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June 10, 2022

Ms. Vanessa A. Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Via email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

**Re: File Number S-7-10-22  
The Enhancement and Standardization of Climate-Related  
Disclosures for Investors**

Dear Ms. Countryman:

The Real Estate Roundtable ([www.rer.org](http://www.rer.org)) (“The Roundtable”) appreciates this opportunity to comment on the proposed rules (the “Proposal”) in the above-referenced file. The Roundtable brings together the leaders of the nation’s top publicly-held and privately-owned real estate ownership, development, lending, and management firms, together with the leaders of major real estate trade associations, to jointly address national policy issues relating to real estate and the overall economy. More information on The Roundtable is provided in an addendum attached to our detailed comments.<sup>1</sup> Our topline points are summarized as follows:

- ***“Organizational” and “operational” boundaries should clarify that no registrant is responsible to report on emissions from sources they do not own or control.***

The Roundtable agrees that “organizational boundaries” should sync with “consolidated” entities presented in a Form 10-K financial statement for any required Scopes 1 and 2 disclosures. However, the Proposal is internally inconsistent regarding emissions from a registrant’s “unconsolidated” investments presented under the “equity method” of accounting. On the one hand, the Proposal states that mandatory **Scopes 1 and 2** reporting would apply to a registrant’s “proportionate” share of emissions from unconsolidated investments. On the other hand, the Proposal follows the GHG Protocol and states that emissions from “[i]nvestments by a registrant” should be treated as **Scope 3**.<sup>2</sup> The Commission should clarify that any emissions from unconsolidated investments over which a registrant lacks operational control are not subject to mandatory Scopes 1 and 2 reporting. Emissions from unconsolidated investments might be categorized as Scope 3.

<sup>1</sup> See p. 23 of attached comments.

<sup>2</sup> Proposed 17 C.F.R. § 229.1500(r)(2)(vii).

The Commission’s proposed “organizational” and “operational” boundaries provide important guidelines for commercial real estate (“CRE”) owners to categorize emissions. A CRE owner should not have a Scopes 1 and 2 mandate to report on tenant-based emissions because they are Scope 3 emissions from downstream “leased assets.”<sup>3</sup> Business tenants that lease space in buildings are not a CRE owner’s “consolidated” entities or “unconsolidated” investments. Furthermore, electricity, steam, heating or cooling measured by a meter for a particular leased space does not generate a CRE owner’s Scope 2 emissions – because the meter quantifies energy “consumed *by*”<sup>4</sup> a specific tenant to run its operations, which are beyond a CRE owner’s control.

- ***Create a safe harbor for emissions calculated with U.S. government data and tools.***

There are few broadly adopted commercial standards for the calculation of GHG emissions. Industry has made such calculations more “art” than “science” – and this “art” is not a useful basis for investor disclosures. The U.S. Environmental Protection Agency (EPA) and other federal departments have provided a number of tools to quantify emissions, and their methods of measurement have been accepted and used more than any other. If a registrant uses data, factors, and tools developed by EPA and other federal agencies to quantify emissions, it should get peace of mind that its calculations will not be second-guessed in an enforcement action or private litigation.

The Commission should create a “calculation safe harbor” that insulates emissions disclosures from liability when they are: (1) based on the best, available, and most recent data and tools released by the federal government; and (2) reasonably quantified by professionals with expertise in GHG calculations.

- ***Reporting on Scope 3 “if material” is a back-door mandate and should be dropped.***

The Proposal’s direction to disclose Scope 3 emissions “if material” is effectively a reporting mandate. Guidance from the Task Force on Climate-Related Financial Disclosures (“TCFD”)<sup>5</sup> explains that adding up emissions from all indirect sources will virtually always be “material” because they will readily exceed Scopes 1 and 2 amounts in nearly every industry sector. For example, TCFD reports that “downstream” Scope 3 GHGs alone account for about 90% of real estate sector emissions. The Commission should impose no mandate – in text or effect – requiring emissions reports based on unobtainable or unverifiable data, from Scope 3 “value chain” sources outside of a registrant’s “organizational” and “operational” boundaries.

A registrant that voluntarily sets a Scope 3 reduction target should receive “safe harbor” protections, but the one proposed by the Commission needs improvement. Any Scope 3 “safe harbor” should affirmatively protect estimates with a reasonable basis of support (not just intentionally fraudulent reports). Also, given the major challenges acknowledged by the Commission regarding Scope 3 calculations, any safe harbor should apply to a registrant’s reasonable decision to omit “value chain” estimates.

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<sup>3</sup> Proposed 17 C.F.R. § 229.1500(r)(2)(v) (codifying GHG Protocol, Scope 3 Category 13).

<sup>4</sup> Proposed 17 C.F.R. § 229.1500(q) (“Scope 2 emissions” definition) (emphasis supplied)

<sup>5</sup> TCFD, [Guidance on Metrics, Targets, and Transition Plans](#), at p. 56, Figures A1-1, A1-2 (2021).

- ***Do not require filings based on Scopes 1 and 2 “estimates.” Wait until a registrant has a full year of “actual” data to support such disclosures.***

The Proposal effectively requires two separate emissions disclosures: the first filed with Form 10-K based on fourth quarter estimates, and a subsequent revised filing after the registrant possesses all “actual, determined”<sup>6</sup> GHG data for the prior fiscal year. A registrant should only be required to file mandatory emissions reports – with third-party attestations – once a year. The goals of consistency and transparency for investors would be furthered if the Commission moves its proposed GHG filing deadline *after* a registrant (and verifiers) have all the data and sufficient time they need to quantify and attest to the previous year’s Scopes 1 and 2 calculations.

- ***“Physical” and “transition” risks should not be reported under a prescriptive “one percent” impact rule. They are better suited to principles-based MD&A disclosures.***

A registrant should discuss the effect of floods, droughts, and similar climate-related events in the Form 10-K Management’s Discussion and Analysis (“MD&A”), as a “known trend or uncertainty” under Regulation S-K amendments adopted last year. Such events are better suited to principles-based reporting – as opposed to the Proposal’s prescriptive, bright-line rule that precise metrics must be disclosed for “physical” risks, “transition” risks and related expenditures if they have a one percent or greater impact on any line item in a financial statement.

\* \* \*

More detailed comments are attached to this letter. Please contact Duane J. Desiderio ([d-desiderio@rer.org](mailto:d-desiderio@rer.org)), Senior Vice President and Counsel with The Roundtable, if you require additional information.

Sincerely,



Jeffrey D. DeBoer  
President and Chief Executive Officer

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<sup>6</sup> “Actual, determined” data is the undefined term the Commission uses at Proposed 17 C.F.R. § 229.1504(e)(4)(i). We construe that term to mean all final, numerical readings from energy meters, utility bills, and other documents received by a registrant to calculate Scopes 1 and 2 emissions for the prior fiscal year.



**COMMENTS ON THE SEC’S PROPOSING RELEASE**  
**“The Enhancement and Standardization of Climate-Related Disclosures for Investors”<sup>1</sup>**  
**File # S7-10-22**  
**June 10, 2022**

**EXECUTIVE SUMMARY**

- **No registrant should be required to report on GHG emissions from sources they do not own, or from operations they do not control.**
  - “Organizational boundaries” for purposes of any Scopes 1 and 2 reporting mandate should apply to entities “consolidated” in a Form 10-K financial statement, as the Commission proposes.
    - However, the Commission conflates “organizational” and “operational” boundaries in a key respect. It proposes that organizational boundaries should encompass a registrant’s proportionate share of emissions from *un*consolidated “investments” under the “equity method” of accounting.
    - No Scopes 1 and 2 reporting mandate should apply to unconsolidated ventures beyond the registrant’s operational control. Emissions from unconsolidated investments might be Scope 3 downstream emissions from “investments by a registrant,” as the Commission would codify.<sup>2</sup>
  - The Roundtable supports the Commission’s proposed approach for setting “operational boundaries” because a registrant should only be responsible to report on Scope 1 emissions from sources it owns or controls – and Scope 2 emissions from electricity, steam, heating, or cooling “consumed *by*” the registrant.
  - Applying these principles to the commercial real estate (CRE) context:
    - Registrants that own income-producing buildings should be under no mandate to report on emissions from their business or residential tenants. Unaffiliated tenants are not “consolidated” entities or “unconsolidated” investments of a building owner. Nor does a CRE owner control tenants’ operations in leased spaces.
    - CRE owners do not have “operational control” in tenant spaces beyond the terms of their contractual lease agreements – and commercial tenants have significant market leverage in the negotiation of those leases.

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<sup>1</sup> Release No. 33-11042, 87 Fed. Reg. 21,334 (Apr. 11, 2022) (hereafter, the “Proposal”).

