

June 17, 2022

The Honorable Gary Gensler
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

VIA EMAIL (rule-comments@sec.gov)

Re: Comments of the American Petroleum Institute on the Proposed Rule “The Enhancement and Standardization of Climate-Related Disclosures for Investors,” SEC File No. S7-10-22.

Dear Chairman Gensler:

The American Petroleum Institute (API) submits these comments on the Securities and Exchange Commission’s (“SEC” or “Commission”) proposed rule called, “The Enhancement and Standardization of Climate-Related Disclosures for Investors” (“the Proposal”).¹

API represents all segments of America’s oil and natural gas industry. Its over 600 members produce, process, and distribute most of the nation’s energy. The industry supports millions of U.S. jobs and is backed by a growing grassroots movement of millions of Americans. API was formed in 1919 as a standards-setting organization. In our first 100 years, API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability.

The challenge of meeting the world’s growing need for energy while ushering in a lower-carbon future is massive, intertwined, and fundamental. It is the opportunity of our time—governments, industries, and consumers must rise to seize it together. Our industry is essential to supplying energy that makes life modern, healthier, and better—while doing so in ways that tackle the climate challenge: lowering greenhouse gas (GHG) emissions, increasing efficiency, advancing technological innovation, building modern infrastructure, and more.

Meeting this effort requires new approaches, new partners, new policies, and continuous innovation. To that end, we have laid out a Climate Action Framework that presents actions we are taking to accelerate technology and innovation, further mitigate GHG emissions from operations, endorse a carbon price policy, advance cleaner fuels, and, importantly, drive consistent, comparable, and reliable climate reporting.²

API supports timely and accurate reporting of GHG emissions from all emitting sectors in the economy to provide a transparent fact base to address climate change through market-based solutions and appropriate government policy. API members are committed to transparency and recognize the importance of climate-related information to policymakers and industry stakeholders. To that end, API is promoting the continued improvement of industry reporting of GHG emissions and is working to enhance consistency, comparability, and reliability of reporting. We work with partners—the International Petroleum Industry Environmental Conservation

¹ 87 Fed. Reg. 21,334 (Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, and 249).

² API, *Climate Action Framework* (last visited June 13, 2022), <https://www.api.org/-/media/Files/EHS/climate-change/2021/api-climate-action-framework.pdf?la=en&hash=E6BB3FA3013B52153E10D3E66C52616E00411D20>.



Association (IPIECA) and the International Association of Oil & Gas Producers (IOGP)—to update sector-wide guidance for sustainability reporting, providing companies a common framework for assessing environmental, social, and governance issues.³ In addition, API developed the Guidance Document for GHG Reporting (“Guidance”), which is intended to offer further consistency, comparability, and clarity of information to the industry’s key stakeholders.⁴

Indeed, our members are global leaders in providing stakeholders, including shareholders and other investors, information about GHG emissions, emissions reductions, and policies and practices our industry is advancing to address climate risks and transition opportunities. Therefore, API supports government action and policies that enable and enhance our efforts to ensure energy delivery and GHG emissions reduction. We also recognize the need for and support the SEC’s role of ensuring that investors have relevant and reliable material information on management decisions, business risks, and financial results to make informed decisions on how to invest and how to vote. We understand that this could include information on a registrant’s actions or considerations of the risks and objectives regarding climate change when that information is material under the federal securities laws.

Despite the Proposal’s stated objective, API cannot support the Proposal as currently written. The Proposal will lead to the inclusion of immaterial and likely unreliable information in registrants’ financial statements and other SEC mandated disclosures. Investors would be inundated with data and other information—determined based on a host of assumptions and estimates, subject to significant data limitations, and dependent on third parties to provide to registrants that simply may not be available—that would neither be comparable nor consistent across registrants, eroding the usefulness of the information to informed investor decision-making. The Proposal also presents too many undue costs and impositions on registrants that undermine established concepts of materiality or overwhelm the potential benefits normally associated with filed disclosures that provide clear decision-useful information to investors in a reasonable manner. These issues make the Commission’s expansive and costly proposed changes to Regulations S-X as well as other aspects of the proposed disclosures under Regulations S-K simply unworkable and contrary to the SEC’s goal of more consistent, comparable, and reliable information for investors.

Therefore, we strongly urge the Commission to reject proposed changes to Regulation S-X, as well as Regulation S-K, and consider alternative approaches that would better serve investors and would allow the SEC to achieve its stated goal in advancing this rulemaking. In Section IV, we discuss recommendations to revise the proposed reporting requirements to make them far more useful to investors and less burdensome and costly to public companies. We believe that the recommended alternatives below will avoid likely unintended consequences of the Commission’s current proposal, such as investor confusion and overwhelming investors with non-material information, firms choosing not to go public, limitations on capital formation, and other impacts which we discuss in more detail below. More specifically, we believe:

1. That the current rules around the long-standing, judicially accepted understanding of “materiality” under the federal securities laws already require registrants to file material information in their SEC filings. Any new regulations should conform to the traditional understanding of materiality and appropriately limit any new mandatory reporting obligations

³ IPIECA, API & IOGP, *Sustainability Reporting Guidance For the Oil and Gas Industry* (2020), <https://www.ipieca.org/our-work/sustainability/performance-reporting/sustainability-reporting-guidance/>.

⁴ API, *Guidance Document for GHG Reporting* (Mar. 2022), <https://www.api.org/-/media/Files/Policy/ESG/GHG/Guidance-API-Template-for-Climate-related-Reporting-Initiative-March-2022.pdf?la=en&hash=44F7B339AB25B383E74EA991E8AF50B971EBC6CD>.



to information material to a reasonable investor’s investment or voting decision, taking into account the “total mix of available information.”

2. If the Commission determines that additional information that is not material should be required to be disclosed, then registrants should be allowed to furnish, rather than file, such climate-related information. That said, entirely aside from whether it is furnished or filed, the SEC should not mandate granular, line-item financial metric information such as the Regulation S-X metrics included in the Proposal. We explain why this alternative approach would foster the provision of more descriptive information that stakeholders demand, as demonstrated by the well-accepted GHG emission protocols that our industry and many other industries already use. These protocols are still evolving and improving, which is a significant advantage compared to the fixed, one-size-fits-all, and less informative disclosure of non-material information that the Proposal would require.
3. Issuers could report quantitative Scope 1 and Scope 2 emissions data through better established metrics that will not conflict with existing GHG reporting obligations and widely used frameworks such as the GHG Protocol.
4. The Commission should recognize the inherent limitations with accurately reporting Scope 3 emissions and not require Scope 3 reporting. The Commission should recognize that some issuers may decide that certain categories of their Scope 3 emissions can be accurately quantified and choose to report that information to investors voluntarily because they deem it important.
5. Any requirements included in any final rule must apply prospectively, as mandating information from registrants or firms that were previously not required to capture such information is unworkable.
6. Any final rule should have a multi-year phase in of up to five years to comply with new requirements in recognition of the extremely complex and unprecedented nature of the accounting work, software development, systems reconfigurations, training, data collection, and outside-consultant demands of the Proposal.
7. Any final rule should enhance and expand the safe harbors to recognize the evolving nature and inherent uncertainties of GHG emissions reporting and assessing climate risks as well as the potential reliance upon third parties for certain data. Issuers should especially be shielded from liability for forward-looking statements and other disclosures based on estimates, third-party data, and developing methodologies, and from any inaccuracy in the reporting applicable to the entirety of the climate disclosures that the Commission adopts.

Alternatives aside, API has significant concerns about the legality of the Proposal as currently drafted. As explained below, the Proposal exceeds the Commission’s legal authority. The text, context, and history of the Securities Act of 1933, as amended (the “Securities Act”), and the Securities Exchange Act of 1934, as amended (the “Exchange Act”), demonstrate that the Commission’s authority is far more delimited than the Proposal contemplates. Major aspects of the Proposal would be rejected by the courts because Congress did not authorize the SEC to address them. Requirements of the Proposal that would compel issuers to discuss topics of major political and policy significance that are not material to securities offerings and trading raise serious First Amendment concerns. Furthermore, the Proposal fails to consider important aspects of the problem that the



Proposal seeks to confront and its implications, which would render any final rule arbitrary and capricious and contrary to law. And the Proposal's assessment and evaluation of the costs and benefits and comparison to reasonable alternatives are inadequate, which also would render a final rule unlawful. Unless the Proposal is significantly revised and resubmitted for further comment, it will be unlawful, will not achieve the Commission's objectives, and will only delay any workable mandatory climate disclosure regime.

We look forward to the opportunity to constructively discuss these issues with the Commission and the SEC staff and to help the Commission advance alternative approaches that would be within the ambit of the authority vested in the SEC by Congress and more helpful to investors.

I. The Proposal Must Be Modified to Stay Within the Commission's Legal Authority.

The Proposal, as currently written, suffers from legal flaws that will undermine the validity of any final rule and the Commission's objectives. Although information regarding climate risks and transition opportunities is important to many investors and companies, as evidenced by the Form 10-Ks and sustainability reports published by API members, the Proposal imposes an unprecedented degree of granularity and would require official reporting through the stringent requirements of Regulations S-X and S-K on predictive judgments that fall far outside of what federal securities laws demand. The Proposal also raises serious constitutional questions under the separation of powers. Furthermore, aspects of the Proposal would violate the First Amendment's prohibition against compelled speech. If the Commission does not significantly alter the Proposal to address these concerns, then the final version of the rule will be vulnerable to invalidation on legal grounds.

A. The Text, Context, and History of the Securities Act and the Exchange Act Demonstrate that the Proposal Exceeds the Commission's Statutory Authority.

The Commission offers the Proposal "under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act."⁵ According to the Commission, it has broad authority under these sections to promulgate *any* disclosure requirements that are "necessary or appropriate in the public interest or for the protection of investors," with no subject-matter restriction.⁶ It is understood that a general interpretation of investors can be broad, but the disclosure rules focus on investors *as investors* focused on financial returns and not investors that have other primary objectives or motivating reasons. These reasonable perspectives prevent a nearly limitless understanding of the Commission's authority that is contrary to the text, context, and history of the Securities Act and the Exchange Act.

It is a fundamental tenet of administrative law that an agency "literally has no power to act . . . unless and until Congress confers power upon it."⁷ For this reason, the Commission's authority to promulgate the Proposal is limited by the Acts by which Congress enabled the Commission to make public-disclosure rules.⁸ The statutory text, context, and history of the Securities Act and Exchange Act show that the Commission's authority under both Acts is cabined to matters that are necessary or appropriate to further the specific principles and directives of the Acts. Specifically, the Acts require the Commission to (1) ensure that investors receive *financial* and other *significant information* concerning *securities* offered for sale; (2) prohibit deceit, misrepresentations and other

⁵ 87 Fed. Reg. at 21,462 .

⁶ *Id.* at 21,335.

⁷ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

⁸ *New York Stock Exch. LLC v. SEC*, 962 F.3d 541, 554 (D.C. Cir. 2020) (The Commission "cannot . . . act with the force of law without delegated authority from Congress.").



fraud in connection with the *purchase or sale of securities*; and (3) take measures necessary to regulate and oversee brokerage firms, transfer agents, securities exchanges, and certain other financial market participants.⁹ The Securities Act and Exchange Act empower the Commission in several provisions to make rules “necessary” or “appropriate” to fulfill these directives. In promulgating the Proposal, the Commission relies on numerous of these “necessary” or “appropriate” provisions, two of which are general rulemaking provisions—Section 19(a) of the Securities Act and Section 23(a) of the Exchange Act—and several of which are specific rulemaking provisions—Sections 7(a)(1) and 10(c) of the Securities Act and Sections 12(b)(1), 13(a), and 15(d)(1) of the Exchange Act.¹⁰ These rulemaking provisions “must be read in their context and with a view to their place in the overall statutory scheme.”¹¹

When read in context, the relevant “necessary” or “appropriate” rulemaking provisions delimit the Commission’s authority to require the disclosure of information in support of its overall mission and if it is closely connected with the value of a registrant’s securities. The cited provisions do not give the Commission the boundless authority to require disclosures on any topic it deems in the public interest.

The Proposal cites two general rulemaking provisions, neither of which authorizes the Proposal. Section 19(a) of the Securities Act enables the Commission to “make . . . rules and regulations as may be necessary to carry out the provisions of [the Securities Act].”¹² Comparably, Section 23(a) of the Exchange Act enables the Commission “to make such rules and regulations as may be necessary or appropriate to implement the provisions of [the Exchange Act].”¹³ These provisions alone do not “empower the agency to pursue rulemaking that is not otherwise authorized.”¹⁴ Rather, these general grants of rulemaking authority only authorize rulemaking to “implement” or “carry out” another “provision” of the Act. Standing alone these grants of general rulemaking authority do not authorize the Commission to finalize the Proposal.

The statutory context of Section 19(a) of the Securities Act further supports a limited reading of the provision. In Section 19(a), following the grant of general rulemaking authority, the Act lists examples of the types of rules the Commission can promulgate under the provision. For instance, the Commission can generate forms, detail items included on a balance statement, and dictate methods to be followed in the preparation of accounts.¹⁵ Rather than authorizing broad disclosures on topics not envisioned by the Securities Act, the examples show that Congress authorized the Commission to use its general rulemaking power to establish the particulars necessary to fulfill specific directives in the securities laws.

The specific rulemaking provisions cited by the Commission, when read in context, similarly fall short of

⁹ SEC, *The Laws that Govern the Securities Industry*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/role-sec/laws-govern-securities-industry#:~:text=Often%20referred%20to%20as%20the,in%20the%20sale%20of%20securities> (last visited Apr. 29, 2022). *See generally* 15 U.S.C. §§ 77(a)-(mm), 78(a)-(pp).

