



June 17, 2022

*Submitted via rule-comments@sec.gov*

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

**Re: Comments from Friends of the Earth US on SEC Proposed Rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors** (File Number S7-10-22).

Friends of the Earth US submits these comments to the Securities and Exchange Commission on its proposed rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors.<sup>1</sup>

Friends of the Earth US (FoE) is a 501(c)(3) non-profit organization with offices in Berkeley, California and Washington, D.C., where it is headquartered, and staff located across the country. FoE is a membership organization consisting of more than 4.5 million members and activists in all 50 states and the District of Columbia. FoE is a member of Friends of the Earth-International, which is a network of grassroots groups in 74 countries worldwide. Our mission is to protect our natural environment, including air, water, and land, to create a healthier and more just world. We utilize public education, advocacy, legislative and administrative processes, litigation, and open access to government processes and records to achieve our organizational goals.

For years, FoE has advocated for actions by federal financial regulators to protect the environment and communities. FoE has a dedicated Economic Policy team that works to redirect tax policies and public spending to make polluters pay for the costs of their pollution, and to drive the transition to a cleaner, low-carbon economy. At home and abroad, we advocate for policies that minimize environmental and social harm and fund a brighter future. In the United States, we work to strengthen regulations to encourage sustainability in financial markets and advocate against trade policies that allow companies to run roughshod over the environment and human rights. We also work with allies around the world to alter lending practices at financial institutions such as the World Bank, the U.S. Export-Import Bank and Wall Street banks that fund polluting activities and harm communities in the US and abroad.

FoE commends SEC's efforts to enhance and standardize climate-related disclosures. FoE appreciates SEC's inclusion of reporting for not only Scope 1 and 2 emissions, but also Scope 3 emissions. We also laud the Commission's treatment of offsets and accounting mechanisms.

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<sup>1</sup> Friends of the Earth submits these comments with gratitude for the preparation assistance provided by the following Certified Legal Interns in the University of Pittsburgh School of Law Securities Arbitration and Environmental Law Clinics: Boutros Imad, Connor Riley, Joshua Shearer, Jacqueline Stalnaker, Emily Rollins, and Alexandra Patterson.

While FoE does support SEC's efforts to mandate climate-related disclosures, as further detailed below, we urge the Commission to strengthen the final rule by:

- Mandating disclosure of Scope 3 emissions for all large registrants, and removing the ability of companies to self-determine materiality of their Scope 3 emissions.
- Requiring disclosure of the impacts of industrial, greenhouse-gas-intensive activities on Indigenous populations and frontline communities.
- Limiting the proposed safe harbor for liability.

**I. The SEC Holds Ample Authority to Promulgate this Rule, and to Issue Stronger Requirements.**

The Securities and Exchange Commission (SEC) is granted broad powers under the Securities Act of 1933 and the Exchange Act of 1934 that underscores its ability to promulgate the rule as proposed, but also to include stronger requirements as discussed herein. Existing authority allows SEC to impose strict filing procedures on issuers of securities as long as it is deemed to be in the public interest. There is no doubt that the current “code red” climate moment – and the financial sector’s contribution to climate change – is very much in the public interest. The Commission has the jurisdiction to create, amend, and repeal rules and regulations as needed to carry out the provisions of the Securities Act, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers.<sup>2</sup> The Commission has the power to impose regulations requiring each issuer of an asset-backed securities to provide information on the assets supporting that security.<sup>3</sup> Issuers filing registration statements and prospectus with the Commission could be asked to include any further information and submit additional documents that the Commission, through rules or regulations, deems necessary or appropriate in the public interest or for investor protection.<sup>4</sup> Any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.<sup>5</sup>

In limited circumstances, the Commission may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the rule or regulation, but only where such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.<sup>6</sup> Thus, the SEC would have authority to include a limited safe harbor for liability from Scope 3 emissions reporting.

Similarly to the Exchange Act, the Securities Act confers broad powers on the Commission and the Board of Governors of the Federal Reserve System to define technical, trade, accounting, and other related terms by rules and regulations.<sup>7</sup> Public interest and the protection of investors empower the Commission to expand the scope of the registration information to be provided by

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<sup>2</sup> 15 U.S.C. § 77s(a).

<sup>3</sup> 15 U.S.C. §77g(c)(1).

<sup>4</sup> 15 U.S.C. §77g(a)(1).

<sup>5</sup> 15 U.S.C. §77j(c).

<sup>6</sup> 15 U.S.C. § 77z-3.

<sup>7</sup> 15 U.S.C. § 78c (b)

the issuers.<sup>8</sup> The Commission can and does frequently ask for additional information and documents necessary to keep the information of an issuer as current as possible.<sup>9</sup>

Therefore, the Commission has ample authority to promulgate rules and regulations as may be necessary or appropriate to carry out the responsibilities and functions assigned by the Exchange Act, and may classify persons, securities, transactions, statements, applications, and requisitions for such purposes.<sup>10</sup> The Exchange Act mirrors the provisions of the Securities Act regarding exemptions granted to persons, securities, or transactions.<sup>11</sup>

## **II. Disclosure of Scope 3 Emissions Should be Mandatory for All Large Registrants.**

It is of paramount importance that SEC require disclosure of Scope 3 emissions for large registrants, as this is where the bulk of certain industry emissions can occur. The purpose of the proposed rules is to provide investors with “consistent, comparable, and reliable—and therefore decision-useful—information” so that they can make “informed judgments about the impact of climate-related risks on current and potential investments.”<sup>12</sup> For the proposed rules to achieve their purpose, disclosing Scope 3 emissions must be mandatory for all large registrants and the ability to self-determine materiality should be removed.

Scope 3 emissions are “all indirect GHG [greenhouse gas] emissions not otherwise included in a registrant’s Scope 2 missions, which occur in the upstream and downstream activities of a registrant’s value chain.”<sup>13</sup> The proposed rule describes upstream emissions as “emissions attributable to goods and services that the registrant acquires, the transportation of goods, and employee business travel and commuting.”<sup>14</sup> Downstream emissions are described as including “the use of the registrant’s products, transportation of products, end of life treatment of sold products, and investments made by the registrant.”<sup>15</sup> As defined by the United States Environmental Protection Agency (EPA), Scope 3 emissions “are the result of activities from assets not owned or controlled by the reporting organization, but that the organization indirectly impacts in its value chain.”<sup>16</sup> Also referred to as “value chain emissions,” Scope 3 emissions often represent the majority of an organization’s overall GHG emissions. Though all activities within an organization’s value chain are not under the organization’s direct control, the organization may influence its suppliers or select which vendor with which to contract based on their practices regarding emissions.<sup>17</sup> Indeed, regulatory expectations that businesses must account for the emissions throughout their supply chains may be essential to de-risking supply chains and fostering a stable investment environment.

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<sup>8</sup> 15 U.S.C. § 781 (b)(1)

<sup>9</sup> 15 U.S.C. § 78m

<sup>10</sup> 15 U.S.C. § 78w(a)(1)

<sup>11</sup> 15 U.S.C. § 78mm (a)(1)

<sup>12</sup> The Enhancement and Standardization of Climate-Related Disclosures for Investors, 33-11042, 87 Fed. Reg. 21334, 7 (proposed Mar. 21, 2022) [hereinafter SEC Proposed Rule].

<sup>13</sup> *Id.* at 156.

<sup>14</sup> *Id.* at 157.