<sup>2</sup> Proposed 17 C.F.R. § 229.1500(r)(2)(vii) (codifying GHG Protocol, Scope 3 Category 15).



- Emissions from electricity, steam, heating or cooling – “consumed *by*” a particular tenant and measured by an energy meter covering a specific leased space – are not a CRE owner’s Scopes 1 or 2 responsibilities. Rather, metered tenant space energy consumption generates the owner’s Scope 3 emissions from “downstream leased assets,” as the Commission would codify.<sup>3</sup>
- **The Commission should foster uniform national standards to quantify GHG impacts. To that end, the Commission should provide a “safe harbor” when registrants reasonably calculate emissions using tools and data developed by the U.S. Environmental Protection Agency (EPA) and other federal departments.**
  - A registrant should not be exposed to SEC enforcement or private litigation regarding emissions that are calculated based on the best tools and data that the federal government has to offer.
  - No emissions calculation method is perfect. The “safe harbor” we propose should apply even though the federal government’s data sets and tools may have gaps or deficiencies. A registrant should have assurance that reported emissions receive protection from liability when the reports are: (1) based on the best, available, and most recent data and methods from U.S. EPA and other federal agencies; and (2) reasonably quantified by professionals with expertise in GHG calculations.
  - Examples of federal standards and data that should benefit from a GHG emissions “calculation safe harbor” are set forth in an addendum to these comments.<sup>4</sup>
- **The Proposal’s directive that registrants should report on Scope 3 emissions “if material” is a back-door mandate and should be dropped.**
  - A company must first calculate all of its indirect emissions to ascertain whether the amount of its Scope 3 impacts crosses the “materiality” threshold. The “if material” qualifier puts in motion a circular regulation that compels companies – at the outset – to calculate all Scope 3 emissions throughout its “value chain.”<sup>5</sup>
  - Most companies’ overall emissions typically derive from Scope 3 sources. This is especially the case for electricity consumed by businesses upstream and downstream from the registrant. Furthermore, the Commission appears to endorse a metric that indirect emissions

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<sup>3</sup> Proposed 17 C.F.R. § 229.1500(r)(2)(v) (codifying GHG Protocol, Scope 3 Category 13).

<sup>4</sup> *Infra* Addendum 2, notes 100-117 and accompanying text.

<sup>5</sup> The term “value chain” in these comments has the same meaning as used by the Commission in its “Scope 3” definition at Proposed 17 C.F.R. § 229.1500(r), which itself tracks the term’s use by the World Resources Institute (WRI) in its [Corporate Value Chain \(Scope 3\) Accounting and Reporting Standard \(2011\)](#).



become “material” if they account for 40% of emissions. Why 40% and not some other threshold? The “if material” clause is not conditional because when a registrant adds up indirect emissions across all Scope 3 categories that sum will nearly *always* exceed Scopes 1 and 2 figures.

- The SEC recognizes the complexities of Scope 3 reporting because registrants rarely have access to emissions data possessed by third parties in their “value chains.” For example, a CRE owner or developer will frequently lack emissions data in the control of its tenants or utilities, or data on “embedded” carbon in building products or services it may procure. If registrants do not have access to third-party data it is difficult if not impossible for them to verify it. They should be under no mandate, in text or effect, to report on emissions that depend on unverifiable data.
- As the Commission recognizes, some registrants might set their own Scope 3 reduction target particularly if they have minimal Scopes 1 and 2 emissions. If they decide to report on Scope 3 they should get the benefit of “accommodations” that:
  - Provide a “safe harbor” that gives more surety than the one in the Proposal. Any Scope 3 safe harbor should include emissions estimates that are not intentionally fraudulent or made in bad faith – and also affirmatively reach disclosures that have a reasonable basis of data support, as well as reasonable decisions to omit Scope 3 calculations. In addition, any safe harbor should insulate against both SEC enforcement and private lawsuits;
  - Do not require third-party attestations for Scope 3 given the difficulties and subjective nature inherent to “value chain” emissions estimates; and
  - Phase-in Scope 3 reporting at least two years after registrants make their mandatory Scopes 1 and 2 disclosures.
- **Scopes 1 and 2 disclosures should occur after a registrant possesses a full 12 months of “actual” emissions data for the prior fiscal year.**
  - The Proposal would require Scopes 1 and 2 reporting in Form 10-K based, in part, on *estimated* GHG data – because “*actual, determined*”<sup>6</sup> data for the prior fiscal year’s fourth quarter generally becomes available only after many companies file their 10-Ks. In effect, two emissions reports would be required – the first in a 10-K based partially on estimates and the second in a later filing based fully on “actual” data.

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<sup>6</sup> “Actual, determined” GHG emissions data (as distinguished from “estimated” data) is the undefined term the Commission uses at Proposed 17 C.F.R. § 229.1504(e)(4)(i). We construe that term to mean all final, numerical readings from energy meters, utility bills, and other documents received by a registrant to calculate Scopes 1 and 2 (and where appropriate, Scope 3) emissions for the prior fiscal year.





- The Commission can promote the objectives of investor transparency and ease registrants' compliance burdens if it requires Scopes 1 and 2 disclosures once, *after* the registrant has all of the “actual” data it needs to report on 12 months of emissions.
- Filings that include Scopes 1 and 2 disclosures based on “actual” data must also provide ample time for registrants to obtain third-party attestations, particularly because many assurance providers currently lack GHG emissions expertise. The attestation sector will need to scale-up to handle the sheer volume of work that these rules, if finalized, will generate.
- **The Commission should abandon its prescriptive “one percent” threshold for disclosing financial metrics for “severe weather” and “transition” risks under Regulation S-X. Instead, it should follow its own recent Regulation S-K reforms for “principles-based” discussions in Form 10-K’s MD&A.**
  - The Commission proposes unprecedented changes to Regulation S-X through a one-size-fits-all rule for risk disclosures related to “severe weather and other natural conditions” and “transition activities”: if the impact from any such risk is one percent or more on any line item in a financial statement, the impact must be disclosed and precisely quantified.
    - “Expenditure metrics” are likewise subject to the same prescriptive threshold. Reporting would be required if the expenditure is one percent or greater of aggregate amounts expensed or capitalized by the registrant to mitigate climate-related events and address “transition activities.”
  - The bright-line, prescriptive “one percent” rule diverges from analogous Regulation S-K reforms that became effective 15 months ago. The Regulation S-K reforms require principles-based reporting of “known trends or uncertainties” in Form 10-K’s “Management Discussion and Analysis” (“MD&A”).
  - Floods, droughts, and similar events are Regulation S-K “known trends or uncertainties.” The same principles-based approach adopted for MD&A reforms should apply to any financial impact disclosures regarding climate-related physical risks, transition risks, and related expenditures.

## **I. Comments on the SEC’s Proposed Emissions Methodology**

The Commission proposes that a registrant should describe its “emissions methodology” that includes defining its “organizational boundaries,” “operational boundaries,” and “emissions calculation approach.”<sup>7</sup> Each component is addressed below.

### ***A. Registrants should only be required to report on Scopes 1 and 2 emissions from entities “consolidated” in a financial statement. Unconsolidated investments should not be subject to mandatory GHG disclosures.***

The Commission proposes that, as an “initial step,” a registrant should:

[S]et the organizational boundaries for its GHG emissions disclosure using the same scope of entities, operations, assets and other holdings within its business organization as those included in, and based upon the same set of accounting principles applicable to, *its consolidated financial statement*.<sup>8</sup>

The Roundtable agrees that “organizational boundaries” should sync with consolidated entities presented in a Form 10-K financial statement for purposes of any required Scopes 1 and 2 disclosures.<sup>9</sup>

Commission regulations direct that “majority ownership” is the primary factor that provides the “most meaningful” presentation of a financial statement to investors, and that registrants generally “shall consolidate entities that are majority owned and shall not consolidate entities that are not majority owned.”<sup>10</sup> The same rule should apply to climate reporting. A company will have access to data to quantify Scopes 1 and 2 impacts from its operations, and from the operations of its majority-owned ventures. A registrant, even if it were possible, should not be mandated to collect GHG emissions data possessed by other businesses outside of the registrant’s control. Indeed, the extent of any authorities under the 1933 Securities Act and the 1934 Exchange Act<sup>11</sup> cannot stretch beyond the Commission’s jurisdiction to regulate entities presented in a financial statement. Organizational boundaries for emissions disclosures *must* correspond to financial disclosures for purposes of the securities laws – because the Commission is a financial regulator and not an environmental regulator.

