sifma

asset management group

June 17, 2022

<u>*Submitted electronically via SEC.gov*</u>
Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

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

Dear Ms. Countryman:

The Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG")[1] appreciates the opportunity to comment on the Commission's proposal[2] to enhance and standardize climate-related disclosures.[3]

SIFMA AMG is supportive of the Commission's goals to elicit "[c]onsistent, comparable, and reliable disclosures on the material climate-related risks."[4] This information is valuable to the investment assessment process. Information currently included in voluntary

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[1] SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit http://www.sifma.org/amg. SIFMA AMG appreciates the assistance of Michael Littenberg, Marc Rotter and Kate Donohue of Ropes & Gray LLP in the preparation of this response.

[2] The Enhancement and Standardization of Climate-Related Disclosures for Investors Release No. 33-11042, 87 Fed. Reg. 21,334 (proposed Apr. 11, 2022), https://www.sec.gov/rules/proposed/2022/33-11042.pdf (the "Proposing Release").

[3] SIFMA AMG acknowledges and appreciates the Commission's extension to the original proposed comment period but still believes that complex rule proposals should be given longer comment periods upon publication to allow sufficient time to provide fulsome analysis and feedback. *See* Joint Comment Letter from SIFMA & SIFMA AMG on the "Importance of Appropriate Length of Comment Periods" (Apr. 5, 2022), https://www.sifma.org/resources/submissions/importance-of-appropriate-length-of-comment-periods.

[4] Proposing Release at 13. The discussion in the Proposing Release regarding materiality is in some cases inconsistent with traditional standards of materiality. As discussed in this comment letter, the adopting release for the proposed rules, this commentary should be revised to conform to existing Supreme Court and Commission precedent. *See*, e.g., *Basic Inc. v. Levinson*; 485 U.S. 224 (1988); *TSC Industries, Inc. v. Northway, Inc.*, 426 U. S. 438 (1977); SEC Staff Accounting Bulletin No. 99, Release No. SAB 99 (Aug. 12, 1999), available at https://www.sec.gov/interps/account/sab99.htm#body1 (last visited May 3, 2022); Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Exchange Act Release No. 33-6835 (May 18, 1989), available at https://www.sec.gov/rules/interp/33-6835.htm.

disclosures published by registrants under leading frameworks and standards, including the recommendations of the Task Force on Climate-related Financial Disclosures, the Greenhouse Gas Protocol, the Sustainability Accounting Standards Board standards, the World Economic Forum Stakeholder Capitalism Metrics and the Global Reporting Initiative standards, is regularly reviewed by SIFMA AMG members and taken into account when making certain investment decisions. However, the lack of a mandatory framework applicable to all registrants leads to disclosure that is incomplete, not comparable and in many cases simply not provided.

As discussed in this comment letter, SIFMA AMG believes that some aspects of the proposed rules can be better tailored to achieve the Commission's objectives and serve the needs of investors. In furtherance of the foregoing, SIFMA AMG has provided suggested modifications to selected aspects of the proposed rules for the Commission's consideration.

1. Executive Summary

We have organized our discussion into three sections: (1) areas where the Commission's proposal can be better tailored to satisfy investor needs and avoid unintended consequences, (2) matters for which the timing of effectiveness and reporting proposed by the Commission should be revisited, and (3) proposed requirements that can be revised to mitigate costs and burdens faced by registrants without compromising disclosure of information important to investors. For the convenience of the Commission, we have summarized below the points discussed in the sections that follow:

- To facilitate investors' ability to discern between information that the registrant views as material and information that the registrant believes is immaterial, and to mitigate the disincentive to provide disclosure that may be created by increased liability, SIFMA AMG recommends that the Commission amend the proposed rules to allow certain information to be furnished on a single separate form, rather than filed as part of annual reports and registration statements. To the extent that information is material to a registrant, it could then be incorporated by reference in the registrant's annual or quarterly (as applicable) report and registration statements.
    - In order to be of the most use to investors, disclosure needs to (i) present an accurate portrait of the relevant registrant, (ii) be comparable, (iii) be reliable and (iv) facilitate investors' ability to hone in on critical information. To make it easier for investors to utilize the information required to be disclosed, we recommend the Commission utilize in the rules standards of materiality that investors and registrants understand and are used to applying, and that the Commission clarify the discussion of materiality in the Proposing Release, which is in some cases inconsistent with traditional standards of materiality used by investors.
- SIFMA AMG is supportive of enhanced disclosures relating to climate in financial statements. However, we have concerns that the proposed revisions to Regulation S-X are likely to result in disclosures that are (1) not comparable, (2) of very limited value to investors, and (3) extremely difficult and costly for management to produce. We discuss later in this comment letter specific aspects of this portion of the proposed rules that the Commission should consider modifying and suggest that the Commission instead look to MD&A requirements to require registrants to provide fulsome disclosure of material climate-

related financial impacts that is tailored to the registrant and provided together with a discussion of the registrant's overall performance and business.

- Investors would be better served if foreign private issuers ("FPIs") are allowed to comply with standards adopted by the International Sustainability Standards Board (the "ISSB") or non-U.S. climate reporting regimes recognized as equivalent by the Commission. As a general matter, it is more important to be able to compare registrants against companies in the same market where substantially equivalent disclosure standards exist and thus will be the reference point for many investors.

- Investors would obtain little benefit from climate-related disclosure by non-operating companies, such as business development companies ("BDCs"), real estate investment trusts ("REITS") and exchange-traded products ("ETPs"), such as exchange-traded funds that only hold commodities and, as such, are not registered under the Investment Company Act of 1940 (the "1940 Act"). Like investment companies registered under the 1940 Act ("RICs") not subject to the proposed rules, those companies and vehicles primarily make investments rather than engaging in operating activities. The proposed rules appear to be designed for operating companies, and as such are not well suited to capturing relevant information for BDCs, REITs and ETPs. Those types of entities should be treated like RICs and excluded.