<sup>15</sup> *Id.*

<sup>16</sup> *Scope 3 Inventory Guidance*, EPA, <https://www.epa.gov/climateleadership/scope-3-inventory-guidance> (last visited Apr. 25, 2022).

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

Currently, the proposed rules require registrants to disclose their Scope 1 and 2 emissions, however registrants are only required to disclose Scope 3 emissions for the fiscal year if they are *material*,<sup>18</sup> or if the registrant had already set a GHG emissions reduction target or goal that includes its Scope 3 emissions. The commission has defined materiality as whether there is a “substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote.”<sup>19</sup>

FoE proposes the same amendments to Scope 3 reporting as provided in the comment letter from Public Citizen and other organizations, which FOE joined. As it stands, this requirement for Scope 3 emissions does not go far enough and has the potential to overlook a significant portion of emissions from certain industries. Depending on the size, industry sector, and specific assets owned and controlled by the registrant, Scope 3 emissions may constitute the majority of emissions for a company subject to SEC’s proposed rule. Allowing registrants to self-determine whether Scope 3 emissions are material will lead to underreporting and undisclosed risk. The ability to self-determine should be removed. While FoE believes that disclosure of Scope 3 emissions is material for most companies, we are concerned that some companies will attempt to skirt this requirement by arguing that their Scope 3 emissions are not material. Moreover, SEC should require disclosure of Scope 3 emissions for all large registrants, regardless of whether or not the reporting entity deems them to be material. For many industries, Scope 3 emissions make up a majority of their emissions.<sup>20</sup> For example, Scope 3 emissions make up around 88% of the total GHG emissions from the oil and gas sector,<sup>21</sup> and around 75-90% of the total GHG emissions from major food and beverage companies.<sup>22</sup> Without clear parameters requiring disclosure of emissions by large companies, total industry emissions could be drastically underreported. Therefore, Scope 3 emissions must be mandatory for all large registrants. Below, we provide further detail on the specific types of industries where mandatory Scope 3 emissions disclosure for large registrants matters most.

**a. Emissions from the agricultural industry and agro-commodities are predominantly Scope 3 emissions and their disclosure should be mandated by SEC.**

Scope 3 emissions disclosure requirements must be a necessary component of food and agricultural companies’ climate-related financial disclosures to SEC. Food systems make up one

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<sup>18</sup> While FoE does not concede that the determination of materiality is discretionary, we are concerned that certain industries with high Scope 3 emissions may take advantage of the lack of clarity surrounding materiality to claim that their Scope 3 emissions are not material. We hope that the SEC makes it clear that the determination of materiality should not be interpreted as discretionary.

<sup>19</sup> SEC Proposed Rule, *supra* note 12, at 68.

<sup>20</sup> Brendan Baker, *Scope 3 Carbon Emissions: Seeing the Full Picture*, MSCI (Sep. 17, 2020) <https://www.msci.com/www/blog-posts/scope-3-carbon-emissions-seeing/02092372761>.

<sup>21</sup> Amena Saiyid, *Oil, Gas Companies Under Pressure to Manage Scope 3 emissions to Reach Net-Zero Goals: Analysts*, CLEAN ENERGY NEWS (June 22, 2021) <https://cleanenergynews.ihsmarkit.com/research-analysis/oil-gas-companies-under-pressure-to-manage-scope-3-emissions-t.html>

<sup>22</sup> *Top US Food and Beverage Companies Scope 3 Emissions Disclosure and Reductions*, CERES, <https://engagethechain.org/top-us-food-and-beverage-companies-scope-3-emissions-disclosure-and-reductions> (last visited May 4, 2022).

third of global human-created GHG emissions, the majority of which fall under Scope 3.<sup>23</sup> In fact, 90-95% of a food manufacturer's emissions fall under Scope 3.<sup>24</sup> This includes GHG emissions from processes like land-use changes, agricultural production, packaging, and waste management.<sup>25</sup> Moreover, the increasing population and demand for food means that these emissions are on a trajectory to increase absent significant changes in policy. According to the UN, 16.5 billion tonnes of GHGs were emitted from global agri-food systems in 2019, and of this, 7.2 billion tonnes came from within the farm gate, 3.5 billion came from land use change, and 5.8 billion came from supply-chain processes.<sup>26</sup> These industries are largely failing to disclose their full emissions.<sup>27</sup> In fact, only 16 out of the top 50 food and beverage companies reported their full Scope 3 emissions in 2017.<sup>28</sup> Further, only 9 out of the top 50 food and beverage companies have adopted targets to reduce their Scope 3 emissions.<sup>29</sup>

The Scope 3 emissions in the food and agriculture industries are embedded in the production of agricultural commodities from supply chains of major companies that source, manufacture, distribute, and sell agricultural products.<sup>30</sup> Different areas of these supply chains may remain outside the control of registered organizations, but these organizations should account for the emissions created across their value chain by disclosing Scope 3 emissions. It is essential that these industries disclose GHG emissions across their entire value chain to achieve emissions reductions in alignment with the broader goals of the SEC rulemaking.

**b. Fossil fuel and energy sector organizations contribute high levels of Scope 3 emissions, which should be subject to mandatory disclosure.**

Like the food and agricultural sectors, more prescriptive requirements should be implemented requiring fossil fuel and energy organizations to disclose the entirety of their Scope 3 emissions. In fact, Scope 3 emissions up and down the value chain account for approximately 88% of total emissions in the oil & gas sector.<sup>31</sup> Scope 3 emissions from these industries stem from value chain activities, which include emissions from fossil fuel products the company purchases as inputs or sells to consumers. For example, significant Scope 3 emissions result from the production of oil used to produce transportation fuels, and gas and coal for power plants, or emissions released from the use of these products.<sup>32</sup>

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<sup>23</sup> *Food Systems Account for More than One Third of Global Greenhouse Gas Emissions*, FAO (Mar. 9, 2021) <https://www.fao.org/news/story/en/item/1379373/icode/>.

<sup>24</sup> Dean Best, *The challenges facing food manufacturers on Scope 3 emissions*, JUST-FOOD.COM (Feb. 11, 2022), <https://www.just-food.com/features/the-challenges-facing-food-manufacturers-on-scope-3-emissions/>.

<sup>25</sup> FAO, *supra* note 23.

<sup>26</sup> *New FAO analysis reveals carbon footprint of agri-food supply chain*, UN (Nov. 8, 2021), <https://news.un.org/en/story/2021/11/1105172>.

<sup>27</sup> CERES, *supra* note 22.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Food Emissions 50*, CERES, <https://www.ceres.org/climate/ambition2030/food#about-the-initiative> (last visited Apr. 25, 2022).

<sup>31</sup> Alexandra Thornton, *Why Companies Should Be Required to Disclose Their Scope 3 Emissions*, AM. PROGRESS (Dec. 13, 2021), <https://www.americanprogress.org/article/why-companies-should-be-required-to-disclose-their-scope-3-emissions/>.

<sup>32</sup> Lisa Grice, *Estimating petroleum industry value chain (Scope 3) greenhouse gas emissions*, IPIECA, 2016 at 10, <https://www.api.org/~media/Files/EHS/climate-change/Scope-3-emissions-reporting-guidance-2016.pdf>.

