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June 14, 2022

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

Re: File No. S7-10-22

Dear Ms. Countryman:

Nasdaq, Inc. (“Nasdaq”)¹ appreciates the opportunity to comment on the Commission’s proposal to enhance and standardize climate-related disclosures for investors (the “Proposal”).² Nasdaq operates regulated entities in the United States, Canada, the Nordics, and Baltics, which are home to over 5,400 listings worldwide that drive the global economy and provide investment opportunities for institutional and Main Street investors. We are a self-regulatory organization mandated to protect investors and the public interest. Nasdaq is also a publicly-traded company subject to the proposed climate-related disclosure rules. Thus, Nasdaq brings a unique, global perspective to these issues.

Nasdaq commends the Commission for its efforts to increase comparability, consistency and reliability in climate-related disclosures as a continuation of its efforts over the past decade to modernize the public company disclosure framework. In its 2016 Concept Release, the Commission sought feedback on “which, if any, sustainability and public policy disclosures are important to an understanding of a registrant’s business and financial condition.”³ At the time, Nasdaq acknowledged the importance of material sustainability disclosures, and noted that we have long been a leader in our own sustainability efforts, including supporting programs to educate our listed companies about these issues.⁴

¹ Nasdaq (Nasdaq: NDAQ) is a S&P 500 global technology company serving the capital markets and other industries. Our diverse offering of data, analytics, software and services enables clients to optimize and execute their business vision with confidence.

² *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, Securities Exchange Act Release No. 34-94478 (March 21, 2022), 87 FR 21334 (April 11, 2022) [hereinafter *Climate-Related Disclosures*].

³ Securities Exchange Act Release No. 34-77599 (April 13, 2016), 81 FR 23915 (April 22, 2016).

⁴ Nasdaq, Inc., *Comment Letter on Business and Financial Disclosure Required by Regulation S-K* (September 16, 2016), available at: <https://www.sec.gov/comments/s7-06-16/s70616-368.pdf> [hereinafter *Nasdaq 2016 Letter*]. We are also members of the UN Sustainable Stock Exchanges initiative, Dow Jones Sustainability Indices, World Federation of Exchanges – Sustainability Working Group, World Economic Forum Stakeholder Capitalism (2021 Signatory), United Nations Global Compact, United Nations Principles for Responsible Investment, GRI Global Sustainability Standards Board, UN Women Empowerment

Nasdaq believes that a framework designed to provide consistent, comparable disclosure to investors by harmonizing existing frameworks—without imposing undue costs and burdens on companies—would promote efficiency, competition and capital formation, all of which are core to the Commission’s mandate. Additionally, Nasdaq generally favors incremental rather than revolutionary reforms as a means of progressing policy while avoiding or mitigating potentially costly unintended consequences. We believe that principles-based disclosure grounded in materiality can provide transparency to investors and a reasonable degree of flexibility to companies, while avoiding the increases in cost and complexity associated with a rigid one-size-fits-all framework. In our response to the Commission’s 2016 Concept Release, we emphasized that one size does not fit all, and that any mandatory sustainability-related disclosures should be grounded in materiality.⁵ Companies share this view, with 82% of respondents to the 2021 Chamber Survey agreeing that companies “should be afforded the flexibility to determine how ‘ESG’ issues apply to them and what material information they should be required to disclose.”⁶

Viewed through this principled lens, we are concerned that the Proposal would impose additional complexity, costs and burdens on issuers, suppliers, and ultimately, investors, and thereby undermine the Commission’s core goals. We respectfully urge the Commission to carefully consider the concerns that we and other listed companies have identified, which include:

- The Proposal creates additional disclosure obligations outside of existing frameworks.
- The proposed timeline for reporting is unreasonable.
- Prescriptive disclosures are burdensome, complex and costly.
- The Proposal’s use of materiality standards deviates from established Commission practice.
- Prescriptive disclosures may not facilitate meaningful comparisons.
- Prescriptive disclosures could create disincentives for companies.
- Scope 3 greenhouse gas (“GHG”) emissions disclosure requirements could harm small private suppliers.
- The Proposal’s timing and scope could harm the initial public offering (“IPO”) market.

We believe the Commission’s goal of enhancing climate-related disclosures could be better accomplished through a comply-or-explain framework for all issuers, or mandatory disclosures only for issuers already reporting to the U.S. Environmental Protection Agency (“EPA”). Either framework should be accompanied by meaningful safe harbors for all climate-related disclosures; provide phase-ins for emerging growth companies (“EGCs”), special purpose acquisition companies (“SPACs”) and acquisition targets; eliminate the mandatory attestation for Scopes 1 and 2 emissions; and permit all issuers to furnish rather than file climate-related disclosures with the Commission. The Commission could also consider harmonizing certain requirements internationally after the International Sustainability

Principles, Business Round Table “Purpose of a Corporation”, Parity Pledge and The 30% Club. See Nasdaq, Inc. 2021 Sustainability Report, available at: <https://www.nasdaq.com/esg/sustainability-report/2021>, at 20 [hereinafter *Nasdaq 2021 Sustainability Report*].

⁵ *Nasdaq 2016 Letter*, supra note 4.

⁶ U.S. Chamber of Commerce Center for Capital Markets, *Climate Change and ESG Reporting from the Public Company Perspective* (2021), available at: <https://www.centerforcapitalmarkets.com/resource/climate-change-public-company-perspective-esg-reporting-climate-change-public-company-perspective/>, at 11 [hereinafter *2021 Chamber Survey*].

Standards Board’s (“ISSB”) proposed framework is finalized.

Our recommendations are informed by a survey of 263 public companies we conducted from April 19 to June 10, 2022 (the “2022 Survey”), which found that 64% of respondents favor a “comply or explain” methodology; 83% support broader safe harbors; and 79% support a more extended phase-in period for climate disclosures. We discuss each of our concerns and constructive suggestions in further detail below, after a general overview of the Proposal and Nasdaq’s experience with voluntary sustainability disclosures. We believe these suggestions would enhance climate-related disclosure without imposing undue costs and burdens on companies, especially as they navigate COVID-19 uncertainty, supply chain disruptions, record levels of inflation, and the ongoing war in Ukraine.

A. Overview of Proposal

The Proposal aims to promote consistency, comparability and reliability of climate-related disclosures in the annual reports and financial statements of foreign and domestic issuers. The proposed disclosure requirements also would apply to registration statements used by, among other entities, debt-only issuers, SPACs (at the IPO and de-SPAC stage), private M&A targets, and other private companies preparing for an IPO. Generally, all companies would be required to disclose:

- **Qualitative disclosure of material climate-related risks and their process for identifying, assessing, and managing those risks, including the governance and oversight around climate-related issues.** Additionally, detailed disclosure would be required to the extent that companies have set any climate-related targets or goals and transition plans, or use carbon offsets, renewable energy credits (“RECs”), an internal carbon price, a scenario analysis or another analytical tool regarding climate-related risks.
- **Disclosure of Scope 1 and Scope 2 GHG emissions, regardless of materiality.** Scope 3 GHG emissions would generally be required if material or used as part of a target or goal and would be subject to a safe harbor, with an exemption for smaller reporting companies (“SRCs”).
- **An independent third party attestation covering Scope 1 and 2 GHG emissions disclosure, for large accelerated and accelerated filers.** Non-accelerated filers and SRCs would be exempt from this requirement, but any company that voluntarily obtains an assurance over Scope 3 GHG emissions must also provide additional disclosure about the engagement.
- **Disclosure in a note to the audited financial statements regarding the financial impacts and expenditures due to climate-related risks and activities,** such as severe weather events and other natural conditions (e.g., impairment charges or increased loss reserves) and transition activities (e.g., changes in salvage values or useful lives of assets), if such amount exceeds 1% of the related line item. These will be subject to existing audit requirements for financial statements.

B. Nasdaq’s Experience with Voluntary Sustainability Disclosures

Nasdaq has a strong client-driven interest in optimizing sustainability disclosures. We provide ESG-focused marketplace solutions that help clients achieve their own ESG objectives, through

technology, tools, data and insights. For example, we offer Nasdaq OneReport, an ESG workflow and reporting platform, and recently acquired Metrio, a provider of ESG data collection, analytics and reporting services based in Montreal. We also provide access to comprehensive ESG data sets through our ESG Data Hub and ESG Advisory services to help companies develop board and investor engagement strategies. In June 2021, Nasdaq acquired a majority stake in Puro.earth, the world’s first registry and marketplace to offer industrial carbon removal instruments that are verifiable and tradable through an open, online platform. Our European Markets—which include Puro.earth, Nasdaq Sustainable Bond Network, Nasdaq Sustainable Debt Markets and ESG Indices—support both our corporate community and investment community through the provision of instruments that help achieve ESG ambitions and targets.⁷ We also recognize that asset owners and asset managers equally face an increasingly complex and dynamic ESG landscape. Nasdaq Investment Intelligence serves the asset management and asset owner communities with a range of workflow, data, and analytics capabilities to help them manage their portfolios and enhance their asset allocation decision-making processes.

We share this background to provide perspective on Nasdaq’s views as an issuer and a service provider of marketplace solutions to public companies. While we are relatively mature as a public company and in our sustainability reporting, we receive feedback from companies of all sizes, ranging from startups considering going public to large cap companies. In our response to the Commission’s 2016 Concept Release, we noted that “most companies provide some form of sustainability information, whether in their periodic reports, on their websites, in separate sustainability reports, or in response to questionnaires.”⁸ At the time, we believed that optimal sustainability-related disclosures would be better driven by market-based forces than by Commission mandate, because transparency around sustainability was increasingly viewed as a good business practice. Indeed, the Commission notes in the Proposal that the percentage of asset and wealth management CEOs concerned about physical risks of climate change grew from 39% in 2016 to 70% in 2021.⁹ Climate-related disclosures by companies have grown alongside this investor interest, with 70% of Russell 1000 companies publishing sustainability reports in 2020, compared to 60% in 2018.¹⁰

Recognizing this business-driven increased interest in voluntary climate-related disclosures from companies, investors and other stakeholders, Nasdaq published its first ESG Reporting Guide in 2017 to assist our Nordic and Baltic listed companies in voluntary ESG reporting practices.¹¹ We updated our Guide in 2019 to provide support to our U.S. issuers who voluntarily choose to report under several competing frameworks.¹² Companies are seeking clarity on complex and overlapping reporting frameworks, and our hope was to bring “clarity and synthesis to a crowded marketplace, not additional confusion.”¹³ We continue to believe that all stakeholders (including companies, investors, suppliers and customers) would be better served by harmonized climate-related disclosure standards that reduce the burden of providing responsive disclosures under divergent frameworks followed by third-party

⁷ Nasdaq 2021 TCFD Report, available at: <https://www.nasdaq.com/esg/sustainability-report/tcf/2021>, at 12 [hereinafter *Nasdaq 2021 TCFD Report*].

⁸ *Nasdaq 2016 Letter*, *supra* note 4.

⁹ *Climate-Related Disclosures*, *supra* note 2, at 319.

¹⁰ *Climate-Related Disclosures*, *supra* note 2, at 311.

¹¹ Nasdaq, *ESG Reporting Guide: A Support Program for Nasdaq Issuers Focus Area: Nordic & Baltic Markets* (2017), available at: http://s3.amazonaws.com/documents.climsystems.com/corporate/insights/ESG-Reporting-Guide_Nasdaq.pdf.

¹² Nasdaq, *ESG Reporting Guide 2.0* (2019), available at: <https://www.nasdaq.com/docs/2019/11/26/2019-ESG-Reporting-Guide.pdf>.

