Companies (“SRCs”), to disclose, in a footnote to their consolidated financial statements, the impact of climate-related events (such as severe weather events and other natural conditions as well as physical risks)³⁶ and transition activities (including efforts to reduce GHG emissions or otherwise mitigate exposure to transition risk) included in the line items of the company’s consolidated financial statements.³⁷ Companies would be required to separately disclose all negative and all positive impacts of climate-related events as well as separately disclose all negative and all positive impacts of transition activities.³⁸ These disclosures would be required for each affected financial statement line item if, on an aggregated basis, the absolute value of all such impacts (*i.e.*, the absolute value of both negative impacts and positive impacts for both climate-related events and transition activities) exceeds one (1) percent of the related line item.³⁹ Similarly, if the total amount expensed for climate-related events and transition activities or the total amount capitalized for such events and activities exceeds one (1) percent of the company’s total expenditures or capitalized costs, respectively, separate disclosure of those amounts would be required, disaggregated by climate-related events and transition activities.⁴⁰ A company would perform this calculation relative to total expenditures and capitalized costs, regardless of the financial statement line items in which the amounts are included.⁴¹

The one (1) percent threshold per line item is extremely low, and it is unclear what level of analysis would be satisfactory to identify expenditures specifically associated with climate-related events and transition activities or to distinguish “severe” weather events. As proposed, the financial impact metrics may include hypothetical information that is prone to management bias and would be difficult for external auditors to verify. This is generally not information that would exist in a given company’s accounting records, but instead would be management’s commentary on a likely variance analysis. For example, it would be hypothetical to speculate why a company lost a sales contract and to attribute it to emissions pricing or new regulations instead of an alternative business rationale. Companies can report on increased revenues and increased cost, as these are objectively verifiable and based on records such as invoices and contractual agreements with third parties. However, companies cannot objectively report on

³⁶ See Proposed 17 CFR 210.14-02(c).

³⁷ See Proposed 17 CFR 210.14-02(d).

³⁸ See Proposed 17 CFR 210.14-02(c)–(d).

³⁹ See Proposed 17 CFR 210.14-02(b)(1).

⁴⁰ See Proposed 17 CFR 210.14-02(b)(2); *see also* Proposed 17 CFR 210.14-02(e)–(f).

⁴¹ See Proposal at 21371.

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decreased revenue (unless due to contractually specific discounts or volume rebates where revenue is recognized net of these amounts) or decreased costs. We foresee that this provision will negatively impact comparability across subject companies.

In addition, some climate-related effects may not be apparent in a reporting year but may become apparent in the future. The Proposal does not account for the nuances and difficulties of identifying expenditures specifically incurred due to climate-related events and transition activities, particularly when there are other factors that may also impact the valuation of certain line items. For example, it would be difficult for a company to attribute an increase in the cost of borrowing directly to climate change. As a result, the provisions impose a significant burden on companies to modify the existing, or put additional, processes, procedures and internal controls, in place to track the information needed to provide expenditure metrics when preparing financial statements. Additionally, the current lack of clarity surrounding the process for calculating and attributing certain line item changes to climate change offers accounting firms virtually no way of affirming such calculations and attributions.

Disclosures would be required for the company's most recently completed fiscal year, and for the historical fiscal year(s) included in the consolidated financial statements in the filing.⁴² It would also be subject to audit by an independent registered public accounting firm and come within the scope of the company's internal controls over financial reporting.⁴³ Unlike the disclosure in a "Climate Related Disclosure" section, the financial statement footnote disclosure proposals do not contain an exemption for information that is not reasonably available with respect to historical periods.

Additionally, costs of compliance, including relating to implementation of appropriate processes, procedures and internal controls and obtaining independent auditor review, are likely to be significant, in particular when compared to the decision-usefulness of such information to investors.

d. Board Member Climate-Expertise and Risk Exposure

The Proposal requires companies to disclose whether any member of its board of directors has climate-related risk expertise.⁴⁴ However, the Proposal does not offer concrete parameters that describe what qualifications would be sufficient to designate a board member as "expertized" in climate-related risk. The Proposal only states that the disclosure should have "sufficient detail to fully describe the nature of the expertise."⁴⁵ Since the Proposal would apply to virtually all companies regardless of industry, it may be unclear to companies that do not have

⁴² See Proposed 17 CFR 210.14-02(c)-(f).

⁴³ See Proposal at 21345.

⁴⁴ See Proposed 17 CFR 229.1501(a)(1)(ii).

⁴⁵ Proposal at 21359.

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an obvious significant environmental impact, such as a software design company, what level of expertise would be considered satisfactory to the Commission and investors under the Proposal.

Historically, the Commission has provided greater clarity around the definitions of certain board member expertise, for example, with respect to the “audit committee financial expert” definition under Regulation S-K Item 407.⁴⁶ The Commission included five attributes of an audit committee financial expert, emphasizing accounting experience and other industry standard terms.⁴⁷ A “climate change expert,” on the other hand, could conceivably encompass everything from statistical and data analytics to scientific expertise to governance, and even those categories are not yet “industry standard.” We anticipate that this ambiguity will create significant implementation challenges for many companies, particularly those companies that do not operate in a high-emissions industry.

The Proposal also does not specify whether board members identified as climate experts would have heightened liability, as compared to other board members, for climate-related risks. This has historically been a concern in connection with other Commission rules and is likely to be of concern to companies subject to the Proposal. For example, when the Commission required companies to identify and, if applicable, disclose members of the board that qualify as audit committee financial experts under Regulation S-K, commentators expressed apprehension that the rule would create additional liability for these directors. However, the Commission specifically addressed these concerns with a safe harbor provision that states that identification of a director as an audit committee financial expert would not impose any additional duties, obligations or liability on such person.⁴⁸ There is no such safe harbor relieving board members responsible for the oversight of climate-related risks or who are identified as having climate-related expertise under the Proposal.

Notably, the Commission’s proposed cybersecurity rules, which were also released in 2022, contain a similar requirement to disclose whether “any member of the registrant’s board of directors has expertise in cybersecurity,”⁴⁹ and offers a safe harbor provision that explicitly relieves board members identified as having such cybersecurity expertise from any additional expert duties, obligations, and liabilities⁵⁰ and excludes such identification from the Commission’s definition of “expert” under Section 11 of the Securities Act of 1933 (15 U.S.C. 77k).⁵¹ The Proposal contains no such safe harbor with respect to identified climate-expertized board members, and while the absence of such language does not necessarily indicate any

⁴⁶ See 17 CFR 229.407(d)(5)(ii).