However, the Commission should not require Scopes 1 and 2 disclosures from *unconsolidated* investments beyond the registrant’s operational control. Proposed 17 C.F.R. § 229.1504(b)(2) states that registrants “may” exclude emissions from “investments” that are “not consolidated, *not proportionately consolidated*, or that do *not qualify for the equity method of accounting* in the registrant’s consolidated financial statements.”<sup>12</sup> The proposing release further explains:

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<sup>7</sup> Proposal, 87 Fed. Reg. at 21,384, col. 1 (April 11, 2022) (page and column hereafter denoted as “21,384/1”).

<sup>8</sup> *Id.* at 21,384/2 (emphasis added); Proposed 17 C.F.R. § 229.1504(e)(2).

<sup>9</sup> See Form 10-K, “General Instructions” at p. 9 (available at <https://www.sec.gov/files/form10-k.pdf>).

<sup>10</sup> [17 C.F.R. § 210.3A-02\(a\)](#).

<sup>11</sup> Proposal, 87 Fed. Reg. at 21,464/1 (section VIII, “Statutory Authority”).

<sup>12</sup> Proposed 17 C.F.R. § 229.1504(b)(2) (emphasis supplied).





For an equity method investee or an operation that is proportionately consolidated, the registrant would be **required to include its share of emissions** based on its percentage of ownership of such investee or operation.<sup>13</sup>

That is, the Proposal would require a registrant to report proportionately on Scopes 1 and 2 emissions from its unconsolidated ventures – reflected in a financial statement under the “equity method” – even if a registrant lacks operational control over that investment.<sup>14</sup> An unconsolidated, privately-held partnership or joint venture might collect no GHG emissions data whatsoever. Yet proposed 17 C.F.R. § 229.1504(b)(2) would impose upon a registrant the impossible task to quantify – and obtain third-party attestations for – “its share of” Scopes 1 and 2 impacts attributable to such unconsolidated ventures.

In this regard, the Proposal is internally inconsistent. The Commission purports to require a registrant to report on proportionate **Scopes 1 and 2** emissions from unconsolidated investments – yet the Commission would codify the GHG Protocol’s treatment of emissions from “investments by a registrant” **as Scope 3**.<sup>15</sup> Investors deserve the clarity that a registrant has no Scopes 1 and 2 responsibilities for emissions from minority-stake ventures in its “value chain” that it does not control – when those emissions properly fall within Scope 3. As the Commission states: “[T]hose activities in [the registrant’s] value chain over which it **lacks ownership or control**” – e.g., unconsolidated investments -- are “sources of its **Scope 3 emissions**.”<sup>16</sup>

Accordingly, The Roundtable urges revisions to proposed 17 C.F.R. § 229.1504(b)(2). Any mandatory emissions reporting should encompass entities that are consolidated in Form 10-K. Furthermore, a registrant should not be required to report on Scopes 1 and 2 emissions (proportionate or otherwise) from unconsolidated investments that it does not operationally control. Emissions from such investments are addressed by the Proposal’s Scope 3 definition.

**B. “Operational boundaries” should be delineated by emissions sources that the registrant “owns or controls,” as the Commission proposes.**

After a registrant describes its “organizational boundaries,” setting its “operational boundaries” comes next. “This would involve identifying emissions sources within its plants, offices, and other operational facilities that fall within its organizational boundaries, and then categorizing them as either direct or indirect emissions.”<sup>17</sup>

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<sup>13</sup> Proposal, 87 Fed. Reg. at 21,384/3-21,385/1 (emphasis supplied).

<sup>14</sup> The SEC offers an example of a “plant” where a registrant has “only a minority ownership ... over which it has no control.” If the “plant” is reflected in the registrant’s financial statement based on the equity method or proportionate consolidation accounting approach, then the registrant should include its “proportional share (based on ownership interest) of that plant’s emissions in the total of each of its Scopes 1 and 2 emissions.” *Id.* at 21,385/1.

<sup>15</sup> Proposed 17 C.F.R. § 229.1500(r)(2)(vii).

<sup>16</sup> Proposal, 87 Fed. Reg. at 21,385/2 (emphasis supplied).

<sup>17</sup> *Id.*



Direct Scope 1 emissions, for example, would include “combustion of fuels in boilers, furnaces, burners, turbines, heaters and incinerators” that the registrant “owns or controls.”<sup>18</sup> “Ownership” and “control” are also touchstones for Scope 2 measurement. The Commission would require Scope 2 reporting “from the generation of purchased or acquired electricity, steam, heating, or cooling that is **consumed by** operations owned or controlled by a registrant.”<sup>19</sup> The Proposal would thus codify GHG Protocol guidance likewise stating: “Scope 2 **only** accounts for the portion of the ... emissions from generating electricity that is **actually consumed by the company.**”<sup>20</sup>

The Roundtable supports the Proposal insofar as it would delineate “operational boundaries” based on sources within a registrant’s “ownership or control.” Emissions from facilities and businesses within “ownership or control” are Scopes 1 and 2 for the registrant. Conversely, emissions from businesses outside “ownership or control” are in the registrant’s Scope 3 “value chain.”

**C. Building owners are not responsible to report on the Scope 3 emissions of their tenants under “organizational” and “operational” boundaries definitions.**

The Proposal’s definitions for “organizational” and “operational” boundaries provide guidelines for CRE owner-registrants to categorize their Scopes 1, 2, and 3 emissions. Under these definitions, a building owner would bear no mandatory Scopes 1 or 2 responsibilities to report emissions attributable to business or residential tenants that pay rent for leased spaces. Rather, from the owner’s perspective, tenant-based emissions are Scope 3 emissions from “downstream leased assets” using the terminology of the GHG Protocol (that the Commission would codify).<sup>21</sup>

Unaffiliated tenants are not part of an owner’s “consolidated” organization.<sup>22</sup> Tenants are also not an owner’s “unconsolidated investment.”<sup>23</sup> Nor do CRE owners control operations in tenant-occupied spaces beyond the terms of contractual lease agreements, and tenants have significant market leverage in the negotiation of those leases. Building owners do not shut a tenant’s lights, turn off the tenant’s computers, determine hours of operation, command workspace densities, or dictate tenant space usages such as electricity-intensive data centers, trading floors, labs, or medical facilities. Furthermore, emissions from the generation of electricity, steam, heating or cooling – measured by a separate meter that monitors a specific tenant’s energy consumption in a particular leased space – are Scope 3 emissions to the CRE owner. Such emissions are Scope 2 **to the tenant** (and not to the owner) because they are created from electricity “consumed **by**” the tenant.<sup>24</sup>

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<sup>18</sup> *Id.* Other Scope 1 examples that the SEC cites include combustion from vehicle fleets owned or controlled by the registrant; and “fugitive emissions” from leaks in equipment, seals, gaskets, etc. within the registrant’s ownership or control. *Id.*

<sup>19</sup> Proposed 17 C.F.R. § 229.1500(q) (emphasis supplied).

<sup>20</sup> GHG Protocol, [A Corporate Accounting and Reporting Standard](#) (revised ed.) App. A at 86 (emphasis supplied).

<sup>21</sup> Proposed 17 C.F.R. § 229.1500(r)(v) (codifying GHG Protocol, [Technical Guidance for Calculating Scope 3 Emissions](#) at 9 (2013)).

<sup>22</sup> See *supra* notes 8-11 and accompanying text.

<sup>23</sup> See *supra* notes 12-14 and accompanying text.

<sup>24</sup> See *supra* notes 19-20 and accompanying text.

An addendum to these comments provides a more detailed Scopes 1, 2, and 3 analysis in the context of the CRE owner-tenant relationship.<sup>25</sup> In short: Tenant-based emissions – such as from metered electricity within a leased space – are a building owner’s Scope 3 emissions from “downstream leased assets.”

**D. Federal government GHG quantification tools should provide the basis for a Scopes 1 and 2 “calculation safe harbor.”**

The Proposal offers a “safe harbor” from liability for Scope 3 reporting.<sup>26</sup> The Commission should also provide a “calculation safe harbor” to shield Scopes 1 and 2 disclosures from both SEC enforcement and private causes of action. The “calculation safe harbor” we recommend should “give peace of mind to good faith actors” and “grant protection from liability”<sup>27</sup> for Scopes 1 and 2 disclosures that are: (1) based on the best available, most recent GHG data sets and quantification tools provided by the United States government; and (2) reasonably quantified by professionals with expertise in emissions calculations. Examples of federal data, factors, and methods that warrant “calculation safe harbor” protection are discussed in an attached addendum.<sup>28</sup>

The Proposed Rule explains, “[i]n addition to setting its organizational and operational boundaries, a registrant would need to select a GHG emissions calculation approach.”<sup>29</sup> Calculating emissions typically involves the “application of published emission factors to the total amount of purchased fuel consumed by a particular source.”<sup>30</sup> The Commission observes that “EPA has published a set of emissions factors” and that “*whatever set* of emission factors a registrant chooses to use, it must identify the emission factors and its source.”<sup>31</sup> Then, “after” deciding to use “emissions factors” a registrant would need to:

[D]etermine what data must be collected and how to conduct the relevant calculations, including whether to use any publicly-available calculation tools. In this regard, *we note* that there are *a number of* publicly-available calculation tools a registrant may elect to utilize in determining its GHG emissions.<sup>32</sup>

The Proposal’s casual reference to EPA’s factors among “whatever set” of others might exist – and its “note” that there are “a number of” publicly-available calculation tools – are too timid. They do not consider the variant and sometimes conflicting tools and standards deployed by state and local governments, and private consultants, which can lead to divergent GHG calculations from the same

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<sup>25</sup> See *infra* Addendum 1, notes 88-99 and accompanying text.