¹³ *Id.* at 6.

raters, investors and international regulators. We agree with the Commission’s observation that:

some registrants currently receive multiple, diverse requests for climate-related information from different parties, such as investors, asset managers, and data service providers. Responding to such third-party requests can be costly and inefficient and may put significant and sometimes competing demands on registrants. A standardized climate disclosure framework could potentially reduce information requests from third parties to the extent that such requests overlap with the disclosures required under the proposed rules.¹⁴

Data shows that many listed companies and their shareholders share this view. Of the 436 companies responding to the 2021 Chamber Survey, 50% said that third-party standard setters are difficult to understand, address immaterial information, and lack transparency. “Only 9% of companies believe that standard setters provide consistent, easy-to-understand metrics.”¹⁵ Similarly, member companies of the Society for Corporate Governance (the “Society”) report receiving “dozens of information requests or surveys from asset managers and third-party data providers on climate and other ESG issues each year.”¹⁶ The Commission itself observed that the proliferation of over 125 third-party ESG data providers in the market has “contributed to reporting fragmentation, which can hinder investors’ ability to understand and compare registrants’ climate-related disclosures.”¹⁷

C. General Concerns with the Proposal

Nasdaq receives valuable feedback from our listed companies that access the public capital markets, and their investors, regarding issues that are important to them. While these companies may have different perspectives on many issues, one topic regularly raised is the increasing compliance costs and regulatory burdens faced by public companies, and whether increased disclosure requirements provide helpful information to their investors. We reviewed the Proposal with these perspectives in mind, and respectfully request the Commission to carefully consider the concerns that we and other listed companies have identified below, and the constructive alternatives we present in Section D.

Proposal Creates Additional Disclosure Obligations Outside of Existing Frameworks

The Proposal would create a much more expansive climate-related disclosure scheme than currently exists by adding new disclosure items to those typically requested by rating agencies, and by asset managers who “develop products through proprietary models based on information they either gather themselves or purchase from third parties.”¹⁸ The Society cautioned the Commission last year that mandatory climate disclosures would not reduce these other disclosure requests meaningfully; rather, “companies will make the required disclosures, but still be faced with requests to respond to new third-party surveys and/or direct requests from asset managers.”¹⁹ In this regard, we have

¹⁴ *Climate-Related Disclosures*, supra note 2, at 391.

¹⁵ *2021 Chamber Survey*, supra note 6, at 11.

¹⁶ Society for Corporate Governance, *Comment Letter on Climate Disclosures* (June 11, 2021), at 9, available at: <https://www.sec.gov/comments/climate-disclosure/cl12-8914283-244663.pdf> [hereinafter *Society Letter*].

¹⁷ *Climate-Related Disclosures*, supra note 2, at 28-29.

¹⁸ *Society Letter*, supra note 16.

¹⁹ Id. at 9. “Regardless of what companies are required to disclose, we believe asset managers will continue to seek a competitive edge by requesting companies provide additional data to fit their own models, and

determined internally that Nasdaq would still need to publish a separate Task Force on Climate-related Financial Disclosures (“TCFD”) Report and Sustainability Report to be responsive to ratings agencies and investors, and would likely still need to respond to third party requests through separate surveys. We believe that the Proposal creates the burdens identified by the Society by multiplying, rather than reducing, the volume of climate-related disclosures that companies will have to prepare and provide annually.

Moreover, the Scope 1 and 2 attestation requirement will pose unique challenges to companies. Although some companies are currently measuring and reporting GHG emissions, they likely do so in accordance with the Greenhouse Gas Protocol (“GHG Protocol”), which requires calculations based on an equity or control approach,²⁰ and likely obtain limited assurance, if they obtain any assurance at all. The Commission deviates from the GHG Protocol by requiring companies to calculate GHG emissions within their organizational or operational boundaries consistent with U.S. GAAP and the disclosure of “entities, operations, assets and other holdings” in their financial statements.²¹ While the Commission believes that “the proposed rules should help limit the compliance burden for those registrants that are already disclosing their GHG emissions pursuant to the GHG Protocol,”²² it is not clear whether companies would need to recalculate their historic Scope 1 and Scope 2 emissions for all years in their financial statements in order to comply with the proposed rules and attestation requirement, or if it could be excluded due to “unreasonable effort or expense.”²³

For example, Nasdaq recently submitted GHG reduction targets to the Science-Based Targets initiative (“SBTi”) and used the operational control approach under the GHG Protocol to calculate our GHG inventory, and will do so as we continue to monitor progress against our goals. We also report our GHG emissions to the Carbon Disclosure Project (“CDP”) in accordance with the GHG Protocol, and it is unclear whether the disclosures required under the Proposal would satisfy their requirements. As a result, Nasdaq and other similarly situated issuers may have to measure and monitor GHG emissions under both the GHG Protocol approach and the Proposal’s U.S. GAAP approach, unless third party standard setters harmonize their requirements with the Proposal. Further, 93% of respondents to our 2022 Survey with less than a \$700 million market cap do not report emissions. More broadly, less than 40% of constituents of the MSCI ACWI Investable Market Index report Scope 1 and 2 emissions, and less than 25% report Scope 3.²⁴ As noted by the Commission, this index “captures large, mid and small cap representation across 23 Developed Markets and 25 Emerging Markets countries, covering approximately 99% of the global equity investment opportunity set,”²⁵ which indicates that mandatory disclosures of GHG emissions could be a significant obligation for a substantial number of issuers.

companies will continue to endeavor to be responsive to these requests. It stands to reason, then, that as many of our member companies have reported, satisfying the investor community collectively is likely an impossible feat.”

²⁰ “Under the GHG Protocol’s equity share approach, a company accounts for GHG emissions from operations according to its share of equity in the operation. Under the GHG Protocol’s control approach, a company accounts for 100% of the GHG emissions from operations over which it has control. A company can choose to define control either in financial or operational terms.” *See Climate-Related Disclosures*, *supra* note 2, at FN 492.

²¹ *Climate-Related Disclosures*, *supra* note 2, at 187.

²² *Climate-Related Disclosures*, *supra* note 2, at 148.

²³ *Climate-Related Disclosures*, *supra* note 2, at 113.

²⁴ MSCI, *Reported Emission Footprints: The Challenge is Real* (March 9, 2022), available at: <https://www.msci.com/www/blog-posts/reported-emission-footprints/03060866159>.

²⁵ *Climate-Related Disclosures*, *supra* note 2, at FN 883.

Proposed Timeline for Reporting is Unreasonable

Nasdaq is concerned that aligning the proposed disclosures with the Form 10-K reporting deadline and phasing in the rules beginning fiscal year 2023 for large accelerated filers does not achieve the Commission's intended goal of reducing the reporting burden on companies. Many companies, including Nasdaq, collect climate change-related data on an annual cycle separate from the preparation of the Form 10-K and its filing deadline. We and other listed companies are concerned that it will be challenging to harmonize existing Form 10-K preparation with the proposed climate-related reporting requirements within the proposed compliance schedule. For example, companies often receive Scope 1 and 2 data after the Form 10-K and proxy disclosure cycle, and the timing for collecting Scope 3 emissions data is dependent on when supplier data is available. It will therefore be challenging for companies to include current emissions disclosures in the Form 10-K, which is due 60 days after year end for large accelerated filers.

Given its breadth and complexity, climate-related reporting of the nature proposed by the Commission would take time to operationalize. Companies would need additional time to organize cross-functional teams; establish internal data collection and information flows; train and address knowledge gaps; and integrate new processes into management reviews, disclosure controls and procedures, risk assessments and board oversight. To the extent that existing employees are already simultaneously working on a company's Form 10-K, proxy statement and sustainability report, a company may need to create a new team, or expand existing teams, to provide the climate-related disclosures.

The timing challenges are compounded by the audit requirement because "companies will need to evaluate, and potentially remedy, systems and resource constraints, which may be particularly acute for small and mid-sized companies."²⁶ Under the Commission's proposed phase-in periods, large accelerated filers will effectively need to have internal and disclosure controls and procedures in place by January 1, 2023 to ensure that data is consistent and reliable for the entire audit period. If the proposed rules are adopted in December 2022, companies would have less than one month to digest any final rules and implement necessary controls and procedures by January 1, 2023. This will create significant uncertainty for companies, especially for SRCs and non-accelerated filers that recalculate their filer status on June 30, 2022 and may become large accelerated filers in 2023 if their share price increases. This timing could be extremely difficult for some companies given cost and resource constraints, as well as personnel shortages or hiring difficulties during the December holiday season.

Prescriptive Disclosures are Burdensome, Complex and Costly

Nasdaq and many companies listed on The Nasdaq Stock Market are concerned that the Proposal would create burdensome and complex disclosures requiring additional legal expenses and accounting expertise to ensure proper compliance. The Commission has attempted to quantify the costs and benefits of the Proposal, while acknowledging that "[i]n many cases, however, we are unable to reliably quantify these potential benefits and costs."²⁷ Respectfully, Nasdaq observes that the Commission's economic analysis is based on sparse data and is concerned that it does not accurately

²⁶ Sullivan & Cromwell LLP, *SEC Proposes Expansive Climate Related Disclosures*, at 11, available at: <https://www.sullcrom.com/files/upload/sc-publication-sec-proposes-expansive-climate-related-disclosure-rules.pdf> [hereinafter *Sullivan & Cromwell Memo*].

²⁷ *Climate-Related Disclosures*, supra note 2, at 333.

assess the full scope of costs and burdens that the Proposal would impose on registrants. Moreover, as set forth below in greater detail, we believe the Commission’s estimates may radically underestimate the potential compliance costs.

While the Commission cites at least 20 empirical studies in support of the benefits of the Proposal, it cites only six sources to estimate the cost and time burden of the proposed rules.²⁸ Two of these sources are based on anecdotal evidence from three to seven companies,²⁹ including large cap companies in the materials, energy, manufacturing and financial services industries, which are not an accurate representation of the estimated 6,220 domestic registrants that filed forms with the Commission in 2020, of which 50% and 22% were SRCs and EGCs, respectively.³⁰ Nevertheless, the amounts reported by these large companies are still significant and well above the Commission’s estimates. For example, one company incurred \$1.3 million in start-up costs to begin reporting under TCFD and SASB, and “another company estimated new/enhanced systems, controls, audit and other costs associated with any additional disclosure requirements at over \$1 million.”³¹ Both of these estimates exclude attestation requirements, which could be significantly higher depending on the company’s size and industry.

The Commission estimates a cost of \$640,000 for larger companies during the first year of compliance (including \$180,000 for internal costs and \$460,000 for external professional costs), and \$530,000 annually thereafter (including \$150,000 for internal costs and \$380,000 for external professional costs).³² A 2022 survey conducted by Ceres, Persefoni and ERM of 39 companies (the “ERM Survey”) found that issuers currently spend \$533,000 to \$677,000 on climate-related disclosures and activities, which is similar to the Commission’s estimated annual compliance costs.³³ In contrast, the Society estimated that external professional costs range from \$50,000 to \$1.35 million annually for “environmental engineering consultants; emissions, climate science, and modeling consultants; outside counsel; and sustainability or sustainability reporting consultants.”³⁴ Further, our 2022 Survey found that 79% of non-SRC respondents believe the Commission has underestimated the direct compliance costs in its economic analysis. Nasdaq agrees with these issuers that the Commission underestimates both the current cost of providing climate-related disclosures, and the estimated burden of complying with the Proposal.

This additional burden would disproportionately impact smaller companies. While many SRCs have a comparative smaller environmental footprint and the Commission recognizes that they “are more likely to be resource-constrained,”³⁵ their startup and annual compliance costs would not be proportionately reduced under the proposed one-size-fits-all framework. Rather, the first-year compliance costs for smaller companies would be higher than the ongoing costs for larger companies,

²⁸ *Climate-Related Disclosures*, supra note 2, at 422.

²⁹ *Climate-Related Disclosures*, supra note 2, at 374.

³⁰ *Climate-Related Disclosures*, supra note 2, at 295.

³¹ *Society Letter*, supra note 16, at 8.

³² *Climate-Related Disclosures*, supra note 2, at 373.

³³ The SustainAbility Institute, *The Costs and Benefits of Climate Related Disclosure Activities by Corporate Issuers and Institutional Investors* (May 17, 2022), at 5, available at: <https://www.sustainability.com/globalassets/sustainability.com/thinking/pdfs/2022/costs-and-benefits-of-climate-related-disclosure-activities-by-corporate-issuers-and-institutional-investors-17-may-22.pdf> [hereinafter *The SustainAbility Institute*].

³⁴ *Society Letter*, supra note 16, at 8.