⁴⁷ *Id.*

⁴⁸ See 17 CFR 229.407(d)(5)(iv).

⁴⁹ Proposed 17 CFR 229.407(j)(1).

⁵⁰ See Proposed 17 CFR 229.407(j)(2)(ii).

⁵¹ See Proposed 17 CFR 229.407(j)(2)(i).

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intention to create greater liability for identified climate experts, the Commission should address this concern, provide this clarification and, ideally, offer protection for such directors, in the final rule.

The Proposal does not explicitly require companies to appoint an expertized board member; rather, it simply requires that companies disclose whether a climate expert serves on the board. Such a disclosure rule has an effect similar to a requirement, as such rules often cause companies to respond to disclosure requirements by implementing changes to their boards to be able to make affirmative statements to their stakeholders that their boards have a director with a particular expertise. Although a director with climate-related expertise may not be critical for boards of companies in certain industries, as adjudged to date by their boards and investors, this disclosure expectation may impact a company's decision-making regarding future director nominees (effectively supplanting the judgement of such boards, management teams and the companies' investors). The Proposal would have the effect of diminishing the discretionary authority and judgment of the board, management and investors to determine, absent regulatory pressure, the proper skills and composition of their board members based on the particular industry and the circumstances of such company.

e. Inconsistencies with Climate-Related Reporting Frameworks

(i) Discrepancies with Other Reporting Standards and Frameworks Will Require the Overhaul of Existing Processes for Sustainability Reporting. Although there are certain similarities between the Proposal and other environmental, social and governance ("ESG") reporting frameworks, including the framework developed by the Task Force on Climate-Related Financial Disclosures ("TCFD"), the GHG Protocol and GHG emissions reporting required by the U.S. Environmental Protection Agency ("EPA"), the Proposal goes beyond the scope of what is provided for under these frameworks, and will cause companies to incur additional, significant costs to revise their voluntary disclosures to comply with the Proposal. Examples include:

- **Defining the Organizational Boundaries for Emissions Reporting.** The Proposal requires the organizational boundary and any determination of whether a company owns or controls a particular source for GHG emissions to be consistent with the scope of entities, operations, assets and other holdings as those included in a company's consolidated financial statements.⁵² The GHG Protocol treats subsidiaries and affiliates differently and permits a company to define "control" either in financial or operational terms.⁵³ Companies already reporting under the GHG Protocol (or other frameworks) may need to revise their reporting boundary and GHG inventory

⁵² See Proposed 17 CFR 229.1504(e)(2).

⁵³ See Standard 3 in Greenhouse Gas Protocol at 17, *The Greenhouse Gas Protocol: A Corporate Accounting and Reporting Standard*. Revised edition.

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management plan to align with the consolidated financial statement requirements, which would increase costs for such companies.

- Emissions Reporting. Many large industrial companies in the United States are already required to report GHG emissions from certain facilities to the EPA.⁵⁴ The EPA’s GHG reporting rule is generally facility-specific with some limited exceptions.⁵⁵ Since the Proposal is focused on “organizational” emissions, a company that collects all the information necessary to comply with the EPA’s requirements may have to collect additional emissions-related information to comply with the Proposal’s GHG emission disclosure requirements, increasing costs for companies subject to both disclosure regimes and the burden of U.S. government-required disclosures, which would be more efficient for all stakeholders if aligned across agencies. Additionally, the EPA’s GHG emissions reporting rules require that emissions data be calculated on a calendar year basis, while the Proposal would require reporting of emissions data on a fiscal year basis. Companies with non-calendar fiscal years that report under the EPA’s GHG emissions reporting program would need to calculate emissions data twice each year, negating the “lower incremental costs” associated with complying with the Proposal’s GHG emission disclosure requirements suggested in the Proposal.⁵⁶
- Attestation Requirement. Neither TCFD nor the GHG Protocol include an attestation requirement, and there is no uniform approach to the attestation of data integrity, especially across the full operational and geographic range of companies in varied industries. Even though the Association of International Certified Professional Accountants (“AICPA”) has published a roadmap to assist audit practitioners with ESG attestation,⁵⁷ these guidelines are general in nature and may not adequately address the complexities in reporting emissions data across the entire operational and geographic footprint of not only the company but also its Scope 2 GHG emissions suppliers.
- International Reporting Frameworks. In addition, given that the European Union (“EU”) rules (in particular under the proposed Corporate Sustainability Reporting Directive, COM (2021) 189 final (“CSRD”)) have not yet detailed the corresponding attestation requirements, the Commission should give careful consideration to such requirements as a “standard setter” in this area, and also contemplate coordination

⁵⁴ See 40 CFR Part 98.1.

⁵⁵ See generally 40 CFR Parts 98.30-478.

⁵⁶ Proposal at 21439.

⁵⁷ See AICPA, *ESG reporting and attestation: A roadmap for audit practitioners* (Feb. 2021).

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with its EU counterparts and the IFRS International Sustainability Standards Board in order to achieve global alignment of disclosure requirements wherever possible.

- Internal Carbon Price. The Proposal would require disclosure of an internal carbon price,⁵⁸ while the TCFD encourages, rather than requires, such disclosure.⁵⁹ Moreover, while the TCFD merely suggests providing internal carbon prices where relevant, the Proposal goes into greater detail, requiring a description of how a company uses an internal carbon price to evaluate and manage climate-related risks or to disclose the rationale for selecting the internal carbon price and how the total price is estimated to change over time.⁶⁰
- Governance Information. The Proposal's governance disclosure requirements are more detailed than and exceed the TCFD recommended disclosures. For example, as discussed above, the Proposal would require companies to identify members of the board of directors with expertise in climate-related risks, with a specific disclosure describing the nature of their expertise, and including a description of how frequently the board (or board committee) discusses climate-related risks.⁶¹ The TCFD governance disclosure focuses on the role of the board as a whole (as well as climate-related responsibilities assigned to specific management-level positions or committees), rather than on specific members of the board.⁶² Under the TCFD guidelines, it is recommended that companies describe the board of directors' oversight of climate-related matters as a whole, such as by elaborating on how the board monitors and oversees progress against goals and targets for addressing climate-related issues, describing processes by which the board and/or board committees are informed about climate-related issues and whether such issues are considered when reviewing strategy and business plans.⁶³

The significant discrepancies between the Proposal and the above-mentioned frameworks, which are currently being used by many companies to voluntarily disclose climate-related information, including the industry-specific disclosure frameworks developed by the Sustainability Accounting Standards Board ("SASB"), will require companies to overhaul their

⁵⁸ See Proposed 17 CFR 229.1502(e).

