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 Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the Commission's proposal[2] to enhance and standardize climate-related disclosures.[3] The Proposing Release states that the Commission is proposing new disclosure requirements to elicit "[c]onsistent, comparable, and reliable disclosures on the material climate-related risks."[4] SIFMA agrees that investors have a strong interest in certain climate-related information, and supports increased disclosure of material climate-related information that is useful to investors.[5] Many SIFMA members have been voluntarily disclosing

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org. This comment letter is being submitted on behalf of SIFMA's broker-dealer and investment bank members. SIFMA's Asset Management Group is submitting a separate response. SIFMA appreciates the assistance of Michael Littenberg, Marc Rotter and Hannah Shapiro 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) (hereinafter the "Proposing Release"), available at https://www.federalregister.gov/d/2022-06342.

[3] SIFMA 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, *Importance of Appropriate Length of Comment Periods* (April 5, 2022), available at https://www.sifma.org/resources/submissions/importance-of-appropriate-length-of-comment-periods.

[4] Proposing Release at 7.

[5] *Id.* 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

greenhouse gas ("GHG") emissions and other climate-related data for some time, often based upon leading international voluntary frameworks and standards, including the recommendations of the Task Force on Climate-related Financial Disclosures ("TCFD"), the Greenhouse Gas Protocol, the Sustainability Accounting Standards Board standards, the World Economic Forum Stakeholder Capitalism Metrics and the Global Reporting Initiative standards. In addition, many international firms have also been working to implement new climate disclosure regulation now required—or under development—by their home country regulators and governmental authorities.

As discussed in this comment letter, while SIFMA is supportive of the goal of increased disclosure of material climate-related information, SIFMA believes the proposed rules can be better tailored to (1) achieve the Commission's objectives, (2) eliminate or reduce the effect of unintended consequences that would prevent the proposed rules from achieving those objectives, (3) elicit disclosure that will be reliable, comparable and useful to investors, and (4) mitigate adverse effects on capital formation and additional costs that registrants will face. Accordingly, SIFMA has provided suggested revisions or alternative approaches to portions of the proposed rules for the Commission's consideration.

1. Executive Summary

SIFMA recommends the Commission reconsider certain aspects of its proposals, as discussed in this comment letter. We have summarized below the selected points discussed in the sections that follow:

- *The proposed approach to financial metrics should be revisited.* SIFMA strongly urges the Commission not to adopt proposed Article 14 of Regulation S-X, and instead look to management discussion and analysis ("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.
    - The requirements under proposed Article 14 of Regulation S-X to provide a granular audited financial statement footnote indicating the effect of climate-related impacts and expenses on individual line items in the financial statements would be very difficult or impossible for registrants to implement as proposed. Registrants would be required to make highly speculative judgments as to the financial impact of severe weather events, transition activities and climate risk as opposed to any number of other factors, such as general economic conditions, subject to external audit.
    - Additionally, the line-item disclosure standard would in many cases lead to distorted results that would not be useful for investors. For example, a registrant may have billions in revenue and other income of $100. If so, any impacts on other income of $1 or more would need to be disclosed, which would not be useful for investors and may in fact be confusing and obfuscate more meaningful disclosures.

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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.

        - This defect cannot be remedied by increasing the percentage threshold from 1% to some higher number. In the above example, if the threshold were 10%, the registrant would need to disclose impacts on other income of $10 or more, an amount still clearly immaterial to a registrant with billions in revenue.

    - If the Commission instead concludes that additional financial statement reporting requirements are needed, to ensure that any such new financial statement reporting requirements appropriately align with existing requirements, SIFMA strongly urges the Commission to follow its historical practice with respect to the development of new accounting standards and work with the Financial Accounting Standards Board ("FASB") to develop appropriate financial statement disclosure standards for climate-related matters (e.g., "transition activities"), rather than adopt proposed Article 14 of Regulation S-X.

- *Scope 3 disclosure should only be required if material to the registrant or to the extent specifically tied to publicly disclosed targets.* Scope 3 disclosure should only be required if either material to the registrant or if the registrant has publicly disclosed Scope 3 targets. However, registrants that have set targets regarding Scope 3 emissions should only be required to disclose Scope 3 emissions related to those targets. For example, a financial institution that has set Scope 3 targets regarding financed emissions in its commercial lending portfolio should not be required to disclose Scope 3 emissions related to its residential lending portfolio (unless Scope 3 emissions from the residential lending portfolio are otherwise material to the registrant). Onerous disclosure requirements relating to targets may induce some registrants to limit or forego climate-related targets.

- *The proposed rules are overly prescriptive and do not provide enough flexibility based on the varied business models of registrants.* The proposed disclosure requirements are overly prescriptive and take an unnecessary "one-size fits all" approach to complex issues that have radically divergent effects on different registrants and industries. For many registrants and industries, the proposed rules would mandate a substantial volume of required information that is immaterial and not useful to investors. By contrast, a more principles-based approach would result in useful information that is more tailored to particular registrants.

    - The volume of information required under the proposed rules could have the unintended consequence of confusing and potentially misleading investors by giving climate-related risks increased prominence relative to other matters of equal or greater importance, making it difficult for investors to discern what information is actually important.

    - The Commission should make clear that any disclosures under the proposed rules would be subject to the same materiality standards set out in prior Commission guidance and established legal precedent. Any divergence from this precedent will make it more difficult for investors to evaluate the information presented and to make informed decisions.

    - The requirement to disclose the frequency with which boards and management discuss climate-related risks will be misleading to investors and inappropriately puts the focus on quantity over quality of discussions. In addition to not being a decision-useful data point, it is likely to divert boards from addressing other urgent matters requiring board attention and significantly increase frivolous breach of fiduciary duty claims and books-and-records requests. SIFMA suggests that this requirement be eliminated.

- *Registrants should be permitted to furnish, rather than file, certain GHG emissions disclosures.* Requiring that all climate-related disclosure be filed, rather than furnished, in the absence of meaningful legal safe harbors for disclosure (which are not included in the proposed rules), will dramatically increase litigation risk for registrants.

    - SIFMA recommends that registrants be permitted to "furnish" rather than "file" Scope 1 and 2 GHG emission disclosures to the extent it is not material.

    - To address the significant challenges associated with measurement and disclosure of Scope 3 emissions, SIFMA recommends that all Scope 3 data should be furnished, rather than filed.

- *Registrants should not be required to produce data for periods prior to the effectiveness of the proposed rules.* Requirements to provide data for periods prior to the effectiveness of the proposed rules (and in some cases even before the proposal) will in many cases be difficult and even impossible. In addition, look-back periods for initial public offering registrants may force companies to delay public offerings or contribute to them determining to not go public, or alternatively listing on a non-U.S. exchange.

- *Annual GHG emissions disclosure should be provided on a different timeline than Form 10-K.* 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 collect, calculate and validate that data. Scope 1 and Scope 2 disclosure should be required on the same date that a quarterly report for the second fiscal quarter is due (or, for covered foreign private issuers ("FPIs"), when it would be due if the FPI was a domestic issuer). Because of practical limitations on the ability to collect Scope 3 data (particularly Category 15-financed emissions), the Commission should also clarify that Scope 3 emissions data would not be required for the immediately preceding fiscal year but could instead be provided for prior periods.

- *The Commission should defer consideration of a requirement to obtain assurance over GHG emissions to the future.* The requirement to obtain an independent attestation for Scope 1 and Scope 2 GHG emissions disclosures (even at a limited assurance level) will be difficult for many registrants to implement on the time frame proposed by the Commission. The Commission should instead revisit this aspect of the proposed rules in the future, after the rules become effective and standards and market practice for obtaining attestation have developed.

- *Certain of the Commission's proposals will have unintended consequences.* The requirement to provide, without any exceptions, detailed disclosures regarding the use of scenario analysis, carbon pricing and similar methods of evaluating climate risk may deter many registrants from using those tools or incentivize them to stop using or further developing them. The

Commission should only require disclosure of those tools to the extent necessary to provide an understanding of a registrant's risk management processes regarding climate-related risks.

- *All registrants should be permitted to comply with international standards in lieu of the standards adopted by the Commission.* Requiring registrants to comply with the proposed rules rather than allowing disclosures in accordance with equivalent non-U.S. reporting regimes or standards adopted by the International Sustainability Standards Board ("ISSB") will potentially result in significant incremental costs for those registrants, as well as investor confusion due to differences in disclosure requirements between jurisdictions. That issue is particularly acute for FPIs, but would apply to all registrants as investors are likely to request (and benefit from) disclosures made under globally consistent standards. SIFMA recommends the rules expressly allow all registrants to comply with ISSB standards and non-U.S. reporting regimes recognized as substantially equivalent by the Commission in order to maximize the consistency and usefulness of climate disclosures to investors.

- *The proposed timeline for implementation should be extended.* Longer implementation periods are needed to build the policies and procedures necessary to ensure the sufficient completeness and reliability of climate-related disclosures as well as the ability to support required attestations. In this comment letter, we suggest new effective dates for several elements of the proposed rules, which are summarized in Section 8 below.

2. Audited Financial Statement Requirements

Proposed Article 14 of Regulation S-X is unnecessary, largely inoperable as proposed and would not elicit meaningful or comparable disclosures.

° *MD&A is the appropriate place for disclosure of climate-related financial impacts. The creation of a new accounting standard by the Commission is unnecessary.*

MD&A addresses the substance of what proposed Article 14 of Regulations S-X is intended to achieve. 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."[6] That requirement encompasses climate-related impacts on financial statements. To the extent the Commission does not believe that registrants currently are adequately addressing climate-related matters in MD&A, the more tailored regulatory approach would be to amend Item 303 of Regulation S-K to add an express reference to climate-related impacts. Information contemplated by proposed Article 14 of Regulation S-X is more useful in the MD&A than in the financial statements, since there it would be presented in context with other information describing year-over-year impacts on financial results.

° *As proposed, Article 14 of Regulation S-X is largely inoperable.*

[6] 17 U.S.C. § 229.303(b).

The proposed rules go well beyond existing financial statement policies and procedures and U.S. GAAP, since they would appear to require registrants to model what reported amounts would have been in the presence or absence of physical or transition risks. If this was not the intent of the proposed rules, including the specific examples provided below, and the intent was instead to only focus on impacts of climate change that would be recognized under GAAP, clarification is necessary for operability and to avoid unintended consequences.

