BANK POLICY INSTITUTE

June 16, 2022

Via Electronic Mail

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-0609

Re: Request for Public Input on Climate Change Disclosures (File Number S7-10-22)

Ladies and Gentlemen:

The Bank Policy Institute (BPI)[1] welcomes the opportunity to comment on the SEC's notice of proposed rulemaking regarding amendments to the SEC's rules under the Securities Act of 1933 and Securities Exchange Act of 1934 that would require registrants to provide certain climate-related information[2] in their registration statements and annual reports. We previously expressed our views on the SEC's climate disclosure efforts in our June 9, 2021 comment letter responding to the SEC's March 15, 2021 request for public input on climate disclosures and have included that letter as Annex 1.[3]

I. Executive Summary

BPI's member organizations are actively engaged in assessing climate-related financial risks and are working to integrate climate-related risks into their risk management and disclosure frameworks.

[1] BPI is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, they employ almost two million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

[2] Throughout this letter, we use the term "climate information"—and related terms such as "climate disclosures" and "climate risks"—to refer to climate-related risks for financial institutions, as differentiated from risks to the climate itself.

[3] *See* BPI, Comment Letter re Request for Public Input on Climate Change Disclosures (June 9, 2021), *available at* https://www.sec.gov/comments/climate-disclosure/cll12-8901041-242153.pdf.

Many BPI member banking organizations publish extensive climate-related disclosures, including via their websites and through voluntary reports or through reporting required by international regulators. These actions are part of a trend by registrants to increasingly and voluntarily disclose climate-related information that goes beyond any material climate disclosures already included in registrants' SEC-filed reports in an effort to be responsive to requests from investors, consumers, employees, and international authorities. We expect this trend would continue even absent SEC action on climate disclosures. For such disclosures to be meaningful to investors, however, they need to be consistent and comparable to each other and to international climate disclosure standards, which the SEC can help drive through a more standardized reporting framework. As a result, BPI supports efforts by the SEC to promote consistency, comparability, and reliability of these disclosures, while maintaining the SEC's traditional approach of principles-based, rather than overly detailed, disclosure requirements.

We provide recommendations below for how the SEC can better calibrate the final rule to achieve its objectives. The following recommendations cover the priority topics for BPI member banks:

- The Regulation S-X financial reporting requirements are largely inoperable, will not result in useful disclosure for investors, and should be removed or, at a minimum, significantly narrowed. There are a host of practical problems that would make compliance with the proposal's financial reporting requirements infeasible, and any resulting disclosure would not be useful for investors. At this stage, disclosures of material climate-related financial impacts should be primarily qualitative and provided in the Management's Discussion and Analysis (MD&A) section of Form 10-K filings. If the SEC wishes to consider climate-related financial reporting in the future (e.g., for "transition activities"), it should go through the standard Financial Accounting Standards Board (FASB) process to determine how to do so. If the SEC decides to retain a financial reporting requirement, the proposal should be narrowed significantly to only require material quantitative disclosures in aggregate that are easily observable for defined severe weather events for both the financial impact and expenditure metrics, given that producing disclosures for transition activities would require myriad assumptions and would not result in useful information for investors.

- The Scope 3 emissions disclosure requirements are overly broad as drafted and should be significantly narrowed. The proposal's Scope 3 emissions disclosure requirements—and as particularly relevant to banking organizations, disclosure of financed emissions under Category 15 of the Greenhouse Gas (GHG) Protocol—are overly broad. They would significantly redefine the concept of materiality under the federal securities laws, as set forth in binding Supreme Court precedent. Overly broad Scope 3 emissions disclosure would not result in consistent, comparable, or reliable disclosure given the significant challenges around Scope 3 emissions data quality and availability and the continuing evolution of Scope 3 calculation methodologies, and would not result in useful information for investors. Many members are already voluntarily providing Scope 3 emissions data, where possible, in their sustainability reports. Rather than redefining the securities laws and violating long-standing legal and market concepts, the SEC should encourage Scope 3 emissions disclosures outside of the SEC reporting documents. Moving in that direction would encourage more robust climate risk disclosures at an appropriate pace as the quality and availability of information increases. If the SEC retains the Scope 3 emissions disclosure requirements, the SEC should significantly narrow the requirements, including by tailoring them to registrants' material climate commitments and goals, which have primarily focused on high-emissions sectors. Furthermore, to the extent the proposed Scope 3 disclosure

requirements are included in any final rule—even if in a narrower form—the SEC should provide for a longer transition period of at least two years from the rule's final effective date.

- The risk management aspects of the proposal should be modified so that they do not front-run, and are consistent with, ongoing efforts by the federal banking regulators. Banking organizations are subject to federal prudential regulation by the Federal Reserve, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation (collectively, the prudential regulators). The prudential regulators have been working both domestically and internationally over the past year to develop guidance and expectations for banks with regard to risk management, governance, and climate scenario analysis—with consultations currently outstanding.[4] Given the extensive work that is underway by the prudential regulators, any climate change disclosure regime applicable to banking organizations should recognize the supervisory objectives and early stage of these efforts and not front-run the prudential process.

- The proposal's board and management governance provisions should be modified to be less prescriptive. The proposal would impose substantive requirements on registrants that are not appropriate for a disclosure regime. The governance provisions should be revised to be principles-based, which would generate more useful disclosure that is tailored to registrants' businesses, rather than have the SEC suggest specific governance practices.

- The proposal's cost-benefit analysis does not satisfy the SEC's statutory cost-benefit obligations. The SEC is required to conduct a thorough and rigorous cost-benefit analysis as part of its rulemaking process.[5] Here, the SEC's analysis falls short, particularly with respect to assessing costs for banking organizations. The SEC largely does not quantify putative benefits of the proposal, and the benefits that are discussed are highly speculative, whereas the SEC significantly undercounts costs.

- The proposal should be revised to permit foreign private issuers (FPIs) to comply using home country standards. All FPIs should benefit from a substituted compliance regime, such as applies to Canadian registrants.

- To avoid conflicts of law and implementation challenges, the proposal should permit alternative compliance by using international standards. Once the rule is finalized, all

[4] *See* Basel Committee on Banking Supervision, Consultative Document, Principles for the Effective Management and Supervision of Climate-Related Financial Risks (Nov. 2021), *available at* https://www.bis.org/bcbs/publ/d530.pdf; Office of the Comptroller of the Currency, Principles for Climate-Related Financial Risk Management for Large Banks (Dec. 16, 2021), *available at* https://www.occ.gov/news-issuances/bulletins/2021/bulletin-2021-62.html; Federal Deposit Insurance Corporation, Statement of Principles for Climate-Related Financial Risk Management for Large Financial Institutions, 87 Fed. Reg. 19507 (Apr. 4, 2022); Financial Stability Board, Interim Report, Supervisory and Regulatory Approaches to Climate-Related Risks (Apr. 29, 2022), *available at* https://www.fsb.org/wp-content/uploads/P290422.pdf.

[5] The statutes require the SEC to "consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. §§ 77b(b), 78c(f), 80a-2(c). Courts have relied on this language to evaluate the sufficiency of the SEC's cost-benefit analysis. *See, e.g.*, *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

registrants should have the option of using International Financial Reporting Standards (IFRS) Foundation's International Sustainability Standards Board (ISSB) as an alternative means of compliance.

- The proposal should not require third-party attestation of Scope 1 and Scope 2 GHG emissions disclosures. In light of the robust controls registrants already have in place over their 10-Ks, the benefits of such attestation do not outweigh the costs.

- The SEC should provide more guidance around GHG emissions verification. We agree with the SEC's approach not to mandate the precise GHG emissions verification standards needed for a registrant to meet its Regulation S-K obligations. However, to give registrants greater certainty, the SEC should provide additional guidance regarding which verification standards would be acceptable.

- Should the SEC retain an attestation requirement, it should confirm that attestation reports are considered expertized material for purposes of Scope 1 and Scope 2 GHG emissions disclosures, and the attestation requirements should be scaled back. Firms acting as underwriters will be subject to unwarranted due diligence requirements if Scope 1 and 2 GHG emissions attestations are not considered to be expertized material for purposes of liability under Section 11 and Section 12 of the Securities Act of 1933 and Rule 10b-5 under the Securities Exchange Act of 1934. Similar to other expertized material such as financial statements, technical reports for mining companies, and reserve reports for oil and gas companies, the highly technical nature of attestation reports and the assurance procedures required to be conducted by a third party make it unreasonable to expect underwriters to be responsible for performing the same level of diligence as would be appropriate for non-expertized material. Although the proposal seems to assume that attestation reports are expertized, the SEC should modify the proposal to clarify that attestation reports are expertized material for liability purposes.

- The SEC should clarify that consolidation of legal entities for GHG emissions disclosures need not match consolidation for financial reporting. There are many operational challenges that would restrict a registrant's ability to follow the same consolidation treatment for both GHG emissions disclosures and financial reporting. The SEC should recognize these limitations and clarify that registrants may choose, and disclose, their approach to organizational boundaries for purposes of computing GHG emissions.

The remainder of this letter provides more detail on our recommendations.

II. The Regulation S-X financial reporting requirements are largely inoperable, will not result in useful disclosure for investors, and should be removed or, at a minimum, significantly narrowed.

The Regulation S-X financial disclosure requirements included in the proposal are entirely novel and go far beyond the Taskforce on Climate-related Financial Disclosures (TCFD) framework on which the SEC proposal is ostensibly based and beyond any requirements issued by any other country or international standard. The proposed Regulation S-X disclosures are also novel within the context of the current U.S. financial reporting framework, in that they would require separate accounting for climate-related factors—an approach that is uncommon for any other factor. We believe that compliance with the requirements ranges from very difficult to impossible, and even if the required data could be

produced, it would not provide useful information for investors. We discuss these challenges further below.

A. Information should be in nonfinancial, not financial, disclosures.

The SEC should remove the Regulation S-X climate disclosure requirements from the proposal. The SEC's objective of providing consistent, comparable, reliable, and useful information to investors about material climate-related financial impacts would be more effectively achieved through qualitative disclosure as part of the MD&A discussion of material risks, where financial impacts would be disclosed, if material, under current guidance. Qualitative disclosures in the MD&A would provide investors with information about material climate-related impacts together with other discussion of key drivers of performance for the periods presented. To the extent the SEC wishes to explore quantitative disclosures of climate-related factors (e.g., for "transition activities") and risks in financial statements, it should go through the customary FASB accounting standards process. For example, the FASB is currently performing research on a project to address the accounting for financial instruments with environmental, social, and governance (ESG)-linked features and regulatory credits, which potentially would include disclosure requirements related to, for example, climate-related targets.

Should the SEC decide to retain the Regulation S-X requirements in some form, these requirements should be limited to quantitative disclosures in aggregate for clearly defined and easily observable severe weather events for both the financial impact and expenditure metrics, only to the extent the impact is material under Supreme Court precedent.[6]

B. Banks are not able to disaggregate climate-related financial impacts in any way that would result in meaningful disclosure for investors.

The Regulation S-X part of the proposal would also require disclosure of the financial impact of risks identified pursuant to the Regulation S-K part of the proposal. The proposal wrongly assumes that registrants would be able to tie identified potentially material climate risks in the Regulation S-K disclosures to the financial statements in the Regulation S-X disclosures. Banks are not able to look backwards to disaggregate the financial impact of any specific risk factor, and disaggregating climate-related risk would be even more challenging given the nascent and evolving state of climate risk management capabilities and the challenges around modeling a type of risk that is inherently uncertain. Registrants could theoretically compute the financial statement impact of certain types of physical weather events, although we do not believe it would result in useful information for investors about the financial impact of material climate-related risk as a number of variables would not be able to be disaggregated as to what element of the weather event is climate-related. But computing the financial impact of transition activities is exceptionally complex, given the myriad variables. Furthermore, it is unclear how a registrant would assign a financial statement line item impact to a particular variable (e.g., how does a change in regulation map onto a financial statement line item).

As one alternative to the proposed Regulation S-X requirements, and as suggested in Question 61 of the proposal, the SEC could require disclosure regarding discrete, observable weather events and natural conditions that have occurred, instead of requiring financial disclosure regarding a broader swath of climate risks. Although such a narrowed scope would still have its implementation

[6] *See* n.18 below and accompanying text.

challenges, this would be much more workable than the rule as proposed. That said, current research indicates that such risk may not be material to investors.[7]

The proposal would require banks to implement processes and procedures to disaggregate the financial impact of climate-related impacts and expenditures and material climate-related risks (subject to external audit) and provide disclosure in a footnote to the audited financial statements if the amount exceeds 1% of any relevant line item in the financial statements. This would effectively require banks to duplicate the current ledger and create a mirror image "climate ledger" to create a balance sheet and income statement for climate-related impacts. This would be needed in order to create an audit trail to determine whether those impacts are greater than 1% of the reported line item (and therefore need to be disclosed in a footnote to the financial statements). The cost of conducting this sort of analysis, assuming it could be done, would far outweigh any benefit of such information to investors.