³⁵ *Climate-Related Disclosures*, supra note 2, at 406.

saddling SRCs with sizeable sunk costs necessary to develop the infrastructure needed to comply with the Proposal. The Commission estimates that SRCs will incur first year compliance costs of \$490,000 (\$140,000 for internal costs and \$350,000 for external professional costs), and annual costs thereafter of \$420,000 (\$120,000 for internal costs and \$300,000 for external professional costs).³⁶ According to one commenter, these first year compliance costs would represent 15-18.5% of the “entire gross revenues for the year prior to becoming a reporting company” for two small companies that recently went public.³⁷ The ERM Survey respondents did not include any SRCs, whereas 12% of respondents to our 2022 survey were SRCs, and 72% of SRC respondents believe the Commission underestimated the direct compliance costs for SRCs in its economic analysis.

Notably, the Commission’s estimates also exclude costs for third-party assurance, which SRCs are exempt from obtaining. For larger companies, the Commission estimates that assurances could impose additional costs ranging from \$30,000 to \$235,000, while the Society found that third-party assurance costs ranged from \$10,000 to \$600,000, depending on the company’s size and level of attestation.³⁸ The ERM Survey found that 28 respondents spend an average of \$82,000 annually “related to third-party full or partial assurance or audit related to climate.”³⁹ We expect that compliance with the proposal will add significant incremental costs related to (i) additional SOX control testing that accounting firms would have to perform if disclosure is included in the financial statements of the Form 10-K without a safe harbor for litigation risk, as well as (ii) readiness assessments and (iii) attestation engagements. While we are unable to estimate those additional costs due to a lack of data and maturity at this point in time, a 2013 study discussed during the Investor Advocacy Committee’s meeting on June 9, 2022, found that the mean reported costs for SOX 404 compliance was \$1.21 million in the most recent reporting year prior to the study.⁴⁰

While the Commission estimates that the paperwork burden would be 3,363 hours for domestic SRCs and 4,438 hours for all other domestic companies, two companies surveyed by the Society reported that employees spent 7,500 to 10,000 hours annually on their TCFD reporting process.⁴¹ One company requires 20 full-time employees and six months to prepare its TCFD disclosures, and another requires nine months. This is similar to Nasdaq’s experience, where our Head of Corporate ESG Strategy and Reporting leads a team of employees that required seven months to gather data and draft disclosures for our 2021 TCFD Report in coordination with numerous subject matter experts across our entire organization. It is worth noting that Nasdaq, by virtue of its business model, has a relatively lighter carbon footprint compared to companies that produce and/or distribute goods and/or energy, and yet, even with our light energy footprint, we still undertake a significant effort today to manage the reporting obligations to investors. While Nasdaq has had a formal sustainability program since 2012 and developed the infrastructure needed to provide voluntary sustainability disclosures over the past 10 years, other issuers are less mature in their sustainability reporting.

The Commission estimates that the additional paperwork burden would almost triple the

³⁶ *Climate-Related Disclosures*, supra note 2, at 383.

³⁷ CrowdCheck Law LLC, *Comment Letter on Proposed Climate Disclosures* (March 28, 2022), at 2, available at: <https://www.sec.gov/comments/s7-10-22/s71022-20121457-273390.pdf> [hereinafter *CrowdCheck Law LLC Letter*].

³⁸ *Climate-Related Disclosures*, supra note 2, at 380.

³⁹ *The SustainAbility Institute*, supra note 33, at 6.

⁴⁰ Cindy R. Alexander, et al., *Economic Effects of SOX Section 404 Compliance: A Corporate Insider Perspective*, 56 J. Acct. & Econ. 267 (2013).

⁴¹ *Society Letter*, supra note 16, at 8.

aggregate compliance costs for public companies, from \$3.9 billion to \$10.2 billion.⁴² Nasdaq is concerned that this increase in costs and paperwork burdens for companies is not correlated with a quantifiable decrease in costs or increased benefit to investors. While the Commission believes the Proposal “could reduce investors’ search costs and improve their information-processing efficiency,”⁴³ it does not quantify this estimated cost reduction, noting that “existing empirical evidence does not allow us to reliably estimate how enhancements in climate-related disclosure affect information processing by investors or firm monitoring.”⁴⁴ The ERM Survey found that investors spend an average of \$1.37 million “to collect, analyze, and report climate data to inform their investment decisions.”⁴⁵ However, only \$257,000 per year was spent on collecting climate-related data, and \$487,000 was spent on external ESG ratings, data providers, and consultants. The remaining \$1,065,000 was spent on investment analysis, proxy advisory firms, proxy solicitors, internal and external counsel, and preparing public disclosures—costs that investors may continue to bear under the Proposal.⁴⁶

Our 2022 Survey found that nearly three-quarters (73%) of respondents expect that their costs to comply with the Proposal would likely exceed the SEC’s estimates, including 41% of respondents that expect that their costs for comply with the Proposal would exceed \$1 million on an annual ongoing basis. Any increased costs to the company will ultimately be borne by investors in the form of reduced earnings, growth, or dividend payments.⁴⁷ We have concerns about the potential high compliance costs imposed by the Proposal, which may drive more companies to go private or stay private, reversing several years of positive momentum in increasing companies’ access to public capital and investors’ opportunity to diversify investments to fulfill their financial goals. Before moving forward, the Commission must conduct a more comprehensive economic analysis of the impact of these proposals.

Proposal’s Use of Materiality Standards Deviates from Established Commission Practice

The Proposal refers to the standard of materiality that has long been used by the Commission in promulgating its disclosure rules, which it acknowledges is consistent with Supreme Court precedent: a matter is material if there is a substantial likelihood that a reasonable investor would consider it important in determining whether to buy or sell securities or how to vote.⁴⁸ However, the Proposal departs from this well-established standard by: (1) setting a low quantitative threshold for a new

⁴² *Climate-Related Disclosures*, supra note 2, at 441.

⁴³ *Climate-Related Disclosures*, supra note 2, at 335.

⁴⁴ *Climate-Related Disclosures*, supra note 2, at 333.

⁴⁵ *The SustainAbility Institute*, supra note 33, at 6.

⁴⁶ Id.

⁴⁷ See also *CrowdCheck Law LLC Letter*, supra note 37 at 2, noting that “smaller reporting companies would be required to reallocate significant amounts of their operating cash from building and growing their companies – what investors expect them to do – into climate-related reporting.”

⁴⁸ *Climate-Related Disclosures*, supra note 2, at 64. See *TSC Indus. Inv. v. Northway, Inc.* 426 U.S. 438, 449 (1976) (noting that an item is material “if there is a substantial likelihood that a reasonable shareholder would consider [the information] important in deciding how to vote”); *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988) (information is material when 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”) (internal quotation marks and citation omitted). This standard has consistently been applied by courts and the Commission, including in the recent rule proposal *Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure*. 17 CFR § 230.405; SEC Release Nos. 33-11038; 34-94382; IC-34529; File No. S7-09-22, pg. 23.

mandatory note to financial statements; and (2) encouraging the disclosure of information about a company's decision in making a materiality assessment, which in many circumstances necessarily entails the disclosure of immaterial information.

First, the Proposal would set a mandatory, low disclosure threshold for a new note to financial statements, which would require an issuer to disclose the financial impacts of disaggregated climate-related risks, unless the aggregated impact is less than 1% of the total line item for the relevant fiscal year. Yet a rigid quantitative threshold is at odds with the definition of materiality as understood by long-standing legal and accounting uses, which instead emphasize the importance of the disclosures a reasonable investor would rely on when making an investment decision. The definitions purposely refrain from specifying a numerical value because "both quantitative and qualitative factors should be considered in assessing a statement's materiality."⁴⁹ This view has been supported by the staff of the Commission. For example, in Staff Accounting Bulletin No. 99, the staff reminded "registrants and the auditors of their financial statements that exclusive reliance on [a numerical rule of thumb] or any percentage or numerical threshold has no basis in the accounting literature or the law."⁵⁰ The Proposal departs from this practice and, if accepted, would likely result in the mandatory disclosure of immaterial information.

Second, instead of disclosing the *information* that an issuer deems material—which would be consistent with the Commission's past application of the materiality standard to its disclosure rules—the Proposal is requiring or encouraging disclosure of the issuer's *own assessment* of what information is and is not material. For example, the Proposal requires disclosure of how the issuer "determines the materiality of climate-related risks, including how it assesses the potential size and scope of any identified climate-related risk."⁵¹ The Proposal also requires disclosure of short-, medium-, and long-term assessments of materiality to account for "the dynamic nature of climate-related risks."⁵² Such broad disclosures concerning an issuer's assessment of materiality likely will entail descriptions of information that issuers ultimately deem immaterial.

In fact, this appears to be the intended result. For example, the Proposal notes that if a registrant determines its Scope 3 emissions are in fact "not material, and therefore not subject to disclosure, it may be useful to investors to understand the basis for that determination."⁵³ Yet requiring disclosure of information deemed immaterial in the name of helping investors understand material information stretches the well-established definition of materiality beyond recognition and burdens reporting companies with needless cost and complexity. As aptly noted by Commissioner Peirce, "Scope 3 data is really about what other people do. The reporting company's long-term financial value is only tenuously at best connected to such third-party emissions. Hence, the Commission's distorted

⁴⁹ *ECA, Loc. 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 197-98 (2d Cir. 2009).

⁵⁰ SEC Staff Accounting Bulletin: No. 99 – Materiality (August 12, 1999), available at: <https://www.sec.gov/interps/account/sab99.htm>.

⁵¹ *Climate-Related Disclosures*, supra note 2, at 467 (proposed Item 1503(a)(1)(iv) of Regulation S-K).

⁵² *Climate-Related Disclosures*, supra note 2, at 66.

⁵³ *Climate-Related Disclosures*, supra note 2, at 166.

materiality analysis for Scope 3 disclosures departs significantly from the “reasonable investor” contemplated by Justice Marshall.”⁵⁴

In our view, the Proposal could result in requiring many issuers to collect and analyze all Scope 3 emissions data from relevant third parties and disclose them regardless of materiality because the Commission acknowledges that “Scope 3 emissions can make up the vast majority of total emissions for many registrants,”⁵⁵ and the Proposal appears to presume materiality for some Scope 3 emissions.⁵⁶ The Proposal further notes that some companies consider Scope 3 emissions to be material if they represent 40% of their overall emissions.⁵⁷ Given the Commission’s acknowledgement of the “potential relative difficulty” in collecting Scope 3 emissions data,⁵⁸ issuers may be concerned that the Commission could, in hindsight, challenge an issuer’s determination of Scope 3 materiality, possibly exposing such issuer to greater risk and liability. Nasdaq encourages the Commission to reevaluate the use of the materiality standard in the Proposal, particularly as it relates to the new note to financial statements and the disclosure of Scope 3 emissions.

Prescriptive Disclosures May Not Facilitate Meaningful Comparisons

We are concerned that the Proposal would impose an overly prescriptive one-size-fits-all disclosure framework that is not tailored by industry, company size, or traditional materiality, and may elicit information that is not relevant for a particular company and therefore not meaningful for investors. In fact, the Proposal itself states that assumptions, methodologies and inputs will differ across companies,⁵⁹ which would make difficult any meaningful comparisons across companies. As noted by the Society:

Given the vast differences among issuers and the industry- and company-specific nature of relevant climate or other sustainability-focused information, however, it will be difficult for investors to make meaningful comparisons across different industries, or even, in some cases, across different companies within the same industry.⁶⁰

Further, the Proposal would overlap with existing frameworks rather than provide a simpler, more comparable and standardized approach to the existing fragmented reporting standards. This could lead to a false sense of comparison and hamper, rather than aid, the transparency that investors are seeking,

⁵⁴ Commissioner Hester M. Peirce, *We are Not the Securities and Environment Commission – At Least Not Yet* (March 21, 2022), available at: <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>.

⁵⁵ *Climate-Related Disclosures*, supra note 2, at 410.

⁵⁶ For example, the Proposal states that “For other industries, however, Scope 3 emissions represent a relatively significant portion of companies’ total GHG footprint, and therefore may reflect a more complete picture of companies’ exposure to transition risks than Scopes 1 and 2 emissions alone. For oil and gas product manufacturers, for example, Scope 3 emissions are likely to be material and thus necessary to an understanding of a registrant’s climate-related risks.” *Climate-Related Disclosures*, supra note 2, at 165.

⁵⁷ *Climate-Related Disclosures*, supra note 2, at 165.