For example, to illustrate the challenges presented by trying to assess and quantify speculative impacts, for a financial services registrant, a severe weather event could affect management and incentive fees by changing the risk tolerance, assumptions and investment priorities of clients and potential clients, the products and securities they invest in, how much they invest and who they choose as managers and advisers. It could also impact investment management revenue by affecting market prices and volatility. Net interest income, investment banking revenues and commissions and fees also could be affected. In many cases, the causal linkage of line item changes to the severe weather event would be highly speculative and uncertain due to impacts on line items of unrelated factors, such as general economic conditions, or even developments in the COVID-19 pandemic or acts of war.

Similar issues would exist with respect to determining the impacts of transition activities. Furthermore, due to differences in each registrant's particular facts and circumstances, reported physical and transition impacts would not be comparable.

In addition, the metrics disclosures that would be required by proposed Article 14 of Regulation S-X would be subject to internal control over financial reporting and audit testing. It is unclear how registrants could develop controls or ascertain completeness around the number of individual judgments necessary to create the "what if" analyses needed to calculate the impacts the Commission proposes that registrants disclose. Even the development of processes and internal controls to determine if actual costs were climate-related at the level of granularity required by proposed Article 14 would be extremely challenging and require registrants to disaggregate climate-related impact where there is no objective means to make this determination given the number of variables involved. For example, a registrant that leases new workspace would need to determine if that lease was related to a transition activity (e.g., was it leased to reduce the company's carbon footprint?) and to what extent was the cost attributable to the transition activity versus other reasons (location or accommodations of the building, cost of the leases versus alternatives, etc.). Neither of these questions is addressed through entries in accounting systems. The result would be the required implementation of processes and controls at a far more granular level than what registrants currently have in place.

These challenges would be even greater for financial institutions that provide lending or financing, as it would require consideration of the specific purpose of the loan itself. For example, a lender would need to ascertain whether a loan to purchase new equipment was related to the transition activities of the borrower (e.g., represents a transition activity for the lender to the extent it funds GHG emission-reducing activity, in whole or in part). The lender would need to undertake that assessment with respect to each loan or financing. Further, if the impact to the allowance for loan loss was due to a reduction in the borrower's creditworthiness, the lender would need to consider if that reduction in creditworthiness was due to physical or transition risks (e.g., the extent to which a downturn in the borrower's business was due to consumer preference for an alternative product with a lower carbon footprint as opposed to other factors).

- *The 1% financial impact thresholds are not appropriate—even if increased—and should be eliminated.*

The 1% threshold proposed by the Commission creates the need for registrants to develop processes and controls at an extremely granular level to quantify the effects of physical and transition impacts on their financial statements, even where climate-related financial impacts clearly are immaterial. Registrants would need to have appropriate controls in place to record the necessary information at the beginning of and throughout any period for which the registrant is required to report under proposed Article 14 of Regulation S-X. As proposed, to calculate that threshold, registrants would need to add up the absolute values of relevant items and compare that aggregate number against the reported total for the relevant line item at the end of the period. Under that standard, a large number of offsetting, immaterial transactions could result in the registrant needing to make mandatory disclosures. Because of that, and because it is impossible for a registrant to know at the beginning of a period what its results will be for each line item at the end of that period, controls in place at the beginning of the period would need to capture effectively all transactions and assess if each one should be counted towards that 1% threshold. Simply increasing the arbitrary 1% threshold to a higher arbitrary threshold would not resolve that issue; registrants would still need to evaluate each transaction to determine if it counts towards that threshold and would not be able to calculate a dollar value for that threshold until the end of the relevant period. In addition to being arbitrary, the 1% thresholds in any event for disclosure of impacts on a financial statement line item and expenditures and capitalized costs[7] are substantially below what is material for financial statement purposes.

Furthermore, as the Commission has previously indicated, a materiality determination is largely fact-specific and requires both quantitative and qualitative considerations.[8] The Commission's staff has repeatedly emphasized that point. In SEC Staff Accounting Bulletin No. 99, the staff affirmed that, in the context of financial statements:

> "an assessment of materiality requires that one views the facts in the context of the surrounding circumstances," as the accounting literature puts it, or the "total mix" of information, in the words of the Supreme Court. In the context of a misstatement of a financial statement item, while the "total mix" includes the size in numerical or percentage terms of the misstatement, it also includes the factual context in which the user of financial statements would view the financial statement item. The shorthand in the accounting and auditing literature for this analysis is that financial management and the auditor must consider both "quantitative" and "qualitative" factors in assessing an item's materiality.[9]

A simple 1% quantitative test is therefore inconsistent with how registrants, investors and the Commission typically consider whether information is material to investors and therefor needs to

[7] Proposed Rule 14-02(b) of Regulation S-X.
[8] Proposing Release at 64 n.210 for a discussion of this principle.
[9] SEC Staff Accounting Bulletin No. 99.

be included in financial statements.[10] While registrants do often use a percentage threshold as a first step in a materiality analysis, even that is typically based on financial statement totals (net income, for example), is substantially higher than 1% and is determined by each registrant by taking into account their own facts and circumstances.[11]

- *Proposed Article 14 of Regulation S-X would not elicit meaningful or comparable disclosure.*

Because similar requirements do not currently exist under U.S. GAAP, proposed Article 14 of Regulation S-X would present significant interpretative issues, including what represents the baseline for the analysis and how different expenditures should be treated. Given the level of interpretation that would be required, we expect the outcome would not be comparable across registrants. It would also likely result in disclosure of large amounts of extremely granular data that are unlikely to add value to the users of financial statements. Further, such information would not be consistent with or indicative of how registrants monitor or manage climate risk.

If the Commission believes enhanced financial statement disclosure is necessary, it should instead 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:

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[10] The extremely limited circumstances in which the Commission's rules currently require the use of a 1% threshold are radically different from the 1% threshold under proposed Article 14 of Regulation S-X. Each of those examples is limited to a single, measurable and discrete item compared against a single line item. For example, Rule 5-03(b)(1), which is cited by the Commission as an example in the Proposing Release,[10] requires a registrant to measure a discrete item (excise taxes) against a single line item (total sales or revenues). Rule 12-13A of Regulation S-X, which does not apply to any entities to which Article 14 would apply and is also cited as an example in the Proposing Release, requires a registrant only to compare the notional value of open contracts against net assets. Further, each of those items would only require disclosure of a single number rather than the extensive disclosure called for by proposed Article 14. The final example cited by the Commission in the Proposing Release, related party transaction disclosure under Item 404(d) of Regulation S-X, which is not a financial statement requirement and only applies to smaller reporting companies, only requires registrants to compare total assets to transactions with related parties.

[11] *See, e.g., id.:*

> The staff is aware that certain registrants, over time, have developed quantitative thresholds as "rules of thumb" to assist in the preparation of their financial statements, and that auditors also have used these thresholds in their evaluation of whether items might be considered material to users of a registrant's financial statements. One rule of thumb in particular suggests that the misstatement or omission of an item that falls under a 5% threshold is not material in the absence of particularly egregious circumstances, such as self-dealing or misappropriation by senior management. . . . The staff has no objection to such a "rule of thumb" as an initial step in assessing materiality. But quantifying, in percentage terms, the magnitude of a misstatement is only the beginning of an analysis of materiality; it cannot appropriately be used as a substitute for a full analysis of all relevant considerations.

Id. (internal citations omitted).

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.

The primary private sector standard setter is the FASB …[12]

SIFMA believes that as a new accounting standard of significant import, any climate-related financial statement disclosure (e.g., for 'transition activities') should be considered and adopted through FASB's well-developed process for setting standards, which includes substantial due process protections and opportunities for stakeholder input.[13]

If the Commission does adopt Article 14 of proposed Regulation S-X, substantial revisions are necessary for operability and to reduce the burden on registrants. Even with these revisions, we do not believe the Commission's proposal would result in consistent, comparable, reliable or useful information for investors.

We outline below several revisions that would be necessary should the Commission adopt Article 14 of Regulation S-X. The proposed revisions below are aimed at making it possible for registrants to report accurate information under the proposed standards. However, we emphasize that even with these revisions, we still do not believe that proposed Article 14 of Regulation S-X would achieve the Commission's objective of disclosure that is consistent, comparable, reliable or useful information for investors, and we and urge the Commission not to adopt this aspect of the proposal.

- *Mandatory financial statement disclosures should be limited to impacts of severe weather events and other natural conditions. The Commission should specify which severe weather events and other natural conditions must be included.*

As noted above, proposed Article 14 would require registrants to make a number of highly speculative estimates and assumptions. If adopted, proposed Article 14 should be limited to disclosure of impacts of "severe weather events" and other "natural conditions," the definitions of which should be clearly specified by the Commission.[14]

However, even under this approach, it would still be very challenging to apply to certain balances, including most trading and investment positions, as the same concerns a registrant

[12] Robert K. Herdman, Testimony Concerning the Roles of the SEC and the FASB in Establishing GAAP Before the House Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Comm. on Fin. Servs. (May 14, 2002), available at https://www.sec.gov/news/testimony/051402tsrkh.htm.
[13]Allowing FASB to take the lead in developing accounting standards related to climate matters also has the benefit of minimizing the risk that such standards will integrate poorly with existing or new U.S. GAAP standards. For example, FASB has an ongoing project aimed to disaggregate certain line items, which would make the 1% threshold proposed by the Commission even more difficult to implement and less likely to lead to comparable disclosure. *See* FASB, *Disaggregation—Income Statement Expenses Project Update* (March 23, 2022), available at https://www.fasb.org/Page/ProjectPage?metadata=fasb-Disaggregation%E2%80%94IncomeStatementExpenses-022820221200.
[14] Proposing Release at 129 (Question 61).

would struggle with for its own account (e.g., determining the component of severity that is driven by climate change or the extent to which certain activities are related to transition or are normal course) would effectively need to be evaluated for all of the underlying positions as well, which would not be feasible. To reduce the burden of performing these "look-through" analyses at a position level, financial instruments accounted for at fair value using Level 1 or Level 2 inputs should be excluded from the scope of the financial statement line item analysis. Given the impact of climate severity generally would be expected to be an unobservable input to fair value measurement, if an instrument is in fact classified as Level 1 or Level 2, it would indicate that such an input was not significant (e.g., it is insignificant); therefore, by definition it would not seem that computing the climate-related impact for Level 1 and Level 2 instruments would be meaningful or relevant to users of the financial statements.