We recognize the SEC's interest in providing investors with greater disclosure of climate-related financial risk, but banks are not able to disaggregate financial impacts specific to climate-related factors from other factors in any way that would result in meaningful disclosure for investors.[8] When severe weather events and policy changes affect a specific industry, a bank would not be able to differentiate these effects from a myriad of other factors that could be influencing the value of its assets—e.g., geopolitical risks, COVID-19, general market conditions.

We provide below two examples that illustrate why banks are not able to disaggregate the financial impact of climate-related factors or risks on financial statement line items:

1. **Line item: principal transactions revenue.** For Fair Value products, the market price will inherently have some element of climate/transition impact embedded. For example, banks would not be able to determine what the prices of securities would have been absent a severe weather event or transition activity.

2. **Line item: provision for credit losses.** For example, a bank client experiences a decline in creditworthiness which could have been the result of a variety of factors, including climate-related risk; it would not be feasible to disaggregate the provision amount specifically attributable to those climate-related risks absent the occurrence of a specific, observable event (e.g., a debtor manufacturing facility is destroyed by a severe weather event, resulting in

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[7] *See* Kristian S. Blickle, Sarah N. Hamerling, and Donald P. Morgan, How Bad Are Weather Disasters for Banks?, Federal Reserve Bank of New York Staff Report (Nov. 2021, revised Jan. 2022), *available at* https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr990.pdf.

[8] The Federal Reserve has also acknowledged the difficulties. *See* Celso Brunetti, Benjamin Dennis, Dylan Gates, Diana Hancock, David Ignell, Elizabeth K. Kiser, Gurubala Katta, Anna Kovner, Richard J. Rosen, and Nicholas K. Tabor, Climate Change and Financial Stability, FEDS Notes (Mar. 19, 2021), *available at* https://www.federalreserve.gov/econres/notes/feds-notes/climate-change-and-financial-stability-20210319.htm ("In principle, quantifying climate-related risks should be similar to quantifying other financial stability risks. In practice, however, climate-related risks face several challenges to measurement beyond those associated with conventional financial system vulnerabilities and potential shocks, and which will require investment to address. These climate-related features impair not only estimation and modeling at the level of the overall economy, but also the analysis of region-, sector-, asset-, institution-, and investor-level exposures. Investment in data procurement, and careful analysis of climate-related data to describe specific economic and financial risks, is critical to addressing these challenges and producing high-quality research on climate-related outcomes.").

significant lost sales which directly impacts their ability to repay). This is particularly challenging in the case of transition activities as well. Financial impact as a result of transition activities is also indirectly transmitted to a bank through the financial impacts on a bank's clients/borrowers.

C. The proposal's 1% disclosure threshold would result in disclosure of significant amounts of information that is not meaningful to investors.

The proposed requirements to disaggregate climate-related impacts will not result in meaningful disclosure for investors. This is exacerbated by the proposed 1% threshold for disclosure, which would result in significant amounts of information that is both immaterial and does not provide investors with any meaningful understanding of material climate-related financial impacts.

Having a percentage threshold for disclosure—particularly on an absolute value, line-by-line basis, whether 1% or higher—would effectively require registrants to create a separate "climate ledger" to track and perform the calculation on a quarterly basis. The would also require a registrant to establish internal controls to ensure this process operates effectively.[9] This is an immense burden to require for a large amount of nonmaterial information that is likely going to overwhelm and confuse investors, without providing them material information.

D. The lack of clear definitions exacerbates the proposal's inoperability.

As a further complication, the proposal's key definitions lack clarity. The requirements—in addition to being fundamentally inoperable—are vague and ambiguous and would require significant technical guidance to interpret as a substantive matter. We note that additional technical guidance would not resolve the underlying problem with the inability to disaggregate the financial impacts of specific factors. Fundamental challenges with this part of the proposal are outlined below.

- Lack of clarity in the definition of "severe weather event." It is not clear whether the SEC is asking for disclosure regarding the full impact of a weather event or the portion attributable to climate change, assuming the latter could even be calculated in a disaggregated manner.

- Lack of clarity regarding what registrants are required to track and how they should track transition activities, as the SEC is effectively asking registrants to disaggregate climate transition risk in every financial statement line item. The proposal would require management to make estimates and assumptions to allocate what portion of each line item is or is not attributable to climate transition risk, which would be extremely difficult if not impossible for financial instruments.

- Lack of clarity as to how a registrant would identify "transition activities" and whether the registrant's intent plays a role in whether to classify an activity as a "transition activity." For example, suppose a registrant's gas-powered vehicle fleet is at the end of its useful life and the registrant replaces it with an electric vehicle fleet (or even a lower-emission, gas-powered vehicle fleet), or suppose a registrant engages in a building efficiency upgrade. Are these "transition activities" because they reflect a change to a greener outcome, or does the motivation for the change—which could include a legislative or regulatory requirement or

[9] *See* Proposal, 17 C.F.R. § 210.14-02(b).

considerations like cost savings—play a role in determining whether they are "transition activities"? The proposal does not provide an answer to this question and it is unclear how a judgment would be anything other than arbitrary, in which case we question whether the information is useful to investors.

- Lack of clarity as to how a registrant would identify the financial impact of a "transition activity" like a new law or regulation, because it is not clear how to disaggregate that impact from other variables. Although it may be possible for a registrant to forecast the impact of future law or regulation, it is impossible on a backward-looking basis to disaggregate its impact. This is a problem because the proposal would require registrants to include the Regulation S-X climate financial impact of both current and historical financial data on climate-related impacts.[10] We note that registrants already disclose a sectoral breakdown of credit exposure, so investors can already see, for example, the oil and gas sector broken out. However, it is not clear how registrants could compute a backward-looking, regulatory-driven impact; it would require a multitude of assumptions as a "what-if" analysis, resulting in disclosure that would be wholly speculative and therefore misleading for investors.

- Lack of clarity as to how registrants would include in their disclosures the financial impact of lost revenue due to transition activities.[11] As drafted, the proposal implies that it would include deals that did not come to fruition and would require assessing opportunity costs that are not currently in any financial reporting disclosures. Registrants do not and cannot have this information without making significant assumptions and rough estimates, resulting in this information being speculative and misleading for investors.

- Lack of clarity as to how an external audit could be completed for registrants regarding this information, exacerbating the difficulty with tracking and disclosing transition activities. The required disclosures in the proposal are not verifiable because they are not based on underlying historical factual transactions. Instead, they are based on management estimates and judgments performing "what-if" analysis and computing opportunity cost. Historically, this kind of information is presented in the MD&A, if at all, and does not require the financial statements auditing processes.

E. Several aspects of the Regulation S-X calculations are particularly inoperable for banking organizations.

Elements of the Regulation S-X part of the proposal pose unique burdens on the banking sector. For example, a significant portion of the balance sheet for banks is composed of trading assets and investments that are generally measured at fair value, often based on quoted prices in active markets or other observable inputs, and loans and certain debt securities held at amortized cost but assessed for expected credit losses (i.e., under the current expected credit loss (CECL) framework, which is not a loan-level estimation approach). In this banking context, it would not be feasible to track and provide line-by-line climate-related impacts, which would require developing a process at the position or instrument level to disaggregate the impacts of climate versus other entity- or market-related economic factors when assessing changes in fair value or determining credit loss provisioning. Fair value of

[10] *See* Proposal, 17 C.F.R. § 210.14-01(d).

[11] *See* Proposal, 17 C.F.R. § 210.14-02(d).

financial instruments fluctuates daily based on the many drivers of market prices. It would not be feasible to identify what portion of changes in the value of these instruments is directly related to a potential physical- or transition-risk event.

The lack of detail on "transition activities" is particularly problematic for the banking sector, because climate-related risks are indirectly transmitted to banking organizations through the performance of the companies to which banking organizations lend. Consider the following examples:

- A banking organization might lend to an oil company that sees an increase in its stranded assets following new regulations. That could cause the creditworthiness of the oil company to decline and result in nonperforming assets or write-offs for the banking organization. However, the creditworthiness of an oil company depends on many different factors—for example, geopolitics, consumer demand, innovation, competition. None of these factors are directly observable in the market, thus hampering the ability to verify disclosure. It would be infeasible to disaggregate whether climate or other factors led to the credit downgrade and the concomitant effects on the banking organization's financials. It would also not be useful for investors, for whom the relevant statistics are the net charge-offs and nonperforming assets, not what might lead to those results. This more relevant financial information is already disclosed in the 10-K at a sectoral level. It is unclear how banking organizations can disaggregate impact without including so many assumptions that the information provided would be unhelpful or potentially misleading to an investor.

- A banking organization might make trading gains on its balance sheet from a long position in an electric vehicle manufacturer after a policy announcement to phase out fossil fuel engine use. Similar to the creditworthiness of oil companies, auto company share prices depend on many factors (e.g., global demand, input costs). It would be infeasible to disaggregate the impact of climate change from other impacts to the value of trading assets on the banking organization's balance sheet. It is especially problematic because profits and losses from trading change on a daily basis.

- A registrant might be exposed to a corporate bond spread. How can the registrant identify how much of the spread is attributable to the registrant's transition risk? With respect to financial instruments like corporate bonds, is the exercise disaggregating the component of the instrument's fair value attributable to transition risk—which is not directly observable in the market through any venue and must be estimated by management—or is the SEC proposing that registrants adjust their methodology to capture climate risks in financial instruments that are not embedded in existing measurements? The proposal does not answer these questions.

For a banking organization, all of the complexities outlined in the examples above regarding its ability to determine the financial impact of a severe weather event, transition activity, or material climate-related risk would have to be evaluated by the banking organization for all of the companies in its trading, investment, and lending portfolios. The need to disaggregate climate impact in trading, investing, and lending portfolios would exponentially increase the compliance burden on banking organization registrants. Some of our members also make markets in commodities derivatives—for example, contracts linked to the price of refined products, natural gas, and energy. In these cases, it is unclear if the proposal would effectively require registrants to determine the change in the prices of these and other commodities related to severe weather and transition events across the broad markets

to which they relate, which are often multinational if not global. This would be a highly judgmental and effectively impossible exercise.

Additionally, quantifying the climate risk impact for CECL would not be practical because of the infeasibility of identifying what portion of the bank's economic outlook was related to a potential climate-related event, activity, or risk. Moreover, banking organizations are permitted to, and many smaller firms do, rely on economic scenarios from third-party providers to calculate their allowance. The interaction between climate-related financial risk and economic scenarios is not yet understood. However, an understanding of these statistical interactions is necessary to estimate the financial impact of climate-related events, activities, or risks on CECL. While the third-party providers could theoretically generate economic scenarios including climate-related financial impacts at a granular level, and banking organizations relying on these scenarios could use them in their CECL models, there is no back-testing on the relationship between climate-related impacts and macroeconomic factors. Banking organizations would therefore be reliant on the black box of the economic scenario provider, without the ability to validate estimates of the climate component of loss estimates. As a result, while there may be certain climate-related impacts that are potentially observable at an entity level (e.g., climate-related severe weather event destroys the borrower's manufacturing facility, which will impact their ability to pay), judgments required to determine the impact of climate from a broader, macroeconomic level would make the quantitative impact on CECL unreliable and difficult to interpret.

These problems are compounded by the proposal not having a safe harbor for financial metrics in Regulation S-X, including the metrics tied to a banking sector registrant's Scope 3 financed emissions and their borrowers' climate-related transition risks. Further, these financial impact metrics are under even heavier scrutiny within Regulation S-X, subject to a more rigorous level of internal controls over financial reporting and auditing standards. The SEC is effectively asking the banking sector to link its borrowers' climate-related transition risks and GHG disclosures under Regulation S-K to actual financial impact metrics under a more rigorous standard of reporting under Regulation S-X. It is contradictory that disclosures which the SEC clearly acknowledges as "difficult to obtain" under Regulation S-K and heavily based on difficult-to-verify assumptions and management estimates, particularly for the banking sector, would equate to complete and accurate financial impact metrics within Regulation S-X.

The difficulty of complying with the proposed Regulation S-X requirements also suggests that the SEC's cost-benefit analysis significantly underestimates the costs of compliance. We discuss that aspect of the proposal in greater detail in Section VI below.

F. The FASB process is more well-suited for developing climate accounting standards.

We have serious procedural concerns with the Regulation S-X part of the proposal. FASB has not been part of the process, and it customarily has been delegated authority for drafting accounting standards for financial disclosures. FASB's process, which is well understood by registrants and accounting firms, is better suited for developing novel climate accounting standards than an SEC notice-and-comment rulemaking. The many feasibility challenges in the Regulation S-X portion of the proposal illustrate why FASB's expertise is needed here.