¹⁰ 15 U.S.C. at §§ 77s(a), 78w(a), 77g(a)(1), 77j(c), 78l(b)(1), 78m(a), 78o(d)(1).

¹¹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (cleaned up) (noting requirement “is a fundamental canon of statutory construction”).

¹² 15 U.S.C. § 77s(a).

¹³ *Id.* § 78w(a)(1).

¹⁴ *New York Stock Exch. LLC*, 962 F.3d at 556. In *New York Stock Exchange LLC*, the Court vacated the SEC’s Pilot Program Rule 610T promulgated under its general rulemaking authority in Section 23(a) of the Exchange Act. *Id.* The Court relied on Supreme Court precedent which made clear that the mere reference to “necessary” or “appropriate” in a statutory provision authorizing an agency to engage in rulemaking does not afford the agency authority to adopt regulations as it sees fit with respect to all matters covered by the agency’s authorizing statute. *Id.* (citing *Michigan v. EPA*, 576 U.S. 743, 751 (2015)).

¹⁵ 15 U.S.C. § 77s(a).



giving the Commission the authority to finalize the Proposal without significant modification.

First, the rulemaking provision in Section 7(a)(1) of the Securities Act, which provides that the SEC may adopt rules to require a registration statement to include information or documents as “necessary or appropriate in the public interest or for the protection of investors,” takes on a more circumscribed meaning when read in context.¹⁶ Section 7 requires that a registration statement for a security be accompanied by the documents specified in Schedule A.¹⁷ Schedule A lists 32 documents that reveal information about the key actors involved with and the financial health of the registrant. Schedule A requires, for example, that a registrant include the names and addresses of the directors, the amount of securities of the issuer held by those directors (and other key persons), and the amount of the funded debt outstanding.¹⁸ Schedule A items are “largely financial in nature,”¹⁹ and are “indispensable to any accurate judgment upon the value of a security.”²⁰

Section 7(a)(1) details the SEC’s role in clarifying a registration statement’s requirements—the Commission may exclude and supplement the required Schedule A information.²¹ When Section 7(a)(1)’s “necessary or appropriate” specific rulemaking provision is read in this context, it becomes clear that the Commission may require the disclosure of additional Schedule A-type documents. But because Schedule A documents are largely financial in nature, the Commission’s rulemaking authority from Section 7(a)(1) cannot extend to requiring registrants to broadly disclose climate-related information.

Second, a similar contextual analysis applies to Section 10(c) of the Securities Act, which governs the information required in a registrant’s prospectus. Section 10(c) provides that “[a]ny prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.”²² Like with the registration statement, Section 10(a)(1) of the Securities Act requires that registrants include certain documents and information when filing a prospectus. However, less information is required: prospectus statements must “contain the information contained in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of schedule A[.]”²³ The prospectus thus must include most of the documents discussed above that reveal the key actors involved with and the financial health of the registrant, but some of the more cumbersome documents, such as copies of certain contracts, opinions of counsel, and copies of certain governance documents are excluded.²⁴ Just like with registration statements, Congress enabled the Commission to omit required information and require “other” Schedule-A type information in a prospectus. This provision does not give the Commission the statutory authority to finalize the vast new requirements contained in the Proposal when read in context.

Third, Section 12(b)(1) of the Exchange Act, which provides that an application for registering a security

¹⁶ *Id.* § 77g(a)(1).

¹⁷ *Id.*

¹⁸ *Id.* §§ 77AA (4), (7) & (12).

¹⁹ SEC, *Concept Release, Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23,916, 23,921 (Apr. 22, 2016).

²⁰ H.R. Rep. No. 73-85, 73rd Cong., 1st Sess., 1933.

²¹ The SEC may promulgate a rule excluding some Schedule A information from a required disclosure if it concludes the information is not necessary for adequate disclosure to investors in particular classes of issuers. 15 U.S.C. § 77g(a)(1). Further, the SEC may adopt rules to require a registration statement to include other information or documents as “necessary or appropriate in the public interest or for the protection of investors.” *Id.* § 77g(a)(1).

²² *Id.* § 77j(c).

²³ *Id.* § 77j(a)(1).

²⁴ *Id.*



shall contain “information, in such detail as to the issuer [and affiliated entities and persons] as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors, *in respect to the following* [categories of information],” likewise fails to provide the Commission the needed authority to finalize the Proposal.²⁵ Section 12(b)(1)’s rulemaking provision explicitly limits the Commission’s power under that section to enact rules only with respect to 12 specific categories of information, which include: the nature of the business, the terms of outstanding securities, descriptions of directors, officers, and major shareholders, material contracts, balance sheets, profit and loss statements, and other financial statements.²⁶ These categories relate to specific types of information material to the issuer’s business, and do not encompass the broad climate information envisioned by the Proposal.

Fourth, Section 13(a) of the Exchange Act’s rulemaking provision likewise falls short of empowering the Commission to finalize the Proposal when read in context. Section 13(a) provides:

Every issuer of a [registered security] shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information . . . the Commission shall require to keep reasonably current the information [supplied to register securities under Section 12 of the Exchange Act]

(2) such annual reports . . . certified if required . . . by independent public accountants, and such quarterly reports . . . as the Commission may prescribe.²⁷

The SEC’s power to require registrants to file annual and quarterly reports is limited when one reads Section 13(a)’s provisions together with Section 13(b)(1). Section 13(b)(1) specifies that the Commission’s rulemaking power in 13(a) is limited to subjects directly related to “items or details to be shown in the balance sheet and earnings statements,” and related items indicative of financial health, not the degree of granularity and information and policy judgment contemplated by the Proposal.²⁸

This limited reading of Section 13(a) is confirmed by the 1934 House report for the Exchange Act, which emphasizes that annual and quarterly company reports would provide financial and accounting information “to give some assurance that reports will not hide the true condition of the company.”²⁹ Under this limited reading,

²⁵ *Id.* § 78l(b)(1) (emphasis added).

²⁶ *Id.* § 78l(b)(1)(A)-(L).

²⁷ *Id.* § 78m(a)(1)-(2).

²⁸ In full, Section 13(b)(1) provides:

The Commission may prescribe, *in regard to reports made pursuant to this chapter*, the form or forms in which the required information shall be set forth, the items or details to be shown in the balance sheet and the earnings statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer[.]

Id. § 78m(b)(1) (emphasis added).

²⁹ H.R. Rep. No. 73-1383, at 11–13, 24 (1934). The reading is also supported by the fact that Section 13(a)(2) envisions that an annual report would be certified by independent public accountants. It would be unusual for the climate disclosures required by the Proposal (or similar non-financial information) to benefit from review by public accountants who have no expertise in climate information.



Section 13(a) also falls short of empowering the Commission to finalize the Proposal.³⁰

Thus, when the text of the cited provisions of the Securities Act and the Exchange Act are read in context, as they must be, it reveals that Congress has not clearly authorized the Commission to promulgate regulations requiring that registrants disclose, for example, broad information regarding costs incurred addressing past weather events or incomparable assessments of future events and policies that are neither concrete nor sufficiently ascertainable unless those costs and assessments are material to the company and valuing its securities from a financial perspective.

And this reading makes sense. Congress has repeatedly expressed disapproval of the length and complexity of the disclosure burdens on registrants and has instructed the SEC to simplify, not exponentially increase, the disclosure burdens on public companies.³¹ This limited reading of the two securities laws is also confirmed by the historical interpretation of the SEC's authority to require disclosures.

The House Report for the Exchange Act further notes that the Commission did not have “unconfined authority to elicit any information whatsoever.”³² Indeed, where Congress has decided more specific information should be disclosed than the general financial and operational information authorized by the two securities acts, it has expressly authorized the Commission to require additional disclosures. For instance, Congress has used statutory authorizations to require disclosures of very specific aspects of corporate responsibility, corporate governance, and selected aspects of executive compensation.³³ In sum, it is well established that if Congress wants the Commission to require additional reporting, then it says so with specificity.

The understanding of the limits of the SEC's authority under the Acts discussed above is also consistent with the Commission's prior explanations of its own authority. The Commission previously determined that “disclosure relating to environmental and other matters of social concern should not be required of all registrants unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material.”³⁴ In compliance with this understanding, the Commission has *never* interpreted its authority as broadly as it does in promulgating the Proposal.

On the contrary, in response to questions about the importance of environmental and regulatory matters, the Commission repeatedly has taken the position that reporting is limited to matters that are material to the financial health of the issuer and to prevent misrepresentations regarding a corporation's response to regulatory

³⁰ In its legal authority section, the Commission cites several other more minor sections of the Exchange Act which also do not give the Commission the authority to finalize the Proposal. Section 15 of the Exchange Act allows the Commission to require Section 13 disclosures from brokers and dealers, which as explained above, is insufficient to authorize the Proposal. 15 U.S.C. § 78o(d)(1). Section 3(b) of the Exchange Act gives the Commission the authority to “define technical, trade, accounting, and other terms used in the title, consistently with the provisions and purposes of this title.” *Id.* at 78c(b). Section 36 of the Exchange Act gives the Commission the authority to exempt persons or entities from provisions in the Act or other rules and regulations. *Id.* § 78mm.

³¹ Fixing America's Surface Transportation Act, Pub. L. No. 114-94, §§ 72002 & 72003, 15 U.S.C. §§ 77g *note* & 77s *note*, 129 Stat. 1784, 1784-85 (2015) (directing the Commission to revise Regulation S-K to reduce the disclosure burden on emerging growth companies and small issuers and to conduct a study to determine “how best to modernize and simplify” the requirements in Regulation S-K “in a manner that reduces the costs and burdens on issuers while still providing all material information”); Jumpstart Our Business Startups Act of 2012 (JOBS Act), Pub. L. No. 112-106, § 108, 26 Stat. 306, 313 (2012) (requiring the Commission to review Regulation S-K to determine how it could be modernized and simplified and to reduce the costs and burdens of compliance for emerging growth companies).

³² H.R. Rep. No. 73-1383, at 23 (1934) (addressing the list of disclosure topics for registration of securities for trading).

³³ See 81 Fed. Reg. at 23,922.

³⁴ See SEC, *Concept Release, Business and Financial Disclosure Required by Regulation S-K*, 81 Fed. Reg. 23,921, 23,970 (Apr. 22, 2016).



matters.³⁵ For example, in 1976 the SEC declined to adopt broad environmental disclosure rules advocated by environmental groups, explaining that its discretion to adopt disclosure requirements, although broad, was limited to contexts related to the objectives of the federal securities laws, which were designed to require disclosure of financial information in the narrow sense.³⁶

Rather than requiring broad, across-the-board disclosures, the SEC has previously required environmental public disclosures only when the information materially affects the financial health of a company. For forty years—since 1982—the Commission has required registrants to disclose environmental proceedings, like major regulatory activities or enforcement actions, only where they may result in significant, *i.e.*, material, sanctions.³⁷ These disclosures focus on material impacts to a company’s operations, such as material capital expenditures that would be required by a regulatory change, enforcement actions, and material liabilities.

Similarly, in 2010, the Commission explained in an Interpretive Release that *some* registrants may face material financial risks related to climate legislation, regulatory requirements, business and market impacts, and the physical effects of climate change on a registrant’s operations. Consistent with the Securities Act and the Exchange Act, the Commission explained that these limited risks may require disclosure under existing disclosure requirements on a case-by case basis.³⁸

When the text, context, and history of the Securities Act and Exchange Act provisions the Commission relies on are closely examined, the cited provisions are best understood to authorize the SEC to require disclosures related to the financial health of a registrant and to give investors a true picture of the securities on the market. The SEC’s unprecedented expansion of disclosure requirements in the Proposal exceeds the Commission’s statutory authority under the Securities Act and the Exchange Act.

B. The Proposal Usurps Congressional Authority on a Question of Vast Economic and Political Significance Without Clear Statutory Authorization.

The Proposal presents separation of powers concerns. It is well established that the courts interpret statutes to preserve the role of Congress in dictating the major aspects of federal regulation of private activity to “protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.”³⁹

If Congress meant for the SEC to broadly regulate registrants’ climate change policy, then it would have clearly authorized the Commission to do so.⁴⁰ The Supreme Court “expect[s] Congress to speak clearly if it wishes to assign to an executive agency decisions of vast economic and political significance.”⁴¹ Where Congress has previously sought to empower the Commission to require registrants to publicly disclose information on matters

³⁵ *Id.*

³⁶ *Environmental and Social Disclosure, Notice of Commission Conclusions and Rulemaking Proposal*, 40 Fed. Reg. 51,656, 51,656 (1975) (“The Commission has concluded that . . . it is generally not authorized to consider the promotion of social goals unrelated to the objectives of the federal securities laws.”); *see also Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1039 (D.C. Cir. 1979) (Federal securities laws “were designed generally to require disclosure of financial information in the narrow sense only.”).

³⁷ Release No. 33-6383, 47 Fed. Reg. 11,380 (Mar. 3, 1982).

³⁸ *Commission Guidance Regarding Disclosure Related to Climate Change*, Release No. 33-9106, 75 Fed. Reg. 6,290 (Feb. 8, 2010).

³⁹ *NFIB v. OSHA*, 142 S. Ct. 661, 668–69 (2022) (Gorsuch, J., concurring).

⁴⁰ *Id.* at 665.