- *The 1% threshold should be replaced with a materiality test.*

For the reasons noted above, a 1% threshold—even if increased—is not an appropriate test to determine if disclosure is necessary. Instead, disclosure should only be required if the relevant item had a material impact on the registrant—determined by using the Commission's longstanding guidance as to materiality.

- *The requirement to disclose impacts on financial estimates and assumptions should be limited to material impacts.*

The proposed rules would require registrants to 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."[15] The Proposing Release makes clear that any such impacts would need to be disclosed, regardless of materiality.[16]

This requirement would 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. This would even include impacts below the 1% threshold the Commission proposed in other parts of proposed Rule 14-02 of Regulation S-X.

If the Commission declines to adopt our suggested approach to the Regulation S-X financial statement line item disclosure in spite of the concerns raised about operability, SIFMA urges the Commission to adopt a materiality standard for purposes of proposed Rules 14-02(g) and (h) of Regulation S-X.

[15] Proposed Rule 14-02(g)-(h) of Regulation S-X.
[16] *See* Proposing Release at 143 (Question 82).

- *A longer phase-in period is needed.*

If the proposed rules are adopted by the Commission in late 2022, the financial statement requirements would apply starting with fiscal year 2023 for large-accelerated filers and fiscal year 2024 for other filers.[17]

In order to meet their compliance obligations, registrants will need sufficient time to build out data collection processes and procedures, which will need to be in place at the beginning of their first reportable fiscal year. Registrants also will need time to adopt and test enhancements to internal controls over financial reporting. Among other things, registrants would need to: (1) develop policies as to how to treat any number of different transactions and events (e.g., defining what constitutes a severe weather event in different areas); (2) design new internal controls over financial reporting that are compliant with the Sarbanes-Oxley Act, including the development of substantially expanded internal audit functions; (3) perform testing of those controls and subsequent revisions; (4) work with external auditors to provide them the information needed to attest to the efficacy of those controls; and (5) implement those controls through extensive training and redevelopment of enterprise reporting software. Additional work may be needed to acquire necessary information from equity method investees and other non-wholly owned entities.

Conservatively, this is likely to take at least three years—with the first year focused on fully understanding the rule, seeking clarification from the Commission where needed and speaking with auditors and peers to develop a broad approach to implementation; the second year focused on developing policies, controls and procedures, building out the enterprise reporting software and other relevant systems and teams and identifying gaps in available data; and the third year focused on implementation, testing and refinement. Following from that, the earliest date that the relevant controls would be ready to implement would be January 1 of the fourth fiscal year following adoption of this proposed rule. Therefore, reporting under proposed Article 14 should not be required for any periods prior to the fourth fiscal year after it is adopted.

Further, SIFMA notes that when novel accounting rules are adopted, registrants typically have more time before compliance is required than has been proposed by the Commission in this context. For example, FASB adopted a new revenue recognition standard (ASU No. 2014-09) (the “Revenue Recognition Standard”) in May 2014. Registrants were only required to report under that standard for periods beginning after December 15, 2017. Similarly, FASB adopted a new credit loss standard (ASU 2016-02) (the “CECL Standard”) in June 2016. Registrants were only required to report under that standard for periods beginning after December 15, 2019.

- *Article 14 of Regulation S-X should only apply prospectively.*

The proposed requirement to include financial statement metrics and related disclosures for periods prior to the effectiveness of the rules is not practicable.[18] As noted above, registrants will need time to build out data collection processes and procedures, as well as related controls.

[17] *Id.* at 216.
[18] Proposed Rule 14-01(d) of Regulation S-X.

In some cases, as proposed, the rules would require registrants to report data for periods prior to the *proposal* of the rules.

Prospective application is more customary when new financial statement requirements are adopted. For example, both the Revenue Recognition Standard and CECL Standard allowed registrants to adopt a modified retrospective approach—recognizing a single catch-up adjustment rather than being required to recast financial statements for prior years to reflect the new standard. As noted elsewhere in this comment letter, SIFMA similarly believes that GHG emissions data should be required to be disclosed prospectively.

3. GHG Emissions Metrics

SIFMA supports Scope 3 GHG emissions disclosure in circumstances where the disclosure is material to the registrant or related to targets publicly disclosed by the registrant.

- *Scope 3 emissions disclosure should only be required if material to the registrant or if specifically related to a target or goal publicly disclosed by the registrant.*

Currently, Scope 3 emissions standards are incomplete—leading to disclosures that may not be reliable or comparable. Value chain member entities may produce data for different periods (similar to how registrants may have different fiscal years). The data they produce is often incomplete and of varying levels of quality. In addition, many registrants have thousands of companies in their value chains, further complicating data collection. Typically, there also is no obligation to provide data, and where one exists, it is often difficult or impossible to enforce due to practical limitations on modifying value chain relationships.[19] There is also no generally accepted framework for value chains to track or present the data that would be needed by registrants to calculate Scope 3 emissions. While in theory, Scope 3 data can be generated using secondary data sources, estimates and models, such calculations will necessarily be highly dependent on the sources used and assumptions made by registrants, further impairing the reliability and comparability of Scope 3 disclosure.

Further, in many cases there is no accepted standard as to how Scope 3 emissions should be calculated for a registrant. This is especially true for financial institutions, for whom a significant amount of Scope 3 emissions would be financed emissions. Standards such as the "Global GHG Accounting & Reporting Standard for the Financial Industry" published by the Partnership for Carbon Accounting Financials ("PCAF") remain incomplete with respect to financial products that contribute to GHG emissions. For example, the PCAF standard 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

[19] The proposed rule states that Scope 3 emissions would include emissions from "franchises." As the Commission is aware, many firms utilize an independent financial adviser model. Under this model, the registrant provides custodian and compliance services to the financial adviser, but the financial adviser operates independently from the registrant. The registrant has no control over the choice of office, number of staff, or travel. *See* proposed Item 1500(r)(2)(vi) of Regulation S-K.

> investment funds, green bonds, sovereign bonds, loans for securitization, exchange traded funds, derivatives (e.g., futures, options, swaps), initial public offering (IPO) underwriting, and more. More detailed guidance on such financial products will be considered and published in later editions of the Standard.[20]

For the foregoing reasons, it is important that Commission requirements for the disclosure of Scope 3 emissions data be carefully calibrated to ensure that registrants are not required to produce disclosure that investors cannot easily rely on or compare across companies—making it difficult for investors to use that data to inform decisions. However, as the Commission indicates in the Proposing Release, there are circumstances in which disclosure of Scope 3 emissions may be of use to investors. To balance those considerations, SIFMA suggests the Commission only require Scope 3 disclosure if it is material to the registrant or related to a target that has been publicly disclosed by the registrant.

In the Final Release, the Commission should revise the commentary it provided as to materiality. As drafted, the proposed rules would require a registrant to disclose its "total Scope 3 emissions if material."[21] The Commission indicates in the Proposing Release that "[w]e are proposing the disclosure of this metric because we believe capital markets have begun to assign financial value to this type of metric, such that it can be material information for investors about financial risks facing a company."[22]

However, the Commission's guidance on proposed inclusion of Scope 3 GHG emissions "if material" could be read as inconsistent with traditional standards for materiality under U.S. federal securities laws and ignores the significant practical challenges concerning Scope 3 data availability and quality. The Commission should clarify that the standard for "materiality" as applied to Scope 3 emissions is consistent with how materiality is determined for other matters.

When discussing how to determine if Scope 3 emissions are material in this context, the Commission states that "some commenters indicated that Scope 3 emissions represent the relatively large source of overall GHG emissions for many companies"[23] and that:

> [w]hen assessing the materiality of Scope 3 emissions, registrants should consider whether Scope 3 emissions make up a relatively significant portion of their overall GHG emissions. While we are not proposing a quantitative threshold for determining materiality, we note that some companies rely on, or support reliance on, a quantitative threshold such as 40 percent when assessing the materiality of Scope 3 emissions.[24]

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[20] PCAF, *Global GHG Accounting & Reporting Standard for the Financial Industry* at 70 (November 18, 2020), available at https://carbonaccountingfinancials.com/files/downloads/PCAF-Global-GHG-Standard.pdf, (last visited Apr. 29, 2022).

[21] The proposed rules would also require disclosure of Scope 3 emissions if a registrant "has set a GHG emissions reduction target or goal that includes its Scope 3 emissions." Proposed Item 1504(c)(1) of Regulation S-K. As discussed below, as proposed, SIFMA believes this will have the effect of chilling the adoption of targets and goals that include Scope 3 emissions.

[22] Proposing Release at 173.

[23] *Id.* at 162-63.

[24] *Id.* at 165.

In the Final Release, this commentary should be revised to conform to existing Supreme Court and Commission materiality precedent cited in the Proposing Release.[25] The relative magnitude of Scope 3 emissions to Scope 1 and Scope 2 emissions is not necessarily a relevant metric for determining the materiality of Scope 3 emissions to a registrant. It presupposes the materiality of GHG emissions to a registrant more generally.

The Commission's approach also appears to equate Scope 3 GHG emissions levels with transition risk, which is not necessarily the case. For example, for many registrants engaged in lending, financed emissions (which are Scope 3, Category 15 emissions) constitute the bulk of GHG emissions disclosed. However, the extent to which those emissions, or emissions of particular sectors within those categories represent transition risk to a particular registrant will be highly dependent on its particular facts and circumstances. As another example, a registrant that makes loans to a large number of companies that each have low levels of GHG emissions and/or limited transition risk, or a small loan (relative to its loan portfolio) to a prodigious emitter of GHGs, might have Scope 3 disclosures that would arguably be "material" under the Commission's commentary in the Proposing Release because its Scope 3 emissions would be large relative to its Scope 1 and Scope 2 emissions. However, those Scope 3 emissions do not present a reasonable likelihood of loan-loss risk due to changes in behavior or regulation related to GHGs that would be material to the registrant's financial condition or results. Accordingly, the Commission should clarify that only the particular Scope 3 emissions that are material, under traditional materiality standards, are required to be disclosed, rather than all Scope 3 emissions.

The Commission also indicates that registrants should disclose the basis for any determination that Scope 3 emissions are not material.[26] Even though not in the rules, by indirectly noting this in the release, registrants may view it as a de facto requirement. A perceived requirement that registrants affirmatively state why a specific matter is immaterial to it would represent a substantial break from the approach to disclosure that has guided registrants for decades and may lead to confusion among investors, as Scope 3 emissions would be the only matter for which registrants would affirmatively state they are immaterial.