⁵⁹ See TCFD, *Guidance on Metrics, Targets, and Transition Plans* at 60 (Oct. 2021) ("The Task Force encourages organizations for which disclosure of internal carbon prices is relevant to disclose the actual internal carbon price(s) used within the organization, for example, when making investment or strategic planning decisions.").

⁶⁰ See Proposed 17 CFR 229.1502(e)(1)–(2).

⁶¹ See Proposed 17 CFR 229.1501(b)(1)(i)–(iii).

⁶² See generally TCFD, *Recommendations of the Task Force on Climate-related Financial Disclosures* at 1–13 (June 2017).

⁶³ *Id.*

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existing processes for sustainability reporting and impose significant additional costs and confusion for companies in meeting their disclosure obligations under the U.S. securities laws. Inconsistencies across various jurisdictions and reporting systems undermine the Commission's stated objectives of consistency and comparability. While the Proposal acknowledges that there will be discrepancies and certain costs associated with those discrepancies, we believe the Commission has underestimated the cost of compliance and that such costs may ultimately outweigh the benefits of subjecting companies to conflicting disclosure frameworks.

(ii) Lack of Industry-Specific Flexibility. ESG reporting is a nuanced area in which each company manages climate-related issues and the related impacts differently and in consideration of unique risks. The Proposal provides a “one size fits all” approach to many of the required disclosures, amounting to a choice by the Commission not to engage in the highly relevant exercise of developing industry-informed guidelines such as those offered by SASB, a widely adopted framework endorsed by many institutional investors.⁶⁴ This contrasts with the extensive guidance and industry-specific criteria for determining relevance provided to companies under other frameworks, such as the GHG Protocol Corporate Value Chain (Scope 3) Accounting and Reporting Standard and Annex H of ISO 14064-1:2018. The EU has also engaged in this type of industry-by-industry analysis under, for example, Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (the “Taxonomy Regulation”).⁶⁵

Disclosure requirements under the Proposal are significantly more prescriptive and granular than the TCFD or SASB, both of which include specific industry guides.⁶⁶ Supporting the use of industry-specific guides ensures that companies in the same industry sector make the same choices in deciding how to report on these issues and thus assures comparability in the reports. Although the Proposal is more prescriptive than the industry guides often are, it does not assure comparability among companies in the same industry sector, which may be more important to investors than comparability across different industries. The Proposal should be revised to allow for a more flexible approach, striking a balance between principles-based and prescriptive disclosures and comparable industry-specific disclosures to be more consistent with the market practice and investors' disclosure framework preferences.

⁶⁴ See, e.g., Examples of SASB's Industry-Specific Approach, available at <https://www.sasb.org/industry-specific>.

⁶⁵ See Taxonomy Regulation and the Climate Delegated Act (C/2021/2800) adopted thereunder, which contains technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation and distinguishes between a wide range of industries.

⁶⁶ SASB has Standards for 77 industries that identify the subset of environmental, social and governance issues most relevant to financial performance in each industry. TCFD developed an annex report that provides sector-specific guidance for certain financial sector industries and non-financial groups.

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(iii) Application to Foreign Private Issuers.

The increased burdens imposed under the Proposal would create a significant deterrent for foreign companies, including FPIs and Canada–U.S. multijurisdictional disclosure system (“MJDS”) filers, to list their securities in the United States. Dual-listed companies are required to navigate compliance and reporting regimes that often differ, sometimes materially, and the disclosure requirements imposed by the Proposal would unnecessarily complicate adherence to those regimes without offering substantively more valuable information to investors.

Companies subject to EU rules. For example, certain companies in the EU are already required, or will be required under forthcoming draft EU legislation (if adopted as proposed),⁶⁷ to carry out many of the practices that “trigger” disclosure obligations under the Proposal (*e.g.*, make efforts to reduce GHG emissions or otherwise mitigate exposure to transition risks,⁶⁸ make expenditures and incur capital costs to reduce GHG emissions or otherwise mitigate exposure to transition risks,⁶⁹ use measures such as an “internal carbon price” to assess risks,⁷⁰ and/or adopt transition plans, complete scenario analyses, and set targets or goals related to the reduction of GHG emissions or any other climate-related target or goal).⁷¹

Enhanced disclosure requirements under the Proposal would be triggered by practices that are (or will be) in fact required under certain FPI filers’ domestic laws. Such redundancies would impose a disproportionate burden on such filers and could result in a chilling effect on their access to U.S. capital markets.

Companies subject to Canadian rules. Similarly, certain dual-listed companies in Canada will be subject to both the Canadian proposed NI 51-107 and the Proposal. Pursuant to NI 51-107, Canadian companies will be required to disclose certain climate-related information in compliance with the TCFD recommendations, including metrics and targets which require Scope 1, Scope 2 and Scope 3 GHG emissions disclosure and the related risks, or the company’s reasons for not disclosing this information. The NI 51-107 requirements substantially overlap

⁶⁷ Under the CSRD, large undertakings (*i.e.*, companies exceeding two of the three following criteria: (i) balance sheet total of € 20 million; (ii) net turnover of € 40 million; and/or (iii) 250 employees) and small and medium enterprises listed on EU regulated markets will be required to disclose detailed information on environmental, social and governance matters. Companies required to report under the CSRD will also be required to disclose how and to what extent the company’s activities are associated with economic activities that qualify as “environmentally sustainable” under the Taxonomy Regulation. In addition, under the proposed Corporate Sustainability Due Diligence Directive, COM (2022) 71, companies will be required to “adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5° C in line with the Paris Agreement.”

⁶⁸ See Proposed 17 CFR 210.14-02(d).

⁶⁹ See Proposed 17 CFR 210.14-02(f).

⁷⁰ See Proposed 17 CFR 226.1506(d).