⁵⁸ *Climate-Related Disclosures*, supra note 2, at 162.

⁵⁹ See *Climate-Related Disclosures*, supra note 2, at 220: “Nevertheless, the evolving and unique nature of GHG emissions reporting involves and, in some cases, warrants varying methodologies, differing assumptions, and a substantial amount of estimation.”

⁶⁰ *Society Letter*, supra note 16, at 6.

which would make it more difficult for investors to understand climate-related exposures across their funds and geographies.

Prescriptive Disclosures Could Create Disincentives for Companies

We have received concerns from listed companies that the prescriptive disclosures required under the Proposal could potentially penalize proactive climate-related actions. In some cases, detailed disclosure requirements would apply only when a company has set targets or goals, such as Scope 3 emissions, internal carbon pricing, climate transition plans, scenario analysis and carbon offsets or RECs. This could discourage companies from setting goals due to increased burdens with measuring emissions that are included in a goal or target, and concerns about increased legal liabilities associated with additional disclosures required. As a result, some companies might refrain from adopting Scope 3 targets or any climate-related goals precisely because of the associated disclosure burdens, actually reducing the information available to investors and the public. This concern extends beyond Scope 3 emissions to all other disclosures—if a company sets any targets for emissions reduction, they are subjecting themselves to onerous disclosure obligations with litigation risk. It creates a counter-intuitive incentive that could eliminate all goal or target setting and communications to investors.

Scope 3 Disclosure Requirements Could Harm Small Private Suppliers

The Commission acknowledges that Scope 3 emissions heavily rely on estimates and assumptions; may be difficult to obtain or verify;⁶¹ and are “a relatively new type of metric, based largely on third-party data, that [it has] not previously required.”⁶² The Commission “expect[s] some of these challenges may recede over time,”⁶³ but only provides a two-year phase-in before Scope 3 disclosures must be filed with the Commission and subject to full liability under federal securities laws.

We have heard from listed companies that Scope 3 data is not mature and determining Scope 3 emissions is difficult and costly due to the infrastructure required to gather necessary information from third parties in a company’s value chain. Our 2022 Survey found that 99% of respondents that would be subject to the Proposal’s Scope 3 GHG emissions disclosure requirements say not all of their suppliers provide reliable information regarding Scope 3 emissions, which would make compliance with this proposed requirement extremely challenging, if not impossible, for the vast majority of companies. We understand there is concern that this disclosure requirement may steer reporting companies away from smaller suppliers who may not have the resources to measure and provide relevant data, including smaller women-, minority- and veteran-owned suppliers. Therefore, the Proposal may have unintended consequences to “small entities” if issuers avoid working with smaller suppliers because they cannot provide the necessary data for issuers to report their Scope 3 emissions.

While the Commission estimates that there are “1,004 registrants that are small entities that would be affected by the proposed rules,”⁶⁴ the potential impact on small entities could in fact be much broader and impose undue burdens and costs on small private suppliers. While the Commission believes that the proposed Scope 3 exemption for SRCs would “reduce the proposed rules’ compliance burden for small entities that, compared to larger registrants with more resources, may be less able to

⁶¹ *Climate-Related Disclosures*, supra note 2, at 208.

⁶² *Climate-Related Disclosures*, supra note 2, at 173.

⁶³ *Climate-Related Disclosures*, supra note 2, at 209.

⁶⁴ *Climate-Related Disclosures*, supra note 2, at 445.

absorb the costs associated with reporting of Scope 3 emissions,”⁶⁵ the exemption would not reduce the burden on small private suppliers—many of them not even public or even subject to Commission jurisdiction—in the value chain of a registrant that is obligated to report its Scope 3 emissions. This impact could be far-reaching given the volume of Scope 3 emissions, which commenters note comprise “upwards of 90% of emissions from companies”⁶⁶ and are the “overwhelming majority of most companies’ carbon footprint.”⁶⁷ However, the Commission does not estimate the number of small entities that could be required to provide Scope 3 emissions data to public companies, nor explain how it has jurisdiction to impose such sweeping administrative costs, lost business opportunities and potential changes to business activities upon such large swaths of the economy.

Separately, the rule may have unintended consequences making it difficult for smaller publicly traded financial institutions to provide capital to small businesses. These financial institutions could face additional challenges gathering Scope 3 emissions from smaller companies that they provide with debt or equity financing. The SEC Small Business Capital Formation Advisory Committee discussed concerns that if a small company is not able to provide Scope 3 data to a bank, the bank may be disincentivized to extend financing to smaller companies.⁶⁸ This could disproportionately impact community banks, which provide “roughly 60% of all small business loans” and “more than 80% of agricultural loans”⁶⁹ but lack the resources of their larger peers and do not have “a trove of climate data readily at their disposal to collect, examine, or disclose.”⁷⁰ If community banks are deterred from providing financing to small businesses and rural farmers because they cannot meet the Proposal’s burdens, Main Street America could suffer further as America is trying to emerge from a pandemic among unprecedented inflation and supply chain disruptions.

We also have concerns that given the relative infancy of this industry and the broad range of sophistication and experience among companies and suppliers in gathering and providing Scope 3 emissions data, the required Scope 3 disclosures may be liable to allegations of miscalculation or second-guessing, and incomplete at best, thereby subjecting companies to undue litigation risk. While the Commission acknowledges “that the methodology underlying climate data continues to evolve,”⁷¹ legal practitioners observed that the Proposal does not include “a safe harbor for corrections that may result over time” as disclosure practices mature.⁷² While the Commission permits public companies to rely on other methodologies, estimates or industry averages to calculate its Scope 3 emissions, rather than rely on data from private suppliers, companies may be reluctant to do so given the accompanying liability from such disclosures and the lack of a meaningful safe harbor, as further discussed below. The

⁶⁵ *Climate-Related Disclosures*, supra note 2, at 446.

⁶⁶ *Climate-Related Disclosures*, supra note 2, at FN 417.

⁶⁷ Id.

⁶⁸ See U.S. Securities and Exchange Commission Small Business Capital Formation Advisory Committee, Transcript of Meeting Held May 6, 2022, available at: <https://www.sec.gov/info/smallbus/acsec/sbcfac-transcript-050622.pdf> at 41 [hereinafter the *Small Business Capital Formation Advisory Committee Meeting Transcript*].

⁶⁹ Independent Community Bankers of America, *About Community Banking*, available at: <https://www.icba.org/about/community-banking> (last accessed June 14, 2022).

⁷⁰ Independent Community Bankers of America, *Request for Extension of Time to Provide Comments on Proposed Rule Amendments titled “The Enhancement and Standardization of Climate-Related Disclosures for Investors”* (SEC: April 21, 2022).

⁷¹ *Climate-Related Disclosures*, supra note 2, at 288.

⁷² *Sullivan & Cromwell Memo*, supra note 26, at 17.

lack of a clear and meaningful safe harbor for such disclosures could create a chilling effect on Scope 3 disclosures. Nasdaq strongly encourages the Commission to eliminate the requirement to disclose Scope 3 emissions for all issuers, and instead permit all issuers to voluntarily disclose Scope 3 emissions on a comply-or-explain basis.

The Proposal's Timing and Scope Could Harm the IPO Market

The Proposal would apply to registration statements used by private companies preparing for an IPO. We have concerns that the Proposal could deter many companies from going public due to increased compliance costs and the litigation risks arising from the lack of safe harbor protection in the Proposal.

Companies already face complex, lengthy and costly processes to prepare for an IPO, and are subject to corporate governance, disclosure and numerous other compliance considerations. The Proposal, if adopted, would impose additional compliance burdens associated with preparing climate-related disclosures, such as the need to consider hiring an internal ESG team and ESG comptroller dedicated to developing and overseeing the execution of climate strategy and maintaining and analyzing ESG data for public disclosures. They also would need to engage auditors with ESG experience for the third-party attestation, if applicable.⁷³ The Commission estimates that the aggregate costs of preparing Form S-1 would increase sixfold from \$179 million to \$1.1 billion across the U.S. economy, and the per-company cost of compliance in the first year is \$490,000 and \$640,000 for SRCs and non-SRCs, respectively.⁷⁴ This dramatic increase in costs could be catastrophic for capital formation, and for the broader U.S. economy during a time of heightened market volatility and record inflation.

In addition, other than a specific safe harbor for certain Scope 3 disclosures, the Proposal does not contain any new safe harbors. Instead, in several places in the Proposal, the Commission notes the availability of the Private Securities Litigation Reform Act ("PSLRA") safe harbor for forward-looking statements. The PSLRA safe harbor, however, does not apply to disclosures in IPOs. As a result, private companies looking to go public would have fewer protections for their climate-related disclosures in some respects than established reporting companies, which may motivate some companies to stay private. Private companies will not shoulder the burdens and costs imposed on public companies (unless they are in the supply chain of a public company) and could direct funds towards job creation and organic growth rather than additional audit, legal and compliance costs. Unfortunately, Main Street investors would have less opportunities to share in this growth, because investments in private companies are limited to accredited and institutional investors only.

⁷³ Rodolfo Araujo et. al, *SEC's Proposed Climate Disclosure Rule Has Immediate Corporate Implications*, FTI Consulting, March 21, 2022, available at: <https://fticonsulting.com/secs-proposed-climate-disclosure-rule-has-immediate-corporate-implications>.

⁷⁴ See *Climate-Related Disclosures*, *supra* note 2, at 440. The Commission estimates that the current external cost burden for preparing Form S-1 is \$178,922,043, and the Proposal would add an additional \$957,722,059 in external costs, for a total external cost burden of \$1,134,929,102.

D. Constructive Suggestions to Decrease Burdens and Costs

Require Comply-or-Explain for All Issuers

Almost half (43%) of companies surveyed by Nasdaq and the Chamber in 2021 believe the Commission should adopt a comply-or-explain approach to climate disclosure,⁷⁵ and 64% of respondents in our 2022 Survey believe a comply-or-explain approach would ease the compliance burden of the Proposal. The Society, which includes representatives of “1,000 public companies of almost every size and industry,”⁷⁶ also advocated for the Commission to consider a “disclose or explain” framework, that would “permit companies to either provide the requested disclosure or explain why they have not (for example, if the measure has not yet been implemented, if they do not yet have the data available, or if the metric is not material to the company).”⁷⁷ Similarly, the National Association of Manufacturers noted that adopting a comply-or-explain mechanism, along with permitting furnished disclosures and leveraging existing standard-setters, “will ease the cost and liability burden for public companies without reducing information availability or accuracy for investors.”⁷⁸

The Proposal is modeled after the TCFD framework, which the Commission observes has been endorsed by G7 Finance Ministers and Central Bank Governors and incorporated into other voluntary climate disclosure frameworks (such as CDP, GRI, CDSB and SASB). The Proposal states that “[a]s of September 2021, the TCFD reported that eight jurisdictions have implemented formal TCFD-aligned disclosure requirements for domestic issuers: Brazil, the European Union, Hong Kong, Japan, New Zealand, Singapore, Switzerland, and the United Kingdom.”⁷⁹ Each of these jurisdictions, however, has contemplated or implemented comply-or-explain frameworks, or mandatory disclosures only for large companies or certain industries, as opposed to the Proposal which would require disclosures from all issuers—regardless of size—on a mandatory basis.

In 2021, the Central Bank of Brazil (“BCB”) proposed climate-related disclosures that would only apply to financial institutions regulated by the BCB.⁸⁰ New Zealand’s government passed legislation in 2021 mandating climate-related disclosures but only for “large publicly listed companies, insurers, banks, non-bank deposit takers and investment managers,”⁸¹ which would impact around 200 entities. Japan has not yet proposed climate-related disclosures but has stated an intention to require mandatory disclosures from companies listed on the Tokyo Stock Exchange’s “prime” segment (which is generally large-cap, blue-chip companies). In the meantime, climate disclosures are part of Japan’s non-binding corporate governance code on a comply-or-explain basis only.⁸² Hong Kong has not yet proposed mandatory TCFD-aligned disclosures but has published an intention to do so “across relevant sectors” by

⁷⁵ 2021 Chamber Survey, *supra* note 6.

⁷⁶ Society Letter, *supra* note 16, at 1.

⁷⁷ Society Letter, *supra* note 16, at 12.