**c. Registrants should be required to disclose their financing of climate change.**

Scope 3 emissions also result from financing by registrants, which can be a significant driver of climate change. U.S. banks and financial institutions actively finance companies involved in fossil fuel infrastructure, land conversion, deforestation, and other environmental degradation through debt and equity financing, and insurance, making billions of dollars in interest, dividends, and fees in the process.<sup>33</sup> For example, deforestation and degradation of intact natural landscapes is a significant contributor to climate change globally, and is largely caused by companies that produce, trade, or use soft commodities like soy, beef, and palm oil which are mass produced using forest-destructive methods. Registrants such as large banks and financial institutions that finance companies that contribute to land conversion and deforestation expose their shareholders to climate risk. Further, many agro-commodity companies acquire commodities from third and fourth hand parties that they do not control. The majority of these upstream emissions (stemming from deforestation or land degradation) are Scope 3, and therefore may be unaccounted for under the proposed rule. As part of the climate-related risk reporting framework, large registrants that provide financing for companies that acquire commodities from third and fourth hand parties must recognize and report the significant risks associated with their direct and indirect contribution to deforestation and land degradation through their financing portfolios.

**III. Strong Emissions Metrics and Reporting are Key to Fully Understanding and Capturing Climate Risks.**

**a. The rule is correct to require reporting of absolute and intensity emissions.**

FoE is highly supportive of the proposed rule's requirement of GHG emissions metrics in both absolute and intensity terms for emissions reporting.<sup>34</sup> Absolute emissions measure the absolute quantity of GHG emissions released to the atmosphere by a registrant. Intensity emissions measure the level of GHG emissions per unit of economic activity or output.

Mandatory reporting on absolute emissions is essential to understand and disclose aggregate emissions that can otherwise be camouflaged when only emissions intensity is reported. While emissions intensity is a useful metric for understanding and comparing the efficiency of sources of emissions, absolute emissions are necessary for understanding and capturing the full picture of climate risk. Climate related risk is ultimately dependent on absolute emissions, as the climate only cares about absolute GHG emissions.

**b. The rule should mandate disclosure of both absolute Scope 3 emissions and the intensity of those emissions for large companies in the food and agriculture sector.**

Food and agriculture corporations have a history of only reporting on emissions intensity metrics while ignoring the more important metric of absolute emissions. As such, FoE strongly urges

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<sup>33</sup> Deforestation Dividends, *How global banks profit from rainforest destruction and human rights abuses*, GLOBAL WITNESS (Oct 21, 2021), <https://www.globalwitness.org/en/campaigns/forests/deforestation-dividends/>.

<sup>34</sup> SEC Proposed Rule, *supra* note 12, at 45.

SEC to include in its final rule a requirement for large companies to report on Scope 3 emissions including both absolute and intensity metrics.

According to the EPA's most recent draft inventory of GHG emissions through 2020, emissions from the food and agricultural sectors have continued to grow while emissions from other sectors are on the decline.<sup>35</sup> These increases have happened even while many food and agriculture industries have been able to reduce emissions intensity. For example, in the dairy sector, despite a pledge made by the Obama Administration and a dairy industry group in 2009 to reduce emissions by 25 percent by 2020, absolute methane emissions from dairy have risen by more than 15 percent, in part due to increases in herd sizes. For investors to get a clear picture of the GHG footprint of these industries and prevent greenwashing, it is crucial that SEC include the requirement for large companies in the food and agriculture sector to fully disclose Scope 3 emissions in both absolute intensity terms.

**c. The rule should mandate disclosure of both absolute Scope 3 emissions and the intensity of those emissions for large companies in the fossil fuel and energy sectors.**

Some fossil fuel and energy organizations have started including Scope 3 emissions in their GHG accounting disclosures and setting targets for reducing carbon intensity of their products.<sup>36</sup> However, this strategy is a half-measure at best because it does not include disclosure of *absolute* emissions, allowing absolute emissions to continue climbing.<sup>37</sup> SEC should require large companies in the fossil fuel and energy sectors to disclose the entire breadth of their Scope 3 emissions – including in both absolute and intensity terms – and to establish a Scope 3 inventory across their value chains.

There are available resources to aid fossil fuel organizations in understanding the materiality and impacts of their entire value chains. The Greenhouse Gas Protocol, a multi-stakeholder partnership convened by the World Resources Institute (WRI) and the World Business Council for Sustainable Development (WBCSD), developed the *Corporate Value Chain (Scope 3) Accounting and Reporting Standard* (2011) and the associated *Technical Guidance for Calculating Scope 3 Emissions* (2013).<sup>38</sup> The IPIECA/API report, *Estimating petroleum industry value chain (Scope 3) greenhouse gas emissions: Overview of methodologies* (2016) provides valuable analyses of the above methods of calculation, and others used by the fossil fuels sector, which should be referenced by oil & gas organizations in evaluating their Scope 3 emissions.<sup>39</sup>

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<sup>35</sup> *Inventory of U.S. Greenhouse Gas Emissions and Sinks*, EPA, <https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks> (last visited May 4, 2022).

<sup>36</sup> Shell, Total, and Equinor have started disclosing their Scope 3 emissions, but only intensity; Emily Pontecorvo, *Big Oil is finally talking about scope 3 emissions*, GRIST (Feb. 12, 2020), <https://grist.org/energy/big-oil-is-finally-talking-about-the-elephant-in-the-room-the-emissions-footprint-of-its-products/>.

<sup>37</sup> *Id.*

<sup>38</sup> *Grice, supra note 32*, at 6.

<sup>39</sup> *Id.*

Currently, there exist several standards for Scope 3 emissions reporting in the fossil fuels energy sector, but lack of uniformity and transparency make statistics incomparable and incalculable.<sup>40</sup> The lack of SEC requirements for disclosure of Scope 3 emissions encourages even more abuses of ineffective net zero commitments, which are already too easily gamed.<sup>41</sup> As more fossil fuel companies, consumer goods manufacturers, and financial services organizations make the greenwashed pledge to become “net zero,” it is more imperative than ever that emissions occurring across entire value chains be disclosed.<sup>42</sup> It is already impossible to make a real difference to climate outcomes through voluntary net zero pledges and net zero commitments that lack clear implementation pathways, but without the mandatory inclusion of Scope 3 emissions for large companies in these sectors, we will be even farther behind. Mandatory reporting requirements put in place by SEC would not be enough to lend credibility to the net zero commitments of businesses in emissions intensive sectors, but it would at least grant investors the assurance that the absolute impact of organizations’ emissions is clearly divulged. Unless reporting of all Scope 3 emissions – including both absolute and intensity terms – is required for all large companies in fossil fuel and energy sectors, investors will be left in the dark as to the status or commitment of an organization towards any climate goals.

**d. The rule is correct to disallow deduction of offsets in emissions reporting.**

FoE strongly supports the SEC’s decision to exclude any use of purchased or generated offsets in the required disclosure of GHG emissions. The proposed rules require registrants to “disclose GHG emissions in gross terms, and exclude any use of purchased or generated offsets.”<sup>43</sup> Offsets and net zero emissions pledges are not an effective way to avoid climate risk, and can even make things worse.