<sup>26</sup> The Proposal’s Scope 3 safe harbor should be improved. See *infra* notes 57-59 and accompanying text.

<sup>27</sup> Allan Horwich, *A Call for the SEC to Adopt More Safe Harbors that Limit the Reach of Rule 10b-5*, 74 *The Business Lawyer* 53 (Winter 2018–2019).

<sup>28</sup> See *infra* Addendum 2, notes 100-117 and accompanying text.

<sup>29</sup> Proposal, 87 Fed. Reg. at 21,385/3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 21,386/1 (emphasis supplied).

<sup>32</sup> *Id.* (emphasis supplied).



assets and sources. Accordingly, The Roundtable urges the Commission should proactively encourage registrants to use GHG quantification resources created by the United States government.

The “calculation safe harbor” we suggest can help standardize how emissions are quantified and assured through the audit process. The Proposal calls upon independent third parties to prepare “attestation reports” that give assurances for Scopes 1 and 2 disclosures.<sup>33</sup> The Commission acknowledges the “fragmentation” among current ESG assurance practices that leads to investor confusion, and that a number of third-party verifiers “may lack GHG emissions expertise.”<sup>34</sup> When underlying calculations are based on federal quantification tools, attestations should not be required to study the precise “figures that are disclosed” or confirm the validity of “key assumptions, methodologies, and data sources the registrant used to arrive at those figures.”<sup>35</sup> The legitimacy of federal-level GHG resources should be *presumed*.

A “safe harbor” for federal calculation tools would also foster comparability in how companies report on GHGs across government programs – at the federal, state, and municipal levels (*e.g.*, local “building performance” laws that limit energy use and emissions from CRE assets).<sup>36</sup> As The Roundtable explained to the Federal Energy Regulatory Commission (FERC) in the carbon pricing context, federal agencies should act within their delegated powers to “help create homogeneous national standards” and “check the problem of hodge-podge regulations” for GHG calculations and metrics.<sup>37</sup>

Quantifying emissions can be more art than science, and no data set or calculation methodology – including federal resources – is perfect. For example, EPA describes its Emissions & Generation Resources Integrated Database (“eGRID”) as the “preeminent source of air emission data for the electric power sector” in the United States.<sup>38</sup> eGRID provides EPA’s factors to convert electricity to GHG emissions – a key tool for Scope 2 reporting.<sup>39</sup> However, eGRID’s factors are based on two-year old data by the time EPA publishes them. That is, the most recent eGRID factors published in January **2022** are based on data collected by EPA in **2020** from electric power plants.<sup>40</sup> A registrant who calculates Scope 2 emissions under the GHG Protocol’s “location-based”<sup>41</sup> method, using the most current eGRID factors, should benefit from The Roundtable’s suggested safe harbor. Another registrant might calculate Scope 2 emissions under the Protocol’s “market-based” approach and use an electricity factor from a *local* grid operator.<sup>42</sup> However, the registrant making reasonable calculations using EPA’s factors should

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<sup>33</sup> *Id.* at 21,392 – 21,405.

<sup>34</sup> *Id.* at 21,394/3.

<sup>35</sup> *Id.* at 21,393/2.

<sup>36</sup> See, *e.g.*, EPA, [Building Performance Standard: Overview for State and Local Decision Makers](#) (Feb. 2021).

<sup>37</sup> [Comments of The Real Estate Roundtable](#) to FERC, *Carbon Pricing in Organized Wholesale Markets*, FERC Docket No. AD20-14-000 (Nov. 10, 2020).

<sup>38</sup> EPA, [eGRID Questions and Answers](#), Question (1), “What is eGRID?”

<sup>39</sup> eGRID electricity sub-region factors available at <https://www.epa.gov/egrid/summary-data>.

<sup>40</sup> *Id.*

<sup>41</sup> The World Resources Institute discusses “location-based” and “market-based” Scope 2 calculation methods in its [GHG Protocol Scope 2 Guidance \(Executive Summary\)](#) at 4 (2015).

<sup>42</sup> Independent System Operators or Regional Transmission Organizations (ISOs/RTOs) are local grid operators created by the Federal Energy Regulatory Commission (FERC). See FERC website, [RTOs and ISOs](#). An ISO/RTO might provide a local grid conversion factor that reflects electricity purchased by a company (through contract or other legal instrument) to support its “market-based” Scope 2 calculation.



not be second-guessed by the Commission or investors. Scope 2 disclosures, based on federal eGRID data, should be presumed valid.

As the Commission attempts to create a first-ever GHG disclosure rule with assurances required “outside of the financial statements,” it should foster widespread reliance on the U.S. government’s resources to enhance the “consistency, comparability, and reliability of such disclosures.”<sup>43</sup> The Roundtable advises the Commission to create an “emissions calculation safe harbor” premised on a registrant’s reasonable use of climate quantification tools developed with the resources, backing, and expertise of EPA and other federal agencies.

## **II. The Proposal’s directive that registrants should report on Scope 3 emissions “if material” is a back-door mandate and should be dropped.**

The Proposal directs registrants to report on their Scope 3 emissions if they have established a voluntary Scope 3 reduction target – or, “*only if those emissions are material.*”<sup>44</sup> If a company has established a voluntary target then it should explain how it calculates its indirect emissions. However, the “if material” proviso would function as a Scope 3 reporting *mandate*. It should be abandoned.

The EPA recognizes that, under the GHG Protocol, “Scope 3 emissions quantification is *not* required.”<sup>45</sup> The Hong Kong Stock Exchange likewise provides that its issuers have no obligation to report on Scope 3.<sup>46</sup> However, under the Proposal, a company must first calculate all of its indirect emissions to ascertain whether its Scope 3 impacts cross the “materiality” reporting threshold. The Commission states: “When assessing the materiality of Scope 3 emissions, registrants should consider whether Scope 3 emissions make up a relatively significant portion of their overall GHG emissions.”<sup>47</sup> In other words, the “if material” qualifier puts in motion a regulation that forces companies – at the outset – to quantify all Scope 3 emissions spanning its “value chain.”

The Commission further states:

While we are not proposing a quantitative threshold for determining materiality, we note that some companies rely on, or support reliance on, a quantitative threshold such as **40 percent** when assessing the materiality of Scope 3 emissions.<sup>48</sup>

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<sup>43</sup> Proposal, 87 Fed. Reg. at 21,393/2.

<sup>44</sup> *Id.* at 21,377/3; Proposed 17 C.F.R. § 229.1504(c)(1) (emphasis supplied).

<sup>45</sup> US-EPA, [Scope 3 Inventory Guidance](#) (emphasis supplied).

<sup>46</sup> Hong Kong Stock Exchange, “How to Prepare an ESG Report,” [Appendix 2, Reporting Guidance on Environmental KPIs](#) (“What to Report” section: reporting on indirect Scope 3 emissions is “optional” and the issuer “*may* choose to quantify and report other indirect GHG emissions”) (last updated March 25, 2022).

<sup>47</sup> Proposal, 87 Fed. Reg. at 21,3798/1.

<sup>48</sup> *Id.*





Recent TCFD guidance<sup>49</sup> explains that Scope 3 estimates in nearly all industries easily surpass a putative 40% “materiality” threshold. For example, downstream “value chain” emissions account for about **90%** of all real estate emissions.<sup>50</sup> TCFD’s guidance further states that upstream “scope 3 emissions are on average 11.4 times higher than operational emissions” by sector reporting through CDP.<sup>51</sup> The UK Green Building Council similarly advises: “Scope 3 emissions typically account for **over 85%** of a CRE company’s entire footprint.”<sup>52</sup> As the Commission recognizes, electricity consumed by a business “would likely constitute a large percentage of [its] ... emissions.”<sup>53</sup> In the real estate sector, that means all electricity consumed by a commercial tenant in a leased office space covered by an energy meter would qualify as a building owner’s Scope 3 emissions from downstream “leased assets”<sup>54</sup> – and usually outnumber the owner’s Scopes 1 and 2 emissions.