⁴¹ *Id.* (quotations omitted).



of public concern, it has done so expressly. For instance, in the Dodd-Frank Act, Congress specifically mandated that the Commission adopt rules requiring registrants to disclose information about the presence of “conflict minerals” in their products, of payments made to certain governmental entities by resource-extractive industries, and about health and safety violations at mining-related facilities.⁴² Despite frequently amending the securities laws over the years—including major revisions in the 1970s, 1990s, 2000s, and 2010s⁴³—Congress has included *nothing* in the statutory text to provide the Commission with clear authority to promulgate this Proposal. The Commission can point to no statutory text that clearly enables it to require registrants to gather and report the sweeping and extensive information mandated by the Proposal. It would be inappropriate for the Commission to take these steps because Congress has not clearly vested it with a mandate to impose the Proposal’s climate-related disclosure obligations, especially insofar as they concern information that is not material as materiality has long been understood for purposes of the federal securities laws. Courts “must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.”⁴⁴

On the flip side, if the Securities Act and the Exchange Act are as broad as the Commission interprets them to be and give the SEC limitless authority to require public disclosures on *any* topic it deems in the “public interest” or as “protecting investors,” then the Proposal would violate the non-delegation doctrine, which ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials.⁴⁵ To avoid these constitutional infirmities, courts will read the relevant statutory text in a more limited fashion.⁴⁶ The Commission should do the same.

C. The Proposal Raises Serious First Amendment Concerns.

Certain aspects of the Proposal raise First Amendment concerns because they would compel issuers to discuss, in mandated filings made with the SEC, information that is not purely factual and that may be subject to controversy. The Supreme Court applies strict scrutiny to content-based regulations compelling such speech.⁴⁷

As an initial matter, public policies to address climate change and its impact on capital markets is a topic that remains a major issue of debate and discussion in the political branches. Although there can be no doubt that the climate is changing and industrial activity contributes to it, our Congress and countries around the world

⁴² Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, §§ 1502-04, 124 Stat. 1,376, 2,213-2,222 (2010).

⁴³ See, e.g., Securities Investor Protection Act of 1970, 84 Stat. 1636 (1970) (codified as amended at 15 U.S.C. §§ 78aaa et seq.); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended at 15 U.S.C. §§ 77-78); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (amending various sections of Title 15); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (amending 15 U.S.C. §§ 7201-7266 and in various sections of Titles 18 and 28); Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376 (2010); JOBS Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (amending 15 U.S.C. in various sections).

⁴⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (cleaned up).

⁴⁵ *NFIB*, 142 S. Ct. at 669 (Gorsuch, J., concurring); see also *Jarkesy v. SEC*, 34 F.4th 446, 459 (5th Cir. 2022) (holding that Congress unconstitutionally delegated legislative power to the SEC when it gave the Commission unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency).

⁴⁶ *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”).

⁴⁷ See *Nat’l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372-74 (2018); *Barr v. Am. Ass’n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346, 2347 (2020); *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Although the Supreme Court has subjected some mandatory disclosure laws to lesser scrutiny, it has only done so where disclosures are of “purely factual and uncontroversial information.” *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).



continue to debate the panoply of appropriate policy steps to address climate change. Where Congress has reached political consensus, it has enacted meaningful legislation to, for example, reduce emissions of major GHGs,⁴⁸ promote the development and deployment of emissions reducing and eliminating technology, and enhance the construction of infrastructure needed for a less carbon intensive society.⁴⁹

To be sure, much more needs to be done, and API strongly supports economically sound efforts to enable and enhance sustainable energy delivery and emissions reduction. But Congress' continued deliberation on the best way to do so only highlights the political, economic, and technical complexity of the issues at hand.

As it stands, the Proposal's compelled disclosure of information in SEC mandated disclosures that may not be viewed as material to a company's financial condition or operating results and that are not purely ascertainable is problematic under the First Amendment. For example, many of the proposed additions to Regulation S-X, such as identifying what portion of maintenance or construction costs are directly related to weather and assessment of near-term climate and transition risks to specific facilities or assets, involve judgments and assessments that are not purely factual. Issuers should not be compelled to provide such information in the context of audited financial statements or other mandated disclosures and receive all the attendant responsibility and liability.

Indeed, much of the information that would be compelled under proposed Item 1503 of Regulation S-K involves complicated judgment calls regarding short-, mid-, and long-term risks and opportunities.⁵⁰ Discussion of future risks and opportunities, even when well-informed by scientific assessments and business judgment, are by their nature projections that cannot be verified. A company's assessment of these topics can be helpful to stakeholders, which is why many companies already discuss them in their sustainability reports and even in filings with the SEC. But the far-reaching and highly prescriptive disclosure mandates that the SEC proposes to impose on registrants has no precedent under the federal securities laws and will place an unreasonable and misleading air of certainty on the assessments reflected in company disclosures, particularly those under Regulation S-X and GHG emission disclosures because of their quantitative nature.

Similarly, the required discussions of board-level expertise and involvement in climate risk assessment would compel registrants to engage in a subjective discussion of why such expertise is or is not appropriate at the board level given the nature of the registrant's business or its assessment of risks from climate change.⁵¹ Many companies employ highly skilled professionals with expertise in sustainability, efficiency, emerging technologies, and business strategies to oversee the deployment of GHG emissions reduction and transition activities. Those companies may have differing degrees of board oversight based on the nature of their operations and differing views regarding the types of expertise that are most effective on their board. Although the Proposal may not dictate board member qualifications, registrants would be forced to speak on potentially controversial topics, such as the degree of board-level expertise that is appropriate for effective board management under the proposed Regulation S-K rules.

⁴⁸ See The American Innovation and Manufacturing Act of 2020, 42 U.S.C. §§ 7675 et seq.

⁴⁹ The White House, Fact Sheet: The Bipartisan Infrastructure Deal (Nov. 6, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/>.

⁵⁰ 87 Fed. Reg. at 21,468.

⁵¹ *Id.*



Because the required disclosures are not of “purely factual” and “uncontroversial” information, at least heightened scrutiny will apply to any judicial review of the Proposal, if it were to become a final rule.⁵² Accordingly, the Commission would be required to demonstrate that the Proposal serves a compelling interest and that the Proposal is narrowly tailored to achieve that interest.⁵³ But the Proposal is not narrowly tailored to inform investors of the financial health of a registrant—which is the Commission’s claimed interest in promulgating the Proposal.⁵⁴ There are less restrictive means available to inform investors of the financial health of the securities on the market. For instance, the SEC could achieve its interest by adhering to the traditional requirement that registrants disclose only material financial and operational results and impacts, which for numerous registrants will include certain climate-related information. This alternative achieves a much closer fit between the Commission’s stated purpose and the means it uses to achieve it.⁵⁵ Not only does this alternative better comport with the Commission’s statutory authority under the Securities Act and the Exchange Act, but it is better suited to satisfy First Amendment demands.

II. Finalizing the Proposal as Drafted Would Be Arbitrary and Capricious.

We respect and support the mission of the SEC to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. Although the Proposal may be well intentioned in seeking to meet these objectives, in particular addressing certain investor concerns, there are numerous ways in which it would be arbitrary and capricious for the Commission to finalize it in its current form. We identify three illustrative problems: (1) the absence of a coherent approach to materiality, a bedrock concept of federal securities law; (2) the failure of the Commission to meet its own goal in producing comparable, consistent, and reliable disclosures across registrants; and (3) the one-size-fits-all nature of the board-related provisions, which do not have a reasoned explanation to support the Commission’s approach.

A. The Proposal’s Approach to Materiality Is Inconsistent with Established Standards.

The materiality standard has rightly been described as the “cornerstone” of the securities disclosure system.⁵⁶ Thus, companies routinely apply it when making financial disclosures. Information is material if there is a substantial likelihood that a reasonable investor would consider it important or significant when deciding whether to buy or sell a security or how to vote as a shareholder.⁵⁷ In explaining the concept of materiality, the Supreme Court has been mindful “not to set too low a standard” (*i.e.*, an overly expansive standard) to avoid “bring[ing] an overabundance of information . . . and lead[ing] management simply to bury the shareholders in an avalanche of trivial information.”⁵⁸ This information overload, the Court recognized, is “hardly conducive to

⁵² *Nat’l Inst. of Family and Life Advocates*, 138 S. Ct. at 2372-74.

⁵³ *Reed*, 576 U.S. 155 at 171.

⁵⁴ 87 Fed. Reg. at 21,335 (“We are proposing [the required disclosures] because the information can have an impact on public companies’ financial performance or position and may be material to investors in making investment or voting decisions.”).

⁵⁵ Even if the courts were to apply intermediate scrutiny to review the Proposal, the disclosure requirements would fail because the Commission has not explained why less restrictive alternatives are inadequate. *Nat’l Ass’n of Mfrs v. SEC*, 748 F.3d 359, 371-73 (D.C. Cir. 2014) (invalidating SEC’s conflict minerals required disclosure rule under the intermediate scrutiny standard but not deciding whether strict scrutiny or intermediate scrutiny should apply).

⁵⁶ *TSC Industries, Inc. v. Northway*, 426 U.S. 438, 448-49 (1976) (explaining, for information to be material, “there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information available”).

⁵⁷ *Id.*

⁵⁸ *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (internal quotation marks and citation omitted).

informed decision making” by investors.⁵⁹

In recognition of the securities laws’ focus on information that is material to the reasonable investor, the Commission has long required that issuers “focus specifically on material events and uncertainties known to management,” including only “description and amounts of matters that have a material impact on reported operations, as well as matters that are reasonably likely based on management’s assessment to have a material impact on future operations.”⁶⁰ Further, management discussion is best focused on “financial statements and other statistical data that the registrant believes will enhance a reader’s understanding of the registrant’s financial condition, cash flows, and other changes in financial condition and results of operations.”⁶¹

Unfortunately, the Proposal disregards the intentional limits on the type of information filed under Regulations S-X and S-K and would require filings that overwhelm investors with information that is counterproductive in detail, potentially unreliable, not material, and likely confusing to an investors’ overall understanding of the registrant’s business.

1. The Proposed Changes to Regulation S-X Lack Appropriate Materiality Thresholds.

The proposed changes to Regulation S-X would require issuers to disclose, for each line item, the financial impacts of weather events and other natural conditions, as well as costs related to efforts to reduce emissions and mitigate climate-related risks. Additionally, the Proposal requires disclosure of the impacts of GHG emissions reduction efforts on an “aggregated line-by-line basis for all negative impacts and, separately, at a minimum on an aggregated line-by-line basis for all positive impacts.”⁶² Further, the Proposal’s description of the types of “climate-related risk” for which registrants must report financial data would require vast and granular reporting of all “actual or potential” impacts of “climate-related conditions and events” on financial statements (on a line-by-line basis), business operations and value chain, down to the zip code.⁶³

Without any meaningful requirement that the disclosed costs and risks are material and focused on data that the *registrant* believes will enhance the readers’ understanding of its financial condition, these requirements will create an avalanche of granular information that will not be helpful to reasonable investors. The only limitation on this information contemplated by the Proposal is that disclosure would not be required if the sum of the absolute values of the positive and negative impacts is less than one percent of a particular line item.⁶⁴ This, however, is not much of a limit. For example, if there are five climate-related events that might have 0.2 percent impact on a line item, individual impacts are miniscule but under the Proposal those separate and unrelated events would need to be aggregated to 1 percent, requiring disclosure. This new approach to materiality is further strained as 1 percent would rarely be considered a “material impact” under current Regulation S-X,⁶⁵ and the proposed values are “absolute,” meaning that disclosure would be required even without any net effect. The sheer number of line items that would be presented under these requirements is unprecedented.

⁵⁹ *Id.* (internal quotation marks and citation omitted).

⁶⁰ 17 C.F.R. § 229.303(a).

⁶¹ *Id.*

⁶² 87 Fed. Reg. at 21,464.

⁶³ *Id.* at 21,465.

⁶⁴ *Id.* at 21,464.

⁶⁵ 17 C.F.R. § 229.303(a).



We note that current guidance from the Task Force on Climate-Related Financial Disclosures (“TCFD”) does recognize the value of a more integrated coupling of quantitative data with qualitative information and recommends discussion of the related costs and impacts, but only at a much higher level than the Proposal seeks to require. Examples include “suggesting an organization might report that revenue of a particular service is expected to be negatively impacted under the tested scenario.”⁶⁶ In another instance, it considers how quantitative information could help provide more specificity, such as when an organization might disclose the percentage increase of operating costs due to a climate-related event or the capital allocated toward a particular adaptation project.⁶⁷ However, the TCFD prompts do not contemplate the information at the level of granularity encompassed by the Proposal.

2. The Proposed Changes to Regulation S-K Similarly Lack Appropriate Materiality Thresholds.

The Proposed requirement to include GHG emissions data in reports *filed* in accordance with Regulation S-K disclosure requirements is similarly problematic because the Proposal would deem the data material without appropriate regard for its actual significance to a registrant’s financial health and operations. For example, the Proposal assumes that Scope 1 and Scope 2 GHG emissions are deemed material for *all* companies, but this information will only be material in some circumstances and for some companies as materiality has traditionally been understood for purposes of federal securities regulation. Although Scope 1 and Scope 2 GHG emissions could be significant for some oil and natural gas companies, that may not be true for many of the sector’s vendors and suppliers. For many companies that already provide Scope 1 and Scope 2 GHG emissions data through a combination of regulatory reporting requirements (e.g., the EPA’s Greenhouse Gas Reporting Program requiring Scope 1 data), sustainability reports, and other means, requiring the *filing* of Scope 1 and Scope 2 GHG emissions in SEC reports is not necessary for all registrants.⁶⁸ Investors will already have access to the emissions data even without an SEC disclosure mandate.

3. The Proposed Scope 3 Reporting Requirements Are Insufficiently Bound to Materiality.

The Proposal also imposes a new approach for assessing whether Scope 3 GHG emissions are material. Scope 3 GHG emissions include indirect GHG emissions in the upstream and downstream activities of a registrant’s value chain and of various dimensions of a registrant’s supply chain or its employees’ business-related activities.⁶⁹ This would include GHG emissions generated by a third party who manufactures a product that the registrant purchases, or even the transportation of those products. GHG emissions from other companies’ operations are not within the control of the issuer and significant methodological gaps and uncertainties exist surrounding their calculation (some of those are discussed in Section III., below).