- *The proposed requirement to disclose Scope 3 emissions if targets include Scope 3 emissions is overly broad. Disclosure of Scope 3 emissions should only be required for types of emissions with respect to which the registrant has set a specific target.*

The proposed requirement to disclose Scope 3 emissions if the registrant has "set a GHG emissions reduction target or goal that includes its Scope 3 emissions"[27] is overly broad and will create a strong incentive for many registrants not to adopt such targets or goals. As proposed, this would require disclosure of all Scope 3 emissions, not just those related to the target or that otherwise would be required to be disclosed under the rules due to their materiality. Registrants that have set targets regarding Scope 3 emissions should only be required to disclose Scope 3 emissions related to those targets. For example, a financial institution that has set Scope 3 targets regarding financed emissions in its commercial lending portfolio should not be required to disclose Scope 3 emissions related to its residential lending portfolio (unless Scope 3

[25] *Id*. at 64, 162.
[26] *Id.* at 174.
[27] Proposed Item 1504(c)(1) of Regulation S-K.

emissions from the residential lending portfolio are otherwise material to the registrant). Investors will then have a clear use for the Scope 3 information—tracking a registrant's progress towards its targets.

- *The Commission's proposal to require disaggregated GHG emissions disclosures would require overly granular disclosure that is unlikely to be available or useful.*

The Commission has proposed requiring data on GHG emissions to be disaggregated by constituent greenhouse gas.[28] While that data may be available for Scope 1 emissions, in many cases they are not currently available for Scope 2 and Scope 3 emissions. Collecting that data will exponentially increase data collection challenges while resulting in low-quality disclosure that is not useful to investors and adding to the already substantial timing challenges around Scope 3 disclosure. In addition, this requirement goes beyond TCFD recommendations. In our members' experience with voluntary disclosure, investors do not generally find disaggregation by constituent GHG useful, with the exception of methane for the oil and gas sector.

Because disaggregation by constituent GHG does not provide useful information to investors of many registrants (and because the production of that information and obtaining assurance of it would be burdensome costly), SIFMA recommends that registrants only be required to provide CO_2 equivalent information unless emissions of a particular GHG pose a material risk to a registrant. To the extent emissions of a particular constituent GHG pose a material risk to a registrant, the registrant already would be required to disclose that risk under the Commission's existing principles-based rules. To the extent the Commission does not believe that registrants are making such disclosures, the more tailored approach would be to add an express requirement to disclose emissions of a particular constituent GHG if those emissions (or potential restrictions on those emissions) pose a material risk to a registrant.

The proposed rules would also require registrants to disclose GHG intensity per unit of total revenue and per unit of production relevant to the registrant's industry, or another financial measure or economic output intensity metric if the foregoing are not applicable.[29] This is not a workable standard for many industries or registrants that offer a wide gamut of services and products. While SIFMA appreciates the rules would allow registrants some flexibility in determining how to measure GHG intensity, this metric would require registrants to incur the expense of producing and obtaining attestation of data that is not useful to investors, since it will not be comparable across registrants. This metric should therefore not be mandatory and should instead be treated as voluntary in line with the approach taken in the Proposing Release relating to climate-related opportunities.

- *The proposed deadlines for Scope 1 and 2 GHG emissions disclosures do not provide sufficient time for registrants to obtain that data and produce disclosure.*

Reliable, assured Scopes 1 and 2 GHG emissions data will in most cases not be ready for inclusion in that year's Form 10-K.[30] Based on the data collection, validation and assurance experiences of several SIFMA members, we would expect this process to take between

[28] Proposed Item 1504(a)(1) of Regulation S-K.
[29] Proposed Item 1504(d)(3) of Regulation S-K.
[30] Proposing Release at 398-99.

approximately five and seven months after fiscal year-end. For example, following the approach taken in connection with current voluntary reporting (which would likely be similar to the approach taken under the proposed rules), registrants in the financial services industry currently would be required to collect all of their electric utility and other energy bills covering any portion of the fiscal year (which for some of our larger members number in the tens of thousands), manually enter energy usage reported in those bills into a previously prepared spreadsheet model, validate the output of that model and, even with limited assurance, perform procedures to test their process for collecting and reporting energy usage to report Scope 2 emissions. Our members have indicated that the last electric utility and other energy bills for a fiscal year are typically not even received until six or more weeks following the end of a fiscal year.

Accordingly, SIFMA recommends that Scope 1 and Scope 2 GHG disclosures for a particular fiscal year be required to be filed (if material) or furnished (if not material) as applicable no later than the date of the registrant's quarterly report on Form 10-Q for the second fiscal quarter of the subsequent year (or the equivalent date for an FPI). For example, an accelerated or large-accelerated filer would be required to file or furnish Scope 1 and Scope 2 data for the fiscal year ending December 31, 2024 by August 11, 2025. We propose that this disclosure be included in the Form 10-Q (or on a Form 6-K for an FPI).

We believe our proposed timing is more closely aligned with current voluntary market practices. Furthermore, because GHG emissions data are not inextricably linked to the information provided in the Form 10-K, our proposed timeline for providing those data does not compromise their usefulness to investors.

We acknowledge that the proposed rules would allow for the use of estimates for the fourth fiscal quarter if actual data are not yet available.[31] However, this would still put the registrant in the difficult position of taking liability risk for estimated data that are inherently uncertain and can be unreliable, and having a duty to update if there are material differences in the estimates reported and actual data.[32] This unnecessarily would potentially expose the registrant to third-party claims. Furthermore, this approach raises practical issues with respect to obtaining attestation over estimates that are likely to be revised. These issues can be eliminated by allowing registrants reasonable time to produce actual data, rather than estimated data followed by a potential revision. This would also better achieve the SEC's objective of providing investors with reliable disclosure in one location.

Disclosure of Scope 3 emissions data, where required, will present even greater challenges, since many registrants need to apply evolving and incomplete standards, as well as obtain information from a large number of third parties and to then evaluate and synthesize that information.[33]

To cite an example, Scope 3 data for financed emissions can often only be obtained for relevant borrowers or other members of the value chain substantially after the end of the period for which data are reported, because it relies on Scope 1 and Scope 2 emissions data from third parties, which must first report that information. For example, certain of our members have

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[31] *Id.* at 45.
[32] *Id*.
[33] *Id.* at 156.

indicated that Scope 3 emissions for some industries (e.g., automotive) rely on regulatory reporting to determine their emissions, which is only available three years after the end of the relevant period. After the data are made available, they then must be analyzed and consolidated. This process often is manual and time-consuming—taking in many cases up to 18 months after the end of the relevant period—because members of the value chain do not apply uniform standards and processes when tracking GHG emissions and provide data in different formats.

- *Clarify that Scope 3 data does not need to be from the most recent fiscal year.*

It is unclear from the proposal whether the SEC would allow registrants to use Scope 3 data that are not from the most recent fiscal year as part of the registrant's Scope 3 data calculations. As discussed above, registrants generally need to obtain Scope 3 data from third-party sources, whether directly from third parties or estimated or modeled data. As we discussed above, publicly available Scope 3 data for some Scope 3 emissions sources may be available only on a lag. We ask the SEC to provide clarity in the final rule that registrants may include in their Scope 3 calculations data that are not from the most recent fiscal year, subject to a standard of good faith.

- *The phase-in date for Scope 3 disclosures should be extended.*

Additionally, the proposed compliance dates for initially providing Scope 3 data should be extended. As proposed, large-accelerated filers that are required to report Scope 3 data would need to begin doing so in 2024 for fiscal year 2023, and accelerated filers would need to begin doing so in 2025 for fiscal year 2024. This does not provide registrants with sufficient time to develop new reporting processes, controls and procedures to gather, synthesize and disclose Scope 3 information in a reliable manner. The concern is made more acute by the fact that methodologies for calculating Scope 3 disclosures are incomplete and evolving. More time is needed to allow those methodologies to develop and for registrants to appropriately implement them.

SIFMA proposes that the periods for which registrants need to begin providing mandatory Scope 3 disclosure, if material, be delayed by an additional two years to provide registrants with time for relevant methodologies to further develop, and for registrants to design and implement the necessary processes, controls and procedures.

- *Scope 3 data should be furnished, rather than filed, and the safe harbor for Scope 3 disclosure should be clarified and expanded to cover any climate-related disclosures that rely on third-party data and the use of estimates.*

As the Commission acknowledges, there are significant challenges associated with measurement and disclosure of Scope 3 emissions.[34] As such, registrants should be allowed to furnish, rather than file, that disclosure. Allowing registrants to furnish rather than file Scope 3 disclosure would appropriately mitigate litigation exposure for companies based on such information. The information would not be subject to liability under Section 18 of the Exchange Act or Sections 11 and 12 of the Securities Act.

[34] *Id.* at 208-209.

SIFMA agrees with the Commission that Scope 3 disclosure should benefit from a safe harbor, due to the need to rely on third parties for the relevant data. The safe harbor should be extended to other climate-related disclosures that rely on third-party data (e.g., Scope 2 emissions and, if third-party data is utilized by a registrant to produce it, Scope 1 emissions), as these present the same considerations and liability concerns as Scope 3 emissions data. However, the safe harbor proposed by the Commission should be modified in light of the volume of data and number of different sources registrants may need to obtain information from in order to comply with the Commission's proposed disclosure requirements. Rather than requiring that registrants have a "reasonable basis" to believe that the Scope 3 disclosure is accurate, which would require some registrants to conduct diligence on thousands of counterparties at least annually, the safe harbor should apply unless the registrant has actual knowledge the third-party information it is using in connection with its disclosures is erroneous. The safe harbor should also clearly apply to both private actions and Commission enforcement actions.

- *Underwriters and other persons (excluding the registrant) should benefit from a safe harbor for GHG emissions disclosure.*

Firms acting as underwriters and other persons subject to disclosure liability under the Securities Act and Exchange Act will be exposed to significant legal liability as a result of the inclusion of Scope 1, Scope 2 and Scope 3 disclosures. Underwriters and other persons are not well situated to perform extensive due diligence on GHG emissions data because of the specialized expertise required and the volume of information that would need to be reviewed. The result would be that investors may derive a false sense of comfort from a "gatekeeper's" review of the GHG emissions data when that gatekeeper is not able to provide the same level of review as is included for other aspects of the disclosure. It would also likely result in increased costs for registrants, as gatekeepers make efforts to try to conduct reviews to the extent possible. The safe harbor should provide that persons subject to disclosure liability, such as underwriters, face the same standard of liability for GHG emissions data as they would for "expertized" data under Section 11(b)(3)(C) of the Securities Act, and that such persons are deemed not to have "scienter" under Section 10(b) of the Exchange Act if they had no reasonable ground to believe and did not believe that the relevant statement was untrue or misleading.