G. Registrants cannot comply with the proposed timing requirements.

The proposal's Regulation S-X requirements present two severe timing challenges. First, if the rule were finalized at the end of 2022 and effective in 2023, large accelerated filers would have only a few weeks to build out the extensive compliance regime needed to comply with the rule because they

would need to begin collecting data at the start of 2023 for purposes of the 10-K filing for 2023. Second, even if the rule had a later effective date, there would not be enough time between the end of any particular year and the Form 10-K filing deadline to gather and analyze the information needed to comply with the proposal. For example, in a typical reporting year, Scope 1 and 2 emissions data are not available until late March or early April, which is well past the February Form 10-K filing deadline for large accelerated filers. Although the proposal would allow for estimates for fourth quarter data followed by updates as information becomes available, even estimates would be difficult to achieve in such a short period of time. Some banking organizations have calculated that they could obtain fourth quarter data for only approximately 30% of their energy consumption within the Form 10-K filing time frame, which would preclude their ability to meet GHG emissions verification requirements such that they could not reasonably meet the Form 10-K reporting requirements. In addition, initial estimates would be of little value to investors if they knew there would be updated, completed information forthcoming.

Moreover, the proposal would require disaggregated metrics for previously reported financial results. In addition to the substantive difficulties meeting this requirement discussed in Section II.B above, any final rule should apply only on a going-forward basis to be feasible given the time constraints.

Should the SEC retain even a more scaled-back requirement in relation to Regulation S-X, reporting should be required with a lag. As compared to traditional financial metrics, many of the climate-related measures and decarbonization initiatives take a longer time to take effect and be reflected in emissions measurements. A two-quarter lag in climate-related metrics disclosure would therefore be appropriate and would not materially reduce the utility of the disclosure.

H. The 1% threshold for disclosure is unsupported and inconsistent with, and detrimental to, the SEC's disclosure framework and the proposal's objectives.

The 1% reporting threshold in the Regulation S-X part of the proposal[12] is an arbitrary bright-line for which the SEC has not provided sufficient support. There is no precedent for this threshold in financial statements, and it is inconsistent with the materiality concept used for SEC reporting more generally. In addition, an imposed "one-size-fits-all" threshold eliminates a registrant's ability to follow its own well-established internal process for determining whether a financial impact is material.

Contrary to the SEC's claim, the examples cited in footnote 347 of the proposal do not support the 1% threshold, most importantly because they are 1% of aggregated amounts rather than 1% of each line item. First, the proposal cites to 17 C.F.R. § 210.5-03.1(a) regarding disclosure of excise taxes if equal to 1% or more of total sales and revenues. But that example is not 1% *of a line item*. Similarly, the SEC's citation to 17 C.F.R. § 210.12-13 is about a 1% of net asset value threshold, not 1% *of a line item*, and, in any event, applies only to management investment companies. The SEC's third example, 17 C.F.R. § 229.404(d) regarding disclosure of certain related-party transactions, again is not about 1% *of a line item* and applies only to smaller reporting companies. We note that the threshold is even lower than 1% in practice, because the proposal would require registrants to aggregate the absolute value of both positive and negative impacts as well as subtotals on the financial statements (e.g., net income) that would be smaller than the aggregated totals.

[12] *See* Proposal, 17 C.F.R. § 210.14-02(b).

Even if a registrant were below the 1% threshold, and even if the financial impact were not material, the proposed rule would still require the registrant to perform the calculation every quarter to prove it was below the threshold. Increasing the threshold to a higher percentage would not resolve this tracking challenge. We therefore think the best option would be to instead require disclosure of material climate-related financial risks in the MD&A discussion of material risk.

III. The Scope 3 emissions disclosure requirements are overly broad as drafted and should be significantly narrowed to material targets or goals.

BPI members support the long-term development of a disclosure regime for Scope 3 emissions. Many members currently disclose, where possible, some portion of their Scope 3 emissions in sustainability reports, and are trying to improve those disclosures. At this stage, however, there are many practical problems with mandated Scope 3 emissions disclosures, as well as liability concerns, which is why we suggest a much more narrow formulation of any requirement.

A. Contrary to the SEC's goals, requiring Scope 3 emissions disclosure before calculation methodologies and data collection are more mature would result in inconsistent, noncomparable, and unreliable disclosures.

The proposal's Scope 3 emissions disclosure requirements are overly broad and would not result in consistent, comparable, or reliable disclosures. This is because, at this stage, there are significant problems with data quality and availability for calculating Scope 3 emissions. Thus, the proposal would require registrants to produce information that would be difficult for investors to interpret, especially across registrants and over time.

Scope 3 emissions information continues to be highly challenging to obtain, calculate, and confirm, with very significant data quality concerns and error margins. While there has been progress in registrants' ability to identify Scope 3 emissions, significant limitations, including data availability, double counting, scoping, and organizational barriers, remain. Thus, such disclosures would not provide information on which investors could reasonably rely.

Under Scope 3 emissions Category 15 of the GHG Protocol,[13] banking organizations need to obtain considerable third-party data not in their possession to understand the GHG emissions of their borrowers. A banking organization's ability to fully disclose Scope 3 emissions depends, in large part, on the availability of Scope 1, 2, and 3 emissions data published by third-party suppliers and clients. However, not all third parties currently disclose even Scope 1 and 2 emissions. The proposal's requirement that registrants disclose Scope 1 and 2 emissions would not resolve this problem, because banking organizations would still be unable to obtain such information from innumerable clients that are not public companies—most notably, small businesses and individual borrowers. We also note that it would be infeasible to obtain data from natural person clients, and financed emissions related to individual borrowers should be excluded from any Scope 3 emissions disclosure requirement.

[13] Greenhouse Gas Protocol, Corporate Value Chain (Scope 3) Accounting and Reporting Standard: Supplement to the GHG Protocol Corporate Accounting and Reporting Standard; *see also* Proposal at 180 n.464 (explaining that financed emissions fall under the "investments" category [Category 15] of the GHG Protocol).

B. The proposal's safe harbor for Scope 3 disclosures should be clarified and expanded because the proposal requires heavy reliance on third-party data.

The SEC appropriately includes in the proposal a safe harbor for Scope 3 emissions disclosures, but the SEC should provide more detail on the safe harbor and expand it. The safe harbor provides that a statement regarding Scope 3 emissions disclosed in an SEC filing is deemed not to be a fraudulent statement "unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith."[14] The safe harbor is necessary because registrants must rely on estimates, assumptions, and third-party data outside of the registrants' control to compute their Scope 3 emissions.

In the preamble to any final rule, the SEC should provide greater clarity on the bounds of the Scope 3 safe harbor. In particular, the Scope 3 safe harbor is subject to the condition that the registrants' disclosure must not be shown to have been "made or reaffirmed without a reasonable basis or was disclosed other than in good faith." The "reasonable basis" and "good faith" standards are not defined. The SEC should clarify that these terms refer to a standard equivalent to that applicable to the safe harbor for forward-looking statements in the Private Securities Litigation Reform Act, whereby statements are not applicable if protected by meaningful cautionary statements, if immaterial, or if the plaintiff is unable to prove that the statement was made with actual knowledge that it is false.[15] It would give registrants greater certainty regarding when the safe harbor would apply to their disclosures. We believe that a more robust accommodation is warranted for Scope 3 as the SEC acknowledges the challenges associated with measurement and disclosure.

For the same reasons, the safe harbor should be expanded beyond Scope 3 emissions alone to any reporting requirement for which a registrant must rely on third-party data. This would include Scope 1 and Scope 2 emissions reporting and some elements of scenario analysis, depending what scenario analysis disclosure requirements the SEC ultimately imposes.

C. Rather than mandate Scope 3 emissions in securities law filings, the SEC should encourage disclosures outside of SEC reporting documents at an appropriate pace as the quality and availability of information increases.

Scope 3 emissions disclosure should not yet be required in mandatory securities filings. There are significant problems with data reliability and availability—and in the banking sector, as explained below, there are challenges with double counting—that must be resolved before disclosures would be useful for investors. The SEC should encourage the continued development of these disclosures outside of securities filings documents as the pace and reliability of the information increases.

We also recommend that the SEC allow Scope 3 emissions disclosures to be furnished, rather than filed, in response to any Scope 3 disclosure requirement. Furnishing would mitigate litigation exposure for companies based on such information because the information would not be subject to Section 18 of the Securities Exchange Act of 1934 and also would not be incorporated by reference into registration statements, which would relieve Section 11 and 12 liability under the Securities Act of 1933. In particular, allowing Scope 3 emissions disclosure to be furnished rather than filed would avoid the

[14] Proposal, 17 C.F.R. § 229.1504(f)(1).

[15] See 15 U.S.C. § 78u-5(c).

automatic incorporation by reference of such information into shelf registration statements, and not impose on underwriters liability for such disclosure. In light of the inherent challenges associated with Scope 3 disclosure, including in particular the need to rely on information provided by third parties, allowing Scope 3 disclosure to be furnished rather than filed would be an appropriate accommodation that decreases the burden on capital formation otherwise imposed by requiring registrations to disclose Scope 1, Scope 2, and Scope 3 emissions.

D. The Scope 3 disclosure requirement departs from traditional materiality as defined by Supreme Court precedent.

The proposal would require disclosure of Scope 3 emissions "if material."[16] The proposal defines materiality by reference to the traditional federal securities law standard of materiality as articulated by the Supreme Court in binding precedent.[17] That standard judges materiality as what information about a company a reasonable investor would find significant in making a voting or investment decision.[18] However, the proposal later states that "[w]hen assessing the materiality of Scope 3 emissions, registrants should consider whether Scope 3 emissions make up a relatively significant portion of [the registrant's] overall GHG emissions."[19] In other words, the proposal implies that the SEC would consider Scope 3 emissions to be material if they reach a proportion of a registrant's total emissions, *regardless* of whether a reasonable investor would find it at all relevant to that investor's investment decision. This effectively shifts the perspective of materiality. This departure from the settled definition of materiality under Supreme Court precedent and SEC regulations and practice is unjustified and unwarranted.

In discussing materiality, the proposal focuses on what proportion of a registrant's total emissions are Scope 3, regardless of how large a registrant's total emissions are. But even if Scope 3 emissions make up a large part of a registrant's emissions profile, it does not follow that they should be assumed to be material to the registrant. For example, suppose a banking organization has 100,000 metric tons of CO2 equivalent (CO2e) GHG emissions, 90,000 metric tons CO2e of which are Scope 3 emissions. This would mean 90% of the banking organization registrant's total GHG emissions are Scope 3. Those 90,000 metric tons CO2e Scope 3 emissions may nonetheless present a negligible risk to the banking organization. Moreover, financed emissions themselves may or may not reflect transition risk to the borrower, so even where Scope 3 emissions are sizable in absolute or relative magnitude it does not necessarily translate to a material climate risk to a banking organization registrant.

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[16] Proposal, 17 C.F.R. § 229.1504(c)(1).

[17] Proposal at 69 & n.209 ("*See* 17 CFR 240.12b-2 (definition of 'material'). *See also Basic Inc. v. Levinson*, 485 U.S. 224, 231, 232, and 240 (1988) (holding that information is material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision; and quoting *TSC Industries, Inc. v. Northway, Inc*., 426 U. S. 438, 449 (1977) to further explain that an omitted fact is material if there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.')").

[18] *See id.*; *Basic v. Levinson*, 485 U.S. at 231–32 (quoting *TSC Industries v. Northway*, 426 U.S. at 449). That is, information is material if it "is significant to the reasonable investor's trading decision." *Basic v. Levinson*, 485 U.S. at 235.

[19] Proposal at 174.

Any suggested guidance as to materiality based on a quantitative threshold using a percentage of total GHG emissions, whether the proposed 40% as articulated in the preamble of the proposal or otherwise, would be arbitrary and would unduly require registrants to disclose Scope 3 emissions even when far from material under the traditional materiality standard, therefore misleading investors about the extent of the risk. A quantitative threshold is generally inappropriate for banking sector registrants, who by the nature of their business will have a large proportion of their total emissions be financed emissions that fall under Scope 3, even though their total emissions may be small and their Scope 3 emissions may not translate to a material risk to the registrant. For banking organizations, which likely will routinely have Scope 3 emissions in excess of the 40% threshold, this would further conflict with the materiality regime established by the Supreme Court.

In any final rule, the SEC should explicitly clarify that any reference to materiality follows the definition articulated by the Supreme Court. Any final rule should also clarify that the materiality of Scope 3 emissions should be viewed as impact on the registrant as seen from the perspective of the reasonable investor. What matters under traditional materiality is the impact on the registrant, not what others do with the registrant's services.

