June 8, 2022

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

RE: Comments on the Enhancement and Standardization of Climate-Related Disclosures for Investors, File No. S7-10-22

Dear Ms. Countryman:

Thank you for providing the opportunity to comment on the Securities and Exchange Commission's ("SEC's") proposed rule on "The Enhancement and Standardization of Climate-Related Disclosures for Investors." The National Association of Convenience Stores (NACS) has strong concerns about the proposal and the negative impacts it would have for members of the industry with publicly traded equity and debt securities and those that are entirely privately held and not subject to SEC regulation. The industry takes seriously its role in reducing carbon emissions and recognizes that structure and consistency in reporting are helpful goals. In our view, however, the proposal exceeds the SEC's statutory authority, conflicts with its mission, creates unwieldy economic burdens even on businesses entirely outside of its jurisdiction, and sets a precedent that would take securities regulation into a political sphere that would be harmful to the SEC and the future of regulation of the markets.

Background on NACS

The National Association of Convenience Stores (NACS) is an international trade association representing the convenience store industry with more than 1,500 retail and 1,600 supplier companies as members, the majority of whom are based in the United States. The convenience industry's sole objective is to sell legal products, in a lawful way, to customers who want to buy them.

Among those products are motor fuels. Fuel retailers are generally independent businesses. Although some might bear the name of a large oil company, this is not indicative of any ownership stake in the business or the real estate, but simply of a marketing relationship or announcement to passing motorists that a certain company's product is available for purchase at that location (comparable to a soft drink advertisement in a grocery store window).

The convenience and retail fuels industry employed approximately 2.34 million workers and generated more than $705 billion in total sales in 2021, representing more than 3 percent of U.S. gross domestic product. Of those sales, approximately $427 billion came from fuel sales alone.

The industry, however, is truly an industry of small business. More than 60 percent of convenience stores are single-store operators. Less than 0.2% of convenience stores that sell gas are owned by a major oil company and about 4% are owned by a refining company. More than 95% of the industry, then, are independent businesses.

Members of the industry process more than 165 million transactions every single day. That means about half the U.S. population visits one of the industry's stores on a daily basis. In fact, ninety-three percent of Americans live within 10 minutes of one of our industry's locations. These businesses are particularly important in urban and rural areas of the country that might not have as many large businesses. In these locations, the convenience store not only serves as the place to get fuel but is often the grocery store and center of a community.

The Proposed Rule Undermines the SEC's Mission and Exceeds Its Statutory Authority

The concept of materiality to the financial position or prospects of a firm that issues securities is the driving principle of SEC disclosure rules. There may be many things that certain investors want to know that are simply not material, that is, while some investors might like that information, there is not a substantial likelihood that a reasonable investor would consider it important to investment or voting decisions. The proposed rule here ventures into the realm of requiring disclosures that are not material both because they are too speculative and because they assume regulatory action that has not occurred will occur. The rules thereby sharply depart from what is material to a firm's financial position.

The first and clearest way the proposed rule does that is through requiring disclosures of emissions. Such disclosures may be appropriate for a different agency (such as the Environmental Protection Agency) with a different mission to collect such information in order to understand the potential for society-wide or worldwide impacts. But the securities laws do not give the SEC authority to require individual companies to report on their share of such worldwide issues without reference to materiality. Companies' individual emissions fit within this rubric.

Nationwide and worldwide emissions create climate change that may impact individual companies in different ways. But the fact that an individual company contributes to such worldwide phenomena to a greater or lesser degree does not create a material change to the financial performance of that company.

Requirements to disclose risks of so-called "acute" and "chronic" risks from climate change are also too speculative to fit within the SEC's authority and the rubric of materiality. The scientific relationship between climate change and "acute" risks through things like extreme weather events is not well understood and difficult to evaluate. Issuers are not equipped to make such determinations or evaluate the extent to which climate change will increase the chances of extreme weather events, which such weather events will occur more frequently or with greater severity in the future, and the geography of any such increased extreme weather events.

The "chronic" risks on which the proposed rule requires disclosure are even more difficult to evaluate. How such long-term changes might take shape and where, not to mention how they might impact an individual issuer's business is very difficult to determine. Forecasting relating to such long-term trends should be the realm of experts – not issuers.