The Proposal appears to suggest that the determination of whether Scope 3 emissions are material is based upon the relation of Scope 3 emissions to a registrant’s overall GHG footprint. In doing so, the Proposal implies that Scope 3 is likely material for all oil and natural gas companies, which takes away from individual issuers that are much better positioned to make such a decision the opportunity to decide if Scope 3 information is material.⁷⁰

⁶⁶ TCFD, *2021 Status Report* (Oct. 2021), <https://www.fsb.org/wp-content/uploads/P141021-1.pdf>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ 87 Fed. Reg. at 21,466.

⁷⁰ *Id.* at 21,334, 21,378-79.



The Proposal also speculates that Scope 3 emissions are likely material to investment decisions because Scope 3 emissions could highlight climate-related transition risks, such as mandatory GHG emissions reductions requirements set by governments, carbon pricing policies, or changes in consumer sentiment.⁷¹ Although those situations may represent risk, their impact on a firm’s financial standing remains unknown unless or until such policies are implemented and what such policies may require becomes known. Once those policies become real and applicable, the impacts of Scope 3 emissions on the financial health of a registrant can be better understood. In the absence of established policies that would require reduction or assign a cost to Scope 3 emissions, reporting Scope 3 emissions would not be helpful to investors. That is, without more established context, most Scope 3 reporting proposed under Regulation S-K would be extraneous.

Furthermore, Scope 3 emissions reporting by an individual company may be unreliable as an indicator of a company’s impact on climate change. Because of the nature of Scope 3 emissions, merely reporting such emissions does not indicate whether global GHG emissions are being reduced or increased. For example, the significantly increased consumption of natural gas produced in the United States has displaced more carbon-intensive fuels, such as coal. This has resulted in the increased Scope 3 emissions of many individual natural gas companies. Importantly, however, it also has resulted in a significant net *reduction* in GHG emissions, particularly in the electric power sector.⁷² As such, Scope 3 emissions may not be indicative of a company’s strategy to manage potential climate risks and opportunities nor of a company’s commercial strategy or viability. This demonstrates that Scope 3 is ripe for misinterpretation and misuse as it is more nuanced and complex compared to Scope 1 and Scope 2.⁷³

That is not to say Scope 3 emissions can never be material to a company’s operations under current policies. For example, some companies make material commitments to reduce and/or to offset emissions from their suppliers or reduce the emissions across specific aspects of their value chain. However, this highlights that the materiality of Scope 3 emissions must be evaluated on a case-by-case, issuer-by-issuer basis and does not lend itself to an across-the-board determination. We discuss more issues concerning the complication of collecting and calculating Scope 3 emissions data below.

4. The Proposal’s Approach to Materiality Is Inconsistent with How Materiality Is Assessed Under the Federal Securities Laws.

To the extent that the Proposal purports to adopt a materiality threshold in some respects, its explanation of the requirements depends upon a misplaced application of “materiality.” As explained above, materiality focuses on a *reasonable investor*, not all information that any investor may express an interest in (especially when for non-financial reasons).⁷⁴ To be sure, investors and other stakeholders with specialized interests, such as sustainability, or climate-focused portfolios, are greatly valued. So much so that many companies have taken it upon themselves to participate in various voluntary initiatives that have spurred a range of metrics and standards

⁷¹ *Id.* at 21,379.

⁷² See, e.g., EIA, *Today In Energy, Electric Power Sector CO₂ Emissions Drop As Generation Mix Shifts From Coal to Natural Gas* (June 9, 2021), <https://www.eia.gov/todayinenergy/detail.php?id=48296>; see also U.S. Energy Information Agency, *U.S. Energy-Related Carbon Dioxide Emissions, 2018*, at 12, https://www.eia.gov/environment/emissions/carbon/archive/2018/pdf/2018_co2analysis.pdf (“[T]he cumulative U.S. CO₂ emissions reductions attributable specifically to shifts from coal to natural gas [from 2005 through 2018] amount to 1,799 MMmt.”).

⁷³ Scope 3 emissions reporting can lead to extensive multiple counting of GHG emissions across the economy. For example, an oil and natural gas company’s Scope 3 emissions represent Scope 1 and/or Scope 2 emissions for fuel consumers (e.g., electric utility combusting natural gas, individuals using gasoline, manufacturers purchasing natural gas to power their operations).

⁷⁴ *TSC Industries, Inc.*, 426 U.S. at 448-49.



that respond to those stakeholders' demands. That does not, however, necessarily mean that those metrics and standards are material, within the meaning of the federal securities laws, to a reasonable investor's evaluation of whether a particular investment is financially sound.

Put another way, the fact that information regarding climate and sustainability efforts is valuable to certain stakeholders does not necessarily make it material for purposes of required disclosure under the federal securities laws. The fact that climate risks and transition costs and opportunities may be material to the performance of some companies does not make it material to all companies, as materiality has long been understood. Rather than allow the materiality standard to guide disclosures by registrants, the Proposal would dictate the same disclosures for all companies based upon novel concepts of materiality untethered from the unique aspects of each company's business, financial condition, and operations. Moreover, we are not aware of widespread and persistent demand from the financial community for the line-by-line financial impact assessments associated with climate risks and opportunities included in the Proposal. Instead, our stakeholders have been far more interested in the descriptive voluntary reports fostered by third-party protocols, including TCFD and the GHG Protocol, which are more attuned to individual company considerations and specifics than the Proposal is. The Commission's goals would be far better served by continuing to allow registrants to determine what information is material under well-established doctrines, while continuing to provide additional helpful information about emissions, climate risks, and other topics that the registrant believes will help stakeholders.

B. Many of the Proposal's Requirements Will Lead to Disclosures That Are Not Comparable, Consistent, and Reliable Across Issuers.

An inescapable issue with the Proposal is that it would require disclosure of information that is difficult to quantify and assess at the level of certainty ordinarily associated with SEC mandated disclosures under Regulations S-X and S-K. It will require establishing extensive new accounting and data tracking methods and processes in an unreasonably short amount of time and, because the proposed disclosure requirements are unprecedented in their breadth and granularity, issuers will necessarily develop their own solutions and assessments to meet the requirements. Rather than leading to comparable, consistent, and reliable information, the Proposal's required disclosures will lead to inconsistent, confusing, and potentially misunderstood information that will not meaningfully inform an investor's decision making.

1. The Unprecedented Quantity of Data That the Proposal Would Require Registrants to File Will Have Unintended Negative Impacts on Investors.

The Proposal's requirements would have the strong potential to overwhelm investors because the information would be so dense and profuse as to not be useful. Since at least 2002, the SEC has expressed concern that excessive information in registration statements and quarterly/annual reporting can overwhelm investors. A flood of immaterial information, as the Commission has noted, is detrimental to investors,⁷⁵ and the Proposal's granularity and deemed significance will overwhelm investors with information that could give them a false understanding of its usefulness and comparability as well as distract from material and other important information that registrants provide. For example, while one registrant may report it spends a significant sum on protecting assets located on the Gulf of Mexico from hurricanes, that does not mean that a registrant spending less is any more or any less susceptible to climate events. An agricultural producer may not spend much at all on

⁷⁵ See, e.g., SEC Chair Mary Jo White, *The Path Forward on Disclosure, Speech to the National Association of Corporate Directors – Leadership Conference 2013* (Oct. 15, 2013), <https://www.sec.gov/news/speech/spch101513mjw>.



preparing for weather related events as there is little it can do to protect crops from a tornado or drought. But this does not necessarily make it more or less susceptible to climate events compared to other companies or industries; it merely reflects a different type of asset held and used to generate revenue.

2. The Proposal Would Require Registrants to File Information That Is Inherently More Speculative and Less Reliable Than Information Traditionally Mandated to be Disclosed.

The Proposal would require disclosure of information concerning the activities of a company’s suppliers, customers, and employees.⁷⁶ The Proposal would require forecasting changing climate policies, regulations, and legislation.⁷⁷ It would require disclosure of technological innovations, adaptations, and changing weather patterns.⁷⁸ It would require development and application of new accounting tools and assessments and widespread training in an unprecedented and unreasonable time frame.⁷⁹ All of these topics depend on judgments that lack the type of standards and guidance normally applied to audited financial disclosures under Regulation S-X and the highly vetted narrative disclosures under Regulation S-K. For example, third-party experts such as the Financial Accounting Standards Board (FASB) and Public Company Accounting Oversight Board (PCAOB) have created comprehensive guidance and accepted principles that have been developed over decades for most financial information and accounting, but there has been no such development for the Proposal’s requirements. The level of subjective assessment and speculation required does not meet the standard of accuracy or certitude required of such carefully reviewed disclosures or normally provided by management in their review and assessment of the business.⁸⁰

In addition, some of the required data for reporting emissions under the Proposal and the emissions data necessary to some of the required assessments will not be publicly available in the time frames contemplated by the Proposal since the data is developed for other government agencies under separate reporting deadlines.⁸¹ Imposing a new deadline when such information may not be fully developed or validated will also lead to disclosures that are not comparable, consistent, and reliable across issuers and that could generate investor confusion.

3. The Lack of Clear Guidance Will Not Foster Reports That Are Sufficiently Comparable, Consistent, and Reliable.

Many of the proposed mandated disclosures lack a consistent standard for calculating and reporting by companies at the same level of precision normally provided and mandated for filings. For example, the Proposal does not define methodologies for calculating GHG emissions by the full range of registrants.⁸² Rather, the Proposal includes a high-level requirement that companies disclose emissions both aggregated and disaggregated by each constituent GHG.⁸³ A registrant would be required to “describe the methodology, significant inputs, and

⁷⁶ 87 Fed. Reg. at 21,468.

⁷⁷ *Id.* at 21,467.

⁷⁸ *Id.* at 21,466-68.

⁷⁹ *See* Section III. below.

⁸⁰ *Ibid.*

⁸¹ We discuss the complications surrounding the gap between when emissions data become available and when issuers file reports under S-K in more detail in Section I^{II}.A.3 below.

⁸² 87 Fed. Reg. at 21,468 (proposed § 229.1504 (Item 1504)).

⁸³ *Id.*



significant assumptions used to calculate GHG emissions.”⁸⁴ Since there are no established guidelines to work from in this area, these disclosures will likely vary considerably based upon the respective management judgment and estimation approaches for each registrant. So not only would investors receive GHG emissions data reported under different and “evolving” methodologies or standards, but they would also be bombarded by varying descriptions of the various methodologies themselves, not to mention subjective assumptions and information about the limitations of the methodologies employed.⁸⁵

The Commission appears to recognize that such information is highly nuanced, subjective, and does not meet the same standard of accuracy, precision, and standardization as other quantitative information currently included in SEC filings.⁸⁶ Therefore, it is highly unusual that, despite such recognition, the Commission proposes that issuers still include such information in their required filings. Furthermore, some regulatory requirements, including domestic reporting requirements under the EPA’s GHG Reporting Program (GHGRP), regulatory requirements applicable to companies with assets in other countries, and sustainability reporting standards already require emissions reporting using methods not covered by the Proposal. The lack of a uniform approach to GHG emissions reporting across registrants, or even across all regulatory requirements, may cause confusion and conflicting reporting, contrary to the SEC’s stated goals for the Proposal.

The Proposal also would require registrants to report short-term and long-term climate-related physical and transition risks and expenditures in SEC mandated disclosures.⁸⁷ Current climate models do not predict, for example, short-term risks to specific facilities, and API is not aware of any reliable methods that do. As such, the proposed requirement to report short-term and even more so long-term risks at the level of granularity required by the Proposal—down to the zip code or specific facility—will be based on subjective qualitative judgments with low degrees of certainty. For physical risks, the Proposal would require the issuer to identify whether a risk “may be categorized as an acute or chronic risk.” There is no generally accepted standard for what constitutes an “acute or chronic” physical risk, and there is no meaningful guidance on what expenditures should be included in the reports.

The financial assessments required by the Proposal on a line-item basis are simply impossible to address in a manner consistent with other filed financial data without a well-defined baseline to work from. Such a baseline is not present in the Proposal or any accounting standard. Without any such standard, determinations of how requested financial data would flow for income streams, capital expenditures and expenses will be subjectively determined. How costs are tied to climate and then captured in various line items on balance sheets and income statements will be particular to the registrant until potentially informed otherwise, such as in an enforcement action, at which point the registrant will have to incur additional costs to design, develop, and implement a revised approach.

Furthermore, since there is no uniform way to direct a registrant to assess such a risk, the Proposal itself undermines the level of precision currently required for SEC mandated disclosures. Nor is it clear what additional

⁸⁴ *Id.* (proposed § 229.1504(e)).

⁸⁵ *Id.* at 21,277, 21,388 (acknowledging that “evolving” methodologies are necessary given the “underlying uncertainties and limitations” of measuring GHG emissions data).

⁸⁶ *Id.* at 21,277, 21, 293, 21,395, 21,401, 21,404, 21,427, 21,449 (repeatedly recognizing that the gathering and calculating of emissions data is not fully formed and is necessarily an evolving process).

⁸⁷ *Id.* at 21,466-68

guidance or examples could even result in qualitative judgments that are uniform across registrants for such a theoretical concept. For example, the Proposal would appear to require a registrant to separately itemize construction costs related to weatherizing and winterizing facilities located in an exceptionally cold climate, even though such costs are typical for such climates and are unlikely to be material.⁸⁸ Registrants would be left to further define these terms internally based on a subjective assessment that will naturally lead to differing interpretations across registrants.