Carbon offsetting is premised on a false assumption of equivalence, meaning that the offset is sufficiently reflective of the emissions.<sup>44</sup> However, offset strategies such as sequestration and storage through reforestation, afforestation, or forest conservation is not equivalent because it is by nature temporary (until the tree is cut down or burned). There are no reliable and uniform methods of calculating carbon sequestered and stored from reforestation, which would not be fully realized for many years down the line once the trees are more mature. Further, many reforestation projects generating millions of dollars in carbon offsets are seriously mischaracterized to the public by failing to meet the standard of “additionality” -- that is, taking credit for reductions that were already happening or were likely to occur in the absence of the project, regardless of the offset incentive.<sup>45</sup>

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<sup>40</sup> Dan Gardiner, *Net Zero Standard for Oil and Gas*, IIGCC, Sept. 2021 at 4, 9, <https://www.iigcc.org/download/iigcc-net-zero-standard-for-oil-and-gas/?wpdmdl=4866&refresh=62669c8d95d281650891917>.

<sup>41</sup> See e.g., Kathleen Ronayne, *PG&E pledges net-zero emissions by 2040, will keep using gas*, AP NEWS (June 8, 2022), <https://apnews.com/article/climate-science-california-business-government-and-politics-339abdfec6701d3598c7412ee0b601b9>.

<sup>42</sup> *Id.* at 7.

<sup>43</sup> SEC Proposed Rule, *supra* note 12, at 159.

<sup>44</sup> Mike Childs & Paul de Zylva, *A dangerous distraction – the offsetting con*, FRIENDS OF THE EARTH (Oct. 22, 2021), <https://policy.friendsoftheearth.uk/insight/dangerous-distraction-offsetting-con>.

<sup>45</sup> Ben Elgin, *These Trees are Not What They Seem*, BLOOMBERG (Dec. 9, 2020), <https://www.bloomberg.com/features/2020-nature-conservancy-carbon-offsets-trees/>.



Carbon offsets are cheaper than carbon mitigation measures and can actually delay action to reduce emissions.<sup>46</sup> These strategies only enhance the problem by signaling to consumers that businesses are making efforts to reduce their emissions, when in reality they are not. Further, the lack of consistency and uniformity in measuring offsets means that they can't be measured in a meaningful way. FoE also supports the proposed rule provisions that require registrants to disclose the role that carbon offsets or renewable energy credits (REC) play in the registrant's climate-related business strategy if they do use offsets or RECs.

FoE also supports the SEC's position requiring registrants to disclose the amount of carbon reduction represented by REC or offsets if they have used them in their plan to achieve climate-related targets or goals, as well as to disclose the source of the offsets or RECs, a description and location of the underlying projects, any registries or other authentication of the offsets or RECs, and the cost of the offsets or RECs. Mandated detailed disclosure about the nature of a purchased carbon offset could help to mitigate instances of greenwashing as discussed above. Further, the extent of this required disclosure can also help to expose greenwashing and fraud in cases where emissions offsets are exaggerated, simultaneously purchased from other companies, harmful to local communities, or fail to perform (such as in cases where forest offsets are cut down or burned in wildfires).

- e. The SEC should require registrants to default to life-cycle assessment (LCA) factors from the best available peer-reviewed research unless companies have their own LCA data, in which case they should be required to disclose their methodology for the LCA study.**

FoE acknowledges that it is not feasible for SEC itself to establish specific, clear, consistent, and scientifically rigorous methodologies for disclosing emissions across many diverse industry sectors, especially as the science around Scope 3 emissions measurement continues to rapidly develop. However, there are ways in which SEC can offer guidance related to the methodology for Scope 3 emissions disclosure that will ensure the most thorough and scientifically accurate emissions estimates. One of these measures is to require registrants to default to life-cycle assessment (LCA) factors from the best available peer-reviewed research, unless companies have their own LCA data specific to the production conditions used by that company or its suppliers, in which case the registrant should be required to disclose the methodology for its LCA study. An LCA is used to evaluate environmental impacts (or GHG emissions) of a product or activity across its full life cycle, from the point where the raw materials are acquired, to manufacturing, to its use, to its final disposal.<sup>47</sup> If there are significant differences between the LCA factors from the company's own research and the peer-reviewed research, the registrant should be required to provide an explanation for those differences. This will help ensure transparency and accuracy in emissions disclosure.

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<sup>46</sup> Childs & de Zylva, *supra* note 45.

<sup>47</sup> *Design for the Environment Life – Cycle Assessments*, EPA, <https://archive.epa.gov/epa/saferchoice/design-environment-life-cycle-assessments.html> (last visited May 4, 2022).

**f. Emissions sources should be disaggregated and expressed in CO<sub>2</sub>-e.**

The SEC should require Scope 3 emissions to be disclosed on a disaggregated basis for each type of GHG that is included in the Commission’s proposed definition of “greenhouse gasses.” GHGs include carbon dioxide, methane, nitrous oxide, and fluorinated gases, which respectively make up approximately 79%, 11%, 7%, and 3% of all GHGs.<sup>48</sup> Methane’s comparative impact pound for pound is 25 times greater than carbon dioxide over a 100-year period, however it has a shorter lifetime in the atmosphere.<sup>49</sup> Therefore, methane is a short-lived and powerful climate pollutant that could be reduced in the short-term. Methane is emitted through activities such as the production and transport of coal, natural gas, and oil; livestock and other agricultural practices; land use; and the decay of organic waste in municipal solid waste landfills.<sup>50</sup> Many of these fall under Scope 3 emissions. At the very least, methane should be disaggregated because there is a special benefit to understanding a company’s methane emissions. FoE agrees that emissions data should also be expressed in CO<sub>2</sub>-e as proposed so that emissions can be easily compared across companies and sectors.

**IV. The SEC Should Require Disclosure of the Current and Future Climate Impacts of Oil and Gas Leasing and Prevent Stockpiling of Undeveloped Leases.**

Fossil fuel extraction on public lands and in public waters accounts for nearly a quarter of U.S. climate emissions.<sup>51</sup> Currently, the industry holds more than 26 million acres of unused, idle public leases - 14 million acres onshore and 12 million acres offshore - enough to produce oil and gas for decades without new leasing.<sup>52</sup> Oil and gas companies currently hold the ability to stockpile these inactive leases for decades, potentially impacting Scope 3 emissions long into the future if and when development may occur. If or when they are developed, these stockpiled leases would push the world beyond the climate tipping point by releasing at least a half century worth of emissions.<sup>53</sup>

The SEC issued a final rule in 2009 called the Securities and Exchange Commission Modernization of Oil and Gas Reporting Rule that encourages fossil fuel companies to stockpile leases on public lands and waters. The rule made revisions to how the oil and gas industry could report their undeveloped reserves by broadening the definition of “proved reserves” and expanding the terms under which companies could list them.<sup>54</sup> The rule was designed to give

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<sup>48</sup> *Overview of Greenhouse Gasses*, EPA, [https://www.epa.gov/ghgemissions/overview-greenhouse-gases#:~:text=In%20general%2C%20fluorinated%20gases%20are,nitrogen%20trifluoride%20\(NF3\)](https://www.epa.gov/ghgemissions/overview-greenhouse-gases#:~:text=In%20general%2C%20fluorinated%20gases%20are,nitrogen%20trifluoride%20(NF3)) (last visited May 4, 2022).

<sup>49</sup> *Id.*

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

<sup>51</sup> Report, *Big Oil’s Public Leasing Shell Game*, FRIENDS OF THE EARTH (Mar. 30, 2022), [http://foe.org/wp-content/uploads/2022/03/Clean-Shell-Game-Brief\\_v4.pdf](http://foe.org/wp-content/uploads/2022/03/Clean-Shell-Game-Brief_v4.pdf).

