Business Council for Sustainable Energy's Comments to the Securities and Exchange Commission in Response to the Enhancement and Standardization of Climate-Related Disclosures for Investors Proposal

June 17, 2022

The Business Council for Sustainable Energy (BCSE) is pleased to submit the following comments in response to the request for public comment on the Securities and Exchange Commission's (SEC) proposed rules, *The Enhancement and Standardization of Climate-Related Disclosures for Investors* (File Number S7-10-22).[1]

Founded in 1992, the Council is a coalition of energy efficiency, natural gas and renewable energy companies and associations. Its membership includes investor-owned and public utilities, independent power producers, manufacturers, technology providers, energy services companies, and sector-specific trade organizations.

BCSE is pleased to have an independent small business division under its banner, the Clean Energy Business Network (CEBN). Together, BCSE and CEBN represent a broad range of the clean energy economy, from Fortune 100 companies to small businesses working in all 50 states and supporting over 3 million U.S. jobs.

BCSE members have a strong understanding of the key policy, regulatory and market drivers that are necessary to help deploy clean energy technologies and reduce greenhouse gas emissions. Efficient and transparent capital markets are critical to attracting investment and deployment. BCSE appreciates the opportunity to share its comments on the proposed climate-related disclosures rules.

Further, several BCSE members intend to submit their own comments to the SEC during the comment period. BCSE has benefitted from their expertise in the development of its submission, and we encourage thoughtful review of their submissions. Please note, as a diverse coalition, not all members take a position or endorse the recommendations that follow.

BCSE Supports the Commission's Focus on ESG and Climate-Related Disclosures

BCSE members offer technologies, products and services to mitigate the impacts of climate change and recognize the risks that climate change place on communities, business operations and the economy. BCSE members also understand that investors are increasingly requesting information on Environmental, Social and Governance (ESG) and climate-related topics. The Commission's focus on ESG and climate change disclosures has the opportunity to improve data collection and dissemination and will aid investors in making decisions.

[1] https://www.sec.gov/rules/proposed/2022/33-11042.pdf

ESG–and specifically climate change–disclosures are best determined in collaboration between registrants and investors. They also should be flexible, sector-specific, and principles-based.

In reviewing the proposal, BCSE supports several key elements of the climate-related disclosure approach contemplated by the Commission.

BCSE also believes that additional clarification and flexibility for registrants is needed in several areas, both in terms of the data provided as well as with the flexibility and the timing of the required disclosures.

Utilization of Existing Reporting Frameworks Provide Critical Foundation for Climate Disclosure Rules

BCSE supports the Commission's efforts to enhance and standardize climate-related disclosures, and, specifically, the requirement to disclose Scope 1 and Scope 2 emissions. BCSE also supports the proposed qualitative disclosures. This is a major step forward in providing investors important information in a standardized form.

The Commission's decision to utilize existing reporting guidance and frameworks such as the Greenhouse Gas Protocol (GHG Protocol) and the Task Force on Climate-related Financial Disclosures (TCFD) framework are important foundations to the proposed rules. This approach will ease adoption and allow for alignment with many existing processes. Further, utilizing these frameworks will provide an opportunity for experts in climate disclosures to continue to update and improve disclosure guidance overtime.

One area where further clarification is needed is with regard to the ability of registrants to select from the methods outlined in the GHG Protocol for establishing organizational boundaries. The GHG Protocol allows entities to set its operational boundary based on equity share or operational control. In contrast, the proposal would require registrants to report Scope 1 and Scope 2 emissions on both consolidated assets and their equity method accounting investments, as well as Scope 3 if they are material to the business. For some registrants, including large financial institutions, this presents several data collection and comparability challenges. To address these concerns, BCSE recommends that registrants have the option to report on their consolidated emissions only, or the SEC should consider providing a phase-in period for equity method accounting investments.

SEC Rule Should Focus on Relevant, Concise and Comparable Climate Disclosures

In crafting its final rules, the Commission should focus its efforts on the provision of concise and financially material climate change information by issuer companies for investors. Materiality should be determined based on the Commission's long-standing approach to materiality, as confirmed by the U.S. Supreme Court in *TSC vs. Northway* and *Basic vs. Levinson*, 426 U.S. 438 (1976). Specifically, information is material for purposes of federal securities regulation if "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" or invest, Id. at 449.

The proposed 1% threshold, which would require disclosure for matters affecting 1% or more of any individual financial statement line item, conflicts with the Commission's long-standing approach to materiality and Supreme Court precedent. One percent of a line item that itself may not be material for a particular company would not meet that standard. Moreover, the resulting volume of information would overwhelm both registrants and investors while obfuscating other more relevant information.