⁷⁸ National Association of Manufacturers, *Comment Letter on Climate Disclosures* (June 8, 2021), at 2, available at: <https://www.sec.gov/comments/climate-disclosure/cll12-8895803-241279.pdf>.

⁷⁹ *Climate-Related Disclosures*, *supra* note 2, at 300.

⁸⁰ TCFD, *2021 Status Report* (October 2021), available at: https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Status_Report.pdf, at 5.

⁸¹ New Zealand Ministry for the Environment, *Mandatory climate-related disclosures* (December 1, 2021), available at: <https://environment.govt.nz/what-government-is-doing/areas-of-work/climate-change/mandatory-climate-related-financial-disclosures/#:~:text=Around%20200%20entities%20in%20New,of%20more%20than%20%241%20billion.>

⁸² *Climate-Related Disclosures*, *supra* note 2, at FN 751.

2025.⁸³

The Singapore Exchange requires all issuers to provide climate-related disclosures beginning in fiscal year 2022 but only on a comply-or-explain basis. Disclosures will be mandatory for certain industries in fiscal year 2023 (financial, agriculture, food, forest and energy industries) and other industries one year later in fiscal year 2024 (materials, buildings and transportation industries). Climate reporting for issuers in all other industries will remain on a comply-or-explain basis.⁸⁴ Switzerland's Federal Department of Finance is planning to issue a proposal in summer 2022 that would require climate-related disclosures beginning in fiscal year 2023 for public companies, banks and insurance companies with 500 or more employees, more than CHF 20 million in total assets or more than CHF 40 million in turnover.⁸⁵

In December 2020, the UK Financial Conduct Authority (the "UK FCA"), adopted climate-related disclosures on a comply-or-explain basis for all premium-listed companies, beginning January 1, 2021. In December 2021, the UK FCA extended these requirements to all listed companies,⁸⁶ beginning January 1, 2022 (the "FCA Listed Company Rules"). In addition, amendments to the UK Companies Act 2006, effective April 6, 2022, impose climate-related disclosure requirements (based on TCFD) on all UK-incorporated companies with more than 500 employees that are either listed companies, banking or insurance companies, or £500 million in turnover (the "UK Companies Act Rules").⁸⁷ As a result, the comply-or-explain FCA Listed Company Rules will apply to all listed companies,⁸⁸ and some large companies will need to comply with the mandatory UK Companies Act Rules in addition to the FCA Listed Company Rules.

Nasdaq agrees with the Commission's observation that the UK FCA "has announced that it plans to consult on making [the FCA Listed Company Rules] mandatory alongside future proposals adapting the rules to any future ISSB climate standard, once issued."⁸⁹ However, Nasdaq respectfully disagrees with the Commission's assertion that the UK Impact Assessment was conducted "for a rule that, similar

⁸³ Hong Kong Exchange, *Guidance on Climate Disclosures* (November 2021), available at: https://www.hkex.com.hk/-/media/HKEX-Market/Listing/Rules-and-Guidance/Environmental-Social-and-Governance/Exchanges-guidance-materials-on-ESG/guidance_climate_disclosures.pdf.

⁸⁴ Singapore Exchange, *Consultation Paper on Climate and Diversity* (August 27, 2021), available at: <https://www.sgx.com/regulation/public-consultations/20210826-consultation-paper-climate-and-diversity>; Singapore Exchange, *Climate and Diversity: The Way Forward* (December 15, 2021), at 5, available at: https://api2.sgx.com/sites/default/files/2021-12/Response%20Paper%20on%20Climate%20and%20Diversity%20-%20The%20Way%20Forward_0.pdf.

⁸⁵ Swiss Federal Council, *Federal Council sets parameters for binding climate reporting for large Swiss companies* (August 18, 2021), available at: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-84741.html>.

⁸⁶ Financial Conduct Authority, *FCA's new rules on climate-related disclosures to help investors, client and consumers* (December 17, 2021), available at: <https://www.fca.org.uk/news/news-stories/new-rules-climate-related-disclosures-help-investors-clients-consumers> [hereinafter *FCA Listed Company Rules*].

⁸⁷ United Kingdom Department for Business, Energy & Industrial Strategy, *Mandatory climate-related financial disclosures by publicly quoted companies, large private companies and LLPs*, at 7, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1056085/mandatory-climate-related-financial-disclosures-publicly-quoted-private-cos-llps.pdf [hereinafter *UK Department for Business, Energy & Industrial Strategy*].

⁸⁸ *FCA Listed Company Rules*, *supra* note 86.

⁸⁹ *Climate-Related Disclosures*, *supra* note 2, at FN 749.

to the Commission’s proposed rules, would require TCFD-aligned disclosures from all listed firms.”⁹⁰ As noted above, the UK Companies Act Rules would only apply to companies with over 500 employees or £500 million in turnover, so the UK Impact Assessment only considered “1,300 of the largest UK-registered companies and financial institutions.”⁹¹

The UK Companies Act Rules represent the UK’s implementation of the European Non-Financial Reporting Directive (“NFRD”) and similarly applies to an equivalent classification of companies in the EU. The NFRD (like the FCA Listed Companies Rules) is modeled on a comply-or-explain approach, requiring companies to disclose any environmental policies and due diligence processes adopted, or explain why they have not adopted any. The EU is currently considering extending the requirements to all listed companies on a mandatory basis as part of its proposed Corporate Sustainability Reporting Directive (“CSRD”),⁹² and the European Financial Regulatory Advisory Group (“EFRAG”) has recently proposed new climate-related disclosures.⁹³ Notably, the NFRD initially applied to large companies only, while the FCA Listed Company Rules initially applied to premium listed companies only. Both jurisdictions are considering mandatory disclosures only after issuers and investors have gained several years of reporting experience under a comply-or-explain framework, and regulators have had time to accurately assess the costs to companies and the benefits to investors of comply-or-explain versus mandatory disclosures.

Nasdaq encourages the Commission to consider the UK FCA’s economic analysis as additional data demonstrating that a comply-or-explain framework is less burdensome to issuers than mandatory disclosures. The Commission largely relied on the UK Impact Assessment in arriving at its cost estimate, which only included LSE- and AIM-listed companies with over 500 employees, and other companies with over 500 employees or £500 million in turnover within the scope of the UK Companies Act Rules.⁹⁴ In contrast, the UK FCA’s economic analysis of a comply-or-explain framework considered both larger issuers and small- and medium-sized enterprises (“SMEs”). It estimated the one-off costs for larger issuers and SMEs for a comply-or-explain framework to be approximately \$489,456 and \$371,304, respectively,⁹⁵ which is lower than the Commission’s estimate of \$640,000 and \$490,000 for first year costs incurred by larger companies and SRCs for the Proposal, respectively.⁹⁶ The UK FCA’s estimated

⁹⁰ *Climate-Related Disclosures*, supra note 2, at 423.

⁹¹ Department for Business, Energy & Industrial Strategy, HM Treasury, John Glen MP, and The Rt Hon Greg Hands MP, *UK to enshrine mandatory climate disclosures for largest companies in law* (October 29, 2021), available at: <https://www.gov.uk/government/news/uk-to-enshrine-mandatory-climate-disclosures-for-largest-companies-in-law>.

⁹² European Commission, *Questions and Answers: Corporate Sustainability Reporting Directive proposal* (April 21 2021), available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1806.

⁹³ European Financial Regulatory Advisory Group, *EFRAG launches a public consultation on the Draft ESRS EDs*, available at: <https://www.efrag.org/Assets/Download?assetUrl=/sites/webpublishing/SiteAssets/PRESS+RELEASE+220429+FINALv.pdf>.

⁹⁴ *Climate-Related Disclosures*, supra note 2, at FN 1011.

⁹⁵ The estimated costs were £355,787 and £269,902, respectively, which are approximately \$489,456 and \$371,304 based on the Commission’s estimated average 2021 exchange rate of \$1.3757 USD/GBP. See Financial Conduct Authority, *Enhancing climate-related disclosures by standard listed companies and seeking views on ESG topics in capital markets* (June 2021), at 55, available at: <https://www.fca.org.uk/publication/consultation/cp21-18.pdf> [hereinafter *FCA Listed Companies Rules Consultation*].

⁹⁶ *Climate-Related Disclosures*, supra note 2, at 373.

ongoing costs for a comply-or-explain framework are also lower than the Commission’s—\$200,717 and \$150,537 for larger issuers and SMEs, respectively,⁹⁷ compared to the Commission’s estimate of \$530,000 and \$420,000 for larger companies and SRCs, respectively.⁹⁸ This is likely to be a more representative estimation than the UK Impact Assessment relied upon by the Commission, as it has looked at UK listed companies, rather than only large companies.

In addition, the timing of the research conducted to support the UK FCA’s comply-or-explain framework is analogous to studies cited by the Commission in support of the Proposal. The UK FCA relied on a study conducted in 2019 to adopt rules effective on January 1, 2021, and the Commission is partly relying on a study conducted in 2021 to adopt final rules effective for larger companies on January 1, 2023. According to the 2019 UK FCA/LSE study, the percentage of LSE-listed companies making disclosures aligned with the TCFD’s 11 recommendations ranged from 17% of companies disclosing strategy resilience to 45% of companies disclosing climate risks and opportunities.⁹⁹ This is similar to the rate of disclosure among U.S. firms in 2020 and 2021 observed by Moody’s, which ranged from 5% of companies disclosing strategy resilience to 45% of companies disclosing climate risks and opportunities.¹⁰⁰ This suggests that it could be possible for companies that already have robust controls and procedures in place and are mature in their voluntary sustainability reporting to begin reporting under a comply-or-explain framework, whereas a mandatory disclosure framework may be more challenging under the proposed timeframe.

While the Commission expressed concern that “the proliferation of voluntary disclosure frameworks has led to inconsistency in application of the frameworks and, in some cases “cherry picking” of information that might not present an accurate picture of companies’ risks,”¹⁰¹ a comply-or-explain approach would not result in companies cherry-picking disclosures. Rather, companies could carefully select disclosures they are prepared to make under robust internal and disclosure controls, within a framework that motivates all issuers to strive towards full compliance. Investors would be provided with meaningful, reliable disclosures if issuers choose to comply with the Commission’s proposed framework, and additional insight if they choose to explain. For example, an issuer could explain that they calculate Scope 1 and 2 GHG emissions in accordance with the GHG Protocol’s equity share approach rather than U.S. GAAP, or that they comply with reporting requirements promulgated under home country law or by another government agency. Such disclosure will provide investors with meaningful information about why their disclosure diverges from the Commission’s proposed framework. It would also provide less mature companies with precedent disclosure to consider from peers in their industry, and could provide all issuers with emissions disclosures that could help them to calculate their own Scope 3 emissions, to the extent that other reporting companies are included in the company’s value chain. As companies mature in their data collection and enhance their controls and procedures, they could increase the number of disclosures they report on.

Nasdaq believes that a comply-or-explain approach to TCFD-aligned climate disclosures, rather than a mandatory approach, would be consistent with other ESG-related disclosures adopted by the

⁹⁷ The estimated costs were £145,902 and £109,426, respectively, or \$200,717 and \$150,537 based on the Commission’s estimated average 2021 exchange rate of \$1.3757 USD/GBP. See FCA Listed Companies Rules Consultation, supra note 95, at 56.

⁹⁸ *Climate-Related Disclosures*, supra note 2, at 373.

⁹⁹ FCA Listed Companies Rules Consultation, supra note 95, at 49.

¹⁰⁰ *Climate-Related Disclosures*, supra note 2, at 315.

¹⁰¹ *Climate-Related Disclosures*, supra note 2, at 32.

Commission, notably in the governance and risk management realm (which comprise five of the TCFD's 11 pillars), and would augment the Commission's existing Regulation 2010 guidance on climate-related disclosures and its existing climate-related disclosure requirements under Items 101(c)(2)(i), 101(h)(4)(xi) and 103(c)(3) of Regulation S-K. Moreover, we adopted a comply-or-explain approach when proposing our own board diversity disclosure rule. Based on our experience proposing and implementing a market driven, comply-or-explain board diversity listing rule—and the feedback we have heard on the burdens, costs and legal liabilities associated with mandatory disclosures versus comply-or-explain—we strongly encourage the Commission to adopt a comply-or-explain framework in lieu of mandatory disclosures.