- SIFMA AMG believes some aspects of the proposed rules would incent companies to take steps contrary to the Commission's goals. For example:

  - SIFMA AMG is concerned that the proposed disclosure requirements relating to transition plans and targets will induce many registrants to limit the targets adopted and, in many cases, forego setting targets altogether. The result may be less effective management of climate risk and less public disclosure from registrants regarding their efforts to manage it. SIFMA AMG therefore advocates including transition plans and targets in the proposed furnished report on a comply or explain basis. If the transition plan or target is material to the registrant, it could then be incorporated by reference in the registrant's annual or quarterly (as applicable) report and registration statements.

  - Similarly, to encourage the use of scenario analysis, carbon pricing and similar methods of evaluating climate risk, these should only be required to be included in the proposed furnished report on a comply or explain basis and, if material to the registrant, incorporated by reference into the registrant's annual or quarterly (as applicable) report and registration statements.

- With a view to registrants' ability to meet the requirements of the proposed rules, we believe the proposed implementation periods are likely too short. Although SIFMA AMG supports efforts to bring rules regarding disclosure of climate-risks into effect as soon as possible, the ability of registrants to provide useful information on the time periods contemplated also needs to be considered.

- Additionally, SIFMA AMG is concerned that the annual deadlines for producing certain of the proposed disclosures would require registrants to rely too heavily on estimates and assumptions, reducing the usefulness of the data produced. For example, the proposed requirement to provide GHG emission disclosures for the immediately preceding fiscal year in the annual report on Form 10-K is not aligned with the time required to calculate, collect and validate that data. Although it is important for investors to receive information as quickly as possible, it is also important that the information be as complete and specific to the registrant as possible at the time it is disclosed. Accordingly, SIFMA AMG is supportive of allowing registrants more time to produce data in certain circumstances. SIFMA AMG believes that its proposed furnished form should be due within 120 days of the fiscal year end, which aligns with the timing for information required by Part III of Form 10-K and should have the effect of encouraging registrants to provide climate-related information at the same time that proxy statements for annual meetings are filed.

2. Certain modifications should be made to the proposed rules to better satisfy investor needs and reduce unintended consequences.

- ***Disclosures should follow existing materiality standards.***
  - *Disclosure of climate-related strategy, business model and outlook in annual reports and registration statements should be governed by the same materiality standard as trend disclosure in Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A"), which prior Commission guidance has made clear is not a "probability/materiality" test.*

The proposed rules would require disclosure of climate-related risks reasonably likely to have a material impact on the registrant over short-, medium- and long-term time horizons.[5] SIFMA AMG is supportive of requiring registrants to disclose material climate-related risks because it results in more transparency for investors.

The Proposing Release states that "[t]he materiality determination that a registrant would be required to make regarding climate-related risks under the proposed rules is similar to what is required when preparing the MD&A section in a registration statement or annual report. The Commission's rules require a registrant to disclose material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."[6]

However, the Proposing Release then seems to deviate from that approach, going on to state that "[t]he proposed rule serves to emphasize that, when assessing the materiality of a particular risk, management should consider its magnitude and probability over the short, medium, and long term. In the context of climate, the magnitude and probability of such risks vary and can be significant over such time periods."[7] In 1989, the Commission expressly rejected the use of a "probability/magnitude" test in connection with disclosure requirements that have a "reasonably likely" standard.[8]

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[5] Proposing Release at 63–64.
[6] Proposing Release at 65.
[7] *Id*.
[8] Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures Release SEC Release No. 33-6835 (1989), https://www.sec.gov/rules/interp/33-6835.htm. The Commission stated that: "MD&A mandates disclosure of specified forward-looking information, and specifies its own standard for disclosure - *i.e.*, reasonably likely to have a material effect. This specific standard governs the circumstances in which Item 303 requires disclosure. The probability/magnitude test for materiality approved by the Supreme Court in *Basic, Inc. v. Levinson*, 108 S. Ct. 978 (1988), is inapposite to Item 303 disclosure."

The Commission has reaffirmed its 1989 guidance several times, including in a Release issued in 2020.[9] In that Release, the Commission observed "Some commenters have noted that the probability/magnitude test can be difficult to apply where there is uncertainty as to the probability, timing, and magnitude of the financial impact of future events. As articulated above, we believe that the 'reasonably likely' threshold provides registrants with a tailored and meaningful framework from which to objectively analyze whether forward-looking information is required and provides specific guidance on how registrants should evaluate known events or uncertainties where the likelihood of fruition cannot be ascertained."

For the reasons cited by the Commission in 2020, the probability/magnitude test should not apply when assessing whether climate-related risks are reasonably likely to have a material impact on the registrant. By their nature, the impact of climate-related risks is inherently uncertain, and a probability/magnitude test would result in a large number of very low probability risks that are obvious to investors, rather than tailored and meaningful disclosure applicable to the individual registrant, as well as its investors.

The Commission also should eliminate the express requirement that registrants include disclosure as to climate impacts over each of short-, medium- and long-term time horizons. SIFMA AMG believes the current "reasonably likely" materiality standard used for MD&A disclosures will elicit disclosure of material risks over whatever time period is relevant to a registrant's particular facts and circumstances. The Commission's prescriptive requirements to disclose climate-related matters would also require more detailed discussion of those matters than is required or provided for in other aspects of a registrant's business that may be of equal or greater importance to that registrant, as well as its investors.

However, if the Commission retains a specific requirement to disclose risks over short-, medium- and long-term time horizons, SIFMA AMG agrees the rules should provide registrants with flexibility to define short-, medium- and long-term horizons in a way that takes their particular business and circumstances into account, rather than providing a prescriptive definition.