E. To the extent a registrant is required to disclose Scope 3 emissions because it has a Scope 3 target or goal, the registrant should only have to report those Scope 3 emissions related to its material targets or goals.

The proposal's unqualified requirement that Scope 3 emissions be disclosed if a registrant "has set a GHG emissions reduction target or goal that includes its Scope 3 emissions"[20] is overly broad, because it would require disclosure of all Scope 3 emissions even if the target or goal concerns only a subset of Scope 3 emissions, and regardless of whether the target or goal is material to the registrant. Should the SEC retain a Scope 3 emissions disclosure requirement based on goals or targets, it should narrow the scope of the requirement to what is useful for investors, which is aligned to the specific metrics set out in the target or goal. If a registrant makes a public commitment as to one category of Scope 3 emissions or a specific sector within Category 15 emissions by announcing a specific quantitative target or goal,[21] that commitment should trigger Scope 3 disclosures only with respect to the specific target or goal referenced in the announcement, not the registrant's Scope 3 emissions generally.

The banking sector is a case in point: banking sector registrants that have set public Scope 3 financed emissions targets have focused on high-emissions sectors where there is sufficient data emerging for estimating each of these sectors' emissions performance. Banking sector registrants generally find that investor interest is most focused on the Scope 3 emissions for which banks have set targets as opposed to broader disclosure of Scope 3 financed emissions for some other asset classes[22] or

[20] Proposal, 17 C.F.R. § 229.1504(c)(1).

[21] We deliberately distinguish here between a long-term, aspirational commitment and a specific, publicly announced quantitative target for particular Scope 3 emissions. Although we believe disclosure of neither should be required unless material, we especially believe that the former should not trigger a disclosure obligation.

[22] Such disclosures would merely represent a banking organization's market share multiplied by the average emissions intensity of that sector.

other immaterial Scope 3 targets or goals that might be set by a registrant as a test case in a limited context.

Not all categories and activities that form part of the inventory of Scope 3 emissions will be useful to investors, making a blanket request to disclose all categories that comprise Scope 3 emissions burdensome without resulting in useful information to investors.

F. Registrants cannot feasibly produce Scope 3 emissions disclosures on the 10-K filing schedule.

Even where the third-party data necessary to calculate Scope 3 emissions can be obtained, it likely would not be possible for banking organizations to obtain the required information within the time frame necessary to include Scope 3 emissions in their 10-Ks, as required by the proposal. For example, as currently drafted in the proposal, it is unclear whether the SEC would allow registrants to use Scope 3 data that is not from the most recent fiscal year as part of the registrant's Scope 3 calculations. Because registrants generally need to obtain Scope 3 data from third-party sources or using estimated or modeled data, Scope 3 data for some Scope 3 emissions sources may be available only on a longer time lag (e.g., Scope 3 emissions data for automotive manufacturing data obtained from publicly available regulatory reporting is disclosed on a three-year lag). We ask the SEC to clarify that registrants may include in their Scope 3 calculations data that is not from the most recent fiscal year, subject to a standard of good faith. Absent this change, these timing challenges are all the more reason it is not appropriate to require registrants to disclose Scope 3 emissions in their 10-Ks.

G. Scope 3 emissions may be counted multiple times for banking organizations.

Scope 3 emissions may be overcounted for banking organizations. Banking organizations lend across value chains, so the same emissions could be counted multiple times as part of a banking organization's Scope 3 emissions. For example, suppose a trucking company purchases fuel from an oil and gas company and in turn provides transportation services to a retail establishment. If a banking organization lends to each organization in this value chain, the same burning of fossil fuels would be counted three times as part of its Scope 3 financed emissions.

As another example, suppose a banking organization lends to a natural gas producer, a utility company that uses the natural gas to produce electricity, and a corporate manufacturer that uses electricity from the utility. The end use of the natural gas by the utility is a Scope 3 emission of the natural gas producer. The direct use of the natural gas by the utility is a Scope 1 emission of the utility. And the utility's electricity purchased by the corporate manufacturer is a Scope 2 emission of the manufacturer. However, all three would be counted in the banking organization's Scope 3 financed emissions, even though these all represent one use of the same carbon source, overstating true total emissions and exacerbating any measurement error. Moreover, the same emissions would also be reported for each company in the value chain in addition to the banking organization. Given these multiple counting difficulties, it seems all the more likely that the proposed disclosures would confuse and mislead investors. The noise would overwhelm the signal.

H. The proposal would define Scope 3 emissions more broadly than the GHG Protocol under which some registrants voluntarily report.

The SEC should not define Scope 3 emissions more broadly than the GHG Protocol, which is broadly used as the global standard for both voluntary GHG emissions reporting and regulatory

reporting in other jurisdictions. The definition of Scope 3 emissions in the proposal goes well beyond what is required for those reporting in line with the GHG Protocol, especially for the banking sector. Under the GHG Protocol, only certain types of financed emissions must be included in Scope 3 emissions; disclosures of Scope 3 for debt investments without known use of proceeds, managed investments and client services, and other investments or financial services are optional. The proposal should be modified to follow the same approach in this regard as the GHG Protocol and exclude these types of investments from the definition of Scope 3 emissions.[23]

I. The SEC should not require disaggregation of Scope 3 emissions.

The SEC should remove the requirement to disaggregate Scope 3 emissions by constituent GHG. While such disclosure may be feasible under Scope 1 and 2, existing data is not sufficient for the disclosures under Scope 3. It is also unclear how this information would be material to investors. Instead of disaggregating constituent emissions, registrants should be required only to report total CO2e emissions.

J. Emissions offsets should form part of Scope 3 emissions disclosures.

The SEC should allow emissions offsets to be disclosed rather than excluded from the calculation of Scope 3 emissions. Excluding offsets is not helpful for investors and potentially disincentivizes use of high-quality offsets. Instead of excluding offsets, disclosures would provide transparency by requiring registrants to describe offsets and how they net out against emissions.

K. The SEC should provide for an extended transition period before mandating any disclosure of Scope 3 emissions.

To ameliorate these challenges, should the SEC retain its Scope 3 emissions disclosure requirement, we recommend that the SEC extend the proposed compliance dates for registrants to begin disclosing their Scope 3 emissions. Although we appreciate that the SEC would provide registrants more time to start disclosing Scope 3 emissions as compared to Scope 1 and 2 emissions, more time is necessary to address the data and methodological challenges associated with producing Scope 3 emissions disclosures. During the extended transition period before compliance would be mandatory, Scope 3 emissions disclosures should be voluntary and, although we believe any disclosure of Scope 3 emissions should be outside the 10-K as a general matter, it is especially important that any Scope 3 emissions disclosures during the extended transition period be provided outside the 10-K.

IV. The risk management aspects of the proposal should be modified so that they do not front-run, and are consistent with, ongoing efforts by the federal banking regulators.

The prudential regulators are separately developing climate principles and guidance that address areas that overlap with the proposal, such as climate scenario analysis and risk management. The specificity of the SEC's disclosure requirements effectively imposes substantive requirements on banking organizations. The SEC should not front-run the prudential regulators' efforts with this type of

[23] Although the GHG Protocol does not speak to it, we also recommend that the SEC clarify for the avoidance of doubt that any requirement to disclose Scope 3 emissions would exclude third-party emissions in the value chain that are associated with a registrant's custodial assets, as distinguished from the registrant's own financed emissions.

indirect regulation. Analysis in these areas may be different for the banking sector as compared to other sectors. At a minimum, any final SEC climate disclosure rule should make clear that banking organizations should follow the expectations of the prudential regulators in the first instance. More broadly, SEC-mandated disclosure ought to be principles-based, rather than overly detailed, precisely because banking organizations have other obligations to the prudential regulators. A more principles-based approach to disclosure would also result in more useful information that is more tailored to particular registrants.

A. The requirement to disclose the inputs and outputs of scenario analysis should be eliminated.

Scenario analysis is a risk management tool. Like other risk management tools, if disclosed at all, it should be captured in the qualitative discussion in the MD&A. Specific disclosures should be limited to whether a registrant uses scenario analysis, whether it is subject to a regulatory process on scenario analysis, whether the registrant is using industry-standard scenarios (and, if so, which ones), and what sectors are being analyzed.

But it is premature to require disclosure of scenario analysis assumptions and, in particular, specific inputs and outputs. Such information should be included in the MD&A at the registrant's discretion. Explaining all the assumptions behind scenario analysis results would take many pages and would lead to disclosure that would not be useful to investors.

Disclosure of scenario analysis pursuant to regulatory mandates would be particularly inappropriate, and highly misleading to investors. First, prudential regulatory exercises have a significantly different purpose from disclosure of material risks to investors; rather, scenario analysis to date has been constructed as exploratory exercises to encourage banks to identify tail risks across a variety of scenarios. In announcing the aggregate results of its 2021 Climate Biennial Exploratory Scenario, the Bank of England specifically noted, "The CBES scenarios are not forecasts of the most likely future outcomes."[24] Second, placing undue focus on climate scenario analysis to the exclusion of any number of other risks that banks manage through a variety of risk management tools could provide a misleading view to investors by outstating the importance of climate scenario analysis. This all suggests providing disclosure through the MD&A would be more appropriate.

Furthermore, it is understood and has been publicly recognized by the prudential regulators that current scenario analysis uses highly immature models, there are significant underlying data gaps, and outputs are imprecise. The Bank of England report also noted, "One recurrent theme across participants' submissions was a lack of data on many key factors that participants need to understand to manage climate risks. Another was the range in the quality of different approaches taken across organisations to the assessment and modelling of these risks."[25] As a result, any disclosures could be misleading and potentially expose registrants to liability if required in their 10-Ks. Given regulators and banking organizations alike are still exploring how to use the results of scenario analysis as part of the supervisory and risk management process, it is especially important that any SEC requirement to

[24] *See* Bank of England, Results of the 2021 Climate Biennial Exploratory Scenario (May 24, 2022), *available at* https://www.bankofengland.co.uk/stress-testing/2022/results-of-the-2021-climate-biennial-exploratory-scenario.

[25] *Id.*

disclose information about scenario analysis exclude the results and detailed discussion of any regulator-mandated scenario analysis.

The proposal's requirement that registrants justify why risks and climate scenario outputs are not material, particularly on transition risks, would suggest that analysis has to be run on a yearly basis across all portfolios. This new requirement is unusual from an SEC public-reporting perspective. Additionally, this new requirement far exceeds any of the requirements or expectations of prudential regulators, who are being more focused and tailored looking at specific portfolios and not expecting banking institutions to run full exercises annually.[26]

There are also corporate strategy and trade secret reasons why registrants should not be required to disclose additional detail. Scenario analysis reflects proprietary information of a banking organization registrant in three ways. First, for scenario analysis to be useful to risk management, the scenarios need to incorporate idiosyncratic elements, assumptions, and overlays that reflect the banking organization's specific business model and forward-looking strategic plans, all of which would be considered highly confidential. Second, over time, adaptation transition plans for banking organizations' specific borrowers will be layered into scenario assumptions; these plans and lenders' mitigation strategies are confidential. Third, assessment of physical risk as part of scenario analysis involves information about critical infrastructure of registrants, such as information about data centers, that should not be public for information security reasons. Put simply, the details of a banking organization's scenario analysis go to the core of the banking organization's risk management, which reflects confidential strategic business decisions.

Right now, scenario analysis is in its infancy. A detailed disclosure requirement from the SEC would effectively set substantive requirements, which would be premature and inconsistent with the SEC's disclosure framework.

B. The proposal's risk management disclosure requirements are in tension with prudential banking regulations, and inappropriately indirectly dictate risk management requirements.

The proposal would require registrants to disclose their processes for identifying, assessing, and managing climate-related risks.[27] This requirement presents multiple problems.

First, banks identify, assess, and manage numerous risks. Core risks include credit risk, interest rate risk, market risk, and operational risk. Within these general categories of risk are numerous more specific risks, such as credit spread risk, concentration risk, basis risk, currency risk, commodity risk, legal risk, and cyber risk. None of these risks comes with a special SEC disclosure regime. Requiring registrants to disclose their risk management processes only for climate risk would present investors with a skewed and deeply misleading view of the relative importance of that risk compared to others. Banking registrants should continue to provide a balanced view of risk in the MD&A.

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[26] For example, it took the Bank of England two years to run its recently published scenario analysis exercise, which did not even include an analysis of the trading book. *See id.*

[27] *See* Proposal, 17 C.F.R. § 229.1503.

Second, in the banking sector, "risk management" has a very different meaning from traditional SEC disclosure of risk factors. Banking organizations have large, comprehensive risk management functions that comply with banking-sector-specific regulations and supervisory expectations, much of which occurs as part of the confidential supervisory process of the prudential regulators. As a result, as well as because of commercial sensitivities, banking organizations could face difficulty disclosing risk management strategy, metrics, and carbon pricing.