<sup>52</sup> *Id.*; Press Release, US DOI, FACT SHEET: President Biden to Take Action to Uphold Commitment to Restore Balance on Public Lands and Waters, Invest in Clean Energy Future (Feb. 11, 2021) <https://www.doi.gov/pressreleases/fact-sheet-president-biden-take-action-uphold-commitment-restore-balance-public-lands>.

<sup>53</sup> *Big Oil’s Public Leasing Shell Game*, *supra* note 52.

<sup>54</sup> *Oil and Gas Companies Gain by Stockpiling America’s Federal Land*, CTR. FOR AM. PROGRESS 6 (Aug. 2018), [https://cdn.americanprogress.org/content/uploads/2018/08/28124032/082918\\_FinancialIncentivesOilandGas-report1.pdf?\\_ga=2.140332720.2060394123.1627594096-753540997.1627594096](https://cdn.americanprogress.org/content/uploads/2018/08/28124032/082918_FinancialIncentivesOilandGas-report1.pdf?_ga=2.140332720.2060394123.1627594096-753540997.1627594096).

investors and shareholders insight into the purported natural resource reserves of oil and gas companies that would help them to determine the asset holdings and market worth.<sup>55</sup> However, the rule incentivizes the oil and gas industry to accumulate below-market public onshore and offshore leases. The industry is holding and stockpiling these unused leases to artificially inflate its net assets and appear more desirable to banks, shareholders, and investors.<sup>56</sup> This practice locks up public resources and lands for decades with little to no return to taxpayers and maintains a looming threat of large quantities of greenhouse gas emissions further contributing to climate change.<sup>57</sup> In fact, if the existing leases were developed, it would generate 46 billion tons of greenhouse gases and shift an estimated \$2.19 trillion of climate costs onto society.<sup>58</sup> To prevent future stockpiling and associated climate disaster, SEC should swiftly undertake revisions to the 2009 Rule to close this perverse incentive and unnecessary loophole.

This practice also allows the oil and gas industry to inflate its bottom-line from market overvaluation on public resources that may never be developed, putting investors at risk and magnifying the boom-bust cycle that is a hallmark of the oil and gas sector.<sup>59</sup> If the SEC aims to boost transparency in publicly traded companies for investors, it must require the oil and gas industry to disclose the potential GHG emissions from these leases, even if they haven't yet been emitted, or rectify the 2009 revisions. This will allow the public to make informed investment decisions based on climate risk. It will also allow the value of oil and gas companies to accurately reflect their climate risk. Continued non-disclosure will only encourage the inflated valuation of these industries and their assets to the detriment of investors and society.

#### V. **SEC Should Require Standardized Disclosure of Risk Management Systems for Climate Change.**

As the SEC correctly points out in the proposed rule, there is currently no singular standardized method in which companies disclose their risk management systems for climate change.<sup>60</sup> The SEC is already aware that this lack of standardization leads to investor frustration when attempting to obtain and compare climate-related risks and their potential impact on a company's business.<sup>61</sup> Certain industries are especially vulnerable to climate risks and should be analyzed thoroughly when making considerations of the types of disclosures required, especially when considering how to guide companies in their reporting of Scope 3 emissions. There are two industries arguably most pertinent to this discussion: agriculture commodities (and their relationship to forests) and fossil fuels. Energy production, agriculture, and land use and forestry are all among the top six primary sources of greenhouse gas emissions in the United States.<sup>62</sup>

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<sup>55</sup> *Big Oil's Shell Game*, *supra* note 52, at 7.

<sup>56</sup> *Id.* at 2.

<sup>57</sup> *Id.* at 9.

<sup>58</sup> *Id.* at 3; see also Friends of the Earth, *Social Cost of Carbon from Federal Oil and Gas Development* (May 24, 2022), [https://foe.org/wp-content/uploads/2022/05/Cost\\_of\\_Carbon\\_FactSheet\\_v5\\_052422.pdf](https://foe.org/wp-content/uploads/2022/05/Cost_of_Carbon_FactSheet_v5_052422.pdf).

<sup>59</sup> *Id.* at 9.

<sup>60</sup> SEC Proposed Rule, *supra* note 12, at 21.

<sup>61</sup> *Id.* at 22.

<sup>62</sup> EPA, *Sources of Greenhouse Gas Emissions* (Last accessed April 20, 2022), <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions>.

Moreover, industrial production accounts for nearly a quarter of the country’s greenhouse gas emissions.<sup>63</sup> As the EPA notes, these greenhouse gas emissions would be considered Scope 3 emissions because they “primarily come from burning fossil fuels,” a form of downstream use.<sup>64</sup> Because of the great effect these industries have on the climate and the great risks climate changes pose to these businesses, proper disclosure methods should be scrupulously analyzed and regulated to ensure thorough and accurate reporting to investors and the general public.

Although there is currently no required standardized disclosure of risk management systems for climate change, as the SEC notes, over recent years, there has been an increase in investor demand for climate-related information.<sup>65</sup> Additionally, there has been a rise in investor advocacy over the past decade and a half. For example, impact investing a decade ago was considered an “emerging market”, but as of 2020, impact investing had a market presence of somewhere between an estimated \$715 billion and \$2.1 trillion.<sup>66</sup> Additionally, more companies are either converting to or emerging as benefit corporations (defined as “social enterprises. . . [that] create value for non-shareholding stakeholders, such as their employees, the local community, and the environment.”).<sup>67</sup> In 2007, benefit corporations were a new phenomenon, but as of today, there are nearly 5,000 B-Corporations in existence, present in over 70 countries.<sup>68</sup>

In the face of this increase in investor demand for corporate transparency in terms of climate and social implications, as well as in response to the 2010 SEC Guidance, companies have increased their voluntary disclosures.<sup>69</sup> International environmental research and consulting firm EY reports that “[m]ost companies now commonly acknowledge climate change as a material issue, either in their annual or sustainability reports. But a majority of highly exposed companies still lack high-quality climate disclosures.”<sup>70</sup> EY’s analysis found that 54% of the companies assessed disclosed climate-related risks in some capacity, but the overall quality of the disclosures (measured by the Task Force on Climate-related Financial Disclosure, or TCFD rating system) was scored at only 27 percent.<sup>71</sup> Arguably, this shows that while companies may be aware of climate risks and acknowledge them, they are taking insufficient steps to actually address the risks and to prevent damage to investors and communities from coming to fruition. Below, we analyze some current disclosure of management systems of climate change for different industries, reflect on how these insufficient management systems involve Scope 3 emissions, and how this shortcoming affects investors, communities, and the climate.

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> SEC Proposed Rule, *supra* note 12, at 14.

<sup>66</sup> Yasemin Saltuk Lamy, Christina Leijonhufvud & Nick O’Donohoe, *The Next 10 Years of Impact Investment*, STAN. SOC. INNOVATION REV. (2021).

<sup>67</sup> Suntae Kim, et al., *Why Companies are Becoming B Corporations*, HARV. BUS. REV., <https://hbr.org/2016/06/why-companies-are-becoming-b-corporations> (last visited Apr. 20, 2022).

<sup>68</sup> *Make Business a Force for Good*, B LAB GLOBAL, [https://www.bcorporation.net/en-us/?\\_ga=2.87534878.766299382.1650557866-1141389055.1650557866](https://www.bcorporation.net/en-us/?_ga=2.87534878.766299382.1650557866-1141389055.1650557866) (last visited Apr. 21, 2022).