- *Scope 1 and Scope 2 emissions data should be disclosed on a "furnished" rather than "filed" basis.*

The proposed rules would require registrants to disclose Scope 1 and Scope 2 emissions data in a registrant's Form 10-K, regardless of whether Scope 1 and Scope 2 emissions data is

[9] Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information Release SEC Release, No. 33-10890 (2020), https://www.sec.gov/rules/final/2020/33-10890.pdf. The Commission has recently rejected proposals to change the standard for MD&A disclosure to utilize the probability/magnitude test, stating that:

> We agree with commenters that the probability/magnitude test could result in disclosure of issues that are large in potential magnitude but low in probability. The probability/magnitude test in Basic was developed in the context of a potential merger, where the probability of the event, the potential timing, and the expected effects may be readily estimated. Some commenters have noted that the probability/magnitude test can be difficult to apply where there is uncertainty as to the probability, timing, and magnitude of the financial impact of future events.

Id. at 48–49.

material to the registrant.[10] Instead, the Commission should require Scope 1 and Scope 2 emissions data to be disclosed in the furnished report. If Scope 1 and Scope 2 emissions data is material to the registrant, it should be incorporated by reference in the registrant's annual or quarterly (as applicable) report and registration statements. This approach will allow investors to have access to Scope 1 and Scope 2 emissions data when assessing investments, while also appropriately reducing the potential for frivolous litigation over immaterial mandatory disclosures.

- *Scope 3 GHG emissions data of some registrants may be important to investors but presents complex issues for both registrants and investors, as methodologies for calculating emissions are continuing to develop. To induce registrants to provide Scope 3 data without mandating disclosures that may be inaccurate or unduly burdensome to produce, registrants should be required to either disclose Scope 3 data in the furnished form or explain why they do not do so.*

Scope 3 emissions disclosure presents complex issues. SIFMA AMG members believe that the Commission's goals with respect to Scope 3 disclosure should be aimed to induce registrants to provide Scope 3 disclosure, including by adopting robust safe harbors from liability (as discussed below). In addition, SIFMA AMG members agree that Scope 3 emissions disclosure should be structured to induce registrants to produce meaningful disclosure, rather than relying heavily on modeling or providing unreliable disclosure, and that appropriate disclosure as to assumptions and methodology used should be included. SIFMA AMG urges the Commission to design any final rule in a manner aimed at achieving those goals.

SIFMA AMG members recognize and appreciate the importance of Scope 3 emissions data in assessing investments. Complete and consistent Scope 3 disclosure is useful for investors to fully understand the transition risks applicable to an issuer.

However, a majority of SIFMA AMG members have expressed concern that it is premature to mandate Scope 3 disclosure because methodologies for calculating emissions and collecting data are still at a relatively early stage of development. The Commission can and should revisit the question of mandatory Scope 3 disclosure in the future rather than adopting mandatory disclosure requirements now. Many industries have not yet settled on methodologies for calculating Scope 3 emissions. For example, within the context of the finance industry, widely accepted guidance has not yet been published for certain financial products. A leading voluntary standard for the financial industry, the "Global GHG Accounting & Reporting Standard for the Financial Industry" published by the Partnership for Carbon Accounting Financials ("PCAF"), states that it:

> does not provide explicit guidance on methods to calculate financed emissions for every financial product including the following: private equity that refers to investment funds, green bonds, sovereign bonds, loans for securitization, exchange traded funds, derivatives (e.g., futures, options, swaps), initial public

[10] Proposed Item 1504(b) of Regulation S-K.

offering (IPO) underwriting, and more. More detailed guidance on such financial products will be considered and published in later editions of the Standard.[11]

Additionally, there is no widely accepted and accurate mechanism to gather data for Scope 3 emissions for certain activities (e.g., financed emissions related to residential loans) other than through the use of broad averages created by data providers, which may lead to inaccurate reporting and make it difficult for investors to conduct meaningful comparisons between registrants. Members have also expressed concern that inclusion of Scope 3 emissions information in annual reports and registration statements may lead investors to believe those disclosures are more accurate, comparable and reliable than is warranted given the evolving nature of Scope 3 methodologies and heavy reliance on assumptions and modelling.

Other industries face similar challenges. For example, there is no defined method for defining Scope 3 GHG emissions from a standard barrel of oil, and trying to track the GHGs emitted can become incredibly complex, especially because the trajectory a petroleum product can take varies.

Instead of requiring mandatory disclosure of Scope 3 emissions as contemplated by the proposed rules, SIFMA AMG believes investors are better served by including Scope 3 emissions data in the proposed furnished report on a comply or explain basis.[12] If Scope 3 emissions data is material to the registrant, disclosure should be incorporated by reference in the registrant's annual or quarterly (as applicable) report and registration statements. Because of the uncertainty inherent in incomplete and evolving methodology for producing Scope 3 disclosures, the Commission should also expand the safe harbor proposed for that disclosure, as discussed below.

Despite the complexity of this issue, some SIFMA AMG members suggest that in lieu of a "comply or explain" approach, all registrants should be required to disclose emissions for those Scope 3 categories (and only for those Scope 3 categories) that are material to that registrant. Those members believe that even imperfect emissions data for those Scope 3 categories will likely be more reliable than the Scope 3 estimates currently available from third-party data providers and will be useful in assessing investments. Those members also believe that failing to mandate such Scope 3 disclosure will delay the development of the mechanisms needed to make Scope 3 disclosures more reliable and comparable.