For example, assume that two hurricanes formed in the Gulf of Mexico in a reporting year that disrupted operations for three companies with onshore operations located in a similar geographic area. One company could determine that two hurricanes were normal for a year. The second company could determine that it was normal for one hurricane to make landfall, but that a second was unusual and may be tied to climate change. And the third company might determine that the instance of two hurricanes was not unusual, but that the intensity of the hurricanes was exceptional and that a portion of the disruptions therefore was due to climate change (by reason of intensity). Any of these determinations could be reasonable based on the companies' subjective assessment yet lead to significant differences in reporting under the Proposal.

Disclosures related to “transition risks” under the Proposal present a different set of challenges. The definition of transition risks includes a wide range of possible events, “actual or potential negative impacts . . . attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate-related risks, such as increased costs attributable to changes in law or policy.”⁸⁹ Identifying and measuring these types of risks are particularly difficult for the oil and natural gas industry where the most material item affecting revenue is the commodity price of oil or natural gas.

For example, consider the recent spike in natural gas prices for consumers in Europe. How would a company be able to determine what portion of this event was caused by normal cold weather, climate change-induced cold weather, changes in government policy, or the geopolitical conflict in Eastern Europe?

Finally, oil and natural gas are commodities traded on efficient, open exchanges around the world where the price fluctuates on a continuous basis—and rarely due to one issue. Just over the past year, the prices of oil and natural gas have moved substantially due to war, political risk, the pandemic, and natural demand—all occurring in different parts of the world. Numerous factors contribute to the market price at any given point in time. It is impossible for registrants to assess what portion of a price or event is due to a climate event, and therefore, impossible to say what should be reported or tracked as such for purposes of the Proposal.

4. The Proposed Methods of Filing Emissions Data Present Their Own Comparability Problems.

The proposed requirements to file Scope 1 and Scope 2 GHG intensity indicators denominated by a company's revenue is also problematic and would fail to achieve the Proposal's stated goal of comparability.⁹⁰ The Proposal would require registrants to report Scope 1 and Scope 2 emissions “in terms of metric tons of CO₂e per unit of total revenue.”⁹¹ However, intensity based upon revenue would not provide comparable information

⁸⁸ See, e.g., *id.* at 21,464.

⁸⁹ *Id.* at 21,466.

⁹⁰ See *id.* at 21,469.

⁹¹ *Id.*



across industries or even across firms—especially for a commodity business subject to significant price fluctuations like that of the oil and natural gas sector. Revenues, and therefore intensity metrics that rely on them, will change depending on the commodity prices throughout the year and create a metric without much meaning for a registrant over time in comparison to other registrants or industries.

We should note that expressing intensity only in terms of units of production may not always represent an appropriate approach for some registrants. For the oil and natural gas industry, there are some companies that are integral to the value chain even though they do not produce or refine or own the product (e.g., midstream and oil and natural gas field service providers). Intensity based on units of production will not be applicable for such companies and other bases might be more appropriate for comparability purposes. For these and other reasons, companies are engaging in the improvement of reporting frameworks to allow more consistent and comparable indicators for those sectors.⁹² The Commission should allow those efforts to mature before imposing prescriptive and potentially misleading GHG emissions reporting requirements. This also demonstrates the importance of flexibility and liability protections that the Commission should build into any mandatory disclosure requirements for different sectors of the economy in order to allow them to identify the most appropriate normalization factors for GHG intensity metrics.

5. Reporting Scope 3 Creates Challenges.

The Proposal's version of Scope 3 emissions reporting also would lead to inconsistent, incomparable, and unreliable reporting because it will result in counting the same emissions multiple times. The Proposal would require oil and natural gas registrants to evaluate all 15 categories of Scope 3 emissions, including purchased goods and services, capital goods, fuel-and-energy related activities, upstream transportation and distribution, waste, business travel, employee commuting, upstream leased assets, downstream transportation and distribution, processing of sold products, use of sold products, and end-of-life treatment of sold products. Many of these categories, however, might be clearly immaterial for companies. Moreover, reporting of those GHG emissions would lead to significant multiple counting of the same GHG emissions not only across the economy but also within one industry, which will make the information unhelpful to investors. For example, registrants that report Scope 3 emissions from use of sold products and purchased goods and services would be required to identify GHG emissions within the entire value chain of their products. Meanwhile, the public companies that use those products or supply services to our members also will be reporting the emissions as part of their Scope 1 and Scope 2 reporting requirements. Hence, multiple companies will report the same emissions.

As for third-party use of oil and natural gas products, it should be noted that not all of the hydrocarbons produced or refined by a company may be combusted at the end of the product lifecycle (e.g., products such as lubricants or asphalt), and upstream exploration and production companies might not have the insight into the final use stage of the oil and natural gas they produce and sell to the market. As such, without better defined standards, reporting on all Scope 3 emissions will lead to overcounting. To that end, it is worth noting that views regarding the value of Scope 3 emissions are still evolving, including which categories of Scope 3 emission are helpful to whom. For example, some segments of the oil and natural gas industry, such as midstream, lack methodologies for calculating Scope 3 emissions from Category 11 (use of sold products or services) because midstream companies typically do not take ownership of the products that they transport and thus do not sell those products. This challenge has been recognized by some financial stakeholders that have excluded midstream Scope

⁹² See, e.g., EEI & AGA, *Natural Gas Sustainability Initiative: Overview* (last visited June 13, 2022), <https://www.eei.org/issues-and-policy/NGSI>.



3 information and reduction targets.⁹³ Industry organizations like IPIECA and API are continuously working toward developing a higher degree of standardization for Scope 3 emissions accounting, as are other sectors. The Commission should allow these industry-specific, stakeholder-driven initiatives to evolve and mature instead of mandating Scope 3 disclosures.

Given the questions raised by Scope 3 and its relevance to investors, we believe that the current process of voluntary engagement and reporting between registrants and their stakeholders is most effective. This recognizes that Scope 3 reporting is still nascent in comparison to Scope 1 and 2 reporting,⁹⁴ and methodologies for calculating Scope 3 emissions are not yet precise or uniform. For example, as noted above, no established guidance exists for exploration and production companies on how to accurately account for non-combusted items produced from their products. Scope 3 intensity, as would be required under proposed § 229.1504, is an even more nascent and uncommon metric for which we are unaware of a generally accepted method for calculating. Indeed, as the Commission notes, “a registrant may encounter data gaps, particularly when calculating its Scope 3 emissions,” and Scope 3 emissions reporting presents difficulties that may make its estimation more appropriate.⁹⁵ Certainly Scope 3 GHG reporting is far from meeting the level of precision and granularity of other quantitative information that is currently included in registrants’ filings with the SEC.

Some companies already voluntarily report Scope 3 emissions in their sustainability reports, which shows that the industry is responsive to its stakeholders’ needs. However, the Proposal’s requirements to file absolute Scope 3 emissions and Scope 3 emissions intensity whenever deemed material (and the Proposal suggests that it is always material for the oil and natural gas industry) could have a chilling effect on companies’ efforts to offer more information to their stakeholders in sustainability and similar reports due to the increased liability exposure and the potential to misconstrue the provision of this information to stakeholders as material to investment decisions. The Proposal, therefore, may wind up limiting the amount of useful information available to stakeholders.

6. The Commission Is Not Well-Suited to Establish Standardized Climate Reporting.

Although there may be a need for further standardization of some climate data or information, the Commission has not adequately explained why it is the right agency to undertake this effort in the manner that the Proposal would mandate or that now is particularly the time to do so. The demand for climate information from certain investors is still relatively recent and continues to evolve. A persistent lack of consensus among financial stakeholders exists about which climate information is material, and little guidance is available regarding how it should be assessed. This is evidenced by the variety of voluntary reporting initiatives and third-party certification organizations. The “marketplace” is still evolving in this area. The Proposal itself acknowledges that standards and methodologies are evolving. The SEC’s one-size-fits-all approach is more likely to stifle the disclosure of helpful information to interested investors than to improve it.

The SEC should recognize that standardization of climate-related reporting within some sectors of the

⁹³ See, e.g., JPMorgan Chase & Co., *JPMorgan Chase Releases Carbon Reduction Targets for Paris-Aligned Financing Commitment* (May 13, 2021), <https://www.jpmorganchase.com/news-stories/jpmorgan-chase-releases-carbon-reduction-targets-for-paris-aligned-financing-commitment>; HSBC, *Net Zero Aligned Finance: Approach Update* (Dec. 2021), file:///C:/Users/adeli/Downloads/211214-financed-emissions-approach-and-methodology-update.pdf.

⁹⁴ See, e.g., 87 Fed. Reg. at 21,388.

⁹⁵ *Id.*



economy is already occurring. Such efforts apply the technical expertise needed to resolve difficult questions and promote comparable, consistent, and reliable reporting on climate related information that is informed by private-sector initiatives.

For example, the oil and natural gas sector, through API, IPIECA, and IOGP, is developing and improving consistent and more comparable methods for calculating GHG emissions, including Scope 3 emissions, from our sector.⁹⁶ Furthermore, API and its members recently developed the API Guidance Document for GHG Reporting (“the Guidance”), which also includes one Scope 3 indicator, which is accompanied by an important “attention” caveat explaining the challenges and limitations of the metric. The objective of the Guidance is to drive consistency and comparability of voluntary reporting by individual oil and natural gas companies of a core set of companywide GHG indicators. The Guidance has been developed to provide common definitions for a core set of GHG indicators to guide individual company reporting and to enhance comparability across company-by-company climate-related reporting. The Guidance draws from existing oil and natural gas company reporting practices, builds on the IPIECA/API/IOGP guidance for reporting, takes into account relevant recommended GHG emissions reporting indicators from frameworks external to the oil and natural gas industry, and leverages the existing regulatory framework established by the US EPA GHGRP. API and its member companies expect to update the Guidance periodically, as appropriate. This demonstrates that the industry is actively working to standardize the reporting of core GHG indicators that are of interest to the industry’s stakeholders. As noted above, the reporting of Scope 3 has recently grown across the industry, and it is our anticipation that even without an SEC mandate, companies will continue to report Scope 3 emissions on a voluntary basis, if such an indicator is important to their stakeholders.

C. The Proposal’s Required Disclosure of Board Expertise Is Not Necessary for All Registrants.

The Proposal, by requiring the disclosure of a board member’s or board committee’s expertise in climate-related risks, would effectively dictate expectations for how a company’s governance should be structured.⁹⁷ As Commissioner Peirce explained, the Proposal’s required governance disclosures “will have a substantive effect on companies’ activities” because the Commission is “not only asking companies to tell us what they do, but suggesting how they might do it.”⁹⁸ Although the integration of climate related expertise into corporate decision-making “likely is a prudent business decision . . . whether, how, and when to do so should be left to business—not SEC—judgment.”⁹⁹

To be sure, climate-related expertise on the board of directors may be important for some registrants, but the Proposal fails to explain why this would be important for *all* registrants at the board level required. Notably, there is no SEC requirement for board members’ expertise to be disclosed in areas of risk such as pandemics, geopolitical affairs, macroeconomics, or taxation, and the SEC has not adequately justified why it should be required for climate change. For many registrants, specific disclosure regarding board-level climate-related expertise would not be material and would contribute to “bury[ing] shareholders in an avalanche of trivial

⁹⁶ API, *Climate Change* (last visited June 13, 2022), <https://www.api.org/oil-and-natural-gas/environment/climate-change>.

⁹⁷ 87 Fed. Reg. at 21,359.

⁹⁸ See Commissioner Hester M. Peirce, *We are Not the Securities and Environment Commission – At Least Not Yet*, (Mar. 21, 2022), <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>.

⁹⁹ Commissioner Hester M. Peirce, *Dissenting Statement on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure Proposal by Commissioner Peirce* (Mar. 9, 2022), <https://www.sec.gov/news/statement/peirce-statement-cybersecurity-030922> (“Such precise disclosure requirements look more like a list of expectations about . . . how [registrants] should operate.”).

information that is hardly conducive to informed decision making.”¹⁰⁰ Indeed, boards can effectively exercise their governance and oversight responsibilities, including as it relates to climate-related topics, without having climate-related expertise, and it is important to account for the distinction between the role of management and the role of the board.

III. The Commission Has Failed to Adequately Consider the Economic Consequences of the Proposal.

The Commission has a statutory obligation to consider the economic implications of the Proposal upon investors, registrants, and the public at large. For example, the Securities Act requires that “[i]n addition to the protection of investors,” the Commission must consider “whether the action will promote efficiency, competition, and capital formation.”¹⁰¹ This means that the Commission must, among other things, “determine as best it can the economic implications of the rule.”¹⁰² The Supreme Court has explained that rules predicated on an administrative determination that regulatory change is “necessary” or “appropriate” require a meaningful evaluation of the costs and benefits involved.¹⁰³

Adequate consideration of the costs and benefits requires a detailed and evenhanded assessment. Even where some costs are uncertain or unquantifiable, the Commission must “do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure.”¹⁰⁴

The Commission similarly has an obligation to consider the costs of alternatives, like those listed below in Section IV of these comments that would also advance the Commission’s objectives.¹⁰⁵ And consideration of those alternatives must evaluate the relative costs and benefits of the various options.¹⁰⁶ Likewise, the Commission must explain why a change from the status quo is necessary at all.¹⁰⁷ That is, it must establish “there are good reasons” for the change in policy.¹⁰⁸ And the Commission also must take into consideration any “serious reliance interests” that long-standing policies may have created before deviating from the status quo.¹⁰⁹

¹⁰⁰ *TSC Indus., Inc.*, 426 U.S. at 448.

¹⁰¹ 15 U.S.C. § 78c(f); *accord id.* §§ 78w(a)(2), 80a-2(c).

¹⁰² *Chamber of Commerce of the United States of America v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005); *see also Business Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011); *American Equity Investment v. SEC*, 613 F.3d 166, 177-79 (D.C. Cir. 2010).