Third, we are concerned that the detailed requirements around how a registrant manages climate-related risks may inadvertently dictate risk management practices, including identifying particular risks that registrants should manage rather than promoting disclosure. The contours of the proposed disclosure are more in line with guidance on risk management issued by banking regulators and beyond typical SEC disclosure. The granularity of the disclosure required may also place undue emphasis and prescriptive prominence on risk management of climate over other risk management topics that banking organizations currently describe under a principles-based framework, which would result in confusing or even misleading information for investors.

Fourth, rigid disclosure requirements risk hampering the development of firms' internal risk management capabilities best suited for individual registrants, without providing meaningful information to investors. Companies' understanding of climate risk and development of climate risk management is still in early stages, and overly prescriptive disclosure can slow progress and innovation. In particular, companies need to have flexibility as they build out their climate risk management capabilities. While qualitative disclosure can be helpful to give investors a sense of how firms are approaching climate risk management, overly detailed requirements may actually harm the development of companies' abilities to manage the risk.

Existing rules relating to risk management should be sufficient to generate adequate disclosure or could be supplemented to add a principles-based discussion of climate risk management. While effective management of climate-related risks is important, these risks are not necessarily the most significant for registrants. A principles-based discussion would enable banking organizations to give appropriately contextualized disclosures without giving climate-related risks outsized emphasis relative to other risks.

If the SEC chooses to maintain the disclosure in a separate climate section, we recommend retaining the high-level descriptions but removing the granular requirements to instead promote principles-based disclosure as follows:

> "Describe any processes the registrant has for identifying, assessing, and managing material climate-related risks, including how such processes are integrated into the registrant's overall risk management framework."

C. The proposal's strategy, business model, and outlook disclosure requirements are in tension with what is already required in the MD&A.

The proposal would require registrants to disclose their strategy, business model and outlook with respect to climate risk,[28] subject to highly detailed requirements that set out what we presume the SEC views as best practices. The proposal effectively creates a separate climate-specific MD&A in

[28] *See* Proposal, 17 C.F.R. § 229.1502.

tension with the existing MD&A, which has as its objective to help investors see the company "through the eyes of management."

The risk disclosure required is also highly granular, including as related to disclosure of material impacts (e.g., impacts on suppliers and other parties in a registrant's value chain). We strongly recommend the SEC pursue a more principles-based approach in line with how other risk items are discussed by registrants.

The proposed physical risk disclosure requirements will require registrants to produce and disclose large amounts of immaterial information.[29] We appreciate the 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 immaterial, 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."[30] For many banking organizations, which unlike sectors such as manufacturing have a relatively small physical footprint and can pivot quickly to remote forms of conducting business, this information would not be useful to investors. Similarly, a requirement to list ZIP codes of properties subject to flood risk is unlikely to be meaningful to investors.[31]

A principles-based approach is also needed in recognition of the ongoing challenge that banking organizations are experiencing in building their climate risk management capabilities. Climate risk has several unique features that can make it challenging to identify and clearly document it in a banking organization's risk inventory. For example, climate risk can be one of many risk drivers; e.g., lower oil prices could be driven by consumers transitioning to low-carbon alternatives, or by excess oil supply or by travel restrictions related to COVID-19. Climate-related risks also can manifest over longer time horizons than typically considered, e.g., chronic sea level rise will worsen over the course of several decades.

The SEC also should clarify or amend 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 be challenging and could effectively create a new standard—rather than considering if a risk was material to the registrant generally, the registrant would need to apply that test separately in each of the three time periods. In contrast, the current materiality

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[29] In addition to the arguments above regarding the 1% reporting threshold under the proposal's revisions to Regulation S-X, we note that a Federal Reserve staff study has shown that, at least for banks, physical risks lead to profit not loss. *See* Blickle, Hamerling, and Morgan, How Bad Are Weather Disasters for Banks?, *supra* n.7 (explaining in the abstract, "We find that FEMA disasters over the last quarter century had insignificant or small effects on U.S. banks' performance. This stability seems endogenous rather than a mere reflection of federal aid. Disasters increase loan demand, which offsets losses and actually boosts profits at larger banks. Local banks tend to avoid mortgage lending where floods are more common than official flood maps would predict, suggesting that local knowledge may also mitigate disaster impacts. Presumably the same is true for other industries, buttressing the notion that much of the physical risk information is immaterial.").

[30] *See* Proposal, 17 C.F.R. § 229.1502(a)(1)(i)(A).

[31] *See* Proposal, 17 C.F.R. § 229.1502(a)(1)(i) ("location" of flood risk properties organized by ZIP codes).

standard used for MD&A disclosures is well understood and tailored to generate disclosure of material risks over whatever time period is relevant to a registrant's particular facts and circumstances.

V. The proposal's board and management governance provisions should be modified to be less prescriptive.

The proposal's governance requirements should be principles-based rather than indirectly impose a regulatory requirement. At most, existing rules could be supplemented to add to registrants' disclosures a principles-based discussion of climate governance at the board and management levels.

We have no objection to the requirement that companies clearly disclose where governance of climate change sits—on a particular committee or the full board. That is not an unusual requirement, and it can help investors understand the company's approach to governance. The proposal goes far beyond that, however, and we are concerned that the requirements will have the effect of decreasing, rather than increasing, the effectiveness of board oversight. The proposal's requirements are more prescriptive than the requirements for audit committee financial experts, defined in Regulation S-K. To the extent the SEC adopts requirements in this area, it should allow these disclosures to be made in the proxy, rather than in the 10-K, because that is where registrants release other governance information and because disclosure in the proxy would allow some registrants additional time to prepare the disclosure.

While BPI agrees that climate-related risk requires appropriate board oversight, we believe the proposed climate expertise disclosure requirement is problematic. Boards are, by design, deliberative bodies tasked with oversight of numerous traditional and emerging risks, of which climate risk is only one. The proposed requirement would suggest that boards without directors with climate expertise are somehow deficient.

Furthermore, appointment of a board member with special expertise comes with a significant risk that such a director would assume outsized responsibility and authority with respect to a critical risk that is the responsibility of the collective board to oversee. Such a director also might naturally be inclined to play a management role that is inappropriate for a director.[32] Similar governance requirements have been proposed with respect to cybersecurity expertise, and the cumulative effect of both climate and cyber expertise requirements—along with risk expertise requirements applicable to large banking organizations[33]—would exacerbate these challenges, filling limited board seats with specialty directors.[34] Boards are best equipped to identify board members with the collective

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[32] *See generally* Board of Governors of the Federal Reserve System, SR Letter 21-3 / CA 21-1: Supervisory Guidance on Board of Directors' Effectiveness (Feb. 26, 2021), *available at* https://www.federalreserve.gov/supervisionreg/srletters/SR2103.htm (describing five key attributes of effective boards).

[33] *See* 12 C.F.R. §§ 252.22(a)(4)(i), .33(a)(4)(i), .132(a)(2), .144(a)(1)(ii), .153(e)(3)(iv)(A), .155(a)(5)(i).

[34] *See* BPI, American Bankers Association, Independent Community Bankers of America, and Mid-Size bank Coalition of America, Comment Letter on Proposed Rule on Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure (May 9, 2022), *available at* https://www.sec.gov/comments/s7-09-22/s70922-20128336-291093.pdf.

experience, knowledge, and judgment to oversee the particular risks they face and select and retain competent management. And to the extent boards, in their discretion, believe they would benefit from additional expertise and insight, they have long found ways to obtain it, including by consulting with independent experts.[35] Thus, in general, we believe that the SEC should allow boards to decide on the staffing of their boards, and refrain from requiring "single-issue" board members.

Such a requirement also would come at a significant cost to their ability to appoint directors with the attributes they believe are appropriate for the overall oversight of the company, including oversight over other, and perhaps more immediate or significant, risks they face. Technical "experts" may not have other critical experience or capabilities complementing skill needs for the board on a collective basis. Pressure on registrants to designate dedicated climate risk expert directors could result in lower-quality directors. The challenge is particularly acute given that climate expertise is in high demand, and it would be difficult for a large number of public companies all to identify individuals with both the technical skills and the broad business background and other leadership qualities sought for board service, especially when the demands of board service limit the number of boards on which any individual sits. Registrants should have the flexibility to choose whether to appoint single-subject-matter experts to fill the limited seats on a board, particularly at boards of heavily regulated and complex institutions like banking organizations, which must oversee a range of complex, diverse, and interrelated risks.

Against this backdrop, it is important to note that current disclosures already provide investors with ample information as to the experience of members of the board of directors. If the SEC nonetheless feels that more information is needed, registrants could be required to disclose how the board of directors oversees the climate risks the company faces, which for large banking organizations could be done as part of the general risk oversight activities of the institution's risk committee. While we do not believe such a requirement is needed, we believe it would be more useful to investors than the disclosure required by the proposal and would avoid the potential harms we have identified with the proposed disclosure.

We believe that flexibility in board governance is particularly important in the banking sector. As noted in BPI's Guiding Principles, a board should have the flexibility to determine its own appropriate composition, taking into consideration the size of the board, and the diversity, expertise and tenure of board members.[36] All directors have the same overarching fiduciary duties. It is these general duties—and not subject-matter-specific duties—that should guide the board's deliberations, including with respect to climate risk, strategy, emerging risks, technological transformation, cybersecurity, management of general operational risks, regulatory compliance and the safety and soundness of the

[35] *See* OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations and Insured Federal Branches; Integration of Regulations, 79 Fed. Reg. 54517 (Sept. 11, 2014) (codified at 12 C.F.R. pt. 30, 168, 170) (clarifying that the board of directors of a large national bank may rely on risk assessments and reports prepared by independent risk management and internal audit to meet its responsibilities to provide active oversight).

[36] BPI, Guiding Principles for Enhancing U.S. Banking Organization Corporate Governance (January 12, 2021), https://bpi.com/wp-content/uploads/2021/01/BPI-Guiding-Principles-on-Enhancing-Banking-Organization-Corporate-Governance.pdf.

banking organization. The SEC's recent trend toward "special interest" directors threatens to undermine that very model.

To the extent the SEC retains the board expertise disclosure requirement, the requirement should be limited to disclosing how the board of directors oversees the climate risks the company faces. Additionally, it should include a safe harbor from expert board member liability similar to what it included in the cyber proposal.[37] The SEC should also confirm that the registrant's board gets to decide how its directors and management qualify as having sufficient climate expertise. Finally, consistent with current governance disclosure, the SEC should add an option to forward-incorporate board and management governance disclosures to the annual definitive proxy statement.

Related considerations apply with respect to the proposal's requirements regarding management expertise. For example, requiring identification of management personnel with climate expertise and public disclosure of their expertise may make it more difficult to hire and manage talent, and it also risks creating personal privacy and safety problems for those individuals. As with board governance, the SEC should be less rigid regarding climate change governance disclosures at the management level and instead limit the disclosure requirement to a flexible, principles-based discussion. This would also allow registrants to better tailor disclosures to their unique circumstances, which would result in more useful information for investors.

VI. The proposal's cost-benefit analysis does not satisfy the SEC's statutory cost-benefit obligations.

We believe that the actual cost of compliance with the proposed rule would be significantly higher than estimated in the preamble, particularly with respect to Regulation S-X and Scope 3 emissions, for the reasons described above. The extraordinary and unprecedented detail of those elements of the proposal, as well as the requirement for attestations, will be expensive and in some cases practically impossible to implement. We are aware that many commenters are deeply concerned about the costs of implementing the proposal as compared to its benefits. We will not repeat here the many points that are being made by others but note that the SEC has a long history of underestimating the direct and indirect costs of proposals. The nature of the detailed requirements in the proposal, which is radically different from past SEC disclosure practices, leads us to believe that the SEC has significantly underestimated the costs, although banks are still evaluating the full magnitude of what it would mean to have to implement such a significant disclosure regime within their organizations. BPI supports the benefits of increased disclosure around climate change, but, if not done in a practical, measured way, there is a high risk that the benefits will be swamped by the costs.

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[37] *See* Item 407(j)(2), Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, Securities Act Release 11038, Exchange Act Release No. 94382, Investment Company Act Release No. 34529 (proposed March 9, 2022), https://www.sec.gov/rules/proposed/2022/33-11038.pdf (providing safe harbor under which person who is determined to have expertise in cybersecurity will not be deemed an expert for purposes of Section 11 of the Securities Act).

VII. FPIs should be permitted to provide their climate disclosures under a substituted compliance regime or some form of alternative reporting regime.

FPIs should be permitted to provide their climate disclosures under a substituted compliance regime or some form of alternative reporting regime.