- ***SIFMA AMG supports enhanced disclosure of climate-related risk management processes. However, registrants should only be required to disclose those processes to the extent material.***

The proposed rules would require registrants to "[d]escribe *any* processes the registrant has for identifying, assessing, and managing climate-related risks" (emphasis added).[13] This would include several highly prescriptive requirements, including how the registrant prioritizes

[11] *See* https://carbonaccountingfinancials.com/files/downloads/PCAF-Global-GHG-Standard.pdf at 70 (last accessed Apr. 29, 2022).
[12] Proposed Item 1504(c) of Regulation S-K.
[13] Proposed Item 1503(a) of Regulation S-K.

risks and decides whether to accept, mitigate or adapt to a particular risk, regardless of whether such risks are material.

The result will be disclosure that provides an unbalanced view of a registrant's risk management practices. Accordingly, SIFMA AMG recommends the Commission revise proposed Rule 1503(a) of Regulation S-K to add a materiality qualifier.

- ***Proposed Article 14 of Regulation S-X would in many respects not elicit meaningful or comparable disclosures.***
  - *Disclosure will be more useful to investors if included in MD&A.*

Disclosures concerning impacts and costs relating to severe weather events and transition activities will be more useful to investors if included in MD&A. Item 303(b) of Regulation S-K requires that "[w]here the financial statements reflect material changes from period to period in one or more line items, including where material changes within a line item offset one another, describe the underlying reasons for these material changes in quantitative and qualitative terms."[14] The information contemplated by proposed Article 14 of Regulation S-X is more useful to investors in the MD&A than in the financial statements since in the MD&A it is presented in context with other quantitative and qualitative information describing year-over-year impacts on financial results. Disaggregating the impact of particular events or transition events to show impacts on particular line items and then aggregating impacts of those events together at the line item level for all severe weather events or transition activities will not allow investors to easily understand the import of any particular event or activity, making it far less useful in developing a holistic understanding of the impact of climate-related events and activities on a registrant's operating results and financial condition. Although the existing MD&A requirements encompass climate-relate impacts on financial statements, SIFMA AMG believes the better approach would be for the Commission to further emphasize the importance of providing that disclosure by adding an express reference to climate-related impacts when discussing results of operations, capital resources and liquidity, rather than imposing new, highly prescriptive financial statement requirements.

- ***If the Commission decides enhanced financial statement disclosure is necessary in lieu of or in addition to MD&A disclosure, it should request FASB to evaluate and, if appropriate, adopt disclosure standards with respect to climate-related matters.***

Adoption of proposed Article 14 of Regulation S-X would represent a marked divergence from the Commission's practice of allowing FASB to develop new substantive accounting standards rather than doing so itself. As then Chief Accountant to the Commission Robert Herdman stated to Congress in 2002:

> "in recognition of the expertise, energy and resources of the accounting profession, and without abdicating its responsibilities, the Commission, for over 60 years, has looked to the private sector for leadership in establishing and improving accounting standards. The quality of our accounting standards and our capital markets can be attributed in large part to the private sector standard-setting process, as overseen by the SEC.

[14] 17 U.S.C. § 229.303(b).

The primary private sector standard setter is the FASB …"[15]

- ***If the Commission proceeds with adopting proposed Article 14, disclosure should only be required for impacts that are material to the registrant and that would be recorded under generally accepted accounting principles.***

If the Commission declines to adopt SIFMA AMG's proposal to require fulsome disclosure in MD&A and instead proceeds with proposed Article 14 of Regulation S-X, several revisions should be made to the proposal. The proposed rules would require registrants to model what reported amounts would have been inclusive or absent physical or transition risks. Given the level of interpretation this analysis would require, SIFMA AMG expects that the outcome would be disclosure of large amounts of extremely granular data that is unlikely to be comparable or to add value to investors. Additionally, such information would not be consistent or indicative of how registrants monitor or manage climate risk. If this was not the intent of the proposed rules, and the intent was instead to only focus on discrete and realized impacts of climate change, clarification is necessary to avoid unintended consequences. Consistent with the approach of only requiring disclosure of impacts that would be recognized under generally accepted accounting principles, the requirement should be limited to disclosure of the impacts of severe weather and other natural conditions, as opposed to requiring disclosure of transition activities.[16]

In addition, to better ensure information is useful to investors, the 1% financial impact threshold should be replaced by a more typical materiality threshold. Due to differences among registrants' particular facts and circumstances, the more useful approach would be a principles-based materiality test, with financial statement materiality determined in accordance with long-standing guidance from the Commission and its staff (e.g., Staff Accounting Bulletin No. 99) and U.S. GAAP.

Consistent with the foregoing approach, in order to make disclosures useful and easily understood by investors, the requirement that registrants disclose impacts on estimates and assumptions used to produce financial statements from "exposures to risks and uncertainties associated with, or known impacts from, severe weather events and other natural conditions" and "risks and uncertainties associated with, or known impacts from, a potential transition to a lower carbon economy or any climate-related targets disclosed by the registrant" should be qualified by materiality.[17] As proposed, this requirement will in many cases result in a large volume of immaterial disclosures of small changes to estimates and assumptions that do not meaningfully affect the financial statements and make it harder for investors to identify significant changes.

[15] *Corporate Accounting Practices: Is There a Credibility GAAP?: The Roles of the SEC and the FASB in Establishing GAAP*: *Hearing Before the H. Subcomm. on Capital Markets, Ins., and Gov't Sponsored Enterprises, Comm. on Fin. Servs.*, 107th Cong. 51–53 (May 14, 2002) (Statement of Robert K. Herdman, Chief Accountant, SEC), https://www.sec.gov/news/testimony/051402tsrkh.htm.
[16] The Commission suggested this approach as a potential alternative in the Proposing Release in request for comment 61.
[17] Proposed Rule 14-02(g)-(h) of Regulation S-X.