SIFMA supports the inclusion of Scope 1 and Scope 2 GHG emissions disclosure requirements. However, the Commission should adopt rules expressly limiting potential liability for Scope 1 and Scope 2 disclosures that are immaterial to the registrant, only require disclosure for periods beginning after the proposed rule becomes effective and allow registrants more flexibility to determine organizational boundaries.

- *Registrants should be permitted to "furnish" rather than "file" immaterial GHG emission disclosures.*

SIFMA is supportive of a requirement to make Scope 1 and Scope 2 GHG emissions disclosures, and to include those disclosures in annual reports on Form 10-K and in registration statements to the extent they are material to the registrant.

However, a registrant should be able to furnish rather than file these disclosures to the extent it determines they are immaterial. This will appropriately reduce the potential for frivolous litigation over immaterial mandatory disclosures.

- *GHG emissions 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 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.[36]

The foregoing timetables would require registrants to collect data for past periods during which there was not only no requirement to obtain the data, but no *proposal* calling for the data to be reported. Although the proposed rules include a "reasonably available" standard for data for historical periods,[37] lack of clarity as to the level of cost or certainty of data required for such a determination unfairly exposes registrants to litigation and enforcement risk. Furthermore, Scope 1 and Scope 2 emissions for past periods are likely to be reasonably available only to the extent already voluntarily published by a registrant in a sustainability report or on its website. Since investors already have access to this information and had no expectation it would be included in Commission filings, there is no compelling policy reason for requiring this information to be provided in those filings with the additional costs and attendant liability that would entail. Accordingly, SIFMA believes the requirement to provide emissions data for periods prior to the effectiveness of the proposed rules should be eliminated.[38] As noted above, SIFMA believes the same approach should be taken with respect to any requirements to disclose climate-related financial information.

If the Commission declines to only require prospective disclosure, it should amend the proposed rules to expressly provide that data for historical periods is only "reasonably available" if such data has previously been collected by the registrant for the relevant period using a methodology comparable to that which the registrant expects to use when reporting future Scope 1 and Scope 2 emissions. This standard is appropriate since data collected using a methodology that is not comparable is likely to be of limited use to investors. Furthermore, because historical period GHG emission data were not collected with the expectation they would be required to be reported in Commission filings, they should have the benefit of an express safe harbor from liability and Commission enforcement action.

- *The Commission should only require registrants to disclose Scope 1 and Scope 2 emissions from entities that are fully consolidated.*

Registrants only should be required to include GHG emissions of entities that are fully consolidated in their financial statements. It is impractical to require registrants to report Scope 1 and Scope 2 emissions data for investments that qualify for equity method accounting or

[35] *Id.* at 44, 215-16.
[36] *Id.*
[37] Proposed Item 1504(a) of Regulation S-K.
[38] For similar reasons, SIFMA believes the requirement to provide Scope 1 and Scope 2 data should not apply to periods before a registrant becomes an SEC-reporting company.

proportionate consolidation. By definition, a registrant does not control those entities and as such will often have limited influence over their GHG emissions. Additionally, registrants will in many cases not have access to the necessary information from investees regarding emissions, and as such may be unable to comply with this requirement. Furthermore, investees may not track the relevant information and registrants may not have the ability to force them to do so. Even if registrants have access to some GHG emissions information of investees, they in many cases will not have information or access to investee personnel needed to satisfy external attestation requirements relating to the data.

We understand the Commission's rationale for proposing that the scope of consolidation and reporting of GHG emissions data be consistent with that of financial data. However, such an approach may pose a number of operational challenges. For example, many registrants currently calculate GHG emissions based on organizational boundaries set in accordance with the GHG Protocol. Realigning boundaries to conform with U.S. GAAP would require significant cost, effort and collaboration between finance teams that are familiar with principles of U.S. GAAP, and sustainability teams, which have typically led the calculation of GHG emissions. Aligning organizational boundaries with U.S. GAAP would also require many registrants to perpetually maintain two sets of records to comply with domestic and international regulatory requirements.

For these reasons, we encourage the Commission to consider adopting the approach taken in the International Sustainability Standards Board's ("ISSB") recent exposure draft on climate-related disclosures, which allows companies to select from the methods outlined in the GHG Protocol for establishing organizational boundaries. As in the ISSB proposal, if the Commission determines to require Scopes 1 and 2 emissions for unconsolidated entities in the final rules, as an alternative recommendation, the Commission could require separate disclosure of Scopes 1 and 2 emissions for the consolidated accounting group and for unconsolidated entities, including an explanation of which method was used to calculate emissions from unconsolidated entities and why that method was selected.[39]

Registrants should be permitted to disclose Scope 1 and Scope 2 emissions net of offsets and renewable energy credits or certificates ("RECs") alongside gross emissions and carbon offsets.

Carbon offsets and RECs are an important part of many registrants' efforts to reduce overall GHGs. High-quality carbon offsets will play an important role in the transition to a low-carbon economy. Financial institutions set high standards and conduct extensive due diligence, contributing to the overall demand and the advancement of best practices for evaluating high-quality credits. In order to provide a fulsome picture of their emissions profile, registrants should be allowed to disclose Scope 1 and Scope 2 emissions net of offsets and RECs, alongside gross emissions and carbon offsets disclosed on a stand-alone basis. The Commission has long recognized that "non-standard" presentations of certain metrics may be important to an investor's ability to understand a registrant, and that such metrics are not misleading so long as the standard metric (in this case, gross Scope 1 and Scope 2 emissions) are provided with equal prominence

[39] IFRS, *Exposure Draft: IFRS Sustainability Disclosure Standard* at paragraph 21(a)(iii) – (v), (Mar. 2022), available at https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-climate-related-disclosures.pdf.

and other appropriate disclosures (in this case, including a reconciliation of gross-to-net emissions).[40] The same approach should be taken with respect to Scope 1 and Scope 2 disclosures.

The Commission's proposed attestation standards should be revisited.

- *SIFMA renews its suggestion that the Commission not require attestation at this time and instead revisit mandatory attestation in the future, once appropriate attestation standards and methodologies have developed*.

As the Commission notes in the Proposing Release, registrants will be required to develop new processes and disclosure controls and procedures to meet the attestation requirement.[41] While the Proposing Release states that the Commission's proposed timeline for phasing in the requirements would give registrants "significant time" to do so,[42] it would in fact provide many registrants—especially large accelerated filers—with an insufficient implementation period. In addition, the costs associated with and the complexity of engaging an independent third party to provide assurance on greenhouse gas emissions disclosure will be significant, and the benefit to investors of mandating that registrants obtain assurance will be limited. Assurance is not required, regularly obtained or requested by investors for any other disclosures included in an annual report, aside from audited financial statements, evidencing its limited value to investors. Assurance may be especially unnecessary for immaterial information; in this regard, we note that the proposed Scope 1 and 2 emissions disclosure requirement does not have a materiality qualifier.

As proposed, the attestation requirement would apply to Scope 1 and Scope 2 GHG emissions data included in a registrant's filing for all periods presented.[43] Accordingly, an accelerated filer that first obtains an attestation report in connection with its annual report for fiscal year 2025 would need to have that report cover its GHG emissions data for 2023, 2024 and 2025. As a practical matter, that means the registrant would need to have the relevant controls and procedures in place for fiscal year 2023. The problem is even more acute for large accelerated filers, who would need to have the relevant processes and procedures in place for fiscal year 2022, which is, of course, impossible since final rules are not yet in place and will not be in place until late 2022 at the earliest.

Further, as the Commission notes, attestation standards for GHG emissions are still "evolving,"[44] and, as SIFMA noted in its June 2021 letter, the professional capacity to audit or assure climate-related metrics or other disclosures by registrants is still being developed.[45] As a result, adoption of a mandatory attestation standard now will require registrants to immediately begin developing and implementing disclosure controls and procedures sufficient to satisfy attestation standards that are not at all certain or quantifiable.

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[40] *See* Rule 10(e) of Regulation S-K and Regulation G.
[41] Proposing Release at 219.
[42] *Id.* at 228.
[43] As earlier noted, we propose that the requirement only apply prospectively.
[44] Proposing Release at 226.
[45] *See supra*, note 42.

Additionally, the benefit of requiring external attestation is limited. As the Commission notes in the Proposing Release, quantitative information included outside of the financial statements is typically not subject to external assurance.[46] 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. They are inapposite to the proposed attestation requirement, which would apply to registrants in all industries regardless of whether GHG emissions are material to the registrant. Other quantitative information provided by registrants, such as key performance indicators ("KPIs"), which in many cases may be more material to a registrant than GHG emissions disclosures, are not subject to any external assurance requirement.[47] While the Commission asserts that such disclosures are often subject to internal control over financial reporting and audit procedures,[48] market practice is mixed, and that is often not the case (nor are they often covered in "comfort letters" issued by auditors under AS 6101 in the context of offerings).

Rather than requiring external assurance, the Commission and investors rely on registrants to ensure reliability of the reported information. In the context of annual reports on Forms 10-K and 20-F, and quarterly reports on Form 10-Q, that disclosure is subject to the full panoply of disclosure controls and procedures under Rules 13a-15 and 15d-15 under the Exchange Act. While reports furnished to the Commission are not subject to requirements such as attestations as to the effectiveness of disclosure controls from principal executive and financial officers, such reports often do include material information (such as current reports on Form 6-K filed by FPIs, which often include material information such as half year and other interim reports) and registrants are well incented to (by virtue of potential liability under Section 10(b) of the Exchange Act as well as reputational and other concerns) and do impose controls to ensure that furnished reports are reliable. Rather than impose substantial new costs and burdens on registrants in the form of a novel attestation requirement, the same approach should be taken with respect to GHG emissions disclosures as is taken with respect to other disclosure outside of the financial statements.

For these reasons, SIFMA believes that the Commission should reevaluate in the future whether the standards and market practice necessary for external assurance has sufficiently developed such that a mandatory assurance requirement is viable and consider adopting an attestation standard at that time.