⁷¹ See Proposed 17 CFR 226.1506(a).

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with the Proposal's disclosure requirements, imposing tedious redundancies on companies required to comply with multiple regimes without offering materially more valuable information to investors.

While Canadian disclosure regimes are substantially similar to the Proposal, there are also differences that will create additional burdens for dual-listed companies. For example, both NI 51-107 and the Proposal are more closely tied to recommendations of the TCFD and the GHG Protocol. However, the Proposal has not adopted all features of the GHG Protocol, while the Canadian Securities Administrators are proposing the GHG Protocol as a basis for disclosing GHG emissions. The two proposals differ in regard to methodology, including "organizational boundaries" that a company would be required to use when calculating its GHG emissions. If MJDS filers are subject to the Proposal, it could be a significant deviation, or create a confusing overlay for investors, depending on a company's investments and organizational structure, as the GHG Protocol uses "equity share" or "control" approach for the determination of which assets/operations are to be included.

Recommendations. Given the significant burdens imposed on dual-listed companies, we believe that FPI filers generally should be exempt from some or all of the new requirements and that such exemption should be extended to other filers, in particular those filers that are already subject to similar rules. Exempting FPIs and MJDS filers from the Proposal would reduce regulatory burdens and avoid unnecessary duplication of securities law provisions, while at the same time continuing to facilitate cross-border public offerings of securities and providing adequate protection of investors. Such additional accommodation would be in line with the spirit of the FPI reporting regime: deference to home country rules in an effort to reduce costs, timing issues and other complications associated with dual regulation.

Further, to the extent that the new climate-related disclosure requirements are applied to FPIs, we would request that the Commission clarify that the exemption applicable to SRCs may also be utilized by FPIs that would, in the absence of Instruction 2 to the definition of "Smaller Reporting Company," otherwise qualify as an SRC. Instruction 2 to the definition of "Smaller Reporting Company" provides that "[a] foreign private issuer is not eligible to use the requirements for smaller reporting companies unless it uses the forms and rules designated for domestic issuers and provides financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles."⁷² Accordingly, while the Proposal includes an exemption from the Scope 3 GHG emissions disclosure for SRCs,⁷³ the Proposal suggests that FPIs excluded from the definition of an SRC solely as a result of Instruction 2 to the definition thereof would be subject to the Scope 3 GHG emissions disclosure requirements, notwithstanding being subject to the same resource constraints as SRCs not carved-out by Instruction 2.⁷⁴ We do not

⁷² Proposed 17 CFR 240.12b-2, Instruction 2.

⁷³ See Proposed 17 CFR 229.1504(c)(3).

⁷⁴ *Id.*

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believe that the Proposal was intended to subject such FPIs to Scope 3 GHG emissions disclosure requirements, and respectfully request that to the extent the exemption from Scope 3 GHG emissions disclosure is limited to SRCs and not otherwise expanded to all FPIs, the Commission clarify that FPIs that would otherwise qualify as SRCs, but for Instruction 2, also be exempt from the Scope 3 GHG emissions disclosure requirements.

2. CHILLING EFFECT ON DISCLOSURES AND GOAL-SETTING

a. *Strategy and Risk Disclosures*

The Proposal would require companies to disclose climate-related risks and management's role in identifying, assessing and managing those risks.⁷⁵ Companies would also be required to describe any analytical tools and strategies, such as scenario analyses, internal carbon pricing, the use of carbon offsets and RECs and other techniques that such companies use to assess and/or mitigate the impacts of climate-related risks on their businesses, or to support the resilience of their strategy and business models.⁷⁶ The Proposal similarly requires companies to disclose any efforts to reduce GHG emissions or otherwise mitigate exposure to transition risks, in addition to estimates and assumptions impacted by such climate-related events and transition activities.⁷⁷ Mandating disclosure of such information (such as scenario analyses, internal carbon pricing and other strategies and methodologies) will become an additional area of litigation risk for companies and may have the effect of chilling such activities by companies in light of the significant new disclosure requirements called for by the Proposal. Dimensional also made this point in its comment letter relating to the Proposal and expressed the concern that requiring such disclosures:

could unintentionally deter companies from using these strategic planning tools, or it could inadvertently encourage firms to view them as a superficial exercise for marketing purposes, rather than as a tool to inform corporate planning. Companies may be reluctant to ask challenging questions about the resilience of their business if they must disclose all of the scenarios considered and the projected financial impacts on their business under each scenario. Therefore, [Dimensional] urge[s] the Commission not to require disclosures relating to internal carbon prices, scenario analysis, or transition plans.⁷⁸

Further to this point, companies who were disclosing scenario analyses and similar methodologies in an effort to support their business planning would come under significant pressure to “get it right” given enhanced potential liability associated with such mandated

⁷⁵ See Proposed 17 CFR 229.1503(a).

⁷⁶ See Proposed 17 CFR 229.1502(e)–(f), 1503(a), 1506(d).

⁷⁷ See Proposed 17 CFR 229.1503(a).

⁷⁸ Dimensional Comment Letter at 2–3.

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disclosures under the Proposal. Therefore, some companies may abandon climate change modeling altogether rather than disclose an analysis of the full spectrum of possible climate outcomes for fear that a comprehensive risk approach may yield information which puts the company in an unfavorable light and opens it up to litigation risk with regulators and the plaintiffs' bar.

b. Target/Goal Setting

Proposed Regulation S-K, Item 1506 would require companies to disclose whether and how the board sets both short and long-term climate-related targets and goals, how the board oversees and measures progress against such targets and goals, and detailed quantitative and qualitative data reflecting progress the company has made toward achieving such targets and goals (to be updated on a yearly basis).⁷⁹ This required data disclosure extends beyond just GHG emissions goals to include any other climate-related target or goal (*e.g.*, regarding energy usage, water usage, conservation or ecosystem restoration or revenues from low carbon products) such as actual or anticipated regulatory requirements, market constraints or other goals established by a climate-related treaty, law, regulation, policy or organization.⁸⁰ It should also be noted that there is no "materiality" threshold for information regarding target- and goal-related disclosures under the Proposal. Thus, companies will also be required to disclose any Scope 3 GHG emissions-related targets and goals irrespective of materiality.⁸¹

Importantly, under the Proposal as written, it appears that this disclosure rule would apply to both publicly stated *and* internal climate-related targets and goals, raising competition concerns and significant cost and implementation challenges⁸² (*see* Section 4 below for a more detailed discussion of competitive harm). The proposed targets and goals disclosure requirements may penalize companies that have set climate-related goals and targets, even internal goals that have not been made public, by triggering this ongoing disclosure obligation. Companies may find that the benefits of setting and achieving climate-related goals do not outweigh the burdensome costs, which may result in chilling climate-related goal setting and have the effect of causing companies to scale back initiatives to make positive climate-related changes to their businesses.