- ***Certain of the proposed rules would better elicit useful information by incorporating principles-based, rather than prescriptive, requirements or including materiality qualifiers.***
  - *Certain of the proposed disclosures regarding physical risks are unlikely to elicit meaningful disclosure from many registrants and may allow some to mask risks.*

SIFMA AMG agrees that registrants should be required, as proposed, to separate out risks by whether they are physical or transition risks.[18]

However, SIFMA AMG believes a principles-based approach is preferable to two of the proposed quantitative requirements regarding physical risks. The proposed rules would require registrants subject to flood risks to "disclose the percentage of those assets (square meters or acres) that are located in flood hazard areas in addition to their locations."[19] The proposed rules also would include a requirement to list ZIP codes of properties subject to flood risk.[20] For both of these items, it would be more useful to investors if registrants were required to describe their properties in the manner determined by them to be appropriate in the context of their business. Square footage or acre disclosure does not take into account the significance of particular assets, potentially underestimating the physical risks represented by high impact assets with a small footprint. ZIP code lists without contextual information, such as the city, region or other relevant geographic identifier, would not be meaningful and could be used by registrants to obfuscate physical risks.

  - *Disaggregated data on GHG emissions will be valuable for some, but not all, registrants.*

The Commission has proposed requiring data on GHG emissions to be disaggregated by constituent greenhouse gas.[21] In most cases, requiring disaggregation by constituent greenhouse gas will produce incremental disclosure that is of little use to investors. Instead, registrants should generally only be required to provide CO_2-equivalent information. However, to the extent emissions of a particular constituent greenhouse gas pose a material risk to a registrant, they should be required to present data for that particular greenhouse gas only on a disaggregated basis. If only a single gas presents a material risk to the registrant, it should not also be required to provide disaggregated data for the remaining 10 gases.

  - *Disclosures relating to carbon offsets and renewable energy credits or certificates ("RECs") should be subject to a materiality qualifier.*

Carbon offsets and RECs are an important part of many registrants' efforts to reduce overall GHGs. SIFMA AMG therefore agrees that use of offsets and RECs should be required to be disclosed if material to a registrant. However, the proposed rules would require disclosure of the amount of carbon reduction represented by *any* use of carbon offsets or RECs, as well as among other things the source and cost of those offsets and RECs. Disclosures regarding immaterial use of offsets or RECs would not be meaningful to investors.[22] As such, proposed Item 1506(d) of Regulation S-K should be revised to include a materiality qualifier.

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[18] Proposed Item 1502(a)(1).
[19] Proposed Item 1502(a)(1)(i)(A) of Regulation S-K.
[20] Proposed Items 1500(k) and 1502(a)(1)(i)(B) of Regulation S-K.
[21] Proposed Item 1504(a)(1) of Regulation S-K.
[22] Proposed Items 1502(c) and Item 1506(d).

SIFMA AMG also recommends the proposed definitions of "carbon offsets" and "Renewable energy credit or certificate (REC)" be revised to align with the definitions of those concepts used in the Greenhouse Gas Protocol. The Greenhouse Gas Protocol definitions provide additional clarity and are definitions investors already are using and familiar with.[23]

- ***Robust safe harbors and clear guidance as to what is necessary to rely on those safe harbors will lead to more complete disclosure, allow investors to better evaluate certain information covered by safe harbors and mitigate adverse effects on capital formation.***
  - *The safe harbor proposed by the Commission for Scope 3 disclosure should be expanded.*

The Commission has proposed a safe harbor for Scope 3 disclosure, due to the need to rely on third parties for the relevant data. The safe harbor should also be extended to other climate-related disclosures (e.g., Scope 2 emissions) that rely on third-party data and the use of estimates made in good faith, as these present the same considerations and liability concerns as Scope 3 emissions data, and the safe harbor should clearly protect against both private actions and Commission enforcement actions. An expanded safe harbor will encourage more fulsome disclosure, which will benefit investors.

  - *The Commission should provide guidance as to what constitutes sufficient cautionary language for climate-related statements under Section 21E of the Securities Act and Section 27A of the Exchange Act and provide similar safe harbors for persons and transactions not able to rely on those provisions.*

Sections 27A of the Securities Act and 21E of the Exchange Act provide protection from liability for forward-looking statements if those statements are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." The requirement to include meaningful cautionary language is important to ensure that investors can adequately assess forward-looking statements. However, given the enormous number of variables that can affect climate-related forward-looking statements, it is far from clear how registrants will interpret that requirement or how narrowly focused such cautionary language must be. As such, the Commission should provide guidance to explicate what would constitute a "meaningful cautionary statement" with respect to climate-related matters. Such guidance would also have the effect of making registrants more likely to feel confident relying on those safe harbors, likely leading to more fulsome disclosure.

Additionally, Section 27A of the Securities Act and Section 21E of the Exchange Act are not available for initial public offerings or tender offers, or to registrants found to violate certain securities laws. Given the breadth of new forward-looking disclosures that would be required by the proposed rules, it is important to create safe harbors for those disclosures in all contexts. Otherwise, potential registrants could delay or avoid initial public offerings in the United States to avoid the heightened risk of litigation that the Commission's proposal would create. That

[23] Greenhouse Gas Protocol, *GHG Protocol Scope 2 Guidance* at 105–06, https://ghgprotocol.org/sites/default/files/standards/Scope%202%20Guidance_Final_Sept26.pdf) (last accessed: Apr. 26, 2022).

would result in those investments only being available to individuals and institutions with access to the private markets, meaning retail investors would lose access to potential investments.