If the Commission declines to adopt this approach, it should at a minimum push back the attestation requirements by an additional year to allow processes, procedures, controls and standards to further mature and align with the final rules. Additionally, as proposed by the Commission, any such attestation requirement should apply only to Scope 1 and Scope 2 disclosures. Because Scope 3 disclosures rely on data from third-party entities (in many cases a

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[46] Proposing Release at 220.

[47] The Commission has noted the 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." Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 33-10751 at 2 (Feb. 25, 2020), available at https://www.sec.gov/rules/interp/2020/33-10751.pdf.

[48] Proposing Release at 220.

prohibitively large number), it is likely that attestation reports over those data would be extremely costly to obtain, if even obtainable, and only provide a limited degree of comfort to investors.

- *If the Commission adopts an attestation requirement, it should only require limited assurance.*

As noted above, the Commission's current requirements generally do not require any assurance on quantitative information provided outside of audited financial statements. A requirement to obtain reasonable assurance over GHG emissions data implies that data are of equal importance to audited financial statements, which are also subject to a reasonable assurance standard,[49] and of more importance than interim financial statements, which are not subject to any Commission requirement for external assurance. Furthermore, to the extent underwriters for registrants conducting offerings obtain external assurance from legal counsel on non-financial information in a registration statement, that is also at a limited assurance level (so-called "10b-5 letters" or "negative comfort letters"). As such, requiring registrants to obtain reasonable assurance over GHG emissions data is entirely out of step with the Commission's and the market's general approach to disclosure.

Furthermore, existing voluntary assurance of GHG emissions data is most frequently at a limited assurance level. As a general matter, we do not believe investors currently are pressing for assurance of GHG emissions data at any level of assurance, and certainly not at a reasonable assurance level.

For all of the foregoing reasons, SIFMA believes that it would be inappropriate to require registrants to incur the substantial expense that would be required to obtain reasonable assurance of GHG emissions data, even after a phase-in period. Limited assurance should be sufficient to provide investors with a degree of comfort that the GHG emissions data provided are accurate.

This, of course, would not preclude shareholders from seeking a higher level of assurance from selected registrants. 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.

4. Strategy, Business Model and Outlook

The standard for risk disclosures should be less prescriptive and follow existing materiality standards.

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.[50] SIFMA is supportive of requiring registrants to disclose material climate-related risks. However, the volume of the required information proposed may have the unintended consequence of presenting a confusing and potentially misleading portrayal of registrants by effectively giving climate-related risks prescriptive prominence relative to other matters that may be of equal or

[49] *Id.* at 230.
[50] Proposed Item 1502(a) of Regulation S-K.

greater importance to a particular registrant, making it difficult for investors to discern what information is actually important for any particular registrant. As such, and as detailed below for several of the specific requirements included in the proposed rules, a more principles-based approach is more likely to elicit useful disclosure and avoid unintended consequences than a set of highly prescriptive requirements.

Moreover, the manner in which registrants determine whether a risk is required to be disclosed should conform to current Commission materiality standards. Applying a different materiality standard will result in investor confusion since, to provide a coherent and integrated discussion of risk, climate-related and other business risks will in most cases be discussed together.

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.[51]

We agree with the foregoing approach. 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."[52]

The Commission has expressly rejected the use of a "probability/magnitude" test in connection with disclosure requirements that have a "reasonably likely" standard—stating in 1989 that "MD&A mandates disclosure of specified forward-looking information, and specifies its own standard for disclosure—e.g., 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."[53]

The Commission recently reaffirmed its 1989 guidance in a Release in 2020.[54] In that Release, the Commission observed:

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[51] Proposing Release at 65.
[52] *Id.*
[53] Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures Release No. 33-6835 at n.27 (1989), https://www.sec.gov/rules/interp/33-6835.htm.
[54] Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Exchange Act Release No. 33-10890 (Feb. 10, 2021), available at 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:

[s]ome 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.[55]

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 therefore be extremely difficult to apply. Because the potential impact of climate-related risks can be extremely high, this approach would result in a large number of very low probability risks that are obvious to investors, since they affect all registrants or entire industries. For example, a 3°C rise in temperatures by 2050 is a low probability event, but the magnitude is likely severe. Disclosures of low-probability/high-magnitude risks would not help investors identify and evaluate the specific risks applicable to an individual registrant, and these disclosures may have the opposite result by drawing attention away from more relevant but less sensationalistic disclosed risks.

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. Requiring materiality to be assessed over each of those time periods would effectively create a new standard: rather than considering if a risk was material to the registrant generally, the registrant would need to determine what those time periods are and then apply the test separately in each of the time periods. SIFMA believes the current materiality standard used for MD&A disclosures is well understood and suitable for eliciting disclosure of material risks over whatever time period is relevant to a registrant's particular facts and circumstances.

However, if the Commission retains a specific requirement to disclose risks over short-, medium- and long-term horizons, SIFMA 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.[56] This will result in tailored disclosure, which is more likely to be informative to investors.

The proposed physical risk disclosure requirements will require registrants to produce and disclose large amounts of immaterial information.

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.

[55] *Id*. at 49.

[56] *Id.* at 67-68.

SIFMA is supportive of requiring disclosure to identify whether material risks are physical or transition risks.[57] SIFMA also appreciates the Commission's effort to make disclosures more comparable by requiring registrants to report similar metrics. However, requiring disclosure of uniform metrics by registrants with very different businesses will lead to "apples to oranges" comparisons that are at best irrelevant, and at worst misleading, to investors.

For example, 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."[58] For many registrants, this information would not be useful to investors. While financial institutions may be subject to flood risks, in most cases disclosing the percentage of a financial institution's physical footprint located in a flood hazard area would not be relevant to investors given the industry's proven ability to pivot to remote work and widespread back-up and redundant facilities. Conversely, a percentage disclosure could be misleading in the case of a trading firm with a small yet significant trading floor or metals warehouse in an area at risk of flooding, since it would understate the physical risks of climate change to that registrant.[59]

Similarly, a requirement to list zip codes of properties subject to flood risk is unlikely to be meaningful to investors.[60] Investors would be better served by allowing registrants to describe their properties in the manner determined by them to be appropriate in the context of their business.

The proposed disclosure requirements relating to the use of scenario analysis will require registrants to disclose substantial amounts of proprietary and confidential data, produce disclosure that is of limited value to investors and induce many 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.[61] Development of the methodology for scenario analysis is still at an early stage, and registrants are continuing to evolve thinking on its use and scenario design, [62] among other things, making disclosure of scenario analysis premature. Rather than promoting disclosure, the proposed requirements will discourage many registrants from further developing and using scenario analysis. That would in turn lead to less effective management of and less robust disclosure regarding climate risks.

Effective scenario analysis requires the use of substantial amounts of competitively sensitive proprietary data relating to a registrant's forecasted future performance, potential

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57 *Id.* at 19, n.38.
58 Proposed Item 1502(a)(1)(i)(A) of Regulation S-K.
59 To the extent the Commission does adopt a requirement to disclose the percentage of assets subject to flood risks, it should be clear that such requirement only applies to assets held by entities that are consolidated in the registrant's consolidated financial statements.
60 Proposed Items 1500(k) and 1502(a)(1)(i)(B) of Regulation S-K.
61 Proposed Item 1502(f) of Regulation S-K.
62 *See* IFRS, *Exposure Draft: IFRS S2 Climate-related Disclosures* (Mar. 2022) at 17 ("at this time the application of climate-related scenario analysis for entities is still developing."), available at https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-climate-related-disclosures.pdf.

business plans, capital planning, risk models and other factors that registrants have a legitimate need to keep strictly confidential in order to compete effectively. Furthermore, for some registrants who are or will be subject to certain prudential or supervisory requirements from home country regulators or the U.S. banking regulators, at least some of that information will be "confidential supervisory information" that is legally required to be kept confidential.[63]

Additionally, the proposed rules presuppose that any analyses generated by registrants are prepared with the level of rigor and deliberation appropriate for public disclosure. When these analyses are prepared for internal registrant use, they may be preliminary in nature and subject to further update and modification since they are prepared for an internal audience capable of understanding the limitations of the analyses and how they fit into business planning and risk management. Internal financial projections are an analogous example. Many registrants prepare financial projections for internal use that are satisfactory and useful for internal purposes, but that would not be appropriate to publicly disclose and would subject the registrant to significant liability if they were required to disclose it.

This information also is unlikely to be additive to investors' understanding of how registrants manage climate-related risks in light of the extensive risk management disclosure requirements proposed by the Commission.[64]

Finally, the requirement to show "projected principal financial impacts"[65] would require registrants to include quantitative projections, which is a novel requirement for periodic reports and registration statements for most types of offerings, and one that is a radical divergence from existing practice due to liability concerns. For example, registrants that provide guidance (which is often far more limited than what would be required under the proposed rules) typically do so in earnings releases that are furnished to the Commission under Item 2.02 of Form 8-K rather than filed. Notably, under the proposed rules, registrants that engage in initial public offerings, which do not benefit from a safe harbor for forward-looking statements, would also be required to include that disclosure.

For the foregoing reasons, SIFMA proposes that the Commission adopt a more limited set of defined disclosure requirements, only requiring disclosure of scenario analysis and similar tools to the extent necessary to understand whether climate-related risks have been integrated into the registrant's business model or strategy, and that such disclosures be included in the MD&A.

Alternatively, registrants should only be required to provide prescribed scenario analysis information that is limited to the scenarios considered without disclosing inputs and outputs. For example, a registrant would disclose that as part of its risk management efforts it considered a

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[63] Bank regulators are expected to issue rules regarding the use of scenario analysis, which may further restrict some registrants' ability to comply with the proposed rules. *See, e.g.*, Peter Schroeder, *U.S. Regulator Joins Effort to Press Banks to Gauge Climate-Linked Financial Risks*, Reuters, Mar. 30, 2022, available at https://www.reuters.com/world/us/us-regulator-joins-effort-press-banks-gauge-climate-linked-financial-risks-2022-03-30/. Requiring disclosure of scenario analysis at this stage would front-run requirements that may be put in place by bank regulators and result in registrants needing to disclose multiple sets of scenario analyses that utilize inconsistent methodology.
[64] Proposed Item 1503 of Regulation S-K.
[65] Proposed Item 1502(f) of Regulation S-K.

scenario in which global temperatures rise by a specified amount over a specified period. It would not, however, disclose inputs such as its internally projected rate of growth for particular products or outputs, such as what the expected impact would be on its revenues. That approach would allow investors to understand if scenario analysis is used by a registrant while mitigating the disincentive for registrants to adopt and develop that tool.