While many companies already voluntarily publish climate-related goals in annual sustainability reports or elsewhere on their websites, many choose not to include these disclosures in their public filings for fear that including such information in their public filings will expose them to heightened potential liability and related litigation risks if such goals are not met as described. Companies that are still in the development stage of implementing

⁷⁹ *See* Proposed 17 CFR 229.1506(a)(1), (b), (c).

⁸⁰ *See* Proposed 17 CFR 229.1506(a)(1).

⁸¹ *See* Proposed 17 CFR 229.1504(c)(1).

⁸² The Proposal does not make a distinction between publicly stated goals and internal goals.

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sophisticated scenario modeling, climate change-impact projections and disclosure frameworks would be forced to disclose their targets and goals before they are prepared to absorb the additional costs and risks. These companies may find that the most efficient way to mitigate such costs and risks is simply to abandon the important practice of setting climate-related goals in order to side-step the disclosure burden altogether. The rules therefore may have the perverse effect of discouraging companies from taking the initiative to set and achieve climate-related goals, which would be counter to the Commission's purposes with the Proposal. Furthermore, certain companies such as FPIs in certain jurisdictions are required by foreign law to set such objectives and create transition plans and would be disproportionately impacted by the Proposal in being (i) required to provide extensive disclosure around such matters as required by the Proposal and (ii) subject to multiple and potentially conflicting standards around such disclosure.

3. COMPETITIVE AND OTHER HARMS

a. Individual Company Competitive Harm

The Proposal would require companies to disclose processes that are in place for identifying, assessing and managing climate-related risks,⁸³ along with the impact of such risks on the company's business strategy, financial planning, capital allocation, business model and outlook.⁸⁴ These provisions are likely to disproportionately affect companies that operate in industries that are more acutely affected by environmental conditions, namely, the energy industry, and cause these companies to divulge confidential strategic information to their competitors, including those companies which are not subject to these requirements and, in essence, competitively disadvantaging companies subject to these rules.

Companies would also be required to describe any analytical tools, such as scenario analysis, that they use to assess the impact of climate-related risks on their business.⁸⁵ Such analytical tools are an important part of strategic environmental management and planning and, therefore, an essential part of certain companies' business strategies to continue to succeed in an increasingly complex and challenging regulatory environment and market. Competitive harm is likely to result among industries that are compelled to make the disclosures called for in the Proposal and especially those industries more acutely impacted by environmental conditions.

b. Harm to Important Environmental Markets

The Proposal also requires companies to disclose whether they use carbon offsets or RECs as part of their climate strategy.⁸⁶ Further, companies are required to exclude the impact

⁸³ See Proposed 17 CFR 229.1503(a).

⁸⁴ See Proposed 17 CFR 229.1502(c).

⁸⁵ See Proposed 17 CFR 229.1502(f).

⁸⁶ See Proposed 17 CFR 229.1506(b)(6), (d).

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of any purchased or generated offsets when disclosing Scopes 1, 2 and 3 GHG emissions.⁸⁷ These aspects of the Proposal would cause significant competitive harm to carbon offset and REC markets, participants in those markets and efforts to transition to a low carbon economy, as discussed briefly below.

Carbon markets, including carbon offsets, are a very important tool to reach global climate goals, particularly in the short and medium term, as has been recognized in the Paris Agreement,⁸⁸ which the Biden Administration supports.⁸⁹ There is an extensive domestic market and regulatory framework governing carbon offsets, and the requirements of the Proposal could inadvertently undermine the legitimate role that carbon offsets play in the transition to a low carbon economy. Various U.S. regulatory programs (*e.g.*, California’s Cap-and-Trade Program⁹⁰ and the Regional Greenhouse Gas Initiative (“RGGI”)⁹¹) and international efforts⁹² are working to ensure the integrity of these instruments. In some cases, these efforts have been ongoing for many years.⁹³

In addition, the Commodity Futures Trading Commission (“CFTC”), a regulator that, unlike the Commission, has regulated energy- and environmental-related products for many

⁸⁷ See Proposed 17 CFR 229.1504(a)(2).

⁸⁸ See *What You Need to Know About Article 6 of the Paris Agreement*, World Bank (May 17, 2022), available at <https://www.worldbank.org/en/news/feature/2022/05/17/what-you-need-to-know-about-article-6-of-the-paris-agreement> (“[U]nder Article 6, . . . countries[] will be able to transfer carbon credits earned from the reduction of GHG emissions to help one or more countries meet climate targets. . . . Article 6.2 creates the basis for trading in GHG emission reductions . . . across countries.”).

⁸⁹ See, *e.g.*, Fact Sheet: President Biden Renews U.S. Leadership on World Stage at U.N. Climate Conference (COP26) (Nov. 1, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/01/fact-sheet-president-biden-renews-u-s-leadership-on-world-stage-at-u-n-climate-conference-cop26/> (touting that “[o]n day one in office, President Joe Biden rejoined the Paris Agreement, restored U.S. leadership on the world stage, and reestablished our position to tackle the climate crisis at home and abroad.”).

⁹⁰ See, *e.g.*, California Air Resources Board, *Cap-and-Trade Program*, available at <https://ww2.arb.ca.gov/our-work/programs/cap-and-trade-program> (“The Cap-and-Trade Program is a key element of California’s strategy to reduce greenhouse gas emissions. It complements other measures to ensure that California cost-effectively meets its goals for greenhouse gas emissions reductions.”).

⁹¹ See, *e.g.*, RGGI, *Elements of RGGI*, available at <https://www.rggi.org/program-overview-and-design/elements> (“The Regional Greenhouse Gas Initiative (RGGI) is a cooperative effort among the states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, Vermont, and Virginia to cap and reduce power sector CO₂ emissions.”).