- ***The Commission's proposed disclosure requirements relating to targets and goals, transition plans, scenario analysis and governance are likely to have unintended consequences that are harmful to investors.***
    - *The disclosure requirements relating to the use of scenario analysis will require registrants to produce disclosure that is of limited value to investors and induce registrants to avoid using scenario analysis and similar tools.*

Use of scenario analysis should not automatically trigger detailed information concerning those tools and their use in an annual report and registration statements.[24] Rather than promoting disclosure, the proposed requirements will discourage many registrants from further developing and using scenario analysis. That may in turn lead to less effective management of and less robust disclosure regarding climate risks.

For the foregoing reasons, SIFMA AMG believes investors are better served by including scenario analysis in the proposed furnished report on a comply or explain basis. Registrants that utilize scenario analysis should be required to disclose in the furnished report that they do so and the scenarios considered, without disclosing inputs and outputs (which will in many cases include proprietary information that registrants would not otherwise be required to, and will not wish to, disclose). If registrants do not utilize scenario analysis or similar tools, they should be required to disclose in the furnished report why such tools are not used. If the use of scenario analysis or similar tools is material to the registrant, disclosure regarding its use should be incorporated by reference in the registrant's annual or quarterly (as applicable) report and registration statements. This approach will allow investors to access this information, while protecting registrants against frivolous lawsuits regarding disclosures of matters like scenario analysis that will contain inherent uncertainty.

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    - *Similarly, requiring registrants that maintain an internal carbon price to provide detailed disclosure concerning its use will induce registrants to avoid using internal carbon pricing and similar tools.*

The Commission's proposed disclosure requirements regarding the use of internal carbon pricing also will cause many registrants to avoid using carbon pricing and similar tools to mitigate their compliance burden. Accordingly, to encourage use of internal carbon pricing, SIFMA AMG recommends that required internal carbon price disclosure should be included in the furnished report on a comply or explain basis. If registrants do not utilize internal carbon pricing or similar tools, they should be required to disclose in the furnished report why such tools are not used. If internal carbon pricing is material to the registrant, it should be incorporated by reference in the registrant's annual or quarterly (as applicable) report and registration statements. This approach will result in more information about how a registrant has integrated climate risks into its business model or strategy.

[24] Proposed Item 1502(f) of Regulation S-K.

- *Further, registrants should only be required to disclose transition plans in a furnished report on a comply or explain basis.*

As proposed, the rules may induce registrants to not create transition plans – ultimately making it more difficult for investors to assess registrants' plans and ability to adapt to a changing climate. The requirement to disclose any transition plan "adopted" by a registrant[25] creates an ambiguous and potentially onerous disclosure standard – it is unclear what "adopted" would mean in this context. For example, a registrant may have an enterprise-wide transition plan approved by its board of directors and more granular sub-plans for specific geographies or business units. These concerns would be further exacerbated for transition plans that are preliminary in nature or otherwise not final and therefore are not appropriate for public disclosure.

Accordingly, this portion of the rules should instead require transition plans to be included in the proposed furnished report on a comply or explain basis. If the transition plan is material to the registrant, it should be incorporated by reference in the registrant's annual or quarterly (as applicable) report and registration statements. This approach will mitigate the disincentive for registrants to utilize transition plans. If registrants do not utilize transition plans, they should be required to disclose in the furnished report why transition plans are not used.

- *Additionally, the requirement to disclose targets and goals should be similarly revised.*

The proposed requirement to disclose "any targets or goals *related to* the reduction of GHG emissions"[26] (emphasis added) is nebulous. The meaning of "other climate-related target or goal"[27] is similarly ambiguous and could potentially encompass any number of different activities, well beyond the examples listed in the proposed rules. It is also unclear what is meant by "interim targets."[28]

SIFMA AMG recommends that these aspects of the proposed rules be clarified. Registrants should be incentivized to set internal climate-related targets and goals, rather than discouraged because of unclear and overly broad disclosure requirements. In addition, SIFMA AMG proposes taking a similar approach to target and goal disclosure as is proposed with respect to transition plans – *i.e.*, that targets and goals are only required to be included in the furnished report on a comply or explain basis and that if the targets or goals are material to the registrant, they should be incorporated by reference in the registrant's annual or quarterly (as applicable) report and registration statements. This approach will mitigate the disincentive for registrants to adopt targets and goals. If the registrant has not adopted targets or goals, they should be required to disclose in the furnished report why they have not done so.

[25] Proposed Item 1503(c)(1) of Regulation S-K.
[26] Proposed Item 1506(a)(1) of Regulation S-K.
[27] *Id.*
[28] Proposed Item 1506(b)(5) of Regulation S-K.

- *Requiring registrants to identify directors with "expertise in climate-related risks" will result in duplicative disclosure, a de facto substantive governance requirement, and degrade the ability of boards to provide effective oversight.*

SIFMA AMG supports enhanced transparency around climate risk governance. However, investors already are provided with information sufficient to evaluate the composition of a registrant's board of directors under the Commission's existing rules. Item 401(e) of Regulation S-K requires that registrants disclose "the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director for the registrant at the time that the disclosure is made, in light of the registrant's business and structure." Requiring registrants to state specifically whether any board member has expertise in climate-related risks will not provide investors with any new information.

Inducing a board to fill a seat with a climate expert rather than a generalist or industry expert will dilute its ability to provide effective oversight—especially when taken together with the Commission's recent similar proposal regarding disclosure of cybersecurity experts on boards of directors.[29]

As an alternative to requiring registrants to identify directors with expertise in climate-related risks, the Commission should instead consider requiring registrants to disclose efforts to familiarize and educate board directors on climate-related risks. Encouraging registrants to focus on educating directors on climate-related issues will result in building expertise among all directors, rather than relying on fewer directors to provide input on all climate-related matters.

SIFMA AMG has similar concerns regarding the requirement to identify management positions or committees responsible for assessing and managing climate-related risks and the identity and expertise of persons holding those positions and would suggest a similar approach to the one suggested above be taken with respect to mandatory disclosure requirements of management's climate-related expertise.