For purposes of international comity, FPIs should be permitted to disclose climate-related risks based on home country standards under an outcomes-based, streamlined substituted compliance regime—such as applies to Canadian registrants under the SEC's multijurisdictional disclosure system[38]—through an *ex ante* determination explicitly provided for in the final rule. More specifically:

- ***SEC recognition of comparable regimes***—One way to enact a streamlined substituted compliance process would be for the SEC to allow a "Recognition of Alternative Reporting Regimes" for foreign jurisdictions with disclosure regimes comparable to the SEC, similar to how the SEC structured its resource extraction rule.[39] Having an upfront decision in the SEC's finalized climate disclosure rule about which international frameworks the SEC generally deems comparable to its own would reduce administrative burdens for the SEC, international regulators, and FPIs. This approach would avoid unnecessary line-by-line evaluation of international rules for jurisdictions that satisfy the same outcomes and objectives sought by the SEC climate disclosure regime. Alternatively, the SEC could create a substituted compliance regime modeled after the regime the SEC has developed for security-based swap dealers.[40]

- ***FPI certification that home country rules are consistent with certain international standards***—Given the alignment between the proposal and TCFD, the SEC should allow an FPI to certify that its home country regime is generally consistent with TCFD or ISSB standards. This approach could be similar to the process in which the Federal Reserve allows foreign banking organizations (FBOs) to comply with the single counterparty credit limits (SCCL) rule by certifying that the FBO is complying with home country SCCL rules based on the large exposure framework recommended by the Basel Committee.

VIII. All registrants should have the option of using the ISSB standard as an alternative means of compliance.

All registrants should have the option of electing to comply with the ISSB standard once it is finalized in order to best promote consistent and useful information for U.S. and global investors.[41]

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[38] *See* SEC, Financial Reporting Manual: Topic 16—Multijurisdictional Disclosure System (May 10, 2018), *available at* https://www.sec.gov/corpfin/cf-manual/topic-16.

[39] *See* SEC, Disclosure of Payments by Resource Extraction Issuers, 86 Fed. Reg. 4662, 4697–98 (Jan. 15, 2021).

[40] *See* 17 C.F.R. § 240.3a71-6.

[41] Press Release, IFRS, ISSB Delivers Proposals that Create Comprehensive Global Baseline of Sustainability Disclosures (March 31, 2022) ("The ISSB is seeking feedback on the proposals over a 120-day consultation period closing on 29 July 2022."), *available at* https://www.ifrs.org/news-and-events/news/2022/03/issb-delivers-proposals-that-create-comprehensive-global-baseline-of-sustainability-

There is a need for coordination with the ISSB and regulators in other jurisdictions to apply concepts of mutual recognition and deference and avoid conflicts of laws.

Such an alternative reporting regime option should be extended to all registrants—including FPIs and U.S. registrants, who may wish to comply with the ISSB standards instead of the SEC's climate disclosure framework. Such an option would significantly simplify compliance for both FPIs and U.S.-domiciled registrants, would support international alignment of standards, and would improve the consistency of global disclosures to the benefit of U.S. and global investors, and strengthen overall market efficiency.

IX. The proposal should not require third-party attestation of Scope 1 and Scope 2 GHG emissions disclosures.

Third-party attestation of GHG emissions is unnecessary. The robust internal controls registrants already have in place for their 10-K filings are sufficient to ensure reliability of disclosures, particularly when balanced against the relatively high incremental costs of obtaining third-party attestation and practical questions about whether there is a deep enough talent pool to provide such attestations. Moreover, excluding the audited financials, other parts of the 10-K do not require third-party assurance.

X. The SEC should provide more guidance around GHG emissions verification.

We appreciate that the proposal is not overly prescriptive about precisely which GHG emissions verification standards or providers would be required to meet a registrant's obligations under Item 1505 of the proposed additions to Regulation S-K.[42] However, we would appreciate if the SEC could provide further guidance on what types of verification would be sufficient. For example, some banking organizations rely on the ISO 14064-3 standard. Would this be acceptable? It would be helpful if the SEC were to provide a nonexhaustive list of acceptable verification standards or were to otherwise provide additional information on verification so that registrants can plan accordingly.

XI. Should the proposal retain an attestation requirement, it should confirm that attestation reports are considered expertized material for purposes of Scope 1 and Scope 2 GHG emissions disclosures, and the attestation requirements should be scaled back.

The SEC should confirm that attestation reports are considered to be expertized material and require attestation providers to be regulated entities to address underwriters' concerns around legal liability. Although the preamble of the proposal seems to assume that attestation reports are expertized, it should state this more explicitly. Firms acting as underwriters will be exposed to significant legal liability if Scope 1 and 2 GHG emissions attestations are not considered to be expertized material for purposes of liability under Section 11 and Section 12 of the Securities Act of 1933 and Rule 10b-5 under the Securities Exchange Act of 1934. Without expertization, underwriters will be required to do a significantly greater level of due diligence which they are not well positioned to undertake. Additionally, the SEC should require attestation providers to be accredited organizations—e.g., PCAOB-

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disclosures/#:~:text=ISSB%20delivers%20proposals%20that%20create%20comprehensive%20global%20baseline%20of%20sustainability%20disclosures,-Follow%20%2D%20ISSB%20delivers.

[42] *See* Proposal, 17 C.F.R. § 229.1505.

registered public accounting firms—or require accreditation through third-party verification standards as required by CDP, to ensure appropriate expertise and level of assurance and to limit underwriters' legal liability for the accuracy of attestation reports. For any period for which assurance is not required for GHG emissions attestation reports, the SEC should clarify that the reports will still be considered to be expertized material, to avoid inadvertently subjecting underwriters to heightened due diligence requirements during an interim period of disclosure implementation.

More broadly, the proposal should be modified to scale back the attestation requirements. In particular, the proposal should require attestation at most at the limited assurance level, rather than reasonable assurance.

XII. The SEC should clarify that consolidation of legal entities for GHG emissions disclosures need not match consolidation for financial reporting.

We recommend that the SEC clarify how companies may choose organizational boundaries for purposes of calculating disclosures. We understand the SEC'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 banking organizations 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, which 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 SEC to consider adopting the approach taken in the ISSB's recent exposure draft on climate-related disclosures, which allows companies to select from the methods outlined in the GHG Protocol for establishing organizational boundaries.[43] The exposure draft also requires 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.

[43] Exposure Draft, IFRS S2 Climate-Related Disclosures, ISSB (proposed March 31, 2022), https://www.ifrs.org/content/dam/ifrs/project/climate-related-disclosures/issb-exposure-draft-2022-2-climate-related-disclosures.pdf.

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BPI appreciates the opportunity to comment on the proposed rule regarding this important topic. We thank the SEC for its consideration and look forward to ongoing dialogue. If you have any questions, please contact the undersigned by phone at (202) 737-3536 or by email at Lauren.Anderson@BPI.com.

Respectfully submitted,

Lauren Anderson
Senior Vice President & Associate General Counsel
Bank Policy Institute

cc: The Honorable Gary Gensler
Chair
Securities and Exchange Commission

The Honorable Hester M. Peirce
Commissioner
Securities and Exchange Commission

The Honorable Allison Herren Lee
Commissioner
Securities and Exchange Commission

The Honorable Caroline A. Crenshaw
Commissioner
Securities and Exchange Commission

Renee Jones
Director, Division of Corporation Finance
Securities and Exchange Commission

Paul Munter
Acting Chief Accountant, Office of the Chief Accountant
Securities and Exchange Commission

Annex 1

BANK POLICY INSTITUTE

June 9, 2021

Via Electronic Mail

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

Re: Request for Public Input on Climate Change Disclosures

Ladies and Gentlemen:

The Bank Policy Institute[1] welcomes the opportunity to respond to the March 15, 2021 request for public input from the U.S. Securities and Exchange Commission seeking comment on how the SEC can best regulate climate disclosures.[2]

I. Executive Summary

We write from the vantage point of public companies that are both subject to SEC disclosure requirements and that are users of disclosures provided by clients. This unique perspective informs the banking sector's suggestions on how the SEC might best mandate climate disclosures.

BPI supports consistent and meaningful climate disclosures. Many banking organizations have already taken several important climate-related actions, including publishing extensive disclosures publicly via their websites or through voluntary reports. These actions are part of an increasing trend of registrants voluntarily disclosing climate information to investors, and we expect this trend would

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[1] BPI is a nonpartisan public policy, research and advocacy group, representing the nation's leading banks and their customers. Our members include universal banks, regional banks, and the major foreign banks doing business in the United States. Collectively, they employ almost 2 million Americans, make nearly half of the nation's small business loans, and are an engine for financial innovation and economic growth.

[2] Throughout this letter, we use the term "climate disclosures"—and related terms such as "climate information" and "climate risks"—to refer to climate-related risks for financial institutions, as differentiated from risks to the climate itself.

continue in response to investor interest in this information and registrants' desire to meet investor demand even absent SEC action on climate disclosures. For such disclosures to be meaningful to investors, however, they need to have a common form and lexicon. Beyond comparability of climate disclosures within the United States alone, given that many banking organizations, along with other companies, operate internationally, any SEC rule or guidance should be consistent with those of regulators in other major financial centers. It is important that the SEC continue to engage with international regulatory counterparts and shape international efforts to ensure any internationally developed standards achieve the SEC's objectives and avoid possible conflicting regimes and fragmentation. In implementing disclosure requirements in the United States, the SEC should ensure it is acting in line with, and not beyond, its core investor protection mandate.[3]

Given the increasing momentum behind voluntary climate disclosures, it is important that any approach taken by the SEC creates the right incentives and does not disincentivize climate disclosures, including those made outside filings under the Securities Act of 1933 and the Securities Exchange Act of 1934. Potential liability is a key factor. Risk of civil litigation from private litigants and the SEC under the U.S. securities disclosure regime, along with the potential for investigation, enforcement, and liability, could result in registrants being more cautious in their disclosures and supplying fewer and less informative climate disclosures. In any event, like other forward-looking statements, forward-looking climate disclosures made in good faith should not subject a public company to liability. Similarly, liability should be limited for good-faith climate disclosures based on third-party information outside registrants' ability to verify and control.

With these foundational considerations in mind, we offer three guiding principles and three recommendations for any SEC actions with respect to climate change disclosures.

A. Guiding Principles.

The principles that should guide the SEC in any rulemaking or guidance are as follows.

- <u>The SEC should hew closely to and build upon its existing approach of a flexible disclosure regime focused on the SEC's core mission of investor protection, capital markets integrity, and capital formation facilitation.</u>

- <u>The SEC should continue to engage and coordinate with foreign regulators and international standard setters to promote consistency in disclosures across borders to the maximum extent possible, but consistent with U.S. law and practice.</u>

- <u>Given the complexity and dynamism of the climate regulatory landscape, the SEC should move in a deliberative manner, taking account of evolving practices in how best to measure and report climate risks.</u>

[3] In this letter, we focus on the substantive policy of potential SEC action on climate disclosures and make some practical suggestions for how SEC rulemaking or guidance might be best suited, rather than focus on the details of the process by which the SEC might act. For example, we do not address the authority of the SEC to act, whether under the Administrative Procedure Act or otherwise.

B. Recommendations.

BPI makes the following three recommendations.

- To create the right incentives for continued progress on climate disclosures, the SEC should limit potential liability for climate disclosures. Under current law, the existing general safe harbor against private litigation for forward-looking statements applies to climate disclosures in the same manner as it would to other forward-looking disclosures, but climate disclosures have certain features that merit an additional safe harbor against SEC investigations and enforcement actions for forward-looking statements, as the existing safe harbor applies only to private litigants. A climate safe harbor applicable to the SEC for forward-looking statements is appropriate given present data limitations and necessary reliance by some registrants (including financial intermediaries) on third-party information and data. Beyond forward-looking statements, the SEC should limit liability for point-in-time climate disclosures based on information and data from third parties that are outside registrants' ability to reasonably verify and control.

- If the SEC requires additional climate disclosures, it should require those disclosures outside of existing securities filings. Any incremental mandated disclosures of climate information should be placed in separate documents that do not attract liability under the Securities Act. To be clear, there would still be liability under Exchange Act Section 10(b) and Rule 10b-5 for these climate disclosures, but for such liability to attach *scienter* would need to be shown. The SEC took this approach in its Conflict Minerals Rule, which requires a specialized disclosure report on newly created Form SD, and the SEC should follow a similar approach here. This approach would better promote climate disclosures by avoiding the risk of liability that attaches to 10-Ks and 10-Qs, which are routinely incorporated by reference into securities offering documents. It would be consistent with the existing SEC liability framework, which limits liability for disclosures based on information outside the knowledge cone and control of registrants, such as for forward-looking statements about general trends and liability protections provided by risk factors. It would also be necessary as a timing matter, because it may not be possible to obtain climate information that needs to be gathered in time to meet the deadlines for 10-K and 10-Q filings.

- The SEC should not require at this stage that any additional climate disclosure requirements be subject to an audit or assurance process given the nascent stage of verification and data inconsistencies. Such a process would be an unduly burdensome requirement given how costly and time-consuming climate assurance is at this time.