⁹² See, *e.g.*, Taskforce on Scaling Voluntary Carbon Markets, *New Governance Body Formed to Ensure Integrity of Voluntary Carbon Markets*, available at <https://www.iif.com/tsvcm/Main-Page/Publications/ID/4621/New-Governance-Body-Formed-to-Ensure-Integrity-of-Voluntary-Carbon-Markets>.

⁹³ See, *e.g.*, RGGI, *U.S. Policy* (2013), available at <https://www.c2es.org/wp-content/uploads/2013/12/rggi-brief.pdf> (stating that RGGI was established in 2005 and conducted its first emission allowance auction in 2008).

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years, is becoming more active in carbon-related market oversight.⁹⁴ The CFTC recently held a “Voluntary Carbon Markets Convening”⁹⁵ on June 2, 2022, “to discuss issues related to the supply and demand for high quality carbon offsets, including product standardization and the data necessary to support the integrity of carbon offsets’ greenhouse gas emissions avoidance and reduction claims.”⁹⁶ The CFTC also recently issued a request for information on climate-related financial risks that address carbon offsets to further its role in the regulation of carbon offsets.⁹⁷

As with carbon offsets, RECs are also a very important tool to reach global climate goals.⁹⁸ There are various U.S. regulatory programs (e.g., state renewable portfolio standards⁹⁹) and voluntary programs (e.g., Green-e RECs from the Center for Resource Solutions) that are working to ensure the integrity of these instruments. RECs can be sold on a stand-alone basis

⁹⁴ For example, the CFTC established the Climate Related Financial Market Risk Subcommittee of its Market Risk Advisory Committee, which, in 2020, published the well-received report: *Managing Climate Risk in the U.S. Financial System*, Report to the CFTC’s Market Risk Advisory Committee by the Climate-Related Market Risk Subcommittee (Sept. 2020), <https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>

⁹⁵ See CFTC Press Release No. 8525-22 (May 11, 2022), available at <https://www.cftc.gov/PressRoom/PressReleases/8525-22>. Panelists also “discuss[ed] issues related to the market structure for trading carbon offsets and carbon derivatives as well as perspectives on the challenges and opportunities in these markets.” *Id.*

⁹⁶ *Id.*

⁹⁷ See Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34,856 (June 8, 2022) (stating that the CFTC is seeking public responses to the RFI “to better inform its understanding and oversight of climate-related financial risk as pertinent to the derivatives markets and underlying commodities markets.”). The CFTC also noted that “[p]ublic responses to this request will help to inform the Commission’s next steps in furtherance of its purpose to, among other things, promote responsible innovation.” *Id.*

⁹⁸ See, e.g., Green-e, *Energy Long Renewable Energy Certificate (REC) Disclosure*, available at <https://www.green-e.org/long-rec-disclosure> (“[A] purchase of Renewable Energy Certificates (RECs) supports renewable electricity production in the region of generation. . . . For every unit of renewable electricity generated and put onto the electricity grid, an equivalent amount of RECs is produced. RECs verify exclusive use of the renewable electricity within an electricity market by the REC purchaser, when paired with electricity drawn from that electricity market. Retail purchasers of RECs are using and receiving the benefits of that renewable electricity. [A] REC purchase also helps build a market for renewable electricity. Increased demand for, and generation of, renewable electricity helps reduce conventional electricity generation in the region where the renewable electricity generator is located. It also has other local and global environmental benefits which may include emitting little or no regional air pollution or carbon dioxide.”).

⁹⁹ See, e.g., *Today in Energy*, U.S. Energy Information Administration (Feb. 1, 2022), available at <https://www.eia.gov/todayinenergy/detail.php?id=51118> (“As of the end of 2021, 31 states and the District of Columbia had renewable portfolio standards . . . or clean energy standards”); see also Center for Resource Solutions, *The Legal Basis for Renewable Energy Certificates* at 6 (June 17, 2015), available at <http://resource-solutions.org/wp-content/uploads/2015/07/The-Legal-Basis-for-RECs.pdf> (noting that “[t]he supremacy of RECs to demonstrate the voluntary usage of renewable electricity and the attributes of its production is recognized by the U.S. Environmental Protection Agency (EPA)”).

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(unbundled) or conveyed as part of power purchase agreements (“PPAs”) and virtual power purchase agreements (“VPPAs”). In the latter case, the RECs which are “generated by the renewable electricity generator, are contractually conveyed to the customer in the financial PPA [and] entitle the customer to exclusive rights to make claims about using the generator’s green power and the associated reductions in Scope 2 emissions.”¹⁰⁰ In addition, the FTC has issued guides for the use of Environmental Marketing Claims that cover carbon offsets and RECs.¹⁰¹

Given this landscape, it is unnecessary for the Commission to mandate disclosure requirements for carbon offsets and RECs. The Commission should allow these markets and regulatory developments to further evolve to ensure that, if necessary in the future, disclosure requirements for carbon offsets and RECs accurately reflect the role of RECs in reducing GHG emissions and clearly define RECs’ benefits and risks for the benefit of investors. If the Commission were to move forward with its disclosure requirements on carbon offsets and RECs, it could inadvertently cause confusion among investors regarding the actual benefits and risks of carbon offsets and RECs and could create unintended negative consequences that would be detrimental to the transition to a low carbon economy. Below are non-exhaustive examples to illustrate the foregoing points.

- Excluding carbon offsets from use in calculating Scopes 1, 2 and 3 GHG emissions under the Proposal would have a number of detrimental impacts. As a starting point, the EPA has recognized that many offsets are created from projects that have a significant positive impact on reducing GHG emissions, such as installing low-N₂O catalyst nitric acid plants¹⁰² or capturing methane from anaerobic digestion of dairy waste.¹⁰³ It is therefore illogical to declare all offsets invalid, as the Proposal essentially does by requiring companies to exclude the impact of any purchased or generated offsets when disclosing Scopes 1, 2 and 3 GHG emissions.
- The Proposal states that “the value of an offset may decrease substantially and suddenly if, for example, the offset represents protected forest land that burns in a wildfire and no longer represents a reduction in GHG emissions. In that case, the registrant may need to write off the offset and purchase a replacement.”¹⁰⁴ However, that statement is inaccurate. Offset registries maintain buffers to account for wildfires and the like and will retire/release non-tradeable offsets upon the registry becoming

¹⁰⁰ EPA, *Financial PPA*, available at <https://www.epa.gov/green-power-markets/financial-ppa>.