<sup>69</sup> Mathew Nelson, *How Can Climate Change Disclosures Protect Reputation and Value?* (Apr. 27, 2020), [https://www.ey.com/en\\_us/climate-change-sustainability-services/how-can-climate-change-disclosures-protect-reputation-and-value](https://www.ey.com/en_us/climate-change-sustainability-services/how-can-climate-change-disclosures-protect-reputation-and-value).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

**a. Industry-specific disclosure of management systems for climate change (as reported by the Task Force on Climate-Related Financial Disclosures [TCFD] recommendations):**

What follows is a brief industry-by-industry discussion explaining how companies are failing to adequately disclose their GHG emissions, underscoring the importance of SEC requiring disclosure of GHG emissions for investors.

Agriculture:

EY reports that “[t]he agriculture, food and forest products sector performed the worst of all nonfinancial sectors,” in terms of the quality of climate change disclosures.<sup>72</sup> There were significant disparities in quality and coverage among various companies and noticeably among different countries, with companies from the least regulated markets scoring the lowest.<sup>73</sup> Overall, companies provided little information of their governance structure as it relates to climate-related issues.<sup>74</sup> Additionally, many companies acknowledged that their company had some form of climate risk management integrated into their company’s general strategy, few if any additional details were provided.<sup>75</sup> The report noted that many companies did submit their climate-risk targets and metrics.<sup>76</sup> However, “few reported their Scope 3 emissions with clear boundaries and methodology.”<sup>77</sup> This shows there is a clear need to use regulatory authority to compel agricultural companies to disclose their general management system of climate change, but specifically to compel more complete and meaningful Scope 3 emissions reporting.

Energy:

US companies consistently fail to report their climate-related financial disclosures.<sup>78</sup> Any claims to the contrary look only at the governance and risk management processes of climate-related risks, more than the actual strategy and reporting of emissions. In fact, less than one-third of companies received a high score on their Scope 3 emissions reporting, and surprisingly “almost a quarter of companies in the energy industry remained silent on their scope 1 and 2 emissions.”<sup>79</sup> Compelling energy companies to disclose this information is clearly necessary, in the face of many companies failing to report at all or at least report sufficiently.

Mining:

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<sup>72</sup> Mathew Nelson, *How the Agriculture Sector Adopted Climate-Related Disclosures* (Jun. 1, 2020), [https://www.ey.com/en\\_us/climate-change-sustainability-services/how-the-agriculture-sector-adopted-climate-related-disclosures](https://www.ey.com/en_us/climate-change-sustainability-services/how-the-agriculture-sector-adopted-climate-related-disclosures).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Mathew Nelson, *How the Energy Industry Is Leading on Climate-Related Disclosures*, EY (June 1, 2020), [https://www.ey.com/en\\_us/climate-change-sustainability-services/how-the-energy-industry-is-leading-on-climate-related-disclosures](https://www.ey.com/en_us/climate-change-sustainability-services/how-the-energy-industry-is-leading-on-climate-related-disclosures).

<sup>79</sup> *Id.*

The quality of climate-related disclosures for mining companies has reportedly decreased in recent years.<sup>80</sup> “Almost two-thirds of companies achieved a quality score of less than 32% and over one-third covered only one or two disclosure recommendations.<sup>81</sup>” Additionally, around half of companies analyzed in the study provided zero information on board oversight or the role of management in climate-risk analysis.<sup>82</sup> Only top-performing companies provided a time frame for the risks or opportunities provided in their disclosures.<sup>83</sup> Additionally, only top-performing companies provided data on their Scope 3 emissions.<sup>84</sup>

### Manufacturing:

Overall, manufacturing companies scored highly, with US companies scoring higher than average.<sup>85</sup> Scope 1 and 2 emissions reporting was common in reports from manufacturing companies; however, only higher-scoring companies reported their Scope 3 emissions comprehensively.<sup>86</sup> Still, Scope 3 boundaries were often not reported.<sup>87</sup>

### Insurance:

The insurance sector overall performed worse than other major industries, like banking, energy, and transport.<sup>88</sup> U.S. insurance companies were scored between 50 percent and 60 percent.<sup>89</sup> Of the four TCFD metrics, strategy disclosures were the worst score for insurance companies, with many companies failing to analyze transitional risks.<sup>90</sup> Few insurance companies provided robust targets and metrics regarding climate risks.<sup>91</sup> Additionally, Scope 1 and 2 emissions were disclosed, but “majority of the insurers did not disclose whether they monitored the carbon intensity of their underwriting or investment portfolios.<sup>92</sup>” Scope 3 emissions “were rarely revealed.<sup>93</sup>”

### Asset owners and managers:

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<sup>80</sup> Mathew Nelson, *How Climate Disclosures in the Mining Sector Are Diverging*, EY (June 1, 2020), [https://www.ey.com/en\\_us/climate-change-sustainability-services/how-climate-disclosures-in-the-mining-sector-are-diverging](https://www.ey.com/en_us/climate-change-sustainability-services/how-climate-disclosures-in-the-mining-sector-are-diverging).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Mathew Nelson, *Why Manufacturing Is Setting the Bar for Climate-Related Disclosures*, EY (June 1, 2020), [https://www.ey.com/en\\_us/climate-change-sustainability-services/why-manufacturing-is-setting-the-bar-for-climate-related-disclosures](https://www.ey.com/en_us/climate-change-sustainability-services/why-manufacturing-is-setting-the-bar-for-climate-related-disclosures).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Mathew Nelson, *How Scrutiny Affected the Insurance Sector’s Climate-Risk Disclosures*, EY (June 1, 2020), [https://www.ey.com/en\\_us/climate-change-sustainability-services/how-scrutiny-has-affected-insurance-sectors-climate-risk-disclosures](https://www.ey.com/en_us/climate-change-sustainability-services/how-scrutiny-has-affected-insurance-sectors-climate-risk-disclosures).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

Per the TCFD metrics, asset owners and managers, which contribute to greenhouse gas emissions by providing financial backing to a variety of destructive sectors and industries including agro-commodities and fossil fuels, have much room for improvement in terms of their climate-risk disclosures. “[A]sset owners and managers obtained the lowest scores for coverage and quality of climate-related risk disclosures across all the sectors assessed.<sup>94</sup>” “Only one-third of asset owners and managers disclosed some information regarding their climate governance structure.<sup>95</sup>” Slightly over one-third of companies reported any form of their climate-related risks and opportunities.<sup>96</sup> Moreover, asset owners and managers fared far worse than the banking or insurance sector in terms of their targets and metrics component of the score.<sup>97</sup> How the asset owners and managers reported Scope 3 emissions was not addressed in the report.

#### Retail, health and consumer goods:

The retail, health and consumer goods sector scored among the lowest of the sectors analyzed.<sup>98</sup> Those who did rank the highest were European companies.<sup>99</sup> While many companies in this sector did identify and assess climate-related risks, most did not “describe how processes for identifying, assessing and managing climate-related risks were integrated into the organization’s overall risk management.<sup>100</sup>” Less than half of the companies analyzed disclosed their Scope 1, 2 and 3 GHG emissions, with companies from countries such as China (Mainland), Hong Kong, the Philippines, and Russia failing to provide any GHG emissions information.<sup>101</sup> This is especially problematic given that a typical consumer-goods company’s supply chain generates more than 80 percent of greenhouse-gas emissions and more than 90 percent of the impact on air, land, water, biodiversity, and geological resources,<sup>102</sup> that the consumer goods sector has a very significant deforestation footprint<sup>103</sup> and a significant climate impact overall.