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The remainder of this letter provides more detail on our guiding principles and recommendations.

II. Principle 1: The SEC should hew closely to and build upon its existing flexible-disclosure approach and core mission.

Any SEC climate disclosure regime should be consistent with the SEC's existing approach of a flexible, principles-based disclosure regime focused on its core mission.

A. Any standards the SEC adopts should be flexible given the dynamic and evolving nature of climate disclosures across sectors.

Flexibility in any new SEC climate disclosure regime is critical because there is not yet a consensus from investors about which climate disclosures they would find most relevant for investment decisions.

Even if there were agreement from investors regarding which climate disclosures would be most useful, there are impediments to registrants providing meaningful disclosures on a consistent basis. Because of current limitations on climate metrics and data, a prescriptive approach cannot adequately capture the differences across companies, both between and within economic sectors. These difficulties are particularly acute for registrants that are banking organizations, which are necessarily reliant on information from clients to be able to generate their own climate-related disclosures. Even as compared to other types of registrants that may be reliant on third-party data to produce climate disclosures, banking organizations—both small and large—face the additional challenge that their portfolios may be weighted more heavily toward retail clients and institutional clients that are private companies, for whom climate data is not widely disclosed or is non-existent.

Thus, until a uniformly applicable single disclosure or set of disclosures is established, the SEC should maintain its existing approach and have any new climate disclosure regime be flexible.

B. An SEC climate disclosure regime should fit within the SEC's mission of investor protection, capital markets integrity, and capital formation facilitation.

Material climate risk should be disclosed just as any other material risk in Securities Act and Exchange Act filings, such as 10-Ks and 10-Qs, using the ordinary U.S. Supreme Court definition of materiality from *Basic v. Levinson* and *TSC Industries v. Northway*.[4] Material climate disclosures should be made in accordance with the SEC's 2010 Climate Change Guidance or any applicable update to that guidance.

This letter is focused on the possible creation of incremental climate disclosure requirements. It would be similar to the regime the SEC created for conflict minerals disclosures under the Conflict Minerals Rule and using Form SD.

Additional climate disclosure requirements—as could be implemented using a new Form Climate Disclosure, or "Form CD"[5]—should be grounded in the SEC's mission. In particular, BPI urges the SEC to adopt only those additional climate disclosure requirements that would further the SEC's

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[4] The definition is, "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" and that to be material "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). The *Basic* Court framed the materiality question as whether the information "is significant to the reasonable investor's trading decision." 485 U.S. at 235.

[5] As discussed further below, unlike Form SD, BPI recommends that Form CD be furnished (and not filed) and not subject to any audit or assurance requirement at this stage.

mandate of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.

There are ongoing efforts outside of the SEC disclosure process where banking organizations are being asked to provide granular disclosures directed toward aims other than investor protection. For example, the Financial Stability Board is currently assessing disclosure requirements, and regulators in the United Kingdom, European Union, and other jurisdictions are considering disclosure of firm-specific financial risk and financial stability risks.[6] The SEC therefore should focus on its core mission, as other regulators focus on theirs.

III. Principle 2: The SEC should engage with bodies developing international climate disclosure standards to ensure any U.S. approach to disclosure is coordinated with other jurisdictions.

Because comparability and consistency of climate disclosure regimes will be critically important—both to registrants[7] and to investors—the SEC should coordinate its approach to developing a climate disclosure regime with bodies developing international standards, while maintaining U.S. principles of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation. With respect to international organizations, the SEC should continue to actively participate in the efforts of the International Organization of Securities Commissions, particularly with respect to the SEC's role as co-lead of its Technical Expert Group (**TEG**) reviewing prototype sustainability reporting standards that the International Financial Reporting Standards Foundation is expected to issue later this year.

With respect to banking organizations, the SEC should also coordinate its efforts with ongoing climate efforts among the U.S. banking agencies, including through the Financial Stability Oversight Council, in order to ensure that there is no inconsistency or overlap in those efforts.[8]

A. The SEC should continue to coordinate its climate disclosure efforts with those of bodies developing international standards.

Question 6 of the Request for Public Input asks whether the SEC should designate a climate or environmental, social, and governance (**ESG**) disclosure standard setter. The SEC, through its role in the TEG, should continue to engage and shape the IFRS Foundation's current efforts to establish an international sustainability standard setter. BPI therefore encourages the SEC to continue to work through the IFRS Foundation's ongoing process, including as set forth in the Biden administration's April

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6 *See* European Banking Authority, Consultation on Draft ITS on Pillar Disclosures on ESG Risk (Jan. 3, 2021), https://www.eba.europa.eu/calendar/consultation-draft-its-pillar-disclosures-esg-risk.

7 For example, lack of coordination with international bodies poses a risk that inconsistent standards might apply to registrants that operate cross-border.

8 Coordination between the SEC and U.S. banking agencies would be consistent with President Biden's May 2021 Executive Order 14030 on Climate-Related Financial Risk, which calls for the FSOC to consider a number of actions, including issuing a report to the President that includes a discussion of the necessity of any actions to enhance climate-related disclosures. 86 Fed. Reg. 27967, 27968 (May 25, 2021).

22, 2021 U.S. International Climate Finance Plan.[9] We would expect that if the SEC ultimately were to endorse, or delegate to, a separate standard setter, the organization would be free of actual or potential conflicts of interest; and that either it would be politically accountable or the SEC would have sufficient oversight and governance of the standard setter to ensure accountability.

As part of these international efforts, BPI supports the development and use of a harmonized international climate disclosure standard with national adoption and modification as needed. An internationally harmonized standard would make climate disclosures more useful and easier to produce, while national adoption and modification would permit the SEC to tailor the standard as needed to the SEC's existing regulatory focus and to unique aspects of securities disclosure in the United States. In pursuing this international coordination, the SEC should coordinate the timing of any actions it takes to mandate climate disclosures with the development of the international standard.

B. Development and use of a harmonized international standard, with national adoption and modification as needed, would have multiple benefits.

International harmonization is critical for comparability of climate disclosures, making disclosures easier to use and interpret as well as less burdensome to produce.

Unlike in some other regulatory areas, such as prudential banking regulation under the Basel Committee on Banking Supervision Core Principles for Effective Banking Supervision and Financial Stability Board standards, disclosure approaches are more heterogeneous across countries, so the ability to have national tailoring of an international disclosure standard is paramount. The SEC has adhered to a principles-based approach to securities disclosures. This approach is distinct from those employed by regulators in some other jurisdictions, where regulators have taken a much more prescriptive approach focused on disclosure templates. Adopting an international standard without an opportunity for adjustments therefore could result in a U.S. climate disclosure regime that would be inconsistent with the long-standing U.S. securities law framework. We encourage the SEC to engage with international standard setters and advocate that they create a national adoption and modification process for implementing an international climate disclosure standard.

An international standard with national adoption and modification as needed would be in agreement with the U.S. International Climate Finance Plan issued by President Biden in April 2021. That plan states that the U.S. Department of the Treasury, in coordination with U.S. regulators, should "help shape any forthcoming recommendations or international standards to be compatible with the U.S. domestic framework and regulatory process."[10]

The SEC should account for the fact that it may be the case that not all aspects of an international framework would be appropriate for incorporation into the SEC's existing disclosure

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9 *See* The White House, U.S. International Climate Finance Plan, at 11–12 (Apr. 22, 2021), *available at* https://www.whitehouse.gov/wp-content/uploads/2021/04/U.S.-International-Climate-Finance-Plan-4.22.21-Updated-Spacing.pdf (stating that the Treasury Department will "[s]upport and help guide, in coordination with U.S. regulators, the direction of work undertaken by the [IFRS] Foundation, [IOSCO], and the [Financial Stability Board] towards consistent, comparable, and reliable climate-related financial disclosures").

10 *Id.*

framework. As a result, some aspects of the international framework may be better left to other regulators in the United States. These could include either private-sector-led initiatives or other federal authorities.

For example, the Task Force on Climate-related Financial Disclosures (**TCFD**) and the climate-related portions of the Sustainability Accounting Standards Board (**SASB**) and the World Economic Forum-International Business Council standards provide a good starting point for the types of information companies might disclose. Nevertheless, not all elements of those standards may be appropriate for the SEC's mandate, as opposed to the mandates of other U.S. regulators. Therefore, if any of those standards are used as the basis for the international standard, the SEC should tailor the standard to the SEC's existing flexible-disclosure approach and the SEC's mission.

Such tailoring by the SEC would be neither unique nor unprecedented. In fact, the United Kingdom has already taken steps to adopt preexisting climate disclosure standards on a tailored basis. In March 2021, following its adoption of mandatory TCFD-aligned disclosures in November 2020,[11] the United Kingdom issued a consultation departing from TCFD by stating that "scenario analysis will be encouraged but will not be required."[12] The consultation recognized "that this is one of the most challenging areas of the TCFD recommendations and while some companies are quickly developing capabilities in this area, there remains a significant skills and expertise gap for many companies."[13] In implementing an international standard in the United States, the SEC should similarly tailor the requirements as needed.

Furthermore, any international standard would need to be tailored with due regard to securities law liability considerations unique to the United States. The United States is atypical in the substantial role private litigants play with respect to its securities disclosure regime and in the fact that the SEC, unlike many foreign regulators, is active in investigations and enforcement. The SEC should be mindful of these potential liability considerations in adopting and tailoring an international climate disclosure standard.

IV. Principle 3: The SEC should proceed in a deliberative manner in developing a climate disclosure regime.

BPI encourages the SEC to proceed in a deliberative manner in developing a climate disclosure regime for three reasons. *First*, acting without deliberation runs the risk of creating a disclosure regime that is neither useful nor effective, especially given current data limitations. *Second*, banking organizations face additional challenges for producing meaningful disclosures because of their reliance on client data to evaluate their own activities. *Third*, as described in detail above, the SEC should coordinate with other actors on climate disclosure, which will take time.

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11 HM Treasury, Chancellor Sets Out Ambition for Future of UK Financial Services (Nov. 9, 2020), *available at* https://www.gov.uk/government/news/chancellor-sets-out-ambition-for-future-of-uk-financial-services.

12 United Kingdom Department for Business, Energy & Industrial Strategy, Consultation on Requiring Mandatory Climate-Related Financial Disclosures by Publicly Quoted Companies, Large Private Companies and Limited Liability Partnerships (LLPs), at 25 (March 24, 2021).

13 *Id.*

A deliberative approach is necessary to ensure climate disclosures are useful and effective, rather than counterproductive. In particular, if climate disclosure requirements are not crafted appropriately and are imposed too quickly, climate disclosures could have the imprimatur associated with U.S. capital markets disclosures without having the preconditions for registrants to be able to provide meaningful information to the market. The ability of registrants to produce comprehensive information about their emissions profile and climate risks is at an early stage. Because it will take time for registrants to develop the ability to provide reliable quantitative disclosures, especially if those disclosures were to be required at a granular level, the SEC should not rush to mandate detailed climate disclosures.

As noted earlier, these issues are magnified in the banking sector. Banking organizations are dependent upon information from their clients to understand the emissions profile and climate risks of their lending activities. Gathering this information from clients—who themselves will take time to be able to produce meaningful data—will take a significant amount of time. Banking organizations therefore face an additional hurdle beyond non-bank companies to be able to provide climate disclosures. Given these challenges, we recommend the SEC implement any climate disclosure requirements on a phased basis. Such phasing could be crafted in a number of ways that would be meaningful to registrants. For example, phased implementation could be done by type of registrant or by types of disclosure metrics for registrants across all sectors of the economy (e.g., qualitative disclosures preceding quantitative disclosures, and Scope 1 and 2 emissions data preceding Scope 3 disclosures).

It is important that climate disclosures be coordinated at both the international and domestic levels. If the SEC were to move quickly to establish a new climate disclosure regime, its efforts could front-run ongoing work to converge on an international standard. That could result in establishing U.S. disclosure requirements that are at odds with those used elsewhere in the world, which would harm the comparability and usefulness of the U.S. regime. Moreover, the domestic climate regulatory landscape is currently in significant flux, and the SEC should coordinate its actions with other U.S. regulators, including federal banking agencies, to minimize redundancies and inconsistencies and achieve a coherent overall regulatory framework.

V. BPI recommends that any new SEC climate disclosure regime should be accompanied by an appropriate liability regime, require disclosure on a separate form outside of existing securities filings, and not require an audit or assurance process.

BPI offers three recommendations, discussed in detail below, should the SEC decide to adopt additional requirements for disclosure of climate information. BPI reiterates that, in any efforts to adopt such a disclosure mandate, the SEC's approach should be grounded in its mission, coordinated with other international and domestic actors, and proceed in a considered and thoughtful manner.