¹⁰³ *Michigan v. EPA*, 576 U.S. 743, 752 (2015).

¹⁰⁴ *Chamber of Commerce*, 412 F.3d at 144; *see also Business Roundtable*, 647 F.3d at 1148-49.

¹⁰⁵ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983); *Chamber of Commerce*, 412 F.3d at 144.

¹⁰⁶ *DHS v. Regents of Univ. of Calif.*, 140 S. Ct. 1891, 1912-13 (2020).

¹⁰⁷ *American Equity Investment*, 613 F.3d at 177-79 (D.C. Cir. 2010) (vacating SEC rule requiring increased transparency on fixed indexed annuities on grounds that its analyses of the rule’s effect on competition, efficiency, and capital formation were inadequate because it failed to consider the effects of the specific rule it adopted and failed to compare the rule to the status quo baseline of regulation).

¹⁰⁸ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (explaining that agency must establish “there are good reasons” for a change in policy).

¹⁰⁹ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *see DHS*, 140 S. Ct. at 1913-14.



A. The Proposal Will Be Historically Costly and Will Effect a Transformation in Accounting and SEC Mandated Reporting.

The cost of complying with the Proposal will be tremendous. The Commission itself estimates that compliance will cost registrants over \$10.2 billion in external expenses and a total of 43,539,033 internal hours.¹¹⁰ But prior experience indicates that the underlying factors in the Commission's estimates for these types of rules result in substantial *underestimates* of their costs. For example, the Commission's estimated that compliance with the Section 404 requirements promulgated pursuant to the Sarbanes-Oxley Act would cost companies about \$91,000 per year. But some large companies actually incurred millions of dollars in annual costs.¹¹¹

Indeed, implementation of the Proposal would require the creation and deployment of entirely new accounting, financial, and, in some cases, scientific processes in a matter of months. The challenges for issuers to report new metrics in filed financial statements, for which there are no well-established and vetted regulatory guidelines from which issuers or auditors may seek guidance, in such a short time may be insurmountable for some and extraordinarily expensive for all. Some of the most well-resourced auditors are noting a significant commitment to staff and resource their operations in anticipation of addressing climate and other ESG issues companies are facing. For example, KPMG said "it planned to spend more than \$1.5 billion over the next three years on climate-change-related initiatives, including training on environmental, social and governance issues for all 227,000 employees and efforts to advise businesses on how to meet net-zero emission targets." Similarly, Ernst & Young indicated the company "would spend \$10 billion over the next three years on audit quality, sustainability and technology," while PricewaterhouseCoopers unveiled a five-year plan of \$12 billion, including to "train employees on climate-related matters and hire 100,000 new people."¹¹² This underscores the scope and extent of work that would need to be conducted to implement the Proposal if it were adopted as proposed.

1. Costs and Complications Associated with New Analysis and Systems.

The Proposal's requirement that issuers "describe the actual and potential impacts of any climate-related risks . . . on the registrant's strategy, business, model, and outlook," would require development of new financial and other internal reporting processes and infrastructure in a matter of months. For example, the Proposal would require issuers to report the financial impacts of "severe weather events, other natural conditions, such as flooding, drought, wildfires, extreme temperatures, and sea level rise on any relevant line items in the registrant's consolidated financial statements during the fiscal years presented," at an essentially immaterial 1 percent threshold.¹¹³ The granularity of this requirement and its impact on registrants cannot be overstated. Even if a higher percentage threshold level were proposed, issuers would still have to track and code all expenses, capital, and revenue items that may be related to weather events and maintenance, for all line items, regardless of how minor, to determine whether the threshold—whatever it is set at—is met. Further still, issuers would have to estimate expenses, capital expenditures, and revenues that did *not* occur due to weather and climate-related events.

Prospectively, complying with this requirement will require the development of new accounting systems and techniques to track and delineate revenues, capital expenditures, and expenses, along with the development

¹¹⁰ 87 Fed. Reg. at 21,461.

¹¹¹ E.g., Lorraine Wooller, *The Cost of Climate Regulation*, POLITICO (Apr. 21, 2022), <https://www.politico.com/newsletters/the-long-game/2022/04/21/the-cost-of-climate-regulation-00026694>.

¹¹² Mark Maurer, *Auditors Assess Complex New Climate Disclosures*, WALL ST. J. (Mar. 29, 2022), https://www.wsj.com/articles/auditors-prepare-to-assess-complex-new-climate-disclosures-11648546201?mod=hp_minor_pos7_

¹¹³ 87 Fed. Reg. at 21,464.



of new software, training, and auditing approaches. That is because most financial tracking and reporting systems and processes are not designed for tracking and reporting such cost impacts, particularly with little to no cost threshold,¹¹⁴ for each transaction. Company personnel will need to establish a process and guidance for identifying the relevant costs. The company will then need to develop a new review process that would be repeatable, defensible, sustainable, and compliant with internal controls over financial reporting. And it will need to reproduce this effort across multiple organizations. This will be an immense effort. For example, it is not uncommon for a single member company to process millions of individual invoices in a year, each of which would need to be assessed under the newly required metrics to identify with adequate precision the climate-related line-item impact. And that effort relates only to current year reporting. Going back to track, calculate, and delineate these costs for past reporting years, as the Proposal would require, would involve unprecedented forensic evaluations for which much of the data will not be available (particularly where past costs were not material and were not specifically identified as weather related). It would require an intensely detailed retrospective assessment of invoices to assess their potential climate-related purpose and considerable speculation.

The work effort that would be needed to make line-item assessments in a manner consistent with the accounting standards of the financial statements are impossible to define since the Proposal provides no established baseline to work from. There is no direction to registrants on how to begin to train for and integrate these new considerations into complex internal systems, processes, and controls. The Proposal makes it clear that systems, processes, and controls would need to be radically changed; but, in the end, companies would be left to guess or generalize even for basic transactions until further guidance is issued. For example, assume a company constructed a building that included low carbon materials and imposed low-carbon building standards on its contractor that increased the overall cost of the project. While this decision would lower the company's Scope 1 and Scope 2 emissions from operating the building, it is unclear how this investment would be handled for purposes of the Proposal.

Furthermore, from a "systems" perspective, much of the accounting of major issuers is highly complex and automated. If the Commission were to finalize the Proposal in the last quarter of 2022, then issuers would have mere weeks to update their systems, processes, and controls to account for what the final rules would require. The time necessary to develop effective software to track such information and for issuers to implement and test the new software will take years, based on issuers' experience with software providers while implementing the FASB's Leases Standard, and will ultimately be developed without clear direction. Other significant financial statement standards have developed over decades by expert organizations and regulatory bodies, including FASB and PCAOB, with broad stakeholder engagement on a host of technical accounting, auditing, and related financial reporting items. The Proposal does not allow for that to occur here before any final rules would go into effect and would force registrants to establish policies, train their organizations in applying the judgments required, and develop credible assessment tools in short time and at great cost, without the reasonable certainty of knowing that they are meeting regulatory expectations.

API member companies have highlighted the severity of how the Proposal underestimates the building of internal systems and procedures to report this information across their domestic and international operations. Some have estimated that compliance with the proposed requirements under Regulations S-X and S-K would cost over \$100 million for certain companies—excluding any costs for the Scope 3 disclosure requirements in the

¹¹⁴ The only limiting factor is that the disclosure would not be required if the sum of the absolute value of the impacts is less than one percent of the line item. Determining that, however, will require tallying up the costs and developing new accounting systems for future expenses and reporting efforts.



Proposal. Another large accelerated filer estimated the Proposal would cost approximately \$35 million over five years including one-time and recurring expenses but excluding the time of at least 60 individuals who are involved in the reporting of emissions and the additional time necessary to review the information as part of the SEC filing process. The primary categories of cost included in this estimate include audit fees, professional services, subscriptions, labor, licenses, and training. Within these estimated costs, the reporting of Scope 3 emissions constituted the largest expense at \$15.6 million or 45% of total cost over five years. A significant part of this cost is attributed to attestation requirements and with “filing” Scope 3 information. Further, the company’s estimate identified that annual labor cost would amount to at least 17.5 FTEs, which is significantly higher than the SEC’s estimate of 3,799 burden hours.¹¹⁵

2. Costs Impacting Third Parties.

The oil and natural gas industry has many unique aspects, including the significant use of joint venture arrangements between private and public companies.¹¹⁶ Indeed, oil and natural gas producers engage in hundreds, if not thousands, of joint ventures related to their production in the U.S. and around the world to mitigate financial risk and manage capital. At times they act as operators, and other times as non-operators. Sharing of risks and benefits is usually aligned with a company’s percentage ownership in the operation.

Application of the Proposal’s financial metrics for the industry would require extensive assessment and categorization of income and expenses flowing from joint venture assets that are not contemplated or required to be provided to joint venture partners in current arrangements. Seeking such information will create new costs not considered by the Commission. Further, non-operating members of a joint venture will have to estimate significant portions of their Scope 1 and Scope 2 emissions, without direct access to the underlying data. Addressing these new data needs could require restructuring of contracts and could result in reopening other aspects of the joint venture arrangement (potentially to the disadvantage of the issuer and its shareholders).

Additionally, the Proposal will impact arrangements with private companies and other entities that contract with registrants as they will likely be forced to collect and provide data to registrants in a manner that would attempt to support the registrant’s climate disclosure obligations. Some private companies and other businesses not directly subject to the SEC’s disclosure mandates may be able to shoulder the cost of collecting and providing information that registrants need, but many will not be able to afford to undertake the effort. It is likely that this distinction would become a defining factor in a registrant’s choice of supplier or vendor and create an unintended cost to the economy, thus having a significant impact across registrant value chains that the Proposal does not adequately take into account in assessing the costs and benefits.

Further, there is no analysis of the costs or benefits resulting from the potential impact of investor actions as a result of the proposed disclosures. The Commission recognizes that the disclosures could help identify risks that investors would act on that could impact specific geographic regions, communities, or industries. The SEC has provided no perspective on the costs of those shifts and reallocations or the benefit from the mitigation of perceived risks by investors; nor is there any assessment that the Proposal’s benefits are worth the full range of the expressed or above stated costs. By way of a single illustration, the Commission does not evaluate the impact

¹¹⁵ This estimate does not break out incremental costs of compliance with the Proposal from what the company currently expects to spend in the years ahead on voluntary climate disclosure.

¹¹⁶ It is important to note that, in some instances, joint venture partners include government-owned companies that do not fall under any form of GHG reporting requirements in their jurisdictions. This represents another challenge in obtaining GHG emissions data from such joint venture partners who might not be tracking their GHG emissions or may be unwilling to provide such information.



on investors or other stakeholders, such as employees and local communities, if capital flows away from certain companies or sectors as a result of any final rules the Commission adopts.

3. Costs Arising from Duplicative and Inconsistent Reporting Requirements.

The emissions reporting requirements included in the Proposal are unreasonably complicated and inconsistent with other established requirements. Expert environmental regulators can spend years of technical analysis to develop separate regulations governing the accurate and consistent collection of emissions data for various sectors. For example, EPA currently requires GHG emissions reporting from various aspects of the oil and natural gas industry.¹¹⁷ After companies submit their GHG data to EPA at the end of March for the previous calendar year, EPA reviews the submitted data. Despite the best efforts of companies, minor errors in the calculations that require correction can arise. A company typically updates its submission to EPA before the data gets published in September. This flexibility is important because every year an individual company may submit more than 50 separate GHG reports to EPA. For a single low emission flare, there might be 35,000 data points for that given source that go into the emissions reporting for a single year, and collectively more than 10 million data points for a single company's flares. Restating the information submitted to the EPA might be required if a piece of equipment was changed and data substitutions were required, or if an issue was later resolved that ultimately demonstrated the data that was previously reported was in fact over-reported. The Proposal does not contemplate methods for adjusting data, does not provide an acceptable level of variance, and does not protect the issuers from liability associated with retrospective updates or corrections—in notable contrast to the EPA's approach as the country's primary federal environmental regulator.

Further, the Commission asserts that the Proposal's emissions reporting requirements are largely based on the GHG Protocol,¹¹⁸ but some requirements are misaligned with the GHG Protocol and lack precedent among even the most advanced GHG reporting that some companies presently undertake. For example, the organizational boundary for calculating a registrant's GHG emissions included in the Proposal¹¹⁹ is not consistent with the GHG Protocol guidelines, nor is it a common practice among companies. In the oil and natural gas industry, companies commonly report GHG emissions on an operational control basis, or more recently, on an equity share basis (as defined by the GHG Protocol), both of which are different from the consolidated financial statement boundary included in the Proposal. Requiring that companies shift to a completely different organizational boundary would require that all issuers change their methodologies for company-wide data-gathering and reporting, develop new expertise, obtain data from their partners using different boundaries, and restate their GHG emissions targets, baselines, and other performance indicators. This could also present challenges for third-party attestation because it would introduce new methodologies unfamiliar to third-party verifiers with GHG expertise.

There are still other concerns such as the additional administrative burden associated with a company shifting to the consolidated financial statement basis for GHG reporting. This would be an enormous undertaking and costly on its own, but it also may require the development of multiple emissions reporting efforts in a company. For example, under the EPA's GHGRP, companies gather GHG emissions data by fields, facilities, process units, etc.; not legal entities as the Proposal would require. This discrepancy would conflict with

¹¹⁷ EPA, *Green House Gas Reporting Program: GHGRP and the Oil and Gas Industry* (May 12, 2022), <https://www.epa.gov/ghgreporting/ghgrp-and-oil-and-gas-industry>.

¹¹⁸ 87 Fed. Reg. at 21,345.

¹¹⁹ *Id.* at 21,466.



companies' existing data collection and compliance regimes and processes, as well as significantly expand the work of relevant staff since the EPA and equivalent regulators in other countries would continue to require reporting under their regulatory and, in some cases, statutorily mandated programs. If finalized as written, the Proposal would not result in better GHG information than is currently developed to address required submissions, but rather reporting that is different and, therefore, confusing to users and more costly for companies to prepare.