- *Requiring registrants to disclose the frequency of board and management discussions of climate-related risks will not provide investors with any useful information.*

The proposed rules would require disclosure of board and management processes relating to the consideration of climate-related risks, including the frequency of discussions.[30] Although SIFMA AMG is not opposed to heightened disclosure around board and management consideration of climate-related risks, it believes that requiring disclosure around the frequency of board and management discussions relating to climate-risk is not useful because it inappropriately places the focus on the number, rather than the quality or depth, of discussions. Additionally, for the same reasons that registrants will feel pressured to add members of management and a director with climate-related expertise, boards and management will feel pressured to have more frequent, and not necessarily more thoughtful, discussions related to climate-risk. That will degrade the ability of boards of directors and management to exercise

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[29] *See* Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure Release SEC Release No. 33-11038 (Mar. 9, 2022), https://www.sec.gov/rules/proposed/2022/33-11038.pdf (the "Cybersecurity Proposal").
[30] Proposed Item 1501(a)(iii) at Regulation S-K.

independent judgment as to how their time and resources should be allocated, which will be to the detriment of investors that rely on directors' oversight and judgment.

Boards and management are not required by Commission rules to report on how frequently any other topic is discussed. As such, the proposed requirement will result in climate-related risks being unduly emphasized in annual reports relative to other areas of importance. However, to help encourage board focus on climate risk, in addition to the other disclosures proposed in the rule, SIFMA AMG suggests revising Item 407 of Regulation S-K to clarify that disclosure of the board's role in risk management should include a discussion of how the board addresses climate-related risks that are material to the registrant. In particular, Item 407(h) of Regulation S-K should be amended to specifically reference climate risks.

- ***To allow investors to better compare information produced by FPIs with peer companies, FPIs should be allowed to report using disclosure regimes that are substantially similar to the Commission's rules.***

As noted above, investors will need the ability to compare registrants against companies in the same markets as those registrants. In many cases, that will require investors to compare a registrant's information against climate-related disclosure produced under the requirements of a registrant's home jurisdiction. In order to facilitate investors' ability to do so, and to mitigate costs ultimately borne by shareholders of registrants that are dual listed, SIFMA AMG believes the Commission should adopt an approach similar to that used for resource extraction disclosure. Under Exchange Act Rule 13q-1, FPIs can report using disclosure regimes that the Commission has determined are "substantially similar" to its rules. SIFMA AMG urges the Commission to take a similar approach with respect to climate-related disclosure, including by identifying regimes that are "substantially similar" to its rules when those rules are adopted.[31]

- ***The Commission should publicly commit to reevaluating the rules periodically in light of rapidly evolving disclosure practices and requirements relating to climate risk.***

Practices and requirements around climate risk disclosure are rapidly evolving, and new requirements are pending or proposed across the globe. Furthermore, voluntary standards, frameworks and methodologies continue to evolve. SIFMA AMG believes it is important for the Commission's climate risk rules to be tailored to the needs of U.S. investors. Therefore, it is important for the Commission to actively consider other regulatory developments, voluntary disclosure developments and evolving market norms relating to climate risk disclosure, and for U.S. rules in this area to continue to evolve where appropriate. As it typically does with accounting standards, it would be appropriate for the Commission to look to a private sector standards setter (e.g., FASB or an entity related to FASB, as the ISSB is related to the IFRS Foundation) with respect to climate-related disclosure standards. Alternatively, to ensure the climate-reporting regime ultimately adopted by the Commission remains fit for purpose, the Commission should publicly commit to seek comment on and review the effectiveness and appropriateness of the rules adopted not less frequently than every three years.

[31] SIFMA AMG acknowledges that Canadian issuers reporting under the Multi-Jurisdictional Disclosure System are excluded from the proposed rules. SIFMA AMG supports that exclusion and believes that other FPIs subject to adequate home country disclosure regimes should be similarly situated.

3. Certain of the proposed phase-in periods for disclosure and annual deadlines for reporting information should be revised.

- ***The proposed annual deadlines for climate-related disclosures do not provide sufficient time for registrants to obtain that data and produce disclosure.***

Reliable, assured Scope 1 and Scope 2 GHG emissions data will in most cases not be ready for inclusion in that year's Form 10-K. Disclosure of Scope 3 emissions data, if required, will present even greater challenges, since, as acknowledged in the Proposing Release, many registrants need to obtain information from a large number of third parties and to then evaluate and synthesize that information. Disclosure that is rushed, and as such is more likely to contain errors, is not useful to investors.

Accordingly, SIFMA AMG recommends that climate-related disclosures for a particular fiscal year instead be required to be furnished within 120 days of the end of the fiscal year. We believe this timing is generally aligned with current voluntary market practices (though, in many cases, it would require registrants to accelerate their reporting of climate-related matters). The resulting disclosure is likely to be more accurate and reliable, which will be more useful to investors. SIFMA AMG expects that investors will (when applicable) encourage companies to align furnishing this disclosure with the timing of proxy statements, so that this disclosure can be reviewed before annual general meetings.

- ***If the Commission proceeds with the proposed rules, a substantially longer transition period is needed.***

If the Commission proceeds with the rules as proposed, including, in particular, proposed Article 14 of Regulation S-X and the mandatory disclosure requirement for Scope 3 data, the proposed compliance dates and deadlines would need to be extended. To be able to meet their compliance obligations, registrants will need sufficient time to build out data collection processes and procedures, and the proposed compliance dates and deadlines will not provide an adequate transition period.

4. Elements of proposed rules can be amended to reduce costs and burdens faced by registrants without reducing useful disclosures that would be provided to investors.