A. Recommendation 1: To create the right incentives for continued progress on climate disclosures, the SEC should limit potential liability for any required climate disclosures.

In enacting any new climate disclosure regime, it is critical that the SEC limit liability through two paths: a safe harbor applicable to the SEC for forward-looking statements and explicit SEC guidance, rulemaking, or other relief limiting potential liability—whether from private litigants or the SEC—for point-in-time disclosures based on third-party information, which registrants can neither verify nor control. These limitations are necessary as a general matter for continued progress on climate

disclosures, and they are particularly necessary if the SEC requires disclosures without or before settling on which standard registrants must disclose against. BPI is not suggesting that the SEC provide blanket immunity from all potential liability, but certain liability limitations are appropriate for climate disclosures at this stage.

A safe harbor applicable to the SEC for forward-looking statements in climate disclosures is appropriate on several grounds. *First*, it is difficult to measure climate risk, so good-faith estimates of risks may have high variability and frequently prove incorrect. *Second*, what is disclosed may change over time as the disclosure regime and understanding of climate risk evolve. *Third*, banking organizations are necessarily reliant on third-party data from their customers to be able to generate certain climate disclosures, and have no practical ability to audit data being provided by potentially thousands or tens of thousands of counterparties. Thus, absent a safe harbor, a misstatement by a counterparty could trigger strict liability for any banking organization to which the counterparty reported the underlying data. Thus, in sum, absent a safe harbor, registrants are likely to face opportunistic lawsuits over disclosures that would be, at least in the short term, particularly uncertain.

The existing general statutory safe harbor is insufficient. The Private Securities Litigation Reform Act of 1995 (**PSLRA**) provides a general safe harbor for forward-looking statements. However, the PSLRA's safe harbor applies only to private litigation.[14] Given the uncertainty of climate disclosures and the location in which their disclosure may be mandated, a climate safe harbor is therefore warranted with protections against SEC investigations and enforcement actions for forward-looking statements. In addition, given that it is possible that it may take time between the final rule issuance and when either the SEC or any relevant standard setter selects a prevailing disclosure standard (e.g., IFRS's, TCFD's, SASB's, or another), a safe harbor would be particularly necessary during this time of evolution and uncertainty.

In addition to creating a safe harbor applicable to the SEC, to incentivize progress on climate disclosures it is critical that the SEC issue guidance, rulemaking, or other relief limiting the scope of liability for disclosures based, in whole or in part, on third-party information. This SEC guidance, rulemaking, or other relief is particularly important to the extent the SEC requires additional climate disclosures in 10-Ks and 10-Qs. Registrants will be hesitant to disclose information if liability attaches to client and other third-party information that they cannot verify or control.

This limitation on liability would be consistent with the long-standing U.S. disclosure liability framework. Since the securities laws were enacted in 1933 and 1934, their organizing principle has been that a registrant can be held liable by either the SEC or a private litigant for information about the registrant that the registrant has and controls. Examples include information about the registrant's financial statements, own operations and business, and certifications under the Sarbanes-Oxley Act, which are limited to financial condition and operation. Past SEC requirements for disclosures that may or may not be material—such as information in Guide 3 or regarding related-party transactions—has been confined solely to information that is within the knowledge and ability of the registrant to verify. By sharp contrast, there is liability protection for disclosures based on information outside the knowledge cone and control of the company. Examples include forward-looking statements that discuss general economic, social, and political trends and the protections provided by risk factors.

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[14] *See* 15 U.S.C. §§ 77z-2(c)(1), 78u-5(c)(1) (stating that the safe harbor applies to "private action[s]").

Climate disclosures present new challenges to this schema. Although some climate disclosures are based on information known to and in the control of the registrant and some climate disclosures concern general trends and are already protected from liability, other climate disclosures under public discussion would be unrelated to information within the knowledge or ability to verify of the registrant. These disclosures would necessarily require reliance on others, such as reliance on third-party-created climate scenarios, scientific information, models or client data, as well as on actions by governments around the world to address climate change. This reliance presents a unique challenge in the United States, where registrants can be frequent targets of opportunistic private lawsuits. If the liability regime is not constructed properly, the risk of private sector litigation as well as the risk of SEC investigation and enforcement would have the consequence of discouraging registrants from making fulsome disclosures to investors. Without a limitation on liability, there is also an open question whether the SEC could achieve an adequate cost-benefit analysis of a scheme that would open up liability to disclosures based on third-party information that is unverifiable and/or difficult to access.

The SEC therefore should provide explicit SEC-level guidance, rulemaking, or other relief that addresses these issues. This SEC guidance, rulemaking, or other relief should state that no registrant should be held liable—whether in an SEC or a private action—for disclosures based on information and data from third parties that are outside of its ability to verify and control or access. It should include a statement that, in such cases, there *per se* can be no *scienter*—i.e., a mental state embracing an intent to deceive, manipulate, or defraud.[15] It would mean that liability would not attach under Exchange Act Section 10(b) and Rule 10b-5, which unlike liability provisions under the Securities Act require showing *scienter* and apply to registrants' statements whether or not those statements are made in Securities Act filings. SEC guidance, rulemaking, or other relief confirming that climate disclosures based on third-party information *per se* are not made with *scienter* would be particularly helpful if the SEC agrees with our recommendation that any new climate disclosure requirements be made outside of documents to which Securities Act liability attaches. Alternatively, if the SEC disagrees and requires additional climate disclosures in 10-Ks and 10-Qs—which are incorporated by reference in Securities Act filings—the SEC's liability guidance, rulemaking, or other relief should provide greater protection beyond lack of *scienter* alone.[16] There would also be a concern with respect to the lower standards for SEC enforcement liability under Section 13(a) of the Exchange Act and Sections 17(a)(2) and (3) of the Securities Act. In either case, the SEC should not upend a statutory scheme that is 88 years old by creating the risk of private lawsuits or SEC investigation and enforcement that hold registrants liable for third-party information they cannot control.

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[15] This formulation of *scienter* comes from the Supreme Court's opinion in *Ernst & Ernst v. Hochfelder*, which establishes that *scienter* is required for private actions under Exchange Act Section 10(b) and Rule 10b-5. *See* 425 U.S. 185, 193 & n.12 (1976). The Supreme Court subsequently held that *scienter* is required for SEC enforcement actions under Exchange Act Section 10(b) and Rule 10b-5. *See Aaron v. SEC*, 446 U.S. 680, 701–02 (1980).

[16] In some cases, there are already statutory protections that would limit liability for reasonable reliance on third-party information. For example, in a suit over liability for a material misstatement or omission under Section 12(a)(2) of the Securities Act, there is a defense that an offeror or seller of a security "did not know, and in the exercise of reasonable care could not have known, of such untruth or omission." The SEC should state explicitly that this defense would apply to third-party information underpinning climate disclosures. More broadly, the SEC should provide guidance, rulemaking, or other relief limiting liability beyond Section 12(a)(2) alone.

B. Recommendation 2: Any incremental SEC climate disclosures requirements should require disclosures outside of Securities Act and Exchange Act filings.

Question 1 of the Request for Public Input asks where climate disclosures should be provided. Should the SEC require additional climate disclosures, BPI recommends that those disclosures be placed in a form outside securities disclosure documents.

BPI recommends as one approach consistent with the long-standing principles for SEC disclosure that any such additional climate disclosures be provided through a separate Form Climate Disclosure, or "Form CD." Using a separate form would not be a novel approach, as this was the path taken by the SEC's Conflict Minerals Rule, which required disclosure on a separate Form SD.[17] We note that, unlike with Form SD, which the SEC initially proposed should be furnished but ultimately required to be filed based on statutory considerations not at issue with climate disclosures,[18] we recommend that the SEC require Form CD to be furnished rather than filed. But like Form SD, we recommend that the SEC allow companies to file the form well after the 10-K deadline.

A separate Form CD is justified by precedent and consistent with existing SEC disclosure principles but is also warranted in light of potential liability considerations. Keeping disclosures outside of SEC filings would help avoid potential Securities Act liability and avoid potential liability associated with the fact that many 10-Ks and 10-Qs are incorporated by reference into Securities Act filings. As a practical matter, liability under Exchange Act Section 10 and Rule 10b-5 requires showing *scienter* whereas Securities Act Section 11 and Section 12(a)(2) liability do not, so not being subject to potential Securities Act liability is a meaningful difference. Given the SEC's mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation, the prospect of lawsuits alleging such liability would not be appropriate and would discourage disclosures, so a separate form is warranted for any incremental climate disclosures the SEC may require.

To be clear, potential liability under Exchange Act Section 10(b) and Rule 10b-5 would exist for material disclosures or omissions whether or not disclosures are in SEC filings or are provided elsewhere. For example, even though conflict mineral disclosures are required on Form SD outside, rather than inside, 10-Ks and 10-Qs, there is still potential Section 10(b) and Rule 10b-5 liability to the extent the disclosures or omissions are material under the U.S. securities law definition of materiality. Under our suggestion, the same would be true for Form CD. However, by keeping climate disclosures

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[17] With respect to materiality, in the Conflict Minerals Rule adopting release the SEC observed that the relevant statutory provision "has no materiality thresholds for disclosure based on the amount of conflict minerals an issuer uses in its manufacturing processes" and that therefore the SEC "did not propose to include a materiality threshold for the disclosure or reporting requirements in the proposed rules." SEC, Conflict Minerals, 77 Fed. Reg. 56274, 56293 (Sept. 12, 2012). We note that commenters in that rulemaking debated whether conflict minerals disclosures are material. *See id.* at 56302–04.

We also note that one important difference between the Conflict Minerals Rule and any additional required climate disclosures is that the Conflict Minerals Rule was grounded in a Congressional mandate of a specific statutory direction to the SEC to promulgate regulations requiring disclosure about conflict minerals. *See* 15 U.S.C. § 78m(p)(1)(A). In compelling additional climate disclosures, the SEC should be mindful that Congress has not provided such a statutory mandate for climate disclosures, which is all the more reason any SEC action should hew to the SEC's core mission as discussed in Principle 1 above.

[18] *See* Conflict Minerals Rule, 77 Fed. Reg. 56274 at 56303–04.

outside of 10-Ks and 10-Qs, registrants would not be subject to Securities Act liability, and by furnishing rather than filing Form CD, registrants would not be subject to Exchange Act Section 18 liability. Coupled with a safe harbor applicable to the SEC for climate forward-looking statements and SEC guidance, rulemaking, or other relief that disclosures reliant on unverifiable and uncontrolled third-party information *per se* do not have *scienter*, this would create the right incentives for companies to disclose climate information.

Requiring disclosures inside 10-Ks and 10-Qs also presents challenges on timing. Aside from liability considerations, at this stage in the development of climate disclosures it may be very difficult as a practical matter for registrants to obtain necessary third-party information in time to meet filing deadlines. For this additional reason, the SEC should not require additional climate disclosures in 10-Ks and 10-Qs.

C. Recommendation 3: It is premature to impose an audit or assurance requirement as part of any SEC climate disclosure regime.

Question 10 of the Request for Public Input asks whether disclosures should be subject to an audit or assurance process or requirement. BPI encourages the SEC not to adopt an audit or assurance requirement as part of any SEC climate disclosure regime at this time.

The appropriateness of the existence and content of any assurance or audit process will ultimately depend on the substance of what would be assured or audited. BPI believes an audit or assurance requirement would be unduly burdensome at this juncture given how costly climate assurance is for the disclosure requirements under consideration by the SEC. Monetary cost is not the only impediment. To the extent the SEC disagrees with BPI's recommendation above and requires additional climate disclosures as part of 10-K and 10-Q filings, there is unlikely to be sufficient time to complete the audit or assurance process to meet filing deadlines. The audit or assurance process for climate information can take months, which may not be a feasible timetable for 10-K and 10-Q filings. These burdens would be particularly acute for small registrants.

In contrast to the Conflict Minerals Rule and Form SD—which have certain independent private sector audit requirements—an audit or assurance process in the climate change space is much more difficult. Instead of a relatively straightforward verification of the materials used in a registrant's business and of the source of those materials, an audit or assurance process for climate disclosures would likely require evaluating vast amounts of data, including third-party data, and uncertain predictive forecasts and judgments. Moreover, an audit or assurance process is not statutorily required for climate disclosures—unlike for the Conflict Minerals Rule and Form SD, which are grounded in a statutory audit mandate[19]—further counseling against the SEC expanding its reach to require an audit or assurance process in the climate context.

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[19] *See* 15 U.S.C. § 78m(p)(1)(A)(i).

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BPI appreciates the opportunity to comment on the request for public input regarding this important issue. We thank the SEC for its consideration and look forward to ongoing dialogue. If you have any questions, please contact the undersigned by phone at (202) 737-3536 or by email at Lauren.Anderson@BPI.com.

Respectfully submitted,

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