Alternatively, Require Mandatory Disclosures Only for Certain Issuers

As discussed above, the Commission's economic analysis is based largely on a UK Impact Assessment that applies to companies with over 500 employees or £500 million in turnover, and two surveys based on sample sizes of three to seven companies, including large cap companies in the materials, energy, manufacturing and financial services industries.¹⁰² It also relied on EPA data that estimated costs of facility-level reporting at 0.1% of sales for most sectors and 0.5% of sales for small entities.¹⁰³ Nasdaq encourages the Commission to tailor the Proposal more closely to the scope of companies included within its economic analysis, such as large companies that already report to the EPA.

According to the Commission, "[t]he EPA estimates that the required reporting under their rule covers 85-90% of all GHG emissions from over 8,000 facilities in the United States."¹⁰⁴ Currently, the EPA only requires facility-level emissions, rather than all emissions aggregated across the listed company, which "does not allow a clean disaggregation across the different scopes of emissions for a given registrant."¹⁰⁵ However, the Commission acknowledges that "[w]hile there are numerous differences with regard to EPA reporting, this evidence suggests that even were these differences not to exist, and the only change were to be inclusion in Commission filings, there would nonetheless be an advantage in improving consistency and reliability and decreasing search costs."¹⁰⁶

To the extent that the Commission does not adopt a comply-or-explain framework for all covered companies, we respectfully request the Commission to limit any mandatory disclosure requirements to EPA issuers only and provide those issuers with additional time to comply with the disclosure requirements. For example, companies were initially permitted two and a half years following the adoption of the Sarbanes-Oxley Act to provide a management report and attestation over internal control over financial reporting, with accelerated filers required to comply in their fiscal years ending on or after June 15, 2004, and all other companies by their fiscal years ending on or after April 15, 2005.¹⁰⁷ The Commission then extended the phase-in periods on multiple occasions, particularly for smaller companies, "in light of the substantial time and resources needed by companies to implement the rules properly."¹⁰⁸ Companies should be provided with a similar timeframe to comply with any mandatory climate-related disclosures because these disclosures will require important processes and

¹⁰² *Climate-Related Disclosures*, supra note 2, at 374.

¹⁰³ *Climate-Related Disclosures*, supra note 2, at 381.

¹⁰⁴ *Climate-Related Disclosures*, supra note 2, at 298.

¹⁰⁵ Id.

¹⁰⁶ *Climate-Related Disclosures*, supra note 2, at 354.

¹⁰⁷ Securities Exchange Act Release No. 34-47986 (June 5, 2003).

¹⁰⁸ Securities Exchange Act Release No. 34-54942 (December 15, 2006).

infrastructure to be established.

This approach would allow for disaggregation, along with enhanced comparability, consistency and reliability for investors. It could also provide companies with more accurate data to measure their own emissions, to the extent that EPA reporters provide data helpful in calculating a registrant's emissions. This approach could provide registrants, investors, and the Commission with additional experience and data on the costs and burdens of climate-related disclosures before considering whether to extend such disclosure requirements to all companies. If the Commission were to consider extending mandatory disclosures to all companies in the future, there would be more data available to accurately assess the costs and burdens of the disclosures, and any additional costs may be reduced if companies have already adopted controls and procedures for reporting emissions within their value chain.

However, if the Commission requires mandatory disclosures from all registrants currently subject to EPA reporting, we strongly encourage the final rules to exclude any mandatory disclosures of Scope 3 emissions. As noted by the Commission, "the methodologies pertaining to the measurement of GHG emissions, particularly Scope 3 emissions, are still evolving."¹⁰⁹ To the extent the Commission would require Scope 3 emissions data from public EPA reporters, any listed companies or smaller suppliers that are in the reporter's value chain companies would need to ensure they have implemented robust controls and procedures to measure, monitor and report their emissions to the EPA reporters within an evolving landscape. Establishing such controls and procedures would incur additional costs for those companies, including smaller companies not subject to the final rules and private companies beyond the Commission's jurisdiction. The Commission should leverage the EPA's existing disclosure framework, which requires Scope 1 emissions reporting according to established methodologies, and provides detailed guidance for calculating Scope 2 emissions.¹¹⁰

Eliminate the Attestation Requirement for Scope 1 and 2 Emission Disclosures

Nasdaq is concerned that requiring larger companies to obtain an attestation of their Scope 1 and 2 emissions, and subjecting climate-related financial statement disclosures to existing audit requirements, could create a chilling effect on disclosures if they are not accompanied by sufficient safe harbors for all forward-looking information and factual climate-related data, as discussed in the next section, and if the attestation is unduly burdensome. As noted by Cleary Gottlieb, "[i]mposing an attestation requirement on all reporting companies, as the proposal would do, will turbocharge the development of a new industry that presents serious questions about cost, integrity, supervision and value to investors."¹¹¹ The Commission itself noted that "[t]he evolving nature of GHG emissions calculations and attestation standards could suggest that it may also be premature to require assurance."¹¹² Our 2022 Survey found that 87% of respondents have never received a request from investors for a third-party attestation for Scope 1 and 2 emissions.

To encourage disclosures while the attestation industry continues to mature, the Commission should eliminate the attestation requirement for Scope 1 and 2 emissions, and permit all issuers to

¹⁰⁹ *Climate-Related Disclosures*, supra note 2, at 408.

¹¹⁰ *Climate-Related Disclosures*, supra note 2, at 160.

¹¹¹ Cleary Gottlieb, *The SEC's Climate Proposal - Top Points for Comment* (April 19, 2022), available at: <https://www.clearymawatch.com/2022/04/the-secs-climate-proposal-top-points-for-comment/#more-4026>.

¹¹² *Climate-Related Disclosures*, supra note 2, at 226.

disclose a voluntary attestation in accordance with proposed Items 1505(e)(1-3) of Regulation S-K. Those proposed items would require any SRC or non-accelerated filer voluntarily obtaining an attestation to disclose the standards, level and scope of the assurance, and the identity of the attestation provider. The Commission should extend this flexibility to all issuers, regardless of filing status.

This requirement would comport with our proposed comply-or-explain framework by providing standardized disclosures for investors, to the extent that issuers choose to obtain an attestation, that would “help investors understand the nature and reliability of the attestation or verification provided and help them assess whether the voluntary assurance or verification has enhanced the reliability of the GHG emissions disclosure.”¹¹³ The Commission’s ESG Task Force could review the level of disclosures provided over the next several years and then determine whether to propose a limited or reasonable assurance requirement, and could then consider more closely aligning with other international standards currently under development. For example, the CSRD, as proposed, would require limited assurance for sustainability information, rather than reasonable assurance, with the potential to impose a reasonable assurance requirement if and when the European Commission adopts sustainability assurance standards.¹¹⁴ If the Commission adopts the proposed requirement for reasonable assurance, U.S. multinationals subject to CSRD could be required to provide a limited assurance under CSRD for all sustainability disclosures, and a reasonable assurance under Commission rules for Scope 1 and 2 GHG emissions, duplicating their compliance burdens and costs.

The Final Rule Should Include Meaningful Safe Harbors

Regardless of the ultimate scope of the Proposal, companies should be afforded the protection of meaningful safe harbors for all climate-related disclosures. As discussed above, the Proposal would provide a safe harbor for Scope 3 emissions but otherwise would not create any new safe harbors. Instead, the Proposal notes that the existing PSLRA safe harbor would apply to disclosures of climate-related risks, internal carbon pricing, scenario analysis, transition plans, targets and goals, to the extent such disclosures constitute forward-looking information. We believe this is insufficient to mitigate liability concerns, and our 2022 Survey found that 92% of respondents that have analyzed the proposed safe harbor share this view.

The proposed Scope 3 safe harbor “would provide that disclosure of Scope 3 emissions by or on behalf of the registrant would be deemed not to be a fraudulent statement unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.”¹¹⁵ In this respect, the Scope 3 safe harbor is reminiscent of Rule 175, which was adopted in 1979 as a safe harbor for certain forward-looking statements made with a “reasonable basis” and in “good faith.” However, after investors and legislators recognized that Rule 175 did not provide companies

¹¹³ *Climate-Related Disclosures*, *supra* note 2, at 264.

¹¹⁴ European Commission, *Questions and Answers: Corporate Sustainability Reporting Directive Proposal* (April 21, 2022), available at: https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1806.

¹¹⁵ *Climate-Related Disclosures*, *supra* note 2, at 211 (“For purposes of the proposed safe harbor, the term ‘fraudulent statement’ would be defined to mean a statement that is an untrue statement of material fact, a statement false or misleading with respect to any material fact, an omission to state a material fact necessary to make a statement not misleading, or that constitutes the employment of a manipulative, deceptive, or fraudulent device, contrivance, scheme, transaction, act, practice, course of business, or an artifice to defraud as those terms are used in the Securities Act or the Exchange Act or the rules or regulations promulgated thereunder.”).

with adequate protection from frivolous litigation, Congress adopted the PSLRA safe harbor. The legislative history explicitly states that the Rule 175 safe harbor “has not provided companies meaningful protection from litigation. In a February 1995 letter to the Commission, [California Public Employees’ Retirement System] stated: ‘A major failing of the existing safe harbor is that while it may provide theoretical protection to issuers from liability when disclosing projections, it fails to prevent the threat of frivolous lawsuits that arises every time a legitimate projection is not realized.’”¹¹⁶

Despite this, the Commission proposes to repurpose a safe harbor for Scope 3 emissions that was superseded by Congress over 20 years ago after proving ineffective for forward-looking information, and apply the PSLRA safe harbor to all other forward-looking disclosures. However, the PSLRA safe harbor is, by its terms, not available for IPOs, notes to the financial statements, or disclosures of LLCs, partnerships or blank-check companies. This disparate application of the PSLRA safe harbor could potentially increase compliance costs or create a chilling effect on disclosures for issuers subject to the proposed rules without the benefit afforded by the PSLRA. This could result in disclosure that is less meaningful or comparable for investors, because the disclosures made by a company without the PSLRA protection may be boilerplate or more generic when compared to a company that does have the protection.

Further, it could impede capital formation for IPOs compared to more mature reporting companies, because IPOs will face increased compliance costs stemming from the increased liability risk from forward-looking disclosures without a safe harbor. As discussed earlier, it may even impede some private companies from going public. In addition, proceeds from an offering that otherwise could have been used for additional jobs or research and development may be diverted to legal, auditing and consulting fees associated with the new disclosures. Reliance on the PSLRA may also produce uneven results, as identical disclosures made in a Form 10-K would have the benefit of the PSLRA safe harbor, while the same disclosure made during an IPO on Form S-1 would not. The Commission does not explain how it would promote competition, efficiency or capital formation by providing the existing PSLRA safe harbor to certain registrants but not others.

We believe the Commission should address these issues: how the proposed Scope 3 safe harbor would promote the public interest and investor protection; and why the disparate application of the PSLRA safe harbor to different registrants and registration statements under the Proposal promotes efficiency, competition and capital formation. Alternatively, the Commission could create a new safe harbor for all climate-related disclosures for all issuers. A new safe harbor could apply to any forward-looking or factual information disclosed under the proposed climate rules—including any information in the notes to the financial statements—provided that the statement is identified and accompanied by meaningful cautionary language and not false or misleading to management’s knowledge. For example, this could be modeled on the PSLRA safe harbor, without the requirement that the statement be considered material, since many of the proposed disclosures are not qualified by a materiality standard. This is similar to the Business Roundtable’s suggestion that the Commission provide “a liability safe harbor for any newly mandated metrics and data points and for forward-looking information provided in response to new disclosure requirements.”¹¹⁷ Data from our 2022 Survey indicates that this alternative would also be welcomed by public companies, with 83% of respondents agreeing that broader safe

¹¹⁶ H.R. Rep. No. 104-369, at FN 29 (1995).

¹¹⁷ Business Roundtable, *Comment Letter on Request for Public Input on Climate Change Disclosures* (SEC: June 11, 2021), available at: <https://www.sec.gov/comments/climate-disclosure/cll12-8906771-244124.pdf>.

harbor protections for Scope 1, 2 and 3 emissions disclosures would ease the compliance burden under the Proposal.