¹⁰¹ See Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62,122 (Oct. 11, 2012).

¹⁰² See EPA, *Available and Emerging Technologies for Reducing Greenhouse Gas Emissions from the Nitric Acid Production Industry* (Dec. 2010), available at <https://www.epa.gov/sites/default/files/2015-12/documents/nitricacid.pdf>.

¹⁰³ See EPA, *Anaerobic Digestion on Dairy Farms*, available at <https://www.epa.gov/agstar/anaerobic-digestion-dairy-farms>.

¹⁰⁴ Proposal at 21355.

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aware of the non-permanence of a project (e.g., due to a wildfire). Moreover, offset registries do not invalidate offsets in the event that they use up their buffers in response to wildfires or other events,¹⁰⁵ which is why these buffers are often referred to as “insurance” against generated offsets not reducing GHG emissions.¹⁰⁶

- The Proposal does not take into account the distinction between different bundled and unbundled REC products. As indicated by the EPA, a purchaser of RECs can increase their impact on GHG reductions by bundling the RECs with the physical purchase of energy under a PPA or with a financial hedge under a VPPA to enable the construction of actual new renewable energy generation.¹⁰⁷

The disclosures contemplated under the Proposal should not compel material and potentially disruptive changes to the way the markets for RECs and carbon offsets function in

¹⁰⁵ See, e.g., Climate Action Reserve, Reserve Offset Program Manual, Section 2.8.1 (2.8.1 Maintenance and Disposition of the Buffer Pool) (Mar. 12, 2021), available at https://www.climateactionreserve.org/wp-content/uploads/2021/03/Reserve_Offset_Program_Manual_March_2021.pdf (explaining that:

- “[i]n the highly unlikely event that the buffer pool does not contain sufficient supply of credits for a certain project type or program eligibility qualification to compensate for identified, unavoidable reversals for that same project type or program eligibility qualification, the Reserve may opt to retire buffer pool credits of another type. If the aggregate buffer pool still is not sufficient for addressing any identified unavoidable reversals, a situation the Reserve believes to be close to impossible (or indicative of an environmental catastrophe hard to imagine), the Reserve will assess the situation and pursue one or more of the following options depending on what is most suitable:
 - Require an increased buffer pool contribution from existing projects
 - Revise reversal risk ratings within relevant protocols upwards for future reporting to compensate for the unavoidable reversals
 - Purchase and retire an adequate amount of similar credits through the Reserve’s Blind Trust
 - Consult with affected project developers to determine an appropriate course of action[.]”).

See also JP Brisson and Mike Dreibelbis, Managing Offset Risk at 11, *Presentation at the Managing Offset Risk: Golden Offsets, Offset Insurance and Other Measures to Address Invalidation & Buyer Liability Climate Action Reserve Special Topics Webinar* (June 20, 2013), available at <https://www.climateactionreserve.org/wp-content/uploads/2009/05/Offset-Risk-Webinar-Slides-v2-1.pdf> (listing reversals as “Not Grounds for Invalidation”).

¹⁰⁶ See, e.g., Carbon Offset Guide, *How Carbon Offset Programs Address Permanence*, available at <https://www.offsetguide.org/high-quality-offsets/permanence/how-carbon-offset-programs-address-permanence/> (stating that “[m]ost carbon offset programs have established ‘buffer reserves’ to address the risk of GHG reductions being reversed.[.] Under this approach, offset credits from individual projects are set aside into a common buffer reserve (or ‘pool’), which functions as an insurance mechanism. . . . Buffer reserves can effectively compensate for reversals due to natural disturbance risks—such as fire, disease, or drought affecting forests and soils.”).

¹⁰⁷ See, e.g., U.S. EPA Green Power Partnership, *Understanding Renewable Energy Certificates (RECs) and the Green Power Procurement Process* at 11 (PPA bundling); EPA, Financial PPA, available at <https://www.epa.gov/green-power-markets/financial-ppa> (VPPA bundling).

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order for a company to meet its disclosure requirements.¹⁰⁸ For instance, the Proposal calls for the disclosure of the costs of a REC,¹⁰⁹ which does not take into account that RECs bundled with energy under a PPA or a financial hedge under a VPPA do not price RECs separately under current market practices.¹¹⁰ The Proposal also calls for the disclosure of the source of carbon offsets and RECs¹¹¹ but does not take into account that various exchanges (some of which are regulated by the CFTC) specify that the integrity of the carbon offsets and RECs sold and purchased under these contracts are verified by a third-party registry or tracking system without specifying the source of the carbon offset or REC.¹¹²

4. LITIGATION RISK

The Proposal is likely to be subject to significant legal challenges if adopted, particularly as exceeding the Commission’s delegated authority and as violating the First Amendment.

With respect to delegation, the Proposal is almost certain to be challenged as overstepping the Commission’s regulatory authority. In recent years, the U.S. Supreme Court has taken a more aggressive approach to reviewing claims that agency action has exceeded its delegated authority, striking down regulations that invoke expansive agency powers.¹¹³ In so doing, the Court has emphasized that it “expect[s] Congress to speak clearly when authorizing an

¹⁰⁸ For instance, VPPAs often are bundled with RECs. *See, e.g.*, Urban Grid, *Quick Guide to Virtual Power Purchase Agreements* (Feb. 11, 2019) (“[In a VPPA, t]ypically, the buyer receives the project’s . . . [RECs].”), available at <https://www.urbangridsolar.com/quick-guide-to-virtual-power-purchase-agreements/>. VPPAs “allow[] smaller buyers and those companies without energy trading expertise to participate [in the corporate renewable energy market].” *See* Rachit Kansal, RMI, *Introduction to the Virtual Power Purchase Agreement* (2019), available at <https://rmi.org/insight/virtual-power-purchase-agreement/>. VPPAs also “are easily scalable and enable buyers to satisfy a large portion of their sustainability goals with a relatively small number of deals. For example, Fifth Third Bank was able to meet its 100% renewable energy goal with just one VPPA.” *See id.* Given the cost, liability concerns and other issues with the Proposal described in this comment letter, we are concerned that the Proposal would cause smaller or infrequent users to forego using RECs.

¹⁰⁹ *See* Proposal at 21406.