The Proposal repeatedly acknowledges that Scope 3 quantification is a difficult, theoretical, and costly exercise:

Depending on the size and complexity of a company and its value chain, the task of calculating Scope 3 emissions could be relatively more burdensome and expensive than calculating Scope 1 and Scope 2 emissions. ***In particular, it may be difficult to obtain activity data from suppliers, customers, and other third parties in a registrant’s value chain, or to verify the accuracy of that information compared to disclosures of Scope 1 and Scope 2 emissions data,*** which are more readily available to a registrant.”<sup>55</sup>

The Commission should not mandate – in text or effect – “value chain” reporting based on guesses, estimates, and access to data controlled by third parties.

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<sup>49</sup> TCFD, [Guidance on Metrics, Targets, and Transition Plans \(2021\)](#), at p. 56, Figure A1-1, “Importance of Scope 3 GHG Emissions in Certain Sectors” (noting substantial Scope 3 emissions that exceed Scopes 1 and 2 in sectors such as banks, insurance, real estate, capital goods, automobiles, consumer durables, technology, diversified financials, retailing, telecommunications, software, consumer services, transportation, pharmaceuticals, media, and food and beverage).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 56, Figure A1-2, “Upstream GHG Emissions by CDP Sector.”

<sup>52</sup> See UKGBC, [Guide to Scope 3 Reporting in Commercial Real Estate](#) at 32 (July 2019) (emphasis supplied).

<sup>53</sup> 87 Fed. Reg. at 21,385/3.

<sup>54</sup> Proposed 17 C.F.R. § 229.1500(r)(2)(v) (codifying GHG Protocol, Scope 3, Category 13). An addendum to these comments explains how CRE owners would categorize as Scope 3 emissions from their tenants’ electricity consumption in a metered leased space. See *infra* Addendum 1, notes 92-99 and accompanying text.

<sup>55</sup> Proposal, 87 Fed. Reg. at 21,396/1. See also *id.* at 21,377/1 (“We recognize that the methodologies pertaining to the measurement of GHG emissions, particularly Scope 3 emissions, are evolving”); *id.* at 21,377/2 (“Unlike Scopes 1 and 2 emissions, Scope 3 emissions typically result from the activities of third parties in a registrant’s value chain and thus collecting the appropriate data and calculating these emissions would potentially be more difficult than for Scopes 1 and 2 emissions”); *id.* at 21,381/1 (“We acknowledge that a registrant’s material Scope 3 emissions is a relatively new type of metric, based largely on third-party data, that we have not previously required”); *id.* at 21,390/1 (“We recognize that the calculation of Scope 3 emissions may pose difficulties compared to Scopes 1 and 2 emissions ... It may be difficult to obtain activity data from suppliers and other third parties in a registrant’s value chain, or to verify the accuracy of that information. It may also be necessary to rely heavily on estimates and assumptions to generate Scope 3 emissions data”).



Companies that set for themselves Scope 3 targets should quantify and explain how they intend to reach those goals (as called for by the Proposal). Other companies might also opt to report their “value chain” emissions because they typically have minimal Scopes 1 and 2 emissions. In these cases, registrants should get the benefit of Scope 3 “accommodations” such as no need for third-party attestations and delayed reporting for at least two years after Scopes 1 and 2 disclosures.<sup>56</sup> The Roundtable also supports a safe harbor for any Scope 3 reporting, but the Proposal’s version needs improvement:

- A Scope 3 safe harbor should explicitly apply to both SEC enforcement and private causes of action.
- Furthermore, the Commission should plainly and affirmatively state that a registrant is protected from liability if Scope 3 disclosures have a reasonable basis of support and are made in good faith.<sup>57</sup>
- The safe harbor should also apply to a registrant’s reasonable decision to omit “value chain” estimates.<sup>58</sup> No liability should attach to a registrant’s decision *not* to report on GHGs from sources it neither owns nor controls, that fall outside of its “organizational” and “operational” boundaries.<sup>59</sup>

To summarize, the Proposal sets in motion a Scope 3 reporting mandate that is regulatory in effect. We urge the Commission to eliminate the directive to report on “value chain” emissions “if material.”

### **III. Scopes 1 and 2 disclosures should occur after a registrant possesses a full 12 months of actual emissions data for the prior fiscal year.**

Form 10-Ks are due two months after the close of a large accelerated filer’s fiscal year.<sup>60</sup> However, at that point a registrant usually does not have all of the “actual, determined”<sup>61</sup> emissions data from its fourth quarter to support Scopes 1 and 2 reporting. The Commission would resolve this problem by proposing a registrant can use a “reasonable estimate” of 4Q emissions for a 10-K filing, together with “actual” emissions data for the first three quarters. Later, in a subsequent filing, the registrant

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<sup>56</sup> *Id.* at 21,390/3.

<sup>57</sup> Proposed 17 C.F.R. § 229.1504(f)(1) proffers a “safe harbor” in the negative: a Scope 3 reporting “statement ... is deemed not to be a fraudulent statement ... unless it is shown that such statement was made or reaffirmed without a reasonable basis or was disclosed other than in good faith.” The Roundtable urges the SEC to state the safe harbor more clearly and affirmatively: Scope 3 disclosures should be protected if they have a reasonable basis of support and are made in good faith.

<sup>58</sup> Proposed 17 C.F.R. § 229.1504(f)(3) defines “fraudulent statement” to include “an omission to state a material fact necessary to make a statement not misleading ....”

<sup>59</sup> *Supra* notes 8-20 and accompanying text.

<sup>60</sup> “SEC Deadlines” at [securex.com](https://www.securex.com).

<sup>61</sup> “Actual, determined” data is the undefined term the Commission uses, as distinguished from “estimates.” See *supra* note 6.

would be obliged to disclose “material differences” between the prior “estimate” and “actual, determined” data after it becomes available.<sup>62</sup>

The Commission essentially proposes two separate emissions disclosures that will add more weight to compliance burdens. Diligent registrants will always be wary about providing “estimates” – especially in formal filings that are not simply “furnished”<sup>63</sup> – when “actual, determined” figures are available a few months later. Companies will err on the side of re-reporting – and re-verifying – “filed” GHG calculations.

The investor community would not benefit from such a two-phase reporting regime. The Roundtable appreciates the importance of the annual 10-K filing. However, giving investors two sets of GHG calculations, with one based heavily on estimates, is a recipe for obfuscation and inconsistency. Any final rule should only require registrants to report, disclose – and seek third-party attestations for – Scopes 1 and 2 calculations *once* during a fiscal year. Such disclosures should be made after a company has all of the “actual, determined” data it needs to avoid reliance on estimates, with enough time to verify those emissions.

This is the approach taken by the Carbon Disclosure Project (CDP). Its 2022 “Climate Change Questionnaire” allows a company to identify its own “start and end date of the year for which [it] is reporting data.”<sup>64</sup> Corporate respondents to CDP also have the discretion to identify whether they are reporting on emissions data for up to three “past reporting years.”<sup>65</sup> July 27, 2022 marks this year’s deadline for submitting responses so a company may be eligible for CDP scoring.<sup>66</sup> Thus, CDP gives companies sufficient time to report emissions based on actual data that is verified. Providing ample time for data assurance is particularly critical in the CRE context, so building owners can supply business tenants with the information they need to conduct their own reporting and control their own emissions from leased space operations.<sup>67</sup>

SEC guidance released last September advises that registrants should strive for consistency between formal filings and other “social responsibility” reports.<sup>68</sup> That objective can be furthered if the Commission only requires a single annual filing for Scopes 1 and 2 emissions – based on “actual, determined” data – which a registrant can multi-purpose for CDP and other voluntary programs.

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<sup>62</sup> Proposal, 87 Fed. Reg. at 21,387/2; Proposed 17 C.F.R. § 229.1504(e)(4)(i).

<sup>63</sup> *Id.* at 21,449/3.

<sup>64</sup> Question C0.2 (at p. 11) of the [CDP Climate Change 2022 Questionnaire](#).