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

The Commission's proposed disclosure requirements regarding the use of internal carbon pricing[66] also will induce many registrants to avoid using carbon pricing and similar tools, to mitigate their compliance burden. Further, such tools are often used for reasons other than risk management. Accordingly, SIFMA recommends that required internal carbon price disclosure (1) be limited to that disclosure that is necessary to an understanding of how a registrant has integrated climate-related risks into its business model or strategy, rather than the prescriptive disclosures proposed, or (2) only be required to the extent otherwise publicly disclosed. The rationale for these modifications is described in the immediately prior point concerning disclosures relating to the use of scenario analysis.

5. Risk Management

Registrants should only be required to disclose material transition plans that have been adopted by their board of directors and should not be required to disclose progress under plans annually.

As proposed, the rules will induce many registrants to not create transition plans. The requirement to disclose *any* transition plan "adopted" by a registrant[67] 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 not appropriate for public disclosure.

Accordingly, this portion of the rules should have a more precise disclosure trigger that expressly mentions or implies materiality and that the plan has been thoroughly considered. The Commission has previously recognized approval by the board of directors (or authorized committees or members of management) as a trigger for disclosure of certain material events—recognizing that such approval is a "sufficiently precise" trigger to allow registrants to determine if disclosure is needed.[68] For example, disclosure of costs related to exit or disposal plans under Item 2.05 of Form 8-K and of material impairments under Item 2.06 of Form 8-K is triggered by approval of the board or other authorized persons.[69] SIFMA recommends the Commission take a

[66] Proposed Item 1502(e)(1) of Regulation S-K.
[67] Proposed Item 1503(c)(1) of Regulation S-K.
[68] Final Rule: Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date, Exchange Act Release No. 33-8400 (Aug. 23, 2004), available at https://www.sec.gov/rules/final/33-8400.htm.
[69] *Id.*

similar approach in this case, only requiring disclosure of material transition plans that have been approved by the board of directors.

Registrants should not automatically be required to disclose progress under transition plans annually.

Transition plans often have long time horizons. As such, annual progress updates will in many cases not provide meaningful information for investors. Additionally, annual disclosure may create a misleading impression that a registrant is progressing well or poorly against their overall transition plan, depending upon the specific actions taken during the particular fiscal year.

To address these considerations, there should instead be a requirement to annually report any actions taken to achieve transition plans that are material to the registrant, as well as any material positive or negative deviations from the plan or changes to it that are material to the registrant.

Registrants should only be required to disclose their processes for identifying climate-related risk 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).[70] This would include several highly prescriptive requirements, including how the registrant prioritizes risks and decides whether to accept, mitigate or adapt to a particular risk, regardless of whether such risks are material.

We are concerned the detailed requirements around how a registrant manages and addresses climate-related risks seem to be aimed at dictating risk management practices and identifying particular risks that registrants should manage rather than simply eliciting disclosure. The granularity of the disclosure required may also place undue emphasis on risk management of climate over other potentially equally or more relevant risk management topics registrants currently describe under a principles-based framework.

Similar disclosure is not currently required for any other risks, and existing rules should be sufficient to elicit relevant information. The proposed disclosure will result in an unbalanced view of the registrant's risk management practices. Accordingly, SIFMA recommends the Commission revise this portion of the proposed rules to only require disclosure to the extent necessary to provide an understanding of the registrant's risk management processes regarding climate change.

6. Targets and Goals

The Commission's proposed disclosure requirements relating to targets and goals are unclear, overly broad and will incentivize many registrants not to adopt targets and goals.

- *It is unclear what targets and goals would come within the scope of the rules.*

[70] Proposed Item 1503(a) of Regulation S-K.

The proposed requirement to disclose "any targets or goals *related to* the reduction of GHG emissions"[71] (emphasis added) needs to be clarified. For example, a financial institution may decide to set a goal to change the composition of borrowers in its portfolio for any number of reasons, a tertiary goal or unintended consequence of which might be a reduction in its Scope 3 emissions. As proposed, it is not clear if that goal or target would be "related to" reduction of greenhouse gas emissions, given that such reduction is not a principal reason for adopting the relevant goal or target. The meaning of "other climate-related target or goal"[72] 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."[73] Further, the concerns raised earlier in this comment letter regarding preliminary or draft internal carbon pricing and scenario analyses and transition plans also apply in the context of interim targets and goals.[74]

To avoid these outcomes, SIFMA proposes that the Commission take a similar approach to target and goal disclosure as SIFMA proposed with respect to transition plans—e.g., that targets and goals only require disclosure if they are material to the registrant and adopted by the board of directors.

- *Annual progress against targets and goals should not automatically be required to be reported.*

Like transition plans, targets and goals often have long time horizons. As such, annual progress updates[75] will in many cases not provide meaningful information for investors. To address these considerations, there should instead be a requirement to annually report any actions taken to achieve targets and goals that are material to the registrant.

Disclosures relating to carbon offsets and RECs should be disclosed if material to a registrant's GHG emissions.

As noted above, carbon offsets and RECs are an important part of many registrants' efforts to reduce overall GHGs. SIFMA therefore agrees that use of offsets and RECs should be required to be disclosed if material to a registrant's GHG emissions. Further, as noted above, SIFMA believes it would be appropriate to require such disclosures if, in addition to disclosing GHG emissions on a gross basis, a registrant chooses to disclose GHG emissions net of offsets and RECs (which, as we note above, should be expressly permitted under any final rule adopted by the Commission). However, disclosures regarding use of offsets or RECs immaterial to a registrant's GHG emissions by a registrant that only discloses GHG emissions on a gross basis would not be meaningful to investors.

SIFMA also recommends the proposed definitions of "carbon offsets" and "Renewable energy credit or certificate (REC)"[76] be revised to align with the definitions of those concepts

[71] Proposed Item 1506(a)(1) of Regulation S-K.
[72] *Id.*
[73] Proposed Item 1506(b)(5) of Regulation S-K.
[74] *Supra*, at 26-27.
[75] Proposed Item 1506(c) of Regulation S-K.
[76] *See* proposed Item 1504(a) and (n) of Regulation S-K.

used in the Greenhouse Gas Protocol. The Greenhouse Gas Protocol definitions provide additional clarity.[77] Furthermore, this is an area where deviating from widely accepted definitions does not enhance investor protection.

7. Governance

Requiring registrants to identify directors with "expertise in climate-related risks" is unnecessary in light of the existing disclosure requirements, would inappropriately add duplicative disclosure, result in a de facto substantive governance requirement and degrade the ability of boards to provide effective oversight.

We are concerned that the prescriptiveness of the proposed governance disclosure requirements will decrease, rather than increase, the effectiveness of board oversight. Boards are, by design, deliberative bodies, which are tasked with oversight of numerous traditional and emerging risks, of which climate risk is only one risk driver. The prescriptive nature of the requirements also seems to be aimed at dictating governance practices rather than simply eliciting disclosure. We have concerns that the granularity of the disclosure required may place undue emphasis on board oversight of climate risk over other risk management topics registrants currently describe under a principles-based framework.

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.

However, it will result in registrants feeling pressured to add a director they can state has "expertise in climate-related risks." A specific disclosure requirement regarding whether or not directors have climate-related expertise will be interpreted as a clear indication that the Commission believes such expertise is important to all public company boards of directors.[78] It would place directors with climate-related expertise alongside audit committee financial experts (and, if proposed Item 407(j) of Regulation S-K is adopted by the Commission, directors with cybersecurity expertise) as the only specific areas where the Commission feels board expertise is important enough to require a specific disclosure requirement addressing it. Registrants that do not have such a director will be forced to justify to stakeholders why they do not have a director with expertise that one of their key regulators feels is important. Rather than regularly engage in those discussions, boards of directors are likely to look to add members with climate-related expertise.

The inclusion of a board member with expertise in climate-related matters is appropriate for some registrants. However, whether or not it is appropriate for a particular registrant should

[77] Mary Sotos, *GHG Protocol Scope 2 Guidance* at105-06, World Res. Inst. (Sept. 23, 2014), available at https://ghgprotocol.org/sites/default/files/standards/Scope%202%20Guidance_Final_Sept26.pdf.
[78] SIFMA notes that past efforts to mandate that boards of directors include a director with climate-related expertise have failed.

be determined by its nominating and governance committee and shareholders rather than influenced by the Commission's disclosure requirements. 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.[79] While it is important for boards to have a mix of directors with different skills and experiences, those are generally considered broadly—experience with retail operations or international business, for instance, rather than particular technical skills. A board should have the flexibility to determine its own appropriate composition, taking into consideration the size of the board, the diversity, expertise and tenure of board members. All directors have the same overarching fiduciary duties, which should guide the boards' consideration of issues relating to climate risk, strategy and emerging risks, technological transformation, cybersecurity, management of general operational risks, and regulatory compliance. The Commission's recent trend toward "special interest" directors threatens to undermine that model. The replacement of existing directors or expansion of boards also has significant costs, including increased board search fees and director compensation resulting from an expanded board (which are not addressed in the Commission's cost estimates).

The Commission's proposal to require each registrant to identify directors with "expertise in climate-related risks" also is markedly different from the existing requirement to identify if a registrant has an "audit committee financial expert" under Item 407(d)(5) of Regulation S-K. Item 407(d)(5) was adopted in response to an express policy decision by Congress to require such disclosure, reflected in Section 407 of the Sarbanes-Oxley Act. Ensuring appropriate oversight of auditors is the rare issue that—unlike climate-related matters—is something that is material to every registrant.

Accordingly, boards will be forced to struggle with evaluating what constitutes climate-related expertise and, given the technical nature of the area, many existing directors and board candidates will likely be hesitant to claim such expertise regardless of director education efforts and familiarity with how climate-related matters affect a registrant. That will likely result in a demand for potential directors with technical qualifications related to climate matters and the business acumen, experience and industry expertise to act as directors that far exceeds the number of such persons. Once that supply is exhausted, many registrants will feel compelled to onboard individuals with technical qualifications related to climate matters but without the other skills and experience necessary to be an effective director of a public company.