Ultimately, the range of scores among different companies in various sectors paints the picture of investor frustration when trying to obtain company disclosures of management systems of climate change. To note, even companies who do provide more thorough data do not provide sufficient information as to the parameters or methodology of the data for investors to accurately understand what the raw data means. With such variances and little consistency and reliability in the information that is available, investors need the SEC’s support to compel companies to

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<sup>94</sup> Mathew Nelson, *Why Asset Owners and Managers Fall Behind on Climate-Risk Disclosures* EY (June 1, 2020), ([https://www.ey.com/en\\_us/climate-change-sustainability-services/why-asset-owners-and-managers-fall-behind-on-climate-risk-disclosures](https://www.ey.com/en_us/climate-change-sustainability-services/why-asset-owners-and-managers-fall-behind-on-climate-risk-disclosures)).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Mathew Nelson, *Why the Consumer Goods and Health Sector Lags on Climate Disclosures*, EY (June 1, 2020), ([https://www.ey.com/en\\_us/climate-change-sustainability-services/why-the-consumer-goods-and-health-sector-lags-on-climate-disclosures](https://www.ey.com/en_us/climate-change-sustainability-services/why-the-consumer-goods-and-health-sector-lags-on-climate-disclosures)).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> McKinsey & Company, *How to prepare for a sustainable future along the value chain* (Jan. 20, 2022), (<https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/how-to-prepare-for-a-sustainable-future-along-the-value-chain>).

<sup>103</sup> Helen Bellfield, *We can no longer ignore deforestation hidden in the goods we buy*, FOREST 500 (Apr. 14, 2021), (<https://forest500.org/analysis/insights/we-can-no-longer-ignore-deforestation-hidden-goods-we-buy>).

provide accurate, readable, and consistent data, which will allow investors to form more sound investment decisions. Industries have failed to create a uniform disclosure system of their own. Therefore, agency action is necessary to better inform and protect investors in their climate-risk-related investment strategies.

## **VI. More Prescriptive Management Strategies Are Especially Needed to Protect Indigenous Peoples.**

The rights of Indigenous Peoples are material and relevant to the proposed rule for reasons we will elaborate below – yet SEC’s proposal overlooks the vital need for mandated disclosure of risks to and impacts on indigenous populations, and conversely, risks to businesses from failures to recognize and respect the rights of Indigenous Peoples impacted by business operations and supply chains. Disregard for the land rights and human rights of Indigenous and tribal peoples regularly – and justly – leads to project delays and even cancellation, as this section details below. This disregard also accelerates environmental degradation, climate change, and social conflict and violence.

Indigenous and tribal peoples are critical to forest conservation and climate stability: studies show that ancestral lands and land under title by Indigenous Peoples are the most biodiverse and best conserved on the planet.<sup>104</sup> A 2019 report on climate change and land use from the Intergovernmental Panel on Climate Change found that agricultural practices which incorporate Indigenous and local knowledge are more effective in adjusting to deforestation, biodiversity loss, and other challenges.<sup>105</sup> To provide an example from one ecosystem critical to climate stability: lands currently under the customary protection and management of Indigenous Peoples make up nearly half of the Amazon rainforest, according to a March 2021 United Nations report.<sup>106</sup> In Brazil, the lands classified by the government as Indigenous territories or protected areas comprise up to 1.3 million square kilometers (500,000 square miles)<sup>107</sup> and store 56 percent of the total carbon stock in the Brazilian Amazon.<sup>108</sup> That makes preserving these areas crucial for achieving the Paris Climate Agreement goal of limiting global warming to 1.5 degrees Celsius above pre-industrial levels.

Yet when Indigenous and tribal peoples attempt to defend their land rights they are often threatened, attacked, and even killed. According to data collected by Global Witness between 2002 and 2019, over 2,000 environmental defenders have been murdered defending their rights

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<sup>104</sup> *Frontiers in Ecology and the Environment*, “Importance of Indigenous Peoples’ Lands For the Conservation of Intact Forest Landscapes,” January 6, 2020, <https://esajournals.onlinelibrary.wiley.com/doi/full/10.1002/fee.2148>.

<sup>105</sup> Intergovernmental Panel on Climate Change, “Special Report on Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems,” 2019, <https://www.ipcc.ch/srccl/>.

<sup>106</sup> Food and Agriculture Organization of the United Nations, “Forest Governance by Indigenous and Tribal Peoples,” March 2021, <http://www.fao.org/americas/publicaciones-audio-video/forest-gov-by-Indigenous/en/>.

<sup>107</sup> The Association of Brazil’s Indigenous Peoples, *Brazilian Indigenous Leaders Issue Call for BlackRock to Adopt a Forests and Indigenous Rights Policy* (January 11, 2021) <https://apiboficial.org/2021/01/11/brazilian-indigenous-leaders-issue-call-for-blackrock-to-adopt-a-forests-and-indigenous-rights-policy/?lang=en>.

<sup>108</sup> Walker et. al., “The role of forest conversion, degradation, and disturbance in the carbon dynamics of Amazon Indigenous territories and protected areas,” *Proceedings of the National Academy of Sciences* Feb 2020, 117 (6) 3015-3025; DOI: 10.1073/pnas.1913321117.



to their land and the environment.<sup>109</sup> The Front Line Defenders Global Analysis 2020 Report identified that a further 220 land, environmental or Indigenous and tribal peoples’ rights defenders were killed in 2020, and 26% of those killed were defenders of Indigenous and tribal peoples’ rights. Front Line Defenders has recorded the killing of 327 Indigenous and tribal peoples’ rights defenders since 2017. Many more have faced threats, physical attacks, smear campaigns, and judicial harassment. Impunity for these attacks is the norm.<sup>110</sup>

While it would be a vast overstatement to suggest that many financial service providers are currently undertaking appropriate due diligence in regard to Indigenous Peoples’ rights, there is a clear trend among certain financial service providers to begin to recognize the materiality of these concerns: banks, asset managers and other financial firms are beginning to publicly recognize the crucial role of respect for Indigenous and tribal rights and to adopt policies predicated on the materiality of these concerns. For example, the California Public Employees Retirement System (CalPERS), the largest public pension fund in the country, updated its investment policy in 2018 such that its Governance & Sustainability Principles now include direct acknowledgement of “free, prior and informed consent (FPIC) as a standard in relation to Indigenous Peoples’ rights.”<sup>111</sup> (Free, prior, and informed consent (FPIC) is discussed below.)

Similarly, BlackRock has clearly stated its expectation that companies “obtain (and maintain) the free, prior, and informed consent of indigenous peoples for business decisions that affect their rights,”<sup>112</sup> and State Street Global Advisors has stated that “Successful approaches [to managing supply chain risks] include ... protection of human rights and the respect of Free, Prior and Informed Consent (“FPIC”) of local [Indigenous] communities.”<sup>113</sup> The World Bank has had a strict FPIC policy in place since 2015.

Foreign securities regulators are also recognizing the importance of disclosures of this nature. For example, the European Commission’s Non-Financial Reporting Directive recommends disclosures on human rights due diligence and efforts to prevent human rights abuses, including the rights of Indigenous Peoples.<sup>114</sup> The Directive is currently under review and these types of standards are expected to become binding.