<sup>65</sup> *Id.*

<sup>66</sup> CDP FAQs, “[What is the timeline for responding?](#)”

<sup>67</sup> The filing timeline of the Global Real Estate Sustainability Benchmark (GRESB) also merits consideration. GRESB is a leading voluntary reporting platform in the CRE industry that “collect[s], validates[s], score[s], and benchmark[s] ESG data.” See <https://gresb.com/nl-en/>. The annual GRESB reporting process started this year when its “Assessment Portal” opened on April 1, 2022, with a submission deadline of July 1, “providing participants with a three-month window to complete the Assessment July through September will mark a “Validation Period,” followed by a “Review Period” that opens in September, allowing companies to amend data and correct any previous inputs from the prior spring. See GRESB [2022 Real Estate Reference Guide](#); GRESB FAQs, “[What is the Review Period?](#)”

<sup>68</sup> SEC, Division of Corporation Finance, [Sample Letter to Companies Regarding Climate Change Disclosures](#) (Sept. 2021).



**IV. The Commission should abandon its prescriptive “one percent” threshold for disclosing financial metrics for “severe weather” and “transition” risks under Regulation S-X. Instead, it should follow its own recent Regulation S-K reforms for “principles-based” descriptions in Form 10-K’s MD&A.**

The Proposal would require disclosures of certain “financial impact metrics” through Regulation S-X. These would include how “severe weather events and other national conditions”<sup>69</sup> and “transition risks”<sup>70</sup> impact each individual line item in a financial statement.<sup>71</sup> The Commission further proposes a prescriptive one-size-fits-all rule for financial impacts: disclosures would be required if the risk amounts to at least “one percent of the total line item for the relevant fiscal year.”<sup>72</sup> “Expenditure metrics”<sup>73</sup> for “transition activities” and to mitigate climate impacts would be subject to the same prescriptive threshold; if the expenditure is one percent or greater of “aggregate” amounts expensed or capitalized, it must be reported.<sup>74</sup>

The Proposal’s “severe weather” and “transition” risk disclosures diverge from recent, analogous Regulation S-K amendments. Revisions that became effective 15 months ago address “known trends or uncertainties” to be described in Form 10-K’s “Management’s Discussion and Analysis of Financial Condition and Results of Operations” (“MD&A”). Floods, droughts and similar events are Regulation S-K “known trends or uncertainties.” The same principles-based approach for MD&A reforms should apply to any financial disclosures for climate-related risks and related expenditures.

The Regulation S-K amendments provide that MD&A must “focus specifically on *material events and uncertainties* known to management that are *reasonably likely*” to impact a registrant’s operations or financial conditions.<sup>75</sup> MD&A’s “reasonably likely” threshold is not activated where the “fruition” of a known event or uncertainty “may be remote”:

*[N]or does it set a bright-line percentage threshold by which disclosure is triggered.*

Rather, this threshold requires a *thoughtful analysis* that applies an objective assessment

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<sup>69</sup> E.g., flooding, drought, wildfires, extreme temperatures, and sea level rise. Proposal, 87 Fed. Reg. at 21,365/3; Proposed 17 C.F.R. § 210.14-02(c).

<sup>70</sup> E.g., impacts on a registrant’s business “prompted by” regulatory, technology, reputational and other “factors” arising from the “transition to a lower carbon economy.” Proposal, 87 Fed. Reg. at 21,366/1; Proposed 17 C.F.R. § 210.14-02(d).

<sup>71</sup> E.g., revenue, cash flow, property sales, carrying costs, debt, and contingent liabilities. Proposal, 87 Fed. Reg. at 21,366 fn. 349.

<sup>72</sup> *Id.* at 21,366/2.

<sup>73</sup> Disclosure would be required for amounts expensed against income or capitalized as a depreciable asset to address “positive and negative climate-related events” such as: flooding or droughts; relocation/closure of at-risk assets; resiliency/mitigation measure; and “climate-related opportunities” to reduce GHG emissions (such as investments in energy efficiency and purchase of renewable energy credits). *Id.* at 21,369-70; Proposed 17 C.F.R. §§ 210.14-02(e), (f), (j).

<sup>74</sup> Proposal, 87 Fed. Reg. at 21,370/1-2.

<sup>75</sup> Item 303, *Management’s discussion and analysis of financial condition and results of operations*, 17 C.F.R. § 229.303(a) (emphasis supplied). Regulation S-K revisions further explain that MD&A must “[d]escribe any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on ... revenues of income from continuing operations.” *Id.*, § 229.303(B)(2)(ii).

of the likelihood that an event will occur balanced with a materiality analysis regarding the need for disclosure regarding such event.<sup>76</sup>

The Proposal’s prescriptive “one percent” threshold would not elicit “thoughtful analysis.” It would deprive fair consideration of whether the particular natural event is likely to occur balanced against whether, if it did occur, it would pose a material impact on financial conditions. As opposed to disclosing financial metrics in Regulation S-X, management should address floods, droughts, etc. through MD&A reporting that is “tailored to its unique business, workforce and facts and circumstances.”<sup>77</sup> The “exact measures” of climate-related financial risks are “evolv[ing] over time” and prescriptive bright-line thresholds like the “one percent” rule will not lead to meaningful investor disclosures “given the varied ... nature” of GHG impacts.<sup>78</sup>

Regulation S-K reforms are intended “to modernize, simplify and enhance disclosures for investors while reducing compliance burdens for registrants.”<sup>79</sup> The “one percent” Proposal would not achieve those purposes. Why is “one” percent tantamount to “material” – and not five, 10, 20, or more? The prescriptive threshold certainly does not reduce compliance burdens. Registrants would be required to theorize whether the risk of a wildfire, flood, etc., would have some specific percentage impact on revenue – and engage in similar conjecture for each individual line item in an audited financial statement.

Moreover, the Proposal itself suggests even further – and we submit, unnecessary – changes to Regulation S-K, on top of last year’s MD&A amendments. A new, separately captioned “Climate-Related Disclosure” section in applicable filings would require a number of prescriptive reports.<sup>80</sup> For example, detailed disclosures regarding “Strategy, business model and outlook”<sup>81</sup> would mandate categorization of “physical risks,” “transition risks,” and their short, medium, and long term impacts on the registrant’s business and financial statements.<sup>82</sup> “Indirect impacts” on the registrant’s “value chains” would also require description.<sup>83</sup> The new “Climate-Related Disclosure” section would also include “narrative discussions” regarding how any risks from floods, droughts, etc., “have affected or are likely

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<sup>76</sup> SEC, Final Rule, *Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information*, 86 Fed. Reg. 2080, 2093/2-3 (Jan. 11, 2021) (hereafter, “MD&A Amendments”).

<sup>77</sup> SEC Release No. 33-10825, Modernization of Regulation S-K Items 101, 103, and 105, at p. 50 (Aug. 26, 2020) available at <https://www.sec.gov/rules/final/2020/33-10825.pdf> (eschewing prescriptive reporting in the context of human capital disclosures).

<sup>78</sup> *Id.*

<sup>79</sup> MD&A Amendments, *supra* note 76, 86 Fed. Reg. at 2087/2.

<sup>80</sup> Proposed 17 C.F.R. Subpart 229.1500.

<sup>81</sup> Proposed 17 C.F.R. § 229.1502 (Item 1502), “Strategy, business model, and outlook.”

<sup>82</sup> Proposed 17 C.F.R. § 229.1502(a). Among other things, registrants would need to disclose: the location of assets by zip code that are subject to immediate and longer time “physical risks”; square meters of assets located in areas subject to potential flooding; the “book value” of assets located in regions of drought and their percentage of “total water usage” in those regions; and details on how a registrant might develop an internal carbon price and how that price might change over time. Proposed 17 C.F.R. § 229.1500(k); § 229.1502(a)(1)(i)(A), (B); § 229.1502(d).

<sup>83</sup> Proposed 17 C.F.R. § 229.1502(b).

to affect” the registrant’s financials,<sup>84</sup> as well as descriptions of the registrant’s “risk management” process.<sup>85</sup>

This amount of reporting is excessive and contravenes last year’s policies to streamline and modernize MD&A disclosures. The Proposal’s further changes to Regulation S-K should not be adopted for the same reasons that the Regulation S-X “one percent” rule should be abandoned: extreme weather events and risks should be treated as “known trends or uncertainties” and assessed by management accordingly. The Commission’s very own reasoning to justify MD&A reforms supports our recommendation:

Given the historical and continued importance of materiality in MD&A, we are not ... adopting modifications to be more explicit or prescriptive. Rather, we continue to believe that MD&A’s materiality-focused and *principles-based approach* facilitates disclosure of complex and often rapidly evolving areas, without the need to continuously amend the text of the rule to update or impose additional prescriptive requirements.<sup>86</sup>

## V. Conclusion

- *Organizational and Operational Boundaries*

Entities “consolidated” in a Form 10-K financial statement should be part of a registrant’s “organizational boundaries,” as the Commission proposes. However, a registrant should not be required to report on emissions from “*unconsolidated investments*” that it does not operationally control as part of any Scopes 1 and 2 mandate. These should be reported, if at all, as emissions from “investments of a registrant” under the Scope 3 definition at Proposed 17 C.F.R. § 229.1500(r)(2)(vii).