It is possible that our understanding of these issues and impacts could advance over time. We would also expect the number of experts in these areas to increase in the coming years. Given time, this type of reporting may be possible on a basis that is not as speculative, but U.S. companies are not in a position to make this type of reporting today with sufficient reliability as contemplated in the proposal.

The Proposed Rule Makes Political Speculation Legally Required

The proposal takes the SEC into a new area that undermines its mission by putting its thumb on the scales of determinations of political risk. The proposal specifically notes that disclosure may be necessary due to "potential adoption of climate-related regulatory policies including those that may be necessary to achieve the national climate goals that may be or have been adopted in the United States and other countries" and "climate-related litigation" as factors requiring climate related disclosures. This oversteps the bounds of materiality as traditionally understood and similarly oversteps the SEC's legal authority.

This is with good reason. Issuers should not be required to make speculative determinations of what future regulations or litigation might entail relating to climate. Such speculative determinations are likely to be unreliable and do not add factual or helpful information to investors.

The proposed rule puts these emissions into the category of "transition risks." These risks are defined in the proposal as "risks related to a potential transition to a lower carbon economy." But the SEC makes a nakedly political assumption in requiring emissions reporting under the rubric of these "transition risks." That is, the SEC assumes a specific type of transition to a lower carbon economy. Such a transition may happen in the way the SEC envisions – or it may not. Any number of other things might happen in the future (including technological or regulatory changes that abrogate the need for a sharp transition to a lower carbon economy). It simply is not the role of the SEC to decide what the future of politics and regulation may bring in areas outside of its area of expertise. It cannot under its current legal authority, and should not as a matter of institutional policy, require all issuers to accept a political assumption and make disclosures based on that assumption.

If the SEC takes this step now, it will set the SEC on a future path in which a later SEC is likely to use the precedent to pursue political ends that the current SEC would find highly objectionable. One could imagine a future SEC requiring issuers to make disclosures about any number of other speculative political risks – for example, the potential future regulation of abortion and how that might impact health care providers. But speculative political risk is not within the expertise of the SEC or issuers. If the SEC wades into such waters, it will create a damaging precedent that may lead to a long line of similar requirements that burden issuers, roil the political world, and fail to provide any assistance to investors.

The Proposed Rule Creates Unreasonable Burdens on Regulated Businesses

On another front, the fact of climate change may impact some issuers differently than others. For example, an issuer whose main production facility is flooded part of the year due to rising sea levels at its doorstep may have a different risk relating to climate than a similar firm that has no locations near large bodies of water. The question, however, is whether and to what extent such risks are sufficiently understood and measurable to make them susceptible to reasonable disclosure.

In many instances, the answer to that question is that climate science rarely provides enough information today to allow for more than speculative disclosures. And, where there is more clarity, SEC rules that already require material disclosures adequately cover such situations.

For example, the proposed rule requires specific disclosures relating to the locations that will be affected by acute or chronic climate risks – including providing the zip codes of locations to be impacted. But the idea that issuers can predict the locations of their business operations that will be negatively impacted by increased extreme weather events due to near- or long-term climate changes is fantasy.[1] They can't make those predictions in a reliable and accurate way.

There may some locations that issuers know are at risk of extreme weather such as hurricanes, for example. If so, such disclosures (if material) are adequately covered by other SEC requirements. But, it would be a remarkable feat to determine whether and to what extent a hurricane risk at a facility was the result of typical weather patterns and risks or climate-related risks. SEC rules should not require unreliable and unachievable determinations like that to be made.

It is worth noting that a number of the comments relied upon by the SEC in its proposal as supporting the idea that there are software tools and consultants to assist issuers in making these determinations come from providers of those software tools or consulting services. These self-interested comments may or may not be accurate, but they do not indicate that such tools are free nor do they provide assurances of accuracy. The cost and questionable reliability of such services must be examined before any rule could move forward and it must be recognized that even where such tools exist, it may take significant time for those tools to be available on a sufficiently widespread basis to allow issuers across the nation to access and use them.