As this section demonstrates, the abuse or disregard of Indigenous and tribal peoples’ rights rightfully leads to legal, reputational, operational, and political risks for companies. Moreover, respect for and strict observance of these rights is central to businesses’ social license to

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<sup>109</sup> Global Witness, *Defending Tomorrow: The climate crisis and threats against land and environmental defenders*, 29 July 2020,

[https://www.globalwitness.org/documents/19939/Defending\\_Tomorrow\\_EN\\_low\\_res\\_-\\_July\\_2020.pdf](https://www.globalwitness.org/documents/19939/Defending_Tomorrow_EN_low_res_-_July_2020.pdf).

<sup>110</sup> Front Line Defenders, *Global Analysis 2020*, 2021,

[https://www.frontlinedefenders.org/sites/default/files/fl\\_d\\_global\\_analysis\\_2020.pdf](https://www.frontlinedefenders.org/sites/default/files/fl_d_global_analysis_2020.pdf).

<sup>111</sup> Chain Reaction Research, *The Chain: CalPERS Approves Updated Investment Policy Including Material Risks from Deforestation* (July 13, 2018) <https://chainreactionresearch.com/the-chain-calpers-approves-updated-investment-policy-including-material-risks-from-deforestation/>.

<sup>112</sup> BlackRock, “Our approach to engagement with companies on their human rights impacts,” March 2021, <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engagement-on-human-rights.pdf>.

<sup>113</sup> State Street Global Advisors, *Addressing Deforestation Risk in Supply Chains* (Apr. 4, 2022), <https://www.ssga.com/us/en/institutional/ic/insights/risk-in-supply-chains>.

<sup>114</sup> European Commission, *Guidelines on non-financial reporting (methodology for reporting non-financial information)*, C/2017/4234, 2017, [https://ec.europa.eu/info/publications/non-financial-reporting-guidelines\\_en](https://ec.europa.eu/info/publications/non-financial-reporting-guidelines_en).

operate<sup>115</sup>; it is also directly connected to climate risk mitigation, an issue the SEC has acknowledged is an important part of its mission.<sup>116</sup> Finally, the issue of Indigenous and tribal peoples' rights and its centrality to environmental and climate protection overlaps with all three pieces of the ESG landscape, a landscape on which investors themselves are increasingly affirming that they base investment decisions.<sup>117</sup>

Therefore, the SEC should require disclosures about the risks related to existing and prospective abuses of Indigenous and tribal people's land rights and other rights caused both by the issuers' business models and specific projects. To do so would squarely support the SEC's mission to 1) protect investors; 2) ensure fair, orderly, and efficient markets; and 3) facilitate capital formation.

**a. Indigenous & tribal peoples and the environment.**

As explained by the UN Permanent Forum on Indigenous Issues, “[w]hile Indigenous peoples in all regions of the world live on lands and territories that contain a great wealth of natural resources, they remain some of the most vulnerable people on earth due to centuries of marginalization and discrimination... Indigenous peoples' special relationship with their lands – a fundamental element of their spiritual, religious, cultural and physical survival – is often at odds with these interests.”<sup>118</sup>

For many Indigenous and tribal peoples, land is not merely a possession and a means of production.<sup>119</sup> Their history and identity are tied to their territory through memories, stories and sacred and cultural sites. Environmental and climate impacts not only affect people's means of sustenance; they also affect people's relationship with their territory and their ability to continue to live as Indigenous people and maintain their own identity and customs. Many Indigenous and tribal territories are collectively owned and managed, with complex networks of relationships, usage rights and diverse decision-making structures.

Indigenous Peoples vary enormously from one to another. Many Indigenous and tribal peoples, especially forest peoples, do not live as settled agriculturalists on a small plot of land. For some, their farming systems are based on rotational agriculture that is spread across extensive areas. Hunter-gatherer peoples spend much of their time in the forest, at camps and farms, sometimes several days' travel from their communities, where they hunt, fish and gather medicinal plants, building materials, clay for pottery, and countless other resources essential for their way of life. In particularly remote regions, like in the Amazon rainforest and in West Papua and the

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<sup>115</sup> Abbi Buxton & Emma Wilson, The Business Case for Getting FPIC Right (Jan 1, 2013) <https://www.jstor.org/stable/resrep01389.6?seq=1>.

<sup>116</sup> SEC Acting Chair Allison Lee, “A Climate for Change: Meeting Investor Demand for Climate and ESG Information at the SEC,” 15 March 2021, <https://www.sec.gov/news/speech/lee-climate-change>.

<sup>117</sup> Business Wire, “ESG Investing Reaches Critical Mass; Ongoing Momentum Depends on What's Driving the Demand, Finds Natixis Investment Managers Survey,” 22 April 2021, <https://www.businesswire.com/news/home/20210422005347/en/ESG-Investing-Reaches-Critical-Mass-Ongoing-%20Momentum-Depends-on-What%E2%80%99s-Driving-the-Demand-Finds-Natixis-Investment-Managers-Survey>.

<sup>118</sup> United Nations Permanent Forum on Indigenous Issues, “Indigenous Peoples And Industrial Corporations,” [https://www.un.org/esa/socdev/unpfii/documents/PFII8\\_FS3.pdf](https://www.un.org/esa/socdev/unpfii/documents/PFII8_FS3.pdf).

<sup>119</sup> J. R. Martínez Cobo, *Study of the problem of discrimination against Indigenous populations*. Volume V. Conclusions, proposals and recommendations. United Nations, 1987.

Andaman Islands, some Indigenous Peoples continue to live in voluntary isolation.<sup>120</sup> Any attempt to contact them or operate in their territory, or in areas that would cause impact to their territory, would be a violation of their right to self-determination, could force their displacement, and poses a serious health risk: COVID-19, influenza, other diseases, or even a simple cold could wipe out an entire people.<sup>121</sup>

As such, oil drilling, mining, agribusiness, or other types of activities or projects, even in an apparently vacant area far from a community, can hinder survival. Per the UN Permanent Forum on Indigenous Issues, “[t]he impact of such projects includes environmental damage to traditional lands in addition to loss of culture, traditional knowledge and livelihoods.”<sup>122</sup> Indigenous and tribal peoples enjoy a deeply intimate relationship with their environments, have unique ways of relating with both the land and people from other cultures, and live and subsist in ways that are often not understood, appreciated or respected by outside entities. These differences are of such significance that they have given rise to a body of international legal standards.

#### **b. International legal standards on Indigenous rights.**

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the United Nations on September 13, 2007, enshrines the rights that “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.”<sup>123</sup> At the time of the UN General Assembly adoption of UNDRIP in 2007, 144 member states voted in favor; only 4 states—the U.S., Canada, Australia and New Zealand—voted against it, and since then all four have reversed course and now support UNDRIP.<sup>124</sup>

While making clear that Indigenous Peoples and individuals enjoy the same human rights that others enjoy, like those stated in the UN Charter and the Universal Declaration of Human Rights, the UNDRIP elaborates additional rights necessary for the survival, dignity and well-being of Indigenous Peoples. One of the first such rights outlined in the Declaration, in Article 3, is Indigenous Peoples’ right to self-determination.

This right should be particularly noteworthy for the purposes of corporate activity impacting Indigenous Peoples and