This safe harbor could be effective for at least a five year transition period, or until any litigation related to the Proposal is settled. We are concerned that the Proposal, in whole or in part, could be subject to litigation and create uncertainty for companies about the level of disclosure they will need to provide, and the liability and enforcement risks they could be subject to, during the litigation period. A safe harbor would provide companies with additional comfort on any disclosures made during this period.

Disclosures Should be Furnished Rather than Filed to Avoid a Chilling Effect

The Proposal would require climate-related information to be filed, rather than furnished, with the Commission in a domestic company's annual report; quarterly report; registration statement in connection with the offering of securities; merger proxy; or by a REIT (Forms 10-K, 10-Q, S-1, 10, S-4 and S-11, respectively). Similarly, most foreign companies would be required to file climate-related information on Form 20-F, F-1, or F-4, which are the equivalents of domestic Forms 10-K, S-1 and S-4, respectively, but would be permitted to *furnish* quarterly climate-related information on Form 6-K. Nasdaq believes that the requirement to file, rather than furnish, climate-related disclosures, coupled with a narrow safe harbor for Scope 3 emissions only, would increase liability and litigation risk for misstatements, third-party data, and any director identified with climate expertise, particularly for domestic companies. The Commission should consider permitting all issuers, domestic and foreign, to furnish all climate-related information with the Commission, similar to current disclosures on conflict minerals which are furnished on Form S-D.

In recent years, companies have faced an increasing risk of liability and litigation alongside the increasing demand for climate-related information. Baker & Mackenzie has observed:

As market pressure for more ESG information has grown, ESG reporting has been transformed into an important and demanding undertaking, often generating hundreds of pages of detailed information in a range of reports, statements, and filings. That prolific reporting has provided a fertile source for challenges testing the legality of ESG promises, performance, and commitments, typically by questioning the accuracy of product claims and performance statements found in company reports and statements.¹¹⁸

In recent years, plaintiffs have brought consumer protection and unfair competition claims under state laws alleging false or misleading statements in sustainability reports. While claims relying on aspirational statements have generally been unsuccessful, those relying on "specific and verifiable facts" have been allowed to proceed.¹¹⁹ The Proposal could increase the litigation risk to companies

¹¹⁸ David Hackett, et al., *Growing ESG Risks: The Rise of Litigation* (Baker McKenzie: 2020), available at: https://www.bakermckenzie.com/-/media/files/insight/publications/2020/10/growing_esg_risks_the_rise_of_litigation.pdf.

¹¹⁹ For example, in *National Consumers League v. Wal-Mart Stores, Inc.*, No. 2015-CA007731, 2016 WL 4080541 (D.C. Super. Ct. July 22, 2016), the court determined that "in-depth descriptions and detailed statistics provided about the auditing programs could influence a reasonable consumer's purchasing decision. If those audits were not done or the representations about the auditing process were inaccurate, then a consumer could be misled." This was sufficient to establish a basis of action under the District of Columbia Consumer Protection Procedures Act. David Hackett, et al., *supra* note 118.

because it would require a company to file aspirational goals and targets with the Commission, to the extent that a company has set such goals or targets. This risk is compounded by the specific and verifiable disclosure required if a disclosure obligation is triggered, which would include defined timeframes and disclosure of how the registrant intends to meet its climate-related targets or goals (e.g. increasing energy efficiency, transitioning to lower carbon products, or purchasing carbon offsets).

This granular level of disclosure could also subject issuers to increased risk of Section 10(b) or Rule 10b-5 claims under the anti-fraud provisions of federal securities laws, which prohibit any false or misleading statement or omission of a material fact in connection with the purchase or sale of any security.¹²⁰ Generally, courts have rejected claims where the ESG disclosures were “either sufficiently vague that they could not be shown to be objectively false or misleading, or were so clearly aspirational that a reasonable investor could not rely on them.”¹²¹ However, courts have found that statements that are “sufficiently concrete or measurable” or “statement[s] of existing fact” are “not entitled to protection under the SEC’s safe-harbor provisions for forward-looking statements.”¹²² In this regard, the proposed disclosure of Scope 1 and 2 emissions, internal carbon pricing and use of offsets could be considered statements of existing fact lacking the protection of the Scope 3 or PSLRA safe harbors, even if the information is partly based on third party data, methodologies and assumptions that may change as the industry matures.

The increased liability risks could also extend to a company’s officers and directors. The Proposal would require companies to disclose whether any director “has expertise in climate-related risks, with disclosure required in sufficient detail to fully describe the nature of the expertise.”¹²³ While the Proposal does not require boards to add directors with climate expertise, companies may feel pressure to do so, particularly smaller companies. There are a limited number of director candidates with climate-related expertise and relevant experience for a public company board, and the Proposal could have the unintended consequence of creating a chilling effect for boards, with directors reluctant to be identified as a climate-related expert. This is because directors would lack the safe harbor afforded to the audit committee financial expert and proposed cybersecurity expert to shield them from additional liabilities compared to other board members, thereby exposing climate-related experts to greater duties and liabilities for climate-related disclosures.

Foreign issuers that are permitted to furnish disclosures, rather than file them, would face less litigation risk than their domestic counterparts. Under the Proposal, most foreign issuers would be required to provide quarterly climate-related information in Form 6-K, which is *furnished*, not filed, with the SEC, and only if they are required to disclose such information under home country law or their stock exchange rules.¹²⁴ The Commission believes it can achieve its goals of consistency, reliability and comparability by permitting foreign issuers to furnish, rather than file, climate-related information, and has not expressed concerns that information furnished on Form 6-K will be less reliable, consistent or comparable for investors. The Commission has also not explained why it has discriminated between foreign and domestic companies in this regard, which could negatively impact efficiency and

¹²⁰ 17 CFR § 240.10b-5.

¹²¹ Gibson, Dunn & Crutcher LLP, *What Corporate Secretaries Should Know*, (June 2018), available at: <https://www.gibsondunn.com/wp-content/uploads/2018/06/Ising-Garbow-Meltzer-McPhee-White-Assaf-Legal-Risks-and-ESG-Disclosures-What-Corporate-Secretaries-Should-Know.pdf>.

¹²² Id.

¹²³ *Climate-Related Disclosures*, supra note 2, at 94.

¹²⁴ *Climate-Related Disclosures*, supra note 2, at FN 692.

competition by subjecting domestic companies to increased compliance costs that their foreign counterparts are not subject to. The Commission should consider permitting issuers to furnish all climate-related information with the Commission.

Provide Phase-Ins for de-SPACs, Acquisition Targets, and EGCs, and Exemptions for SPACs

The Proposal would exempt SRCs from obligations to report their Scope 3 emissions, even if they are material or used as part of a target or goal, and from the requirement to obtain an independent third-party attestation over Scope 1 and 2 GHG emissions. They would also have a longer phase-in to provide the proposed disclosures. However, the Proposal does not provide any phase-ins for EGCs, despite the fact that EGCs are similarly situated to SRCs and permitted to comply with similar scaled disclosure requirements. Further, the Proposal does not provide any phase-ins or exemptions for acquisition targets or SPACs, either at the IPO or the de-SPAC stage.

SPACs and Acquisition Targets

By nature, SPACs do not have any operations at the time of IPO and would therefore have no emissions to disclose. The costs of requiring a SPAC to calculate Scope 1 and 2 emissions would be borne by investors, draining their assets without providing them with any meaningful disclosure.

Similarly, the Proposal does not provide SPACs with any phase-in at the time of a de-SPAC transaction, or provide public companies with any phase-in for merger targets. However, the Proposal would require climate-related disclosures on Form S-4, which could include two years of historical financials for the target. As a result, a SPAC or public company would need to include climate-related disclosures regarding a potential acquisition target in its registration statement on Form S-4, which includes both forward-looking projections and historical information regarding the target. It is also uncertain whether forward-looking statements in the registration statement covering a de-SPAC transaction would be protected by the PSLRA safe harbor, given the Commission's pending rule proposal that would render unavailable to SPACs the liability safe harbor of the PSLRA.

A private company target may not have collected climate-related data prior to their acquisition, and it could be incredibly burdensome for a private company to go back in time and measure the impact of climate-related events during a period when it was not collecting such data. Further, a private acquisition target may not have adequate controls or procedures in place to verify the accuracy of such information during the historical period, so the data could be misleading to investors and subject the company to additional liability. While the Commission states that companies may avail themselves of Rule 409 or 12b-21 that allows companies to exclude information that "is not reasonably available to the registrant without unreasonable effort or expense,"¹²⁵ these rules do not provide an exemption from providing any information. Instead, they require the company to "give such information on the subject as it possesses or can acquire without unreasonable effort or expense, together with the sources thereof."¹²⁶ As a result, companies would still incur additional burdens and costs in an attempt to obtain historical information that may be misleading or meaningless to investors.

¹²⁵ *Climate-Related Disclosures*, *supra* note 2, at 113.

¹²⁶ 17 CFR § 230.409 and 17 CFR § 240.12b-21.

EGCs

The 2021 Chamber Survey found that 89% of respondents support scaling disclosure requirements “based on market capitalization, revenue, type of registrant (e.g., emerging growth company, smaller reporting company), or other metric. Companies also overwhelmingly support phasing in any new disclosure requirements, with 74% supporting phase-in for all issuers and another 14% supporting a phase-in for smaller companies.”¹²⁷ Nasdaq strongly encourages the Commission to provide phase-in periods for EGCs.¹²⁸

In 2012, in connection with the JOBS Act, Congress and the Commission provided phase-in periods for many disclosure requirements for EGCs in recognition of the increased burden and complexity associated with ongoing public company reporting requirements. The Commission acknowledges these burdens in the Proposal, noting that, like SRCs, “EGCs may similarly face resource constraints related to company size or age.”¹²⁹ The Proposal estimates that 22% of domestic registrants in 2020 were EGCs.¹³⁰ However, the Commission explained that it is “not proposing generally to exempt SRCs, EGCs, or registrants that are foreign private issuers from the entire scope of the proposed climate-related disclosure rules because we agree with commenters who stated that, because of their broad impact across industries and jurisdictions, climate-related risks may pose a significant risk to the operations and financial condition of domestic and foreign issuers, both large and small.”¹³¹

Nasdaq agrees that climate-related risks pose a broad impact across industries and jurisdictions but believes the scope and materiality of those risks to a company and its investors may differ depending on the company’s size and industry. Further, a company’s ability to implement robust controls and procedures to measure, monitor and report those risks to investors may vary based on the company’s maturity. For example, the Commission notes that the costs associated with scenario analysis¹³² and reasonable assurance¹³³ may be disproportionately burdensome on smaller companies, including “those that otherwise have no prior experience in scenario analysis.”¹³⁴

The Commission and Congress have long recognized that the cost and complexity of public reporting obligations can be disproportionately burdensome on smaller and less mature companies. In 1979, the Commission adopted an experimental Form S-18 “in recognition of the difficulties small

¹²⁷ 2021 Chamber Survey, *supra* note 6, at 12.

¹²⁸ The Commission seeks comment on whether there are “certain types of other registrants, such as EGCs or business development companies (“BDCs”), that should be excluded from all or some of the proposed climate-related disclosure rules. See *Climate-Related Disclosures*, *supra* note 2, at 278.

¹²⁹ *Climate-Related Disclosures*, *supra* note 2, at 410.

¹³⁰ *Climate-Related Disclosures*, *supra* note 2, at 295.

¹³¹ *Climate-Related Disclosures*, *supra* note 2, at 277.

¹³² “Some registrants may lack the necessary expertise [to conduct a scenario analysis], requiring them to hire external consultants to conduct the analysis. These challenges may pose undue burdens with respect to difficulty and/or costs to some registrants, such as smaller companies and those that otherwise have no prior experience in scenario analysis.” *Climate-Related Disclosures*, *supra* note 2, at 407.

¹³³ “However, because costs increase with the level of assurance, requiring reasonable assurance may be particularly burdensome for affected registrants (i.e., smaller firms) as they would be more likely to incur proportionately higher compliance costs due to the fixed cost components of such compliance, regardless of whether or not there is a transition period before this requirement takes effect.” *Climate-Related Disclosures*, *supra* note 2, at 414.