<u>The Proposed Rule Creates Unfair Burdens on Unregulated Businesses, Small and Large</u>

One of the most burdensome and unfair aspects of the proposed rule involves the "scope 3" emissions disclosure requirements. This aspect of the proposal will require issuers to gather extensive information from private companies that do not issue securities or debt in the public markets do not have. In effect, the proposal would create a brand new regulatory scheme requiring millions of small and large businesses that are entirely outside the SEC's jurisdiction to collect and document emissions information at great expense.

Scope 3 emissions require collection and reporting of data relating to companies with which issuers do business. The vast majority of these other businesses in the value chain are small, private entities. They do not have public reporting requirements nor do they have information regarding the emissions associated with their operations. For them to collect and report such emissions would be expensive as they would need to hire outside experts to provide reliable data.

These indirect requirements render the SEC's analysis of affected parties insufficient and inaccurate. Millions of businesses that will never file any forms with the SEC will be negatively impacted by the proposed rule because those businesses will be required to provide detailed emissions information to issuers in order for those issuers to be able to comply with the scope 3 requirements in the proposed rule. This also undercuts the assumption in the proposal that many impacted businesses already have disclosure requirements under other federal or state rules. The vast majority of businesses – mostly small businesses – are not covered by such rules with respect to their current operations. The first requirement they would face to gather and report emissions relating to their operations would come about if the SEC proposal were finalized.

This would be particularly burdensome for the retail fuels industry. As noted, the major integrated oil companies only own 0.2 percent of retail fueling stations around the nation. But, around 50 percent of

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[1] We have seen that other unpredictable events, such as a pandemic or terrorist attack, can also create material issues for firms. But, the SEC is not asking firms to predict business locations that might suffer from such unpredictable events. Weather disasters that might be climate related fall into a similar category of events that are difficult or impossible to predict.

the industry contracts with such companies to display their branding and sell their fuel. A full 60 percent of the industry are single-store operators and many more own ten stores or fewer. These small businesses do not have the expertise to gather emissions information and would have to hire outside experts to do that on their behalf simply because they contract with large firms that issue securities. This would be a substantial burden on businesses that operate on narrow profit margins between 2 and 3 percent.

The proposed rule is likely to subject many of these small businesses to a growing number of compliance requirements. Many small retailers have locations that contract with different integrated oil companies to receive fuel. For example, one retailer might operate a location that sells Exxon fuel and a different one that sells Chevron fuel. And, that same small retailer may deal with multiple suppliers including wholesalers as well as manufacturers of individual products such as soft drinks, snacks and other items. This could mean that one small retailer needs to provide climate information under scope 3 to a half-dozen or more companies that issue securities. Given the complexity of the proposed rule, it is likely that each of those issuers will ask for different information and ask for it in different ways. That will multiply the burdens imposed by the rule on small businesses in a way that is not contemplated in the SEC's proposal.

We note and are disappointed that while the SEC has requested data on the small business impact of the proposed regulation, it has presented no data or analysis of such impacts in the proposal. The impacts are substantial for the more than 90,000 small businesses in the convenience industry. These businesses do not have the professional or financial wherewithal to determine their emissions as required by scope 3 of the proposed rule. Many would lose their ability to contract with issuers of securities or absorb significant financial losses trying to comply with the rule to provide emissions information. These dislocations would not only hurt these small businesses, but would increase costs in the motor fuel supply chain and thereby significantly increase the retail prices of gasoline and diesel fuel. This financial hardship, therefore, would be felt not only by the small businesses in the convenience industry but also by the 165 million American consumers that they serve every day. Unfortunately, none of this analysis appears in the proposed rule.

The exemption for smaller reporting companies in the proposal does not ameliorate these problems. Reporting companies that are subject to the proposal will still need to require small businesses that are part of their chain of commerce to provide emissions information that those small businesses do not have. That will create a bias for reporting companies subject to the proposal to move their business away from smaller companies and toward larger ones that might have some experience or the resources to track emissions data. That loss of business would be difficult for small firms.