¹¹⁰ *See, e.g.*, Urban Grid, *Quick Guide to Virtual Power Purchase Agreements* (Feb. 11, 2019), available at <https://www.urbangridsolar.com/quick-guide-to-virtual-power-purchase-agreements/> (explaining that “[u]nlike a traditional Unbundled REC purchase, which always costs money, the VPPA swap provides RECs at a price determined by the net difference between the fixed VPPA Price and the wholesale market price.”).

¹¹¹ *See* Proposal at 21406.

¹¹² *See, e.g.*, NYMEX CBL Global Emissions Offset Futures contract specifications, available at <https://www.cmegroup.com/content/dam/cmegroup/rulebook/NYMEX/12/1269.pdf>; ICE Futures U.S. Maryland Solar Renewable Energy Credit Future contract description, available at <https://www.theice.com/products/65898878/Maryland-Solar-Renewable-Energy-Credit-Future>.

¹¹³ *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022) (per curiam) (striking down OSHA’s regulations regarding employee vaccinations for COVID-19); *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (holding that the COVID-19 eviction moratorium exceeded the CDC’s delegated authority).

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agency to exercise powers of vast economic and political significance.”¹¹⁴ Given this standard, the Court may be skeptical of the Commission’s claim that it has the authority to enact the Proposal. The Proposal indisputably involves issues “of vast economic and political significance” as executive officials, including one Commissioner, have recognized.¹¹⁵

Moreover, there is no clear statutory source or historical precedent for the Commission’s attempt to require GHG emissions and other climate-related disclosures that the Proposal mandates. The Commission relies on its power to promulgate regulations that are, “necessary or appropriate in the public interest or for the protection of investors.”¹¹⁶ But the Commission’s previous disclosure rules—even its previous climate-related guidance—limited required disclosures to those that had a direct and material impact on a company’s risk profile and financial performance.¹¹⁷ Further, the breadth of the Proposal, which requires GHG emissions and other climate-related disclosures from all registered companies, regardless of whether those entities face significant climate-related risks or whether those risks directly impact their risk profile or financial viability, goes far beyond this historical precedent. Moreover, the Commission’s claim to authority over climate-related information is made even more questionable given Congress’s decision, through the Clean Air Act, to delegate to the EPA the authority to regulate reporting of climate-related data, including GHG emissions.¹¹⁸

¹¹⁴ *Nat’l Fed’n of Indep. Bus. v. OSHA* at 665 (2022) (quoting *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489).

¹¹⁵ Commissioner Allison Herren Lee, *Shelter from the Storm: Helping Investors Navigate Climate Change Risk*, U.S. SECURITIES AND EXCHANGE COMMISSION (Mar. 21, 2022) (“This is a watershed moment for investors and financial markets as the Commission today addresses disclosure of climate change risk—one of the most momentous risks to face capital markets since the inception of this agency.”); Chairman Gary Gensler, *Statement on Proposed Mandatory Climate Risk Disclosures*, U.S. SECURITIES AND EXCHANGE COMMISSION (Mar. 21, 2022) (“Today, investors representing literally tens of trillions of dollars support climate-related disclosures because they recognize that climate risks can pose significant financial risks to companies, and investors need reliable information about climate risks to make informed investment decisions.”); President Biden, *Remarks by President Biden Before Signing Executive Actions on Tackling Climate Change, Creating Jobs, and Restoring Scientific Integrity*, WHITE HOUSE (Jan. 27, 2021) (describing climate change as an “existential threat” and “one of the most pressing threats of our time”), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/27/remarks-by-president-biden-before-signing-executive-actions-on-tackling-climate-change-creating-jobs-and-restoring-scientific-integrity/>.

¹¹⁶ 15 U.S.C. § 77g; 15 U.S.C. §§ 78l, 78m, and 78o.

¹¹⁷ See, e.g., Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6297 (Feb. 8, 2010) (describing how existing disclosure requirements apply to require companies to make climate-related disclosures that have a direct and material impact on their risk profile and financial performance).

¹¹⁸ See 42 U.S.C. § 7414(a)(1) (giving the EPA the authority to require disclosures of certain emissions); Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56260 (Oct. 30, 2009) (using EPA delegated authority to require reporting of GHG emissions from all sectors of the economy); see also *Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 569–70 (1979) (“The existence of [ERISA] governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Acts to noncontributory, compulsory pension plans.”).

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In addition to this challenge to the Commission’s power, regulated entities may also challenge the Proposal under the First Amendment, claiming it unconstitutionally compels speech. The First Amendment protects “both the right to speak freely and the right to refrain from speaking at all,”¹¹⁹ and its protection against compelled speech extends fully to “business corporations.”¹²⁰ Although this protection does not preclude all government-mandated disclosures, it does preclude such disclosures if the agency fails to provide sufficiently credible justifications for the disclosure requirement.¹²¹ The Proposal will likely be subject to (at a minimum) intermediate scrutiny,¹²² meaning the Proposal must directly advance a substantial government interest and be “narrowly drawn” to advance the interest it serves.¹²³ Given the breadth of the requirements in the Proposal, and the fact that many of these requirements are not limited by a materiality qualifier, there is substantial risk that a court will find it is not narrowly drawn to advance the government’s stated interest of protecting investors. This is particularly true given that the Commission has previously used a more targeted alternative for ensuring that material climate-related risks were disclosed—namely, providing guidance to regulated entities that showed how existing Commission disclosure requirements mandate reporting of certain climate-related risks that have a material impact on a company’s financial viability and risk profile.¹²⁴ Indeed, an argument could be made that the Proposal ultimately undermines (rather than advances) the government’s investor-protection interest, as the breadth of the disclosures it requires may make it difficult for investors to sift out material information.

* * * * *

Thank you for your attention to this matter.

Very truly yours,

/s/ Jones Day

¹¹⁹ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

¹²⁰ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995).

¹²¹ *See, e.g., Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) (striking down compelled disclosure of corporations’ use of “conflict minerals”).

¹²² *Id.* (holding that SEC disclosure requirement was, at minimum, subject to intermediate scrutiny as commercial speech under *Central Hudson*).

¹²³ *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 565 (1980).

¹²⁴ *See, e.g., Commission Guidance Regarding Disclosure Related to Climate Change*, 75 Fed. Reg. 6296–97 (Feb. 8, 2010).