¹³⁴ *Climate-Related Disclosures*, *supra* note 2, at 407.

businesses were facing in accessing the public capital markets,”¹³⁵ and adopted Regulation S-B in 1992 as “an integrated disclosure system tailored specifically to small business issuers.”¹³⁶ In 2007, the Commission moved Regulation S-B into Regulation S-K and established the “smaller reporting company” category,¹³⁷ which permitted smaller companies to comply with scaled disclosure in Regulation S-K. In 2012, the JOBS Act established “a new category of issuers, EGCs, and exempts them from certain regulatory requirements in order to encourage them to go public in the United States.”¹³⁸ We are concerned that the Proposal could have the opposite effect for many smaller companies.

In 2011, Nasdaq testified to the Subcommittee on Capital Markets and Government Sponsored Enterprises that the proposed JOBS Act “would begin the process of reducing the barriers to strong and effective capital markets for companies across the United States.”¹³⁹ The JOBS Act was adopted one year later and, as the Chamber noted, “recognized on a bipartisan basis that nascent public companies should not have the same compliance burdens and reporting requirements as large, mature companies.”¹⁴⁰ It permits EGCs to comply with scaled disclosure requirements for executive compensation, and exempts EGCs from pay ratio disclosures and the SOX 404(b) auditor attestation.¹⁴¹ It also allows EGCs to provide two years of audited financial statements, rather than three, and two years of financial data, rather than five.

In 2021, the Commission hosted a Small Business Forum, where participants “recommended that the Commission provide exemptions or scaled requirements for small and medium-sized companies in connection with any new ESG disclosure requirements adopted by the Commission.”¹⁴² On May 6, 2022, the Commission’s Small Business Capital Formation Advisory Committee hosted a virtual meeting to discuss the Proposal and was supportive of the Commission providing additional phase-ins and scaling for EGCs and SRCs.¹⁴³

In addition, the Commission’s existing scaled disclosure requirements for smaller companies were created alongside disclosure requirements related to environmental issues. As noted in the Proposal, the Commission issued an interpretive release in 1971 “stating that registrants should consider disclosing in their Commission filings the financial impact of compliance with environmental laws.”¹⁴⁴ In 1973, the Commission codified this interpretation, and in 1982, the Commission mandated disclosure of litigation and compliance costs related to the “discharge of materials into the environment

¹³⁵ U.S. Securities and Exchange Commission, *Report on Review of Regulation S-K* (December 2013), at 11, available at: <https://www.sec.gov/news/studies/2013/reg-sk-disclosure-requirements-review.pdf>.

¹³⁶ *Id.* at 14.

¹³⁷ *Id.* at 25.

¹³⁸ H. Rep. No. 112-406 (2011).

¹³⁹ Joseph Brantuk, Head of U.S. Listings and IPOs & Vice President, NASDAQ OMX, December 15, 2011, available at: <https://www.congress.gov/congressional-report/112th-congress/house-report/406/1?overview=closed>.

¹⁴⁰ Center for Capital Markets Competitiveness, *Comment Letter on Request for Information on Climate Change Disclosure* (SEC: June 11, 2021), at 7, available at: <https://www.sec.gov/comments/climate-disclosure/cil12-8907271-244249.pdf>.

¹⁴¹ Michael K. Zeidel, *The JOBS Act: Did It Accomplish Its Goals?* (Harvard: July 18, 2016), available at: <https://corpgov.law.harvard.edu/2016/07/18/the-jobs-act-did-it-accomplish-its-goals/>.

¹⁴² *Climate-Related Disclosures*, *supra* note 2, at 277.

¹⁴³ *Small Business Capital Formation Advisory Committee Meeting Transcript*, *supra* note 69, at 92.

¹⁴⁴ *Climate-Related Disclosures*, *supra* note 2, at 15.

or otherwise relate to the protection of the environment” under Items 101(c)(2)(i) and 103 of Regulation S-K.¹⁴⁵ Disclosure is triggered if the litigation is material to the company; involves a claim that exceeds 10% of the company’s assets; or involves sanctions above \$300,000, or an alternative threshold set by the company subject to certain conditions.¹⁴⁶ In contrast, SRCs only need to disclose the “[c]osts and effects of compliance with environmental laws (federal, state and local)” to the extent material to the understanding of the company.¹⁴⁷

In 2010, the Commission issued guidance to clarify how the existing reporting requirements under Regulation S-K could require a company to disclose climate-related matters, including the impact of climate change legislation and regulation; the impact of international accords; the indirect consequences of regulation or business trends; and the physical impacts of climate change (the “2010 Guidance”).¹⁴⁸ The 2010 Guidance did not mandate any disclosure requirements but did note that SRCs may comply with the scaled requirements under Item 101(h) rather than Items 101(c)(2)(i) and 103. The Proposal would suddenly subject smaller companies to a new level of disclosure inconsistent with current and historical requirements.

Consistent with these accommodations, Nasdaq strongly encourages the Commission to provide EGCs with a phase-in period, such that EGCs are not required to provide any climate-related disclosures until the first filing that requires climate-related disclosures after the issuer ceases to be an EGC.¹⁴⁹ Nasdaq believes that providing a phase-in period for EGCs would be consistent with the Commission’s long history of easing the burdens on smaller and newly public companies, and would be consistent with the Office of the Advocate for Small Business Capital Formation’s suggestion to “continue tailoring the disclosure and reporting framework to the complexity and size of operations of companies, either by scaling obligations or delaying compliance for the smallest of the public companies, particularly as it pertains to potential new or expanded disclosure requirements.”¹⁵⁰ It would also help to ensure that EGCs are not subject to increased liability risk than more seasoned issuers because, as discussed above, the PSLRA safe harbor does not extend to IPOs.

Certain Requirements Should be Harmonized Internationally

Mandating a disclosure framework that is not aligned with the standards in development internationally creates risk of non-conforming data being provided by U.S. listed companies to domestic and foreign investors. This would make comparisons challenging for investors, and potentially erode confidence in the very information the Commission is seeking to elicit, ultimately impeding the Commission’s goals of enhancing and standardizing climate-related disclosures for investors. A comply-

¹⁴⁵ *Climate-Related Disclosures*, *supra* note 2, at 16.

¹⁴⁶ 17 CFR § 229.103(c)(3).

¹⁴⁷ 17 CFR § 229.101(4)(xi).

¹⁴⁸ U.S. Securities and Exchange Commission, *Interpretation: Commission Guidance Regarding Disclosure Related to Climate Change* (February 8, 2010), available at: <https://www.sec.gov/rules/interp/2010/33-9106.pdf>.

¹⁴⁹ Under the current thresholds, this would be the earlier of five fiscal years after an IPO, or upon becoming a large accelerated filer, issuing more than \$1 billion in convertible debt in the past three years or exceeding \$1.07 billion in annual gross revenues.

¹⁵⁰ *See* SEC Office of the Advocate for Small Business Capital Formation, *Annual Report (2021)*, at 68, available at: <https://www.sec.gov/files/2021-OASB-Annual-Report.pdf>.

or-explain disclosure regime would provide the necessary time and flexibility for companies to evolve and mature their climate-related disclosure practices in parallel with the emergence of consolidated global standards and frameworks.

Nasdaq recognizes that aligning with existing frameworks is easier said than done, given the number of initiatives to standardize climate and sustainability reporting that are currently underway around the world. These include the TCFD, Global Reporting Initiative, SBTi, World Economic Forum International Business Council, UN Global Compact, UN Guiding Principles Reporting Framework and World Intellectual Capital Initiative. A number of these initiatives have recently merged, evidencing a demand for consolidation and harmonization of disclosure frameworks on an international basis. For example, the International Organization of Securities Commissions is working towards a global baseline for corporate sustainability reporting through its support of the ISSB. In the European Union, CSRD has been under political negotiation since May 2021, based on a proposal by the European Commission. The European Commission has tasked EFRAG with developing the actual technical sustainability reporting standards within the CSRD package. EFRAG is cooperating with ISSB and aims at striking the right balance between the consolidation of observed best practices in terms of sustainability reporting and the goal to enhance the quality of sustainability reporting in Europe.

ISSB's proposed framework would deviate from TCFD in several respects, so if the Proposal is adopted as proposed, it could be misaligned with the ISSB framework, adding to complexity, comparability and cost concerns. As noted by Ceres in its comment letter, "alignment [with ISSB] will reduce costs for issuers and ensure investors receive comparable disclosures wherever they invest. The ISSB's work is intended to meet the sustainability and climate disclosure needs that investors have expressed in many forums worldwide."¹⁵¹

Nasdaq suggests the Commission carefully consider the timing of its Proposal to align with the formalization of the ISSB standards, which are currently out for consultation. Aligning the Proposal with the final ISSB framework for climate-related disclosure will simplify the disclosure process for companies and make it easier for investors to compare data across companies, industries and geographical regions. This could be facilitated through a comply-or-explain approach, which would provide the Commission's ESG Task Force an opportunity to review the data and disclosures provided by companies over the next several years, and then reconsider making disclosures mandatory based on the quality and content of disclosures, and more accurate data on the costs and burdens associated with such reporting. At that time, the development of any proposed mandatory rules could be informed by the new ISSB TCFD-aligned framework.

E. Conclusion

Nasdaq is deeply committed to corporate sustainability as we contribute to building a more inclusive and prosperous world. Our perspective on the fast-evolving ESG landscape is informed by our unique experiences as both a public company on our own ESG journey, and by our vantage point at the intersection of technology and the capital markets. Our perspective is also informed by our role as a listing venue for, and regulator of, 5,400 listings worldwide. In that respect, Nasdaq is committed to improving the U.S. capital markets for public companies and investors in order to keep our capital markets the envy of the world. Public companies—launched by entrepreneurs with great ideas—drive

¹⁵¹ Ceres, *Comment Letter on Proposed Rule for Climate Disclosure* (December 15, 2021), at 3, available at: <https://www.sec.gov/comments/climate-disclosure/cll12-20109655-264012.pdf>.

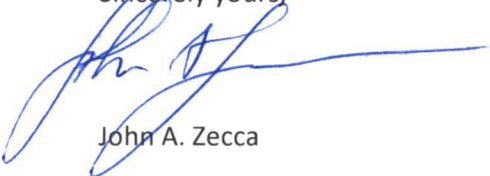
innovation, job creation, economic growth and opportunity across the global economy. Issuers, investors and other market participants benefit from healthy capital markets that promote trust and transparency.

Nasdaq appreciates the opportunity to provide specific feedback on aspects of the Proposal that could be improved to decrease the burden and costs on companies without compromising investor protection. While the SEC's goals to increase consistency, reliability and comparability are laudable, it could achieve these goals while imposing lower costs and burdens on listed companies and the economy more broadly. Nasdaq is concerned that compelling issuers to make mandatory disclosures could present a massive risk to the economy in a time of unprecedented stress, and will reduce growth and job creation by diverting funds towards audit, compliance and legal costs. Further, much of these costs and burdens would be borne by smaller, non-public companies beyond the Commission's jurisdiction. Nasdaq believes the Commission has not provided a sufficient basis to demonstrate that these costly and dramatic changes will promote efficiency, competition and capital formation.

Nasdaq strongly encourages the Commission to consider adopting a comply-or-explain framework, or mandatory disclosures only for certain issuers, rather than compelling mandatory disclosures for all issuers. Disclosure of climate change data is still an evolving industry, with varying levels of sophistication and experience among companies, suppliers, data providers, assurance providers and auditors. A comply-or-explain framework would decrease the costs, burdens and liability risks for listed companies while providing meaningful and comparable information to investors as the industry continues to mature. Regardless of the ultimate scope of the Proposal, the Commission should eliminate the mandatory attestation for Scopes 1 and 2 emissions; permit all issuers to furnish rather than file climate-related disclosures; provide all companies with the protection of meaningful safe harbors; and provide phase-ins for EGCs and acquisition targets, and exemptions for SPACs. We respectfully request the Commission to carefully consider the concerns that we and other listed companies have identified, and the constructive alternatives we have presented. Our proposed alternatives are modest steps to continue progress in climate-related disclosures, without threatening America's capital markets.

Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'John A. Zecca', with a long horizontal flourish extending to the right.

John A. Zecca