And, the proposal threatens to stagnate the market for acquisitions of small businesses. Reporting companies subject to the proposal will need to consider whether it can acquire small businesses that have no history of their emissions. Without that history, once an acquisition was completed the reporting company might have no way to reconstruct the past emissions information it would need to comply with the proposal. This could create a regulatory roadblock to many acquisitions that might otherwise occur.

In our view, all of this means that the SEC has not fulfilled its responsibilities under the Small Business Regulatory Enforcement Fairness Act (SBREFA) and the Regulatory Flexibility Act (RFA). The SEC must undertake full assessments of small business impacts and take those impacts into account before moving forward with any regulation in this area.

The Proposed Rule Results in Counting the Same Emissions Multiple Times

The scope 3 reporting requirements noted above will also result in counting the same emissions multiple times. As noted, only 0.2 percent of retail motor fuel outlets are owned and operated by the major integrated oil companies but nearly half of the industry contracts with such companies to sell their motor fuels. The integrated oil companies will be required to report on the carbon emissions associated with the fuels they sell under the proposal – and then the retailers that sell those fuel brands will need to report on the same fuels and emissions under scope 3. There are also pipeline, trucking, and wholesale companies that may have to report on the same fuels and associated emissions. Retailers deal with a number of different wholesalers as well. And, as noted, many retailers deal with multiple fuel suppliers. Some of these companies may be issuers of securities while others may not be. The result will be an overlapping patchwork in which multiple companies may report on the same fuels and emissions. This will create a confusing and unrealistic picture for investors capturing more fuel and emission volumes than occur in reality. This problem is precisely why projects of this sort should be left to an agency with expertise in this field and an understanding of the distribution and supply chains relating to fuels such as the EPA.

Similar problems come into play with franchise businesses, joint ventures, and similar business arrangements. The proposal creates the likelihood that franchisors and franchisees, multiple joint venture partners, and other business partners all report the same fuels and emissions multiple times. The proposal should ensure that there is a process to avoid these duplication problems as they decrease accuracy, needlessly increase the costs of compliance and may add to unsupported concerns about the volumes of emissions reported.

The Proposed Rule Discourages Capital Formation

The proposed rule will create significant hurdles to issuers acquiring private companies. Those private companies typically do not have information regarding their emissions. But, if acquired, such information would have to be developed for the past two or three years in order for the public company acquirer to meet its obligations under the proposed rule. Reconstructing such information may be very difficult to do with accuracy. The difficulty, expense, and uncertainty relating to such a requirement likely would discourage a number of acquisitions.

Such acquisitions would also raise difficult questions regarding scope 3 emissions. The combined entity's scope 3 emissions may be negatively impacted or may be changed such that an issuer that would not otherwise need to report scope 3 emissions would have a new obligation to do so.

The convenience industry includes many family-owned businesses. These businesses often have trouble transitioning operations when one generation of leadership reaches the age of retirement. If the next generation is not in a position to lead the company or other financial issues emerge, the best answer can be a sale of the business to a public company. But, family businesses will have a much harder time accessing that pool of capital if the proposed rule is finalized.

If the SEC moves forward with the proposal, it should create an exception so that issuers are not required to provide any past emissions data for newly acquired assets and businesses. Instead, such data should only be required after a reasonable transition time of one year or more – and only on a go-forward basis from that point.

The Proposed Rule Would Reduce Voluntary Climate-Related Actions

By setting forth requirements for disclosure of climate scenarios considered, the proposed rule would create incentives against issuers considering such scenarios. Required disclosures could reveal not only climate considerations and assumptions, but business-confidential strategies and plans. Issuers will not want to reveal those strategies and plans. But, if they engage in analyses of climate scenarios, such disclosures will be required. The result of the proposal then will be to reduce the time and effort spent by issuers on considering climate issues in order to avoid the potential negative outcomes relating to disclosing that information.

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We appreciate the opportunity to comment on the SEC's proposed rule on "The Enhancement and Standardization of Climate-Related Disclosures for Investors." We hope that the SEC will consider these comments, withdraw the proposal, and consider other approaches that would be more beneficial, consistent with the SEC's governing statute and mission, and avoid the negative impacts on small businesses that the current proposal would entail.

Sincerely,

Doug Kantor
General Counsel