Concerns of directors and prospective board members that they will have enhanced liability if identified as a director with expertise on climate-related risks also will make it harder to attract and retain directors with the relevant expertise. These concerns will be heightened, given the SEC's proposal does not include safe harbors to protect such directors from liability; and to make clear that other board members are not relieved of their obligations. It included this safe harbor in Item 407(d)(5)(iv) of Regulation S-K with respect to audit committee financial experts and in the Cybersecurity Proposal with respect to directors with expertise in

[79] *See* Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Exchange Act Release No. 33-11038 (Mar. 9, 2022) (hereinafter the "Cybersecurity Proposal"), available at https://www.sec.gov/rules/proposed/2022/33-11038.pdf.

cybersecurity matters.[80] If the Commission does go forward with its proposal to require disclosure regarding whether directors have climate-related expertise, SIFMA urges it to adopt similar safe harbors in this context.

Requiring registrants to disclose the frequency of board and management discussions of climate-related risks will invite shareholders to micromanage how boards and management allocate their time, adversely impact how boards and management allocate their time and increase the risk of frivolous litigation.

The proposed rules would require disclosure of board and management processes relating to the consideration of climate-related risks, including the frequency of discussions.[81] SIFMA is concerned that this aspect of the proposal will drive changes in behavior by boards and management that are detrimental to shareholders for the same reasons that registrants will feel pressured to add a director with climate-related expertise to their board of directors. That will degrade the ability of boards of directors to exercise independent judgment as to how their time and resources should be allocated and will inevitably divert time away from other matters that are more pressing for some registrants.

Boards and management are not required by Commission rules to report on how frequently any other topic is discussed.[82] As such, the proposed requirement will result in climate-related risks being unduly emphasized in annual reports relative to other areas of importance. It also will result in registrants deciding how frequently climate-related issues should be discussed based on a comparison to how often other companies indicate they discuss those issues, rather than allocating the scarce time and resources of boards and management based on their assessment of what is best for the registrant. The proposed rules also break down board oversight disclosure by subtopic, asking a registrant to disclose how a board thinks about climate risk with respect to its business strategy, risk management and financial oversight and how information is provided to the board. This kind of granular oversight about board processes could encourage registrants to prioritize form over substance and appearance over effectiveness. Relatedly, providing the plaintiff's bar with unnecessarily granular insight into internal board processes is likely to increase frivolous breach-of-fiduciary-duty claims and books-and-records requests.

As an alternative, SIFMA suggests revising existing Item 407 of Regulation S-K to clarify that disclosure of the board's role in risk management should include a principles-based discussion of the registrant's climate risk governance. In particular, Item 407(h) of Regulation S-K could be amended to specifically reference climate risks, addressing the Commission's

[80] Rule 407(d)(iv) of Regulation S-K provides that a person identified as an audit committee financial expert (1) will not be deemed an "expert" for any purpose, including Section 11 liability under the Securities Act, and (2) will not have any duties, obligations or liabilities imposed on them additional to those that apply to all audit committee members. It also provides that designating an individual as an audit committee financial expert does not affect the duties, obligations or liabilities of any other director. The Cybersecurity Proposal has a similar provision with respect to directors identified as having cybersecurity expertise.
[81] Proposed Item 1501(a)(iii) of Regulation S-K.
[82]The Cybersecurity Proposal includes a similar requirement to disclose the frequency of discussions by management and boards. That requirement further heightens concerns that resources and time of boards and management will be diverted from areas of importance to particular registrants to areas the Commission has determined require extremely granular disclosure.

concern that processes to manage climate risks are disclosed, without forcing registrants to place undue emphasis on those risks relative to others or make unnecessarily granular disclosures that are not useful to investors and increase litigation risk.

Climate-related governance disclosures should appear together with other governance disclosures.

Disclosure of climate-related corporate governance matters should be required at the same time as other disclosures regarding those topics. Otherwise, investors will receive an incomplete picture of a registrant's corporate governance that unduly emphasizes climate-related matters.

The Commission's current requirements for domestic registrants to disclose corporate governance matters are largely contained in Items 401 through Item 407 of Regulation S-K and required to be included in Part III of annual reports on Form 10-K. Instruction G.3 to Form 10-K allows Part III information to be included in a registrant's proxy statement, which is common practice. Requiring corporate governance disclosure only with respect to climate-related matters in Form 10-K, while other corporate governance disclosure is later disclosed in a proxy statement, will provide an incomplete picture of corporate governance practices and may confuse investors. As such, if retained, the requirement to comply with this portion of the proposed rules should be moved to Part III of Form 10-K.

8. Insufficient Implementation Time Period

The proposed implementation periods for disclosures are insufficient. Longer implementation periods are needed to build the processes, procedures and controls necessary to ensure the sufficient completeness and reliability of climate-related disclosures as well as the ability to support required attestations. SIFMA suggests that the proposed implementation dates for certain of the requirements be revised as follows:

	Large Accelerated Filers	**Accelerated Filers**	**Other Registrants**
Proposed Article 14 of Regulation S-X[83]	For the fourth fiscal year following adoption of the proposed rule (e.g., if the proposed rule is adopted in 2022, a calendar year registrant would first report under proposed Article 14 in 2027 for the year ended December 31, 2026).	For the fifth fiscal year following adoption of the proposed rule.	For the sixth fiscal year following adoption of the proposed rule.
Attestation requirements for	For the third fiscal year following adoption of the	For the fourth fiscal year following	Not applicable.

[83] As noted elsewhere in this comment letter, SIFMA strongly urges the Commission not to adopt proposed Article 14 of Regulation S-X. If the Commission does decide to adopt that requirement (together with revisions needed to make it operable), SIFMA believes registrants would need additional time to implement it for the reasons discussed above.

	Large Accelerated Filers	Accelerated Filers	Other Registrants
Scope 1 and Scope 2 disclosure[84]	proposed rule (e.g., if the proposed rule is adopted in 2022, a calendar year registrant would be required to obtain attestation for its disclosure for the year ended December 31, 2024).	adoption of the proposed rule.	
Scope 3 disclosure requirements	For the fourth fiscal year following adoption of the proposed rule (e.g., if the proposed rule is adopted in 2022, a calendar year registrant would be required to obtain attestation for its disclosure for the year ended December 31, 2026).	For the fifth fiscal year following adoption of the proposed rule.	For the fifth fiscal year following adoption of the proposed rule (other than for smaller reporting companies, which would be exempted from this requirement).

9. Other Matters

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." Given the inherent uncertainty about an almost infinite number of variables that could affect climate-related matters, it is unclear what would constitute a "meaningful cautionary statement" in this context. In order for the safe harbors to be effective, guidance from the Commission is necessary to explicate what would constitute a "meaningful cautionary statement" with respect to climate-related matters. To avoid any ambiguity, the Commission should also adopt a rule (similar to Rule 305(d) of Regulation S-K) to make clear that any disclosures (other than historical facts) made by registrants that are responsive to the rules as adopted are protected by Section 27A of the Securities Act and Section 21E of the Exchange Act safe harbors.

Additionally, Section 27A of the Securities Act and Section 21E of the Exchange Act are unavailable 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.

[84] As noted earlier in this comment letter, SIFMA suggests that the Commission remove the attestation requirement from the proposed rules and revisit the issue in the future. If the Commission declines to take that approach, SIFMA urges it to delay the implementation deadline for required attestations.

Otherwise, there may be a chilling effect on capital formation as registrants delay or avoid initial public offerings in the United States and other transactions to avoid the heightened risk of litigation that the Commission's proposal would create.

To facilitate disclosure of useful and globally comparable information for investors, the Commission should allow registrants to comply with substantially similar foreign regimes in lieu of any rules adopted by the Commission and permit all registrants the option of disclosing according to ISSB standards.

The Commission has often adopted standards that allow FPIs to rely in part on non-U.S. disclosure regimes—for example, FPIs are permitted to prepare financial statements using International Financial Reporting Standards as issued by the International Accounting Standards Board instead of U.S. generally accepted accounting principles, furnish current reports on Form 6-K when disclosure is required in non-U.S. jurisdictions rather than being required to file current reports on Form 8-K when specific triggers are met and to look to home country standards with respect to compensation disclosure for individuals under Item 6.B of Form 20-F rather than report in accordance with Item 402 of Regulation S-K. This reduces the compliance burden of dual-listed issuers and avoids duplicative regulation, unnecessary operational complexity and potential conflicts of law.

SIFMA believes a similar approach should be taken with respect to climate-related disclosure for all registrants. In particular, all registrants should be permitted to comply with standards issued by the ISSB in lieu of standards adopted by the Commission. FPIs should also be allowed to report using disclosure regimes that the Commission has determined are "substantially similar" to its rules on an outcomes-based basis that does not require a line-by-line analysis, as they are permitted to do under Exchange Act Rule 13q-1 with regards to resource extraction payments. Allowing compliance with comparable rules adopted by bodies other than the Commission will conserve regulatory resources at the Commission and international regulators, decrease costs and burdens faced by those issuers and reduce the incentive for those issuers to only allow non-U.S. retail investors to participate in offerings or to deregister under the Exchange Act and cease reporting under the Commission's rules entirely.

Registrants should not be required to report climate-related information for an acquiree until after a transition period.

It is often infeasible for a registrant to immediately integrate an acquiree's climate reporting procedures and controls. As such, the Commission should implement a transition period between the acquisition of a business and when climate-related information for the acquiree is required to be included in the registrant's reports. Such a transition period would be consistent with how the Commission has approached this issue in other contexts, such as conflict minerals disclosure.[85]

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

[85] *See* Instruction 3 to Item 1.01 of Regulation SD.

Practices and requirements around climate risk disclosure are rapidly evolving, and new requirements are pending or proposed across the globe. Furthermore, many banks and other companies have already adopted voluntary standards, frameworks and methodologies, even as such international discussions continue to rapidly evolve. SIFMA believes it is important for the Commission's climate risk disclosure rules to be tailored to the needs and goals of U.S. markets and to be grounded in well-established U.S. standards of materiality. However, it also is important for the Commission to actively consider and participate in ongoing international regulatory dialogues and 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. To ensure the climate reporting regime ultimately adopted by the Commission remains fit for purpose, the Commission should publicly commit to periodically seek comment on and to review the effectiveness and appropriateness of the rules adopted.

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SIFMA 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 Melissa MacGregor at mmacgregor@sifma.org or 202 962 7300, 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,

Kenneth E. Bentsen, Jr.
President & CEO

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

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