- ***SIFMA AMG renews its suggestion that the Commission not require attestation at this time and instead revisit mandatory attestation in the future.***

As SIFMA AMG noted in its June 2021 comment letter to the Commission, the professional capacity to audit or assure climate-related metrics or other disclosures by registrants is still being developed. Additionally, as the Commission noted in the Proposing Release, attestation standards for GHG emissions are still "evolving."[32] As a result, adoption of a mandatory attestation requirement now will result in the use of different attestation standards by different registrants, as applied by attestation providers that have divergent levels of expertise and experience. That is likely to make it difficult for investors to fully evaluate and understand the level of comfort they should derive from any particular attestation report without also having a detailed understanding of the standard used and examining the attestation provider. However, the development of processes and procedures to support an attestation provider's work will

[32] Proposing Release at 226.

impose substantial costs and burdens on registrants (in addition to the amounts paid to the attestation provider), which are ultimately borne by investors.

As the Commission is aware, many larger registrants obtain limited assurance in connection with existing voluntary GHG emission disclosures. We expect this to continue to be the case. Therefore, investors will not be prejudiced if a determination regarding mandatory assurance is deferred. We expect these registrants and their assurance providers will in the interim work to align their processes, procedures, controls and standards, which will create efficiencies and reduce costs for the broader registrant population. It also will better enable the Commission to adopt attestation requirements that are responsive to market needs.

- ***A limited assurance standard is sufficient for investors.***

As noted above, SIFMA AMG recommends that mandatory assurance over GHG emissions data be revisited in the future. When the ecosystem necessary to provide assurance has further developed, assurance may become appropriate and important to provide investors with confidence in GHG emissions data.

However, even if an assurance requirement is adopted, limited assurance should be sufficient to provide investors with a degree of comfort that the GHG emissions data provided is accurate (which, as noted below, will be a higher level of comfort than is included for any other non-financial information that is material to a registrant). Further, it is likely that attestation reports at a reasonable assurance level over that data would be extremely costly to obtain.

As the Commission notes in the Proposing Release, quantitative information included outside of the financial statements, including financial and non-financial metrics such as key performance indicators ("KPIs")[33] is typically not subject to external assurance.[34] The examples that the Commission cites of other areas where external assurance is required for information not included in the financial statements are only applicable to registrants in particular industries and cover matters (e.g., mineral reserves for mining companies) likely to be material to all registrants in those industries.

The approach proposed by SIFMA AMG of course would not preclude shareholders from seeking a higher level of assurance from selected registrants (to the extent assurance is required). We believe that a market-based solution is the better approach for encouraging reasonable assurance, as we believe this is something that investors will seek from a very limited number of registrants. Requiring only limited, rather than reasonable, assurance would substantially mitigate costs faced by registrants, which are ultimately borne by investors.

- ***Climate-related disclosures, including GHG emissions data and financial information, only should be required to be disclosed prospectively.***

As proposed by the Commission, based on its anticipated timeline for adoption of the rules, large-accelerated filers would need to first provide Scope 1 and Scope 2 disclosures in

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[33] The Commission has noted that KPIs and other quantitative disclosures may be required under Item 303(a) of Regulation S-K if the Company "believes [it] is necessary to an understanding of its financial condition, changes in financial condition and results of operations." SEC Release No. 33-10751 at 2 (Feb. 25, 2020).
[34] Proposing Release at 220.

2024 for fiscal years 2023, 2022 and 2021.[35] Accelerated filers would need to first provide that disclosure in 2024 for fiscal years 2022, 2023 and 2024.

As proposed, information for historical periods only would be required if "reasonably available."[36] This information is likely to be of limited use to investors, since it will be incomplete. In addition, attempts to gather that information will impose costs on registrants, which are ultimately borne by investors. Therefore, data should only be required to be disclosed prospectively with respect to GHG emissions. Similarly, financial disclosure should only be required beginning after the effective date of the rule and should not be required for periods beginning prior to the effective date of the rules.

- ***Non-operating companies such as BDCs, REITs and ETPs should be excluded.***

BDCs, REITs and ETPs are entities that generally invest assets in other companies, rather than engaging in operations of their own. Many of the key requirements of the proposed rules, such as disclosure of Scope 1 and Scope 2 emissions and GHG intensity, would not provide meaningful information for BDCs, REITs, ETPs and other non-operating companies that often take non-controlling interests in other companies or simply hold and trade commodities and do not themselves have significant footprints or operations. However, applying the proposed rules to BDCs, REITs, ETPs and other non-operating companies would impose costs and burdens on those entities. The Commission has recognized that applying the proposed rules to registrants that primarily make investments rather than engaging in operations is not appropriate, evidenced by the fact that RICs were excluded from the proposed rules. BDCs, REITs and ETPs should be similarly excluded.

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SIFMA AMG supports the SEC's efforts to create a meaningful and useful framework for climate-related disclosures and appreciates the opportunity to comment on the proposed rules. If you have any questions or would like to discuss these points further, please feel free to contact Lindsey Keljo (LKeljo@sifma.org; 202 962 7312) or our counsel Michael Littenberg (Michael.Littenberg@ropesgray.com; 212 596 9160) and Marc Rotter (Marc.Rotter@ropesgray.com; 212 596 9138) at Ropes & Gray LLP.

Sincerely,

LKeljo

Lindsey Weber Keljo, Esq.
Asset Management Group—Head
Securities Industry and Financial Markets Association

[35] Proposing Release at 44, 215.
[36] Proposed Item 1504(a) of Regulation S-K.

Cc: The Honorable Gary Gensler, Chair
The Honorable Allison Herren Lee, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
Securities and Exchange Commission

Michael R. Littenberg
Marc Rotter
Ropes & Gray LLP
Counsel to SIFMA AMG