Disclosure requirements should take into account that the materiality of climate change and emissions varies among industries and companies within industries. For example, consider some factors below:

- the percentage of infrastructure owned or relied upon by companies subject to ocean surges, flooding and other intense weather patterns effected by climate change;
- the supply chain impacts to core business relying on minerals, shipping, warehousing subject to ocean surges, flooding and other intense weather patterns effected by climate change;
- the land and building structures at risk, either from prior situations or highly likely future; and risks, subject to ocean surges, flooding and other intense weather patterns effected by climate change.

Therefore, we recommend that, to the extent disclosure of specific metrics is required, they should be industry-specific metrics rather than uniform, across-the-board standards for all registrants. This could be done in a fashion analogous to the industry guides the SEC has adopted for other industry-specific disclosures. This will maximize the likelihood that registrants will provide investors with consistent, comparable and reliable information. This approach also would be consistent with the Commission's focus on principles-based disclosure.

SEC Rule Disclosure Requirements Should Align with Existing Reporting Schedules

BCSE appreciates the Commission's recognition that existing emission reporting schedules and the proposed rule's filing timelines do not align. To avoid the potential for undue reporting burden and uncertainty, BCSE recommends that the Commission provide options for registrants to report data consistent with its other existing reporting timelines, understanding this may not align with financial reporting schedules.

One way this can be accomplished is to allow a delay in the timing of reporting emission data by one year. For example, if a registrant files its Form 10-K for reporting year 2024 in February 2025, it would provide the greenhouse gas emission data from the full calendar year 2023. This approach would allow for entities to include complete data consistent with existing schedules for GHG emissions reporting, including the U.S. Environmental Protection Agency's (EPA) Greenhouse Gas Reporting Program (GHGRP).[2] Aligning with EPA's reporting schedule would allow for GHG emissions data reported to EPA to undergo the EPA review process and provide additional mode of verification, and ensure that data reported are consistent across reporting vehicles. Under the GHGRP, entities report data in March, and EPA usually completes their review and posts the data by October. Therefore, utilizing a year lag on reporting GHG emissions in the Form 10-K would allow for inclusion of this complete and reviewed data.

[2] Find and Use GHGRP Data | US EPA

Scope 3 Emissions Disclosure Needs Further Definition and Flexibility

Scope 3 emissions generally require estimates. Nonetheless, as the GHG Protocol—on which the TCDF framework is modeled—notes, reporting of some Scope 3 emissions can help identify potential risks and spheres of influence that may be of value to investors even if the emissions data is not perfectly accurate. As such, many companies understand that disclosure of Scope 3 emissions is the future direction and have developed, or are in the process of developing, data platforms to capture this data.

However, inclusion of this data, if required, should be carefully bounded given the current uncertainties of Scope 3 information. In addition, registrants should be able to include this information as "furnished" not "filed," which would further limit their exposure for including what may be less than fully accurate, but potentially helpful, information.

In reviewing the proposal, BCSE members seek clarification on the boundaries by which Scope 3 emissions would be reported. The current guidance under the GHG Protocol does not define the boundaries of the value chain but contemplates that a value chain that goes beyond initial customers. For the purpose of this rule, the SEC should clarify that only those categories under Scope 3 that are relevant and material to a company's business be required to be included in the reporting.

Further, as noted above, in many cases Scope 3 reporting will be based upon estimates, and those estimates will vary widely depending upon broad factors. These factors include:

- the differences in the mix of downstream participants;
- the amount of emissions information, if any, provided directly by downstream participants;
- the amount of emissions information, if any, more broadly made public (for example in EPA filings, Carbon Disclosure Project and Global Reporting Initiative reports, and otherwise) by downstream participants; and
- the capacity of registrants to absorb and analyze the available information.

Further, in some cases estimates may be based on prior years data.

Overall, in developing this rule, the Commission should recognize that registrants of different sizes and sophistication will have different resources available to them, which will result in less comparability.

To address these issues, the BCSE members identified several suggestions to help improve Scope 3 emissions reporting:

- better define the boundaries of Scope 3 emissions, in line with existing frameworks;
- provide clarity that only the Scope 3 emissions categories that are material to a company need to be reported;
- consider delaying implementation of required reporting of Scope 3 emission disclosure until after 2024, on a prospective basis; and
- allowing data to be included as "furnished," not "filed."

Disclosure Rules Should Adopt Adequate Safe Harbor Provisions for Data Submissions

To ensure the most comprehensive disclosures, BCSE recommends that the Commission adopt adequate and sufficiently protective safe harbor provisions for estimates and data that are provided in good faith and are either inherently unreliable or that issuers do not control.

While safe harbors have been proposed for Scope 3 emissions and forward-looking statements, BCSE recommends that safe harbors also apply to governance information and disclosed results of scenario analysis, and that these safe harbors provide full protection from both third-party litigation and from action by the SEC itself.