Applying the proposed “boundaries” definitions to the CRE context, no building owner should be mandated to report on emissions from electricity, steam, heating, or cooling “consumed *by*” a tenant and measured by a meter for leased space operations. Such tenant-based emissions would be an owner’s downstream Scope 3 emissions from “leased assets” within Proposed 17 C.F.R. § 229.1500(r)(2)(v).

- *“Calculation Safe Harbor” for Scopes 1 and 2 Disclosures*

The SEC should foster uniform national standards to quantify GHG impacts and help normalize the third-party assurance process. Accordingly, the Commission should provide a “safe harbor” from enforcement actions and private suits for Scopes 1 and 2 disclosures that are: (1) based on the best, available, and most recent data, factors, and methods from U.S. EPA and other federal agencies; and (2) reasonably quantified by professionals with expertise in GHG calculations.

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<sup>84</sup> Proposed 17 C.F.R. § 229.1502(d).

<sup>85</sup> Proposed 17 C.F.R. § 229.1503 (Item 1503), “Risk management.”

<sup>86</sup> MD&A Amendments, *supra* note 76, 86 Fed. Reg. at 2089/3.





Examples of the types of U.S. government calculation tools that merit “safe harbor” protection are provided in an attached addendum.<sup>87</sup>

- ***Abandon the Scope 3 “Back-Door” Reporting Mandate and Shore-Up the Scope 3 “Safe Harbor”***

The amount of Scope 3 emissions for most companies in most industries will be substantial, if not greater than Scopes 1 and 2 emissions. The proposed rule’s directive that registrants should report on Scope 3 emissions “only if material” thus functions as a back-door mandate and should be dropped. No registrant should be effectively required to report on indirect emissions beyond its organizational or operational boundaries.

A registrant that sets for itself a Scope 3 reduction target should receive a “safe harbor” for its disclosures, but the one in the Proposal is inadequate. The Scope 3 “safe harbor” should shield against liability from both Commission enforcement and private causes of action. It should affirmatively apply to Scope 3 disclosures that have a reasonable basis of support, and also protect a registrant’s reasonable decision to omit indirect “value chain” emissions estimates.

- ***Require Emissions Filings Once, After All “Actual” Data is Collected***

Registrants will be averse to formally “file” emissions calculations based heavily on “estimates.” They typically do not have all of the “actual, determined” data for the prior fiscal year to support calculations at the time they file Form 10-K. Rather than encouraging another, corrected filing after the 10-K, the Commission should only require emissions disclosures once – after a registrant possesses all of the “actual” data it needs, and allowing for sufficient time to obtain third-party assurances.

- ***Abandon the Prescriptive “One Percent” Rule for Reporting on Climate-Related Financial Risks in Favor of “Principles-Based” MD&A Reporting***

The Commission should abandon its prescriptive “one percent” threshold under Regulation S-X for disclosing precise metrics for “physical” and “transition” risks (and associated expenditures) on every line item in a financial statement. Instead, droughts, wildfires, storms, rising sea levels, and related events should be discussed as “known trends or uncertainties” under recent Regulation S-K amendments. Such risks are better suited for “principles-based” descriptions in MD&A.

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The Real Estate Roundtable appreciates the opportunity to present our positions. For more information regarding these comments, please contact Duane J. Desiderio ([ddesiderio@rer.org](mailto:ddesiderio@rer.org)), Senior Vice President and Counsel.

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<sup>87</sup> *Infra* Addendum 2, notes 101-118 and accompanying text.





**ADDENDUM 1**  
**Emissions “Scoping” Categories**  
**for CRE Owners In Relation to Their Tenants**

- ***Scope 1 for the CRE Owner***
  - Fuels combusted to operate stationary equipment owned or controlled by a CRE registrant – such as central system boilers or furnaces that serve an entire building – generate Scope 1 “direct” emissions for that registrant.<sup>88</sup>
  - If the CRE owner-registrant operates a fleet of vehicles as part of its real estate business, then those vehicles’ emissions are Scope 1 for that registrant.<sup>89</sup>
  - A CRE registrant that uses refrigerants for building air conditioning would account for associated emissions (such as HVAC system leaks) as part of its Scope 1 calculation.<sup>90</sup>
  
- ***Scope 2 for the CRE Owner***
  - A CRE owner controls operations in the “common areas” of a building accessible to all tenants and guests – for example, lobbies, stairwells, elevators, garages, etc. The building owner generally pays the utility directly for electricity consumed within “common areas.” Emissions from electricity, steam, heating, or cooling (collectively hereafter, “electricity”) procured by the CRE owner-registrant to operate “common areas” are Scope 2 emissions for that registrant.
  - Outside of “common areas,” sometimes neither the CRE owner – nor its tenants – know specifically how much electricity any given tenant consumes in any particular leased space. The building might be “master metered” and provide a single reading for all electricity, etc. consumed within the structure. In these cases, the CRE owner generally pays the entire utility bill and then charges tenants a *pro rata* share of “electric rent” that correlates to the amount of square feet they lease. In such cases – where no party knows exactly how much electricity tenants use to operate within any specific leased space – the CRE owner-registrant should categorize as Scope 2 all of the electricity it procures for a building.

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<sup>88</sup> Proposal, 87 Fed. Reg. at 21,386/2 (“For example, when determining its Scope 1 emissions ... a registrant might add up the amount of natural gas consumed by furnaces and other stationary equipment during its most recently completed fiscal year and then apply the CO<sub>2</sub> emissions factor for natural gas to that total amount to derive the amount of GHG emissions expressed in CO<sub>2</sub>e.”)

<sup>89</sup> *Id.* at 21,385/2 (Direct emissions from “the combustion of fuels in automobiles ... and other vessels” that the registrant “owns or controls”).

<sup>90</sup> *Id.* (“[f]ugitive emissions sources” such as equipment leaks); *id.* at 21,385/2 (a “registrant that uses refrigerants” should reference appropriate emissions factors for Scope 1 calculations).



- In certain cities, building owners might purchase “district” steam, hot water, or chilled water from a utility company for an entire building’s common areas plus tenant spaces.<sup>91</sup> Where district energy provides heating or cooling from central off-site plants delivered to multiple buildings, specific consumption of that energy is not usually attributed to any particular user within the building. In these cases, the owner should categorize as Scope 2 the district energy it procures for the entire asset.
- **Scope 3 for the CRE Owner – Tenant-Based Emissions**
  - Whenever a leased space is separately metered and measures the specific amount of electricity that runs the tenant’s operations, emissions from such metered-space electricity consumption are Scope 3 emissions to the building owner.
    - ✓ A tenant that *pays* its own electricity bill, where energy consumption is measured for that specific leased space by a direct meter to the utility, should categorize associated emissions as *its own* Scope 2. Tenant “direct meter” emissions are Scope 3 for a CRE owner-registrant.
    - ✓ A growing number of leased spaces are separately “sub-metered.” Sub-metering does not necessarily mean the tenant pays the bill directly to the utility, but it provides the tenant with data on the specific amount of electricity consumed *solely by that tenant*. Even if the CRE owner pays the utility bill in those cases, the landlord is only serving as a “pass-through” and the tenant is ultimately charged “consumption rent” for the specific amount of electricity that it uses (as measured by the leased space sub-meter). Whenever a sub-meter gives the tenant visibility into the specific amount of electricity *it* consumes for the day-to-day operations *it* controls, then corollary emissions should be Scope 2 for the tenant – and Scope 3 for the CRE owner, even if the owner buys the electricity.
    - ✓ The GHG Protocol’s “Corporate Accounting Standard” clarifies that “Scope 2 *only* accounts for the portion of the ... emissions from generating electricity that is *actually consumed by the company*.”<sup>92</sup> The Commission’s proposed Scope 2 definition likewise follows this direction:

*Scope 2 emissions* are indirect GHG emissions from the generation of purchased or acquired electricity, steam, heat or cooling that is consumed *by* operations owned or controlled by a registrant.<sup>93</sup>
  - CRE owners frequently do not even have access to data on how much electricity their tenants use. This information is proprietary to tenants, who are generally under no legal obligation to

<sup>91</sup> See International District Energy Association, <https://www.districtenergy.org/topics/district-heating>.

<sup>92</sup> GHG Protocol, *A Corporate Accounting and Reporting Standard* (revised ed.) App. A at 86.