4. Scope 3 Costs.

Furthermore, the Proposal strongly suggests that all Scope 3 emissions are material for all oil and natural gas companies, without regard to whether issuers or investors consider that information material to a company's financial and operating performance. Reporting Scope 3 emissions would require issuers to evaluate fifteen different categories of indirect emissions across their value chain, such as the emissions generated in the manufacture and transportation of the products they purchase. Further, it would require issuers to rely on third-party estimates over which they have little control and, in some instances, might not be able to obtain.

As stated above, the onerous data collection from third parties could require the renegotiation of countless contracts, which, depending on how the negotiations unfold, could disadvantage registrants and their investors in other respects. It also will lead to inefficiencies and unnecessary costs among multiple parties without yielding useful information. For example, with Scope 3, category 11 emissions, the Proposal will lead to significant double counting as multiple parties across the value chain of a registrant's product may be reporting the same emissions either as Scope 1, Scope 2, or even Scope 3. The Commission claims that the Proposal will save investors interested in Scope 3 emissions time from having to look for that information in other sources, but the Commission has not explained the incremental value of those savings or whether they justify the immense costs.

5. Impact of Proposal on Auditing Costs.

The Commission did not adequately assess the costs of financial auditing and legal expenses that will be caused by the Proposal. Given the unprecedented changes to Regulation S-X and S-K, and the time frame for compliance included in the Proposal, the auditing and assurance industry will have a significant need for new auditors, systems, and training. Like registrants, financial auditing and law firms will need to swiftly develop new data collection and reporting tools and hire droves of auditors and lawyers to support registrants with the assurance mandate covering newly required information flows. Significantly expanding the number of accounting professionals in this way will generate additional costs in order to effectively train and integrate such a massive increase in the number of employees over such a short period.¹²⁰ Issuers will also compete for these same resources as they seek to augment their current staffing levels, creating an incremental layer of resource constraints regarding human capital. The substantial costs of these new services will be felt by registrants in the first few years of the requirements taking effect and on an ongoing basis. However, because of the emergent nature of many of the Proposal's requirements, the uncertainty involved in assessing risks and impacts, and the lack of consistency and comparability across sectors that would result if the Proposal were adopted, we believe that the purported benefit of reports generated pursuant to the Proposal may not fully materialize and justify the Proposal's enormous costs and burdens.

¹²⁰ It is also unclear that such a large number of accounting professionals will be available. Enrollment and graduation from accounting programs have been on a downward trend. See Ass'n of Int'l Certified Prof. Accountants, *2019 Trends in the Supply of Accounting Graduates and the Demand for Public Accounting Recruits* (last visited June 13, 2022) <https://us.aicpa.org/content/dam/aicpa/interestareas/accountingeducation/newsandpublications/downloadabledocuments/2019-trends-report.pdf>.



Overall, the Proposal will be extraordinarily costly to comply with and will mandate disclosures that are not material under the federal securities laws. As a result, the Commission’s assessment of the external and internal costs vastly underestimates the burdens the Proposal would impose without clearly substantiating the benefits in a manner that justifies imposing the associated costs. Even if many of these costs are difficult to quantify, the Commission has failed to give them treatment equal to the purported benefits of the Proposal. The Proposal does not address the complexity of generating granular information that is being required, or even ask whether reasonable investors, acting as investors focused on material information that is important to financial returns, would *on net* be better off as a result of the changes the Proposal would make if adopted when the benefits are balanced against the costs.

B. The Proposal Will Undermine Efficiency, Competition, and Capital Formation.

The Proposal may impact markets by causing a misallocation of capital and undermining competition and capital formation. The unprecedented and extremely granular reporting included in the Proposal will require registrants to allocate their capital on systems that, without a baseline, are likely subject to change and are at least partially redundant (or at odds) with other governmental efforts. It will also constrain normal transactions, such as lending, and add transaction costs for collecting, vetting, and auditing GHG emissions and related financial data. The Proposal could also lead investors to choose investments where they can avoid the added expense and potential liability associated with companies with intensive reporting obligations. This flow of capital away from certain sectors or companies could have the unintended effect of limiting funds for projects that have been undertaken—or would in the future be undertaken—to address climate risks. Adopting the Proposal as written would undermine competition. The oil and natural gas industry includes a diverse range of actors, such as state-owned entities, private operators, producers, and, of course, publicly traded companies that are all competing in a market of mostly fungible commodities. By imposing enormous burdens and expenses on publicly traded U.S. companies and not the others, the Proposal would create a competitive advantage for those who do not issue securities in U.S. markets and will therefore not incur the Proposal’s significant financial and emissions reporting mandates.

The Proposal would require disclosure of confidential, competitively sensitive information. For instance, a company’s internal carbon price, financial information about investments in new types of technologies, scenario planning, among other items required by the Proposal to be disclosed, is proprietary and competitively sensitive information. Most companies do not disclose this type of information because it might be considered critical for a company’s proprietary competitive advantage. By losing the flexibility to confidentially plan for and implement various transition scenarios and investment strategies, companies may lose competitive positions they have been working on for years. It is important not to inadvertently discourage companies from planning for a wide range of scenarios, including for select scenarios that might be highly unlikely and perhaps even improbable, by requiring disclosure about them. Additionally, companies may use more than one carbon price for internal planning of multiple scenarios. The Proposal would require companies to disclose information about each price used, increasing the likelihood of overwhelming investors with dense and highly technical information.

Finally, the Proposal would have significant consequences for capital formation. The unprecedented costs inherent in the Proposal as written, may cause many private oil and natural gas entities to avoid going public, at the expense of our public markets and the investment opportunities publicly traded companies afford investors. For these same reasons, some already-public issuers may give serious consideration to “going private.”



C. The Proposal Will Generate Counterproductive Results.

If finalized, the Proposal would likely have a chilling effect on issuers' separately published climate-related sustainability reports and could lead to less information being available to the stakeholders who want it. For example, many companies in the oil and natural gas industry currently publish extensive and detailed sustainability reports that are tailored to what each company determines is most relevant to its business and operations, including climate-related risks and impacts. But if the Proposal comes into force, companies will be reluctant to develop separate, detailed sustainability reports to avoid any potential confusion when compared to the information that the Proposal would mandate companies disclose. Companies will also be required to allocate significant resources to meeting the requirements of any final rules the Commission adopts, which will detract from other climate-related reporting efforts. Furthermore, the Proposal's requirement that companies disclose internal information, such as internal carbon pricing, scenario planning, and related information if a company has an emission reduction target, could discourage companies from setting such targets. For these reasons the Proposal could be counterproductive to the Commission's stated goals as it will potentially discourage the disclosure of other, more useful information.

The totality of climate-related disclosures that the Proposal would mandate will overwhelm, confuse, or at best be unhelpful to investors. The flood of information and the presumed importance that would attach to it by virtue of the SEC's mandate could easily distract investors from equally important or more topically relevant material information that a registrant discloses. Creating such a significant aperture of exposure to this single issue may unnecessarily refocus capital and attention in ways that are not requested by or helpful to investors. Certainly not all requirements included in the Proposal are demanded by investors. In our experience, financial stakeholders are most interested in much less granular reporting than, for example, the 1% financial statement line-item disclosures the SEC proposes and focus instead on more concise and appropriate emissions indicators and intensity metrics and climate impacts that a company might decide are material and, thus, capture as part of its existing risk factor or MD&A disclosures. Further, the "marketplace" of ideas and demands in the area of climate-related reporting are changing, and the Proposal will stymie innovation and continuous improvement by ossifying disclosure requirements that are not the most useful to investors over time. The granularity and prescriptiveness of the Proposal would entrench disclosure requirements that can become outdated and not keep pace with marketplace, climate science, risk assessment developments, and other advancements.

By laying out such detailed reporting obligations as the Proposal requires, the Commission creates unnecessary confusion and uncertainty for registrants with respect to how they should interact with other reporting agencies and their reporting requirements. For example, the EPA is the primary US agency covering GHG emissions. It has a well-established reporting requirement through the GHGRP as well as deep technical expertise in the measurement, collection, and reporting of emissions data, which is also made publicly available. The emissions reporting requirements included in the Proposal are inconsistent with current methods required by the EPA for some sectors and fail to adequately align with the reporting cycle currently managed by the EPA. This will result in differing reported data that may cause confusion for employees tracking different boundaries and timelines as well as uncertainty or misunderstanding for investors and other stakeholders as they consider potentially different data from different agencies for the same registrant.

IV. The Commission Should Consider Alternatives That Better Serve Investors and Are Less Costly and Burdensome.

The SEC has an obligation to consider alternatives to the Proposal that lower the economic costs while still advancing the Commission's objectives. And the consideration of alternatives must evaluate the relative costs



and benefits of various options.

A. The Commission Should Remove Proposed Changes to Regulation S-X and Return to a Traditional Understanding of Materiality.

Overall, many of the Proposal’s requirements would be overly granular and prescriptive, extremely costly, and, in many instances, unworkable to prepare, and would overwhelm and distract investors to a degree that runs counter to the goal of helping investors make better informed investment and voting decisions. The Commission should focus on registrants’ disclosure of those costs and impacts of climate-related physical risks or transition risks and opportunities that are material to investors as materiality has traditionally been understood in the aftermath of the Supreme Court’s opinion in *TSC v. Northway*. This return to a traditional understanding of materiality for federal securities law purposes would ensure investors are provided with important information relating to the soundness of their investment and voting decisions, including relevant financial risks. And grounding any final rule in materiality will enable companies to continue to provide additional information if registrants determine that would be appropriate to meet stakeholder interests, as companies have been increasingly doing via climate and sustainability reporting outside of SEC filings.

As a basic matter, the Commission should withdraw the proposed changes to the Regulation S-X financial reporting requirements in the Proposal that would require issuers to disclose, for each line item, the financial impacts of weather events and costs related to emissions reduction efforts and transition activities. The proposed 1 percent threshold is simply unworkable. Nor are these issues adequately addressed by setting the threshold at a higher level than 1 percent, as registrants will still need to overhaul their existing internal systems, processes, and procedures and track all events and receipts at the same detailed level in order to determine whether or not the threshold—regardless of the level it is set at—is met. Any effort to consider new financial metrics reporting beyond what GAAP already requires needs to be the product of deliberate processes to identify and weigh unintended consequences of any additional financial statement reporting of climate-related risk and impacts and should be driven by FASB, which has expertise in guiding financial reporting and accounting principles, defining evolving concepts under GAAP, and weighing interpretations on financial reporting and accounting in order to build a consensus.

B. The Commission Could Achieve Its Goals by Allowing Registrants to Furnish, Rather than File, Reports.

The Commission should consider substantially less burdensome and more appropriate alternatives to accomplish the same goals, including allowing companies to “furnish” reports, rather than “file” reports with the SEC as the Proposal would require. If the Commission believes that non-financial climate related information should be disclosed, the Commission should allow registrants to provide those disclosures as part of a separate climate-related report, formally “furnished” to the Commission.¹²¹ Such formal reporting with the SEC could be supplemented with sustainability reports that companies voluntarily prepare, as many currently and increasingly do, that could include information that might be important to a company’s specific stakeholders, such as Scope 3 information that registrants decide to disclose, but that the SEC should not mandate. Any furnished reports would be provided on a consistent basis but separate from a registrant’s currently required filings’ reporting cycle to better align with regulatory GHG reporting requirements under the US EPA GHGRP.

Regarding emissions disclosures in particular, as stated above, most GHG data is *not* within issuers’

¹²¹ Even if the Commission were to seek to have climate information as part of a filed report, we believe the Commission should still address the points raised in Section IV, C-G.



control or is subject to change if relevant government entities maintaining emission reporting requirements, like the EPA GHGRP, change their GHG reporting guidance. For example, the EPA has recently issued a proposed rulemaking that would result in changes to the current GHGRP, which could change how companies calculate and report their GHG emissions to comply with the EPA regulations. EPA takes a thorough approach to ensuring that changes to the reporting program are science-based, transparent, and serve the interests of EPA, reporters, and parties with an interest in the data. Changes to the EPA reporting program are subject to public notice-and-comment. However, this also shows that GHG calculation and reporting methodologies continue to evolve, and oil and natural gas companies work diligently to provide relevant information to their stakeholders. It is currently common practice for companies to update their GHG emissions information as methodologies improve over time, new information becomes available, and when investors and other stakeholders ask for specific and new information. If the SEC were to impose additional GHG reporting requirements that conflict with other regulatory requirements, such as those promulgated by EPA, and which would result in multiple regulatory reports with differing GHG emissions data for a company, it would be highly problematic and should be avoided. Furthermore, as noted above, the oil and natural gas industry, like other sectors, is continuously working to improve methods of gathering and reporting information to help improve existing regulatory requirements and provide information beyond what is required. Requiring the filing of GHG emissions information would stymie this continuous improvement as companies will be less likely to change methodologies due to the liability concerns associated with SEC filings.

Having registrants furnish, rather than file, reports recognizes that climate-related information is more subjective, more speculative and uncertain, and harder to capture at the same level of precision as the more objective financial information contained in existing SEC filings or even currently required qualitative disclosures in SEC filings. It is also not fully in the issuers' control, unlike the financial information. For example, EPA currently requires companies to use emissions factors according to published guidance that changes periodically based on EPA's efforts to improve the process.¹²² If GHG information is part of a registrant's filing, then a registrant would potentially have to recalculate its GHG information every time the EPA adjusts its methodologies for GHG reporting, which could affect previous years' reporting. Further, companies, in many instances, must rely upon third parties to obtain GHG data. As noted above, oil and natural gas companies often enter joint-venture agreements in which one or more parties have no operational control. Therefore, under the Proposal, non-operating companies would have to rely on the joint venture operator to provide them with timely and accurate GHG information. In some instances, a joint venture operator might not have the information or might be unwilling to provide it, in which case a registrant might offer an estimate of its portion of GHG emissions. Reporting companies should not be liable for the quality or lack thereof of third-party information over which they do not exert control. Furnished information could still be informed by TCFD and the GHG Protocol and could also rely upon industry guidance to support consistent reporting.