In addition, as noted above, the Commission should consider adopting a “furnished” not “filed” approach. This recommended treatment reflects the experience of the industry that ESG and climate change disclosures are evolving and are not sufficiently mature to support the more rigorous liability structure attendant to “filed” information.

Attestation of Scope 1 and Scope 2 Emissions Should Not be Required in Final Rules

In considering this issue, the Commission should rely on the commitment of registrants to provide accurate information to investors and the *in terrorem* effect of the anti-fraud provisions of the Federal securities laws and the other already-existing reporting regimes. There is nothing particularly unique about the proposed disclosures as compared to numerous existing disclosures on other topics that would justify imposing an attestation requirement. As such, BCSE does not recommend that attestation of Scope 1 and Scope 2 emissions be required in the final rules.

Carbon Offsets and RECs are Distinct Instruments, and Should be Disclosed as Part of a Registrant’s Emissions Mitigation Strategy

Renewable Energy Credits (RECs) and carbon offsets are important tools to assist registrants in meeting their greenhouse gas emission reduction and sustainability goals, especially as companies seek to achieve net-zero targets. In response to questions posed by the Commission, BCSE supports the definition of a carbon offset as the equivalent of one ton of carbon dioxide equivalent (CO2e) that has not been emitted. This definition can be refined to differentiate a ton that has been removed, reduced, or avoided.

BCSE supports the proposal’s definition of a REC to mean a credit or certificate representing each purchased megawatt-hour (1 MWh or 1000 kilowatt-hours) of renewable electricity generated and delivered to a registrant’s power grid. Of note, a REC does not necessarily represent an emission reduction that is real, measurable, permanent, additional, independently verified, and unique.

To avoid issues with comparability, BCSE supports the proposed approach for registrants to report carbon offsets as part of their mitigation strategy, not as part of their emissions accounting.

With regard to RECs, BCSE supports the Commission’s decision to permit registrants to utilize both the location- and market-based methods as defined by the GHG Protocol. The market-based method is

useful for providing information on corporations' individual procurement actions as well as supplier-specific data.[3]

In addition, BCSE recommends further definition and treatment of RECs with regard to Scope 2 emissions reporting. This is important given the myriad ways in which registrants and other entities utilize and procure renewable energy. RECs function in both compliance (i.e., where utilities are required to comply with a state's renewable portfolio standard) and voluntary markets (i.e., a corporation's purchase of unbundled RECs to support the general deployment of renewable energy). With respect to bundled RECs, where the REC serves as a contractual instrument and the renewable attribute is tied to the underlying energy purchase, companies are able to procure renewable energy in the following ways: through utility and retail providers, via power purchase agreements or financial contracts, or through self-generation, both on- and off-site.[4]

The utilization of RECs as a contractual instrument for the purpose of emissions accounting is critical to the verifiability of renewable energy claims and accurate emissions disclosure.[5] As such, BCSE proposes that the Commission ask registrants indicate whether RECs are being utilized in voluntary and compliance markets in their Scope 2 emissions reports.

Background on the EEI-AGA ESG/Sustainability Reporting Template

As an example of a model process that integrates several of the ideas noted above that works for a subset of BCSE members for their reporting purposes, the America Gas Association (AGA) in partnership with the Edison Electric Institute (EEI) established the EEI-AGA ESG/Sustainability Reporting Template.[6] This first-of-a-kind tool was developed with investors to assist them in evaluating electric and natural gas utility sectors. It seeks to provide consistent, brief, relevant disclosure metrics accompanied by narrative, qualitative discussion. The investor advisory group has included 9 of the 10 largest institutional investors in the United States, representing over $31 trillion of assets under management.

The EEI-AGA ESG/Sustainability Reporting Template process is transparent and inclusive and has evolved over time. It has included participation by policymakers and representatives of proxy advisory firms, rating agencies, ESG rating providers, NGOs, including Ceres, the Sustainability Accounting Standards Board (SASB), and the Task Force on Climate-related Financial Disclosures (TCFD), among other key stakeholders. BCSE encourages the Commission to review the approach and design of the EEI-AGA ESG/Sustainability Reporting Template as it considers its final rules climate disclosures.

Closing

The Business Council for Sustainable Energy appreciates the opportunity to participate in the comment period on *The Enhancement and Standardization of Climate-Related Disclosures for Investors* proposal. Please contact bcse@bcse.org for any questions related to this submission.

[3] https://ghgprotocol.org/sites/default/files/standards/Scope%202%20Guidance_Final_Sept26.pdf, p. 26
[4] https://www.epa.gov/sites/default/files/2018-08/documents/guide-purchasing-green-power-4.pdf, 4-3
[5] https://www.epa.gov/sites/default/files/2018-08/documents/guide-purchasing-green-power-4.pdf, 4-4
[6] *See* EEI-AGA ESG/Sustainability Reporting Template (June 8, 2021) https://www.aga.org/policy/natural-gas-esgsustainability/