<sup>93</sup> Proposed 17 C.F.R. § 229.1500(q) (Proposal, 87 Fed. Reg. at 21,466/3).



disclose their leased space energy usage to the owner (unless the lessee agrees to report that information under the terms of a “green lease”).<sup>94</sup>

- ✓ Depending on local laws and regulations from municipalities and public service commissions,<sup>95</sup> sometimes a utility might provide “whole-building” data to the building’s owner for electricity used throughout the structure; however, this is nowhere near a universal practice in the U.S utility sector. Owners might also access whole-building consumption data (for electricity, gas, water) through an industry-led effort, the “Green Button” initiative.<sup>96</sup> In any event, where electricity data is available, it is typically *aggregated* across all individual meters throughout a building – and it is also *anonymized* to safeguard tenants’ privacy.
- ✓ The aggregated, anonymized data does not provide a building owner with granular information on energy consumed by any specific tenant in a particular leased space. Where the CRE owner receives aggregated, anonymized whole-building electricity data from the utility it may categorize associated emissions as Scope 3.
- The UK Green Building Council (UKGBC)<sup>97</sup> has developed CRE-specific guidance to help building owners implement Scope 3 reporting in alignment with the GHG Protocol.<sup>98</sup> The UKGBC explains that emissions from “downstream leased assets” for a “building owner, operator or manager ... relate[ ] to any tenant energy use in leased spaces.”<sup>99</sup>

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<sup>94</sup> According to the U.S. Department of Energy (US-DOE), “[t]here is currently little widely accepted green ... leasing language, and no simple blueprint for leasing agents tasked with bridging the landlord-tenant divide on sustainability.” See US-DOE, [Better Buildings Initiative, “Green Lease Leaders”](#) program. To earn voluntary recognition from US-DOE as a “Green Lease Leader,” CRE owners are encouraged to negotiate clauses in leasing contracts that ask their tenants to share leased-space energy usage information. See “Request Annual Tenant Energy Disclosure,” Credit 9 of US-DOE’s Green Lease Leaders, [Reference Guide for Landlords](#).

<sup>95</sup> The U.S. Environmental Protection Agency (US-EPA) keeps tracks of U.S. utility companies that provide aggregated, anonymized “whole-building” energy data to CRE building owners. See US-EPA, [Utilities Providing Energy Data for Benchmarking in ENERGY STAR Portfolio Manager](#) (Aug. 2018).

<sup>96</sup> See <https://www.greenbuttondata.org/index.html>.

<sup>97</sup> [www.ukgbc.org](http://www.ukgbc.org)

<sup>98</sup> See UKGBC, [Guide to Scope 3 Reporting in Commercial Real Estate](#) (July 2019).

<sup>99</sup> *Id.* at 32 (emphasis supplied).

## ADDENDUM 2

### Examples of Federal GHG Emissions Data and Tools That Should Benefit from a “Calculation Safe Harbor” for SEC Reporting

- **US-EPA’s Emissions Factors:** US-EPA’s Center for Corporate Climate Leadership has created a “GHG Emissions Factor Hub”<sup>100</sup> as part of its “comprehensive resource[s] to help organizations measure and manage GHG emissions.”<sup>101</sup> The Hub publishes EPA’s standard factors for Scopes 1 and 2 calculations for combustion of various fuels from stationary sources (such as boilers or furnaces)<sup>102</sup>; cars, construction equipment, and other mobile sources<sup>103</sup>; and steam and heat.<sup>104</sup> Furthermore, the Hub’s factors for “electricity” adopt the most recent factors published by EPA’s Emissions & Generation Resource Integrated Database (eGRID), which consider the varying fuel mixes that power the electric grid in regions across the U.S.<sup>105</sup> (Notably, EPA’s factors also support calculations for certain Scope 3 categories.<sup>106</sup>) The Commission acknowledges that “the GHG Protocol’s own set of GHG emission calculation tools are based in part on EPA’s emission factors.”<sup>107</sup> National uniformity in GHG quantification would accelerate if the SEC endorsed EPA’s factors through a “calculation safe harbor.”
- **US-EPA’s ENERGY STAR tools:** Over 25% of U.S. commercial floor space uses EPA’s “Portfolio Manager” tool to measure and track energy use (as well as water use and waste).<sup>108</sup> In addition, 34 local governments and three states “rely on EPA’s ENERGY STAR Portfolio Manager for their energy benchmarking” reporting and disclosure policies.<sup>109</sup> Moreover, ENERGY STAR’s “Building Emissions Calculator” allows CRE owners to leverage their energy consumption data submitted to Portfolio Manager to “estimate ... building’s GHG emissions, support GHG emissions inventories,” and assist with compliance with local laws that cap emissions on buildings.<sup>110</sup> CRE owners registered with the Commission should benefit from “safe harbor” assurance if they quantify emissions using ENERGY STAR tools.

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<sup>100</sup> See [Emission Factors for Greenhouse Gas Inventories \(epa.gov\)](https://www.epa.gov/greenhouse-gas-inventories)

<sup>101</sup> See [https://www.epa.gov/sites/default/files/2015-08/documents/center\\_one\\_pager\\_revised\\_7-2015.pdf](https://www.epa.gov/sites/default/files/2015-08/documents/center_one_pager_revised_7-2015.pdf)

<sup>102</sup> *Id.*, Table 1.

<sup>103</sup> *Id.*, Tables 2-5.

<sup>104</sup> *Id.*, Table 7.

<sup>105</sup> *Id.*, Table 6. Specifically, the emissions factors for electricity vary by region’s delineated by EPA’s Emissions & Generation Resource Integrated Database (eGRID), the best “comprehensive source of data ... on the environmental characteristics of almost all electric power generated in the United States.” See <https://www.epa.gov/eGRID>.

<sup>106</sup> *Id.*, Tables 8-10.

<sup>107</sup> Proposal, 87 Fed. Reg. at 21,386/1.

<sup>108</sup> See US-EPA, ENERGY STAR Facts and Stats, “ENERGY STAR in the Commercial Buildings Market,” available at <https://www.energystar.gov/buildings/about-us/facts-and-stats>.

<sup>109</sup> *Id.*

<sup>110</sup> See [https://www.energystar.gov/buildings/resources/topic/portfolio\\_manager\\_building\\_emissions\\_calculator](https://www.energystar.gov/buildings/resources/topic/portfolio_manager_building_emissions_calculator).



- **Calculations that follow US-EPA fugitive gas emissions guidance:** EPA’s Center for Corporate Climate Leadership provides methods to measure Scope 1 “direct fugitive emissions” from refrigeration and air conditioning.<sup>111</sup> The fugitive emissions guidance “does not necessarily require a rigorous quantification of all sources, but at a minimum, an estimate based on available data . . . .”<sup>112</sup> For example, this guidance recommends that one method organizations might use to calculate relevant Scope 1 emissions is based on records of refrigerant purchases obtained from contractors that service HVAC equipment.<sup>113</sup> Third-party assurers should not have to assess the underlying validity of a registrant’s methodology for measuring refrigerant emissions if it deploys EPA’s approach.
- **Commercial Building Energy Consumption Survey (CBECS) data:** CBECS is a program of the U.S. Energy Information Administration (US-EIA). It is the federal government’s national random-sample data set regarding energy consumption and other characteristics of U.S. commercial building infrastructure.<sup>114</sup> CBECS is used by government programs to set policy; for example, it provides the underlying data for U.S. EPA to rate and score the efficiency of buildings under the ENERGY STAR program.<sup>115</sup> It is also used by energy modelers to forecast emissions across a number of CRE asset classes (e.g., office, retail, hotels, warehouses, health care).<sup>116</sup> Registrants that rely on the most recent iteration of CBECS<sup>117</sup> should benefit from a “safe harbor” that confirms the validity of any disclosures based on US-EIA’s data.

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<sup>111</sup> US-EPA, Center for Corporate Climate Leadership, [Greenhouse Gas Inventory Guidance, Direct Fugitive Emissions from Refrigeration, Air Conditioning, and Industrial Gases](#) (Nov. 2014).

<sup>112</sup> *Id.* at 5.

<sup>113</sup> *Id.* at 12.

<sup>114</sup> US-EIA, [About the Commercial Building Energy Consumption Survey](#)

<sup>115</sup> US-EPA, ENERGY STAR Portfolio Manager Technical Reference, [U.S. Energy Use Intensity by Property Type](#) at 1 (April 2021).

<sup>116</sup> CBECS tables for [Consumption and Expenditures](#).

<sup>117</sup> As of this writing, the most recent, best available CBECS data regarding building energy consumption is from 2012. EIA reports that its newest “preliminary estimates” for building energy “consumption and expenditures,” based on 2018 data, will be released this coming August. See [CBECS Status Update](#) (March 10, 2022).



**ADDENDUM 3**

**About The Real Estate Roundtable**

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# Who We Are