We believe that there may be some measure of liability protection for furnished reports, which is essential, given evolving methodologies and technologies on climate issues, the subjective nature of the information and the many estimates, assumptions, and data limitations as the basis of any such disclosures. Under the Exchange Act, liability is imposed for omissions or misstatements of information that is filed with the SEC. While information that is allowed to be furnished, rather than filed, is excluded from some the Exchange Act's liability provisions, liability remains for material misstatements and omissions and thus there is appropriate accountability

¹²² See EPA, *Fact Sheet, Proposed Rule: Revisions and Confidentiality Determinations for Data Elements Under the Greenhouse Gas Reporting Rule* (Apr. 2022), https://www.epa.gov/system/files/documents/2022-04/ghgrp-data-quality-improvements-proposal_fact-sheet.pdf.



even for furnished information. Furnished information, unlike filed information, is not automatically incorporated by reference into a registration statement. Despite this measure of liability protection for issuers afforded by furnishing reports, investors could still be confident that they are receiving accurate, reliable data.

Overall, the extremely prescriptive nature of the rules and detailed requirements of the Proposal conflict with the evolving nature and existing rules of how and what climate-related information is generally gathered by registrants. Further, we have seen the marketplace adopt a more engaged and continuously-improving process that has generated informational reporting outside of a mandated filing with the SEC. Disrupting this process with detailed and prescriptive filing requirements could limit the development of innovative and improved disclosure metrics that may be appropriate in this dynamic space and prove more useful to investors precisely because they allow registrants more flexibility in determining the information that is more informative for investors, as well as other stakeholders.

C. The Commission Should Allow Issuers to Provide Climate-Related Information on a Different Schedule that Better Aligns with Existing Regulatory GHG Reporting.

It is important to allow companies to provide a specialized climate-related report proposed in this letter on a different schedule than 10-K disclosures. Of particular note, as mentioned in Section III.A.3 above, EPA's GHGRP recognizes the complexity of collecting and reporting GHG information and allows several months for review and adjustment before the data are published in the fall each calendar year. Companies submit their initial GHG data to EPA by the end of March for the previous year and in May companies start to receive comments and requests for adjustments from EPA on their submission. Recognizing the vast amount of data that companies need to review and report to EPA, the EPA GHGRP may allow up to 75 days to close out the EPA review process. The SEC should be aware that the EPA has their own verification and assessment process over the GHGRP data submission. Any separate attestation requirement imposed by the SEC would cause an increase in the time necessary to prepare an SEC mandated disclosure.

As such, the EPA-mandated GHG data reporting process does not align with typical SEC reporting schedules. The SEC should work with EPA to determine the most feasible deadline for issuers to prepare and provide to the SEC the GHG information sought by the Commission, if the Commission proceeds to adopt a final rule requiring GHG emissions reporting. As the published data from EPA's GHGRP is generally available in the fall, we recommend that the SEC allows issuers to submit the climate-related report to the SEC later in the year than when Form 10-Ks are filed to better align with the EPA reporting requirements. This would ease the reporting burden and costs imposed on companies to comply with any SEC final rule, would reduce investor confusion by aligning reporting timing, and enhance the reliability of the data that is reported. For example, allowing issuers to submit a specialized furnished report to the SEC in December of each year would be more appropriate than requiring companies to provide GHG-related information to the SEC on the same timeframe as 10-K filings.

If the Commission requires GHG information to be included in 10-K filings, emissions data presented in SEC filings will appear different from data reported pursuant to other regulatory requirements, such as EPA's GHGRP, simply because of the differing reporting schedules and availability of data by the time different reports are due with different regulators. Moreover, because of the difference in the reporting cycles, overlapping and incongruent data-collection efforts would be required, causing registrants to incur unnecessary costs. The result would be different emissions data from the same company across multiple regulators, which would not advance the goal of better-informed investor decision-making. As explained above, to avoid these complications, the Commission should allow registrants to provide emissions data in separate reports from their 10-K filings and at intervals that would allow them to include the most updated emissions data from EPA's GHGRP and other

resources.

D. The Commission Should Limit any Furnished Reports to Certain Information.

If the SEC should require registrants to provide certain information beyond what is material as materiality has long been understood under the federal securities laws, we believe such non-material required disclosure should not be as expansive and granular as included in Proposal. Registrants could utilize TCFD-informed content, which has proven to be a useful and standardized framework for companies to discuss their management of climate risks and opportunities. Such a report could include specific information regarding a company's efforts to meet any stated climate commitments and targets, the approach to those commitments and targets, as well as risks, opportunities, and costs. A report could generally include information aligned with TCFD recommendations and take advantage of already established methodologies. This would allow issuers to discuss their approach to carbon pricing, but this information should not be required for the reasons stated earlier in the document.

A furnished report should be limited to Scope 1 and Scope 2 quantitative information. Registrants have some control over Scope 1 and Scope 2 information, and methodologies for collecting those data are more established than for Scope 3. Scope 1 and Scope 2 information could be provided initially for emissions from the registrant's operations (using "operational control" as an organizational boundary), with a phase-in over time for reporting on an equity basis (i.e., asset ownership or share of financial benefits) to account for GHG emissions associated with the company's share of control over operations, as defined in the API Guidance Document for GHG Reporting.¹²³

GHG emissions intensity indicators—as opposed to absolute emissions metrics—associated with Scope 1 and Scope 2 should, if required, be based upon production volumes, which is the most relevant metric for the oil and natural gas industry. This approach has significant advantages over the revenue-based approach to measuring GHG intensity included in the Proposal. Intensity based upon revenue, as proposed, would not provide comparable information across industries or even across firms—especially for a commodity business subject to significant price fluctuations. For example, a revenue-based metric would change dramatically depending on the price of commodities, which does not offer useful insight into a company's management of GHG emissions.¹²⁴ Intensity based upon revenue would also not be comparable across sectors of the economy, as investors would have to tease out many other factors to compare metrics across vastly different businesses.

However, for some companies in the oil and natural gas value chain that do not produce oil or natural gas, flexibility to report GHG intensity on a different basis would be appropriate—again, if the SEC adopts a final rule requiring GHG emissions disclosures. For example, throughput might be a more appropriate metric for pipeline companies because they simply do not have production volumes to use in the proposed GHG intensity metric. Meanwhile, another metric, like miles traveled, may be more appropriate for other forms of hydrocarbon transportation (e.g., rail or trucks). Similarly, there should be flexibility for oil and natural gas services companies to determine the most appropriate GHG intensity metric as those companies do not produce oil or natural gas. Multiple ongoing efforts within the industry are underway to improve and standardize such metrics. Apart from the GHG intensity indicators developed by API that can be found in the API Guidance Document for GHG Reporting, midstream companies are engaging in an ongoing refinement of the Energy Infrastructure Council's EIC/GPA Midstream ESG Reporting Template, which has been developed in coordination with key investors,

¹²³ API, *Guidance Document for GHG Reporting* (Mar. 2022).

¹²⁴ Issuers' commodity hedging strategies would also serve as a source of additional variability to the intensity metric as not all issuers' revenues could be affected by commodity price changes in an identical or congruent manner.



including those publicly cited on the EIC website. Other examples include the EEI/AGA Natural Gas Sustainability Initiative effort to standardize methane emissions reporting for the natural gas value chain. This shows that the industry is committed to improved and comparable reporting of GHG emissions and points to the complexity of such metrics.

We note that this type of furnished information is still covered by federal securities laws anti-fraud protections. Moreover, when registrants furnish this type of information, they would still apply various controls, procedures, and processes to ensure that the information collected, as well as methodologies used, are reliable. Furnishing information in this way has been an acceptable practice for decades.

However, we do not believe that the disclosure of Scope 3 information should be mandatory—whether furnished or filed. Standalone Scope 3 information should not be required by the SEC until more established calculation and estimation methodologies are developed. This does not mean that investors may not have access to Scope 3 information. Many registrants in the oil and natural gas industry are already attuned to investors who want Scope 3 data. Voluntary reporting by companies accommodates these investors, as companies can decide whether to disclose Scope 3 information based on their stakeholders' needs. The oil and natural gas industry has been working to improve Scope 3 methodologies to standardize the reporting among the companies that choose to report it.¹²⁵

E. The Commission Should Limit Application of the Rules Only to Years After the Effective Date of Any Final Rule.

As noted, the Proposal would require companies to submit historic data for both Regulation S-X and Regulation S-K requirements, exacerbating the costs companies would have to incur to comply with the Proposal's granular, prescriptive, and complicated reporting requirements. Retrospective reporting, as the SEC proposed, would require registrants to potentially revisit and recalculate discrete financial items and their associated impact contained in its disclosures. However, systems, processes, training, and internal controls have yet to be developed with the level of granularity contemplated by the Proposal, and compliance will require backward evaluation of enormous amounts of data and other information that is not available for earlier periods.

Moreover, as proposed, the rules would require each registrant to produce metrics for prior years in the first year under the new climate disclosure rules. Requiring registrants to provide comparative, historical information, from two to three years prior to implementation of a dramatically detailed and challenging set of reporting rules, would necessarily involve a comprehensive, costly, and potentially futile review for those prior years. Such historic information simply might not be available as the established accounting systems were not set up to capture climate-related information as required to comply with the Proposal. To avoid these unnecessary burdens, as with most rulemakings, the Commission should ensure that any final rule's requirements apply prospectively and allow a reasonable implementation period.

F. The Commission Should Phase in Requirements Over a Longer Period.

The Commission should recognize the need for flexibility to allow maturation of methodologies that aim to improve comparability and transparency of GHG reporting and allow a sufficient phase-in period for providing climate-related reports to the SEC. This might allow the Commission to work more closely with regulators, like the EPA, that have the technical expertise to assess GHG emissions data collection and reporting methods to

¹²⁵ See IPIECA & API, *Estimating Petroleum Industry Value Chain (Scope 3) Greenhouse Gas Emissions: Overview of Methodologies* (2016), <https://www.api.org/~media/Files/EHS/climate-change/Scope-3-emissions-reporting-guidance-2016.pdf>. API is currently working with IPIECA to update this document.



assure the data are useful across regulatory programs and to interested investors.

Under the Proposal, Scope 1 and Scope 2 GHG emissions included in the SEC reports would initially be subject to limited assurance review by third-party independent assurance providers. But the submission and assurance process for such reporting would benefit from a multi-year phase-in of up to five years to allow for industries to adjust and for potential assurance firms time to understand the attestation requirements and to orient to reporting requirements.¹²⁶ In other words, any third party assurance should not be required in the initial period after the new requirements are implemented, and the Commission should allow for a longer phase in for the limited assurance requirements. The complexity of the Proposal’s requirements will involve significant technical hurdles, extensive training, and substantial coordination with assurance firms that may lack the ability to quickly ramp up providing attestation services to a significant number of additional companies.

G. The Commission Should Strengthen the Safe Harbors.

Furnishing climate-related information to the SEC exposes issuers to enormous liability—especially as that information is inherently less precise, less quantifiable, and more subjective than financial data reported in companies’ 10-K filings. Requiring that registrants provide GHG information in filed reports without strong safe harbors could stymie the industry’s best efforts to provide complete information to its stakeholders and, more importantly, expose companies to undue second-guessing and liability associated with reporting such information without considerable liability protections.

Hence, the Commission should include safe harbors from potential liability that would recognize the uncertainty and evolving state of many of the Proposal’s metrics and other disclosures. Safe harbors should recognize the assurance that might be provided and protect all registrants subject to the Proposal’s disclosure requirements from liability for both forward-looking and non-forward-looking statements that would be required. This should include all required assessments of climate-related risks in recognition of the uncertainties associated with making those assessments and the data limitations that the SEC acknowledges exist. It also should cover all emissions calculations, recognizing the improving and evolving metrics associated with various reporting requirements, including the EPA’s GHGRP.

Companies should not face undue liability risk because of mandatory disclosures of highly uncertain information based on estimates, assumptions, changing methodologies, and limited data and that is subject to significant second-guessing with the benefit of hindsight. For example, there is no baseline for transition and physical climate risks for companies to compare events and, therefore, the Proposal would require companies to make speculative judgments regarding specific risks and impacts. Furthermore, transition risks can be multiple and very broad, particularly in jurisdictions that lack comprehensive climate policy, such as carbon pricing, and in an environment of geopolitical uncertainty impacting demand and prices for oil and natural gas products. Finally, liability protection is necessary to avoid chilling other disclosures. Companies may be more willing to continue to provide climate and sustainability information under third-party verified reporting frameworks and guidelines if there is a lower risk of undue second-guessing, which could develop if there are differences across disclosed information as a result of differing metrics and calculations methods.

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¹²⁶ Such as ISO 14064 and ISAE 3000, among others. Additionally, the Commission should allow the issuers to use services of specialty quality and environmental assurance provider firms with a track record of providing third-party assurance services in the oil and natural gas sector.



For the reasons stated above, we respectfully request that the Commission consider alternatives that would provide investors more useful information and better promote efficiency, competition, and capital formation, and that the Commission revise the Proposal accordingly and resubmit the modified proposal for further public evaluation and comment.

We look forward to the opportunity to discuss these issues with the Commission and its staff.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Michael Kern', is written in a cursive style.

President and CEO
American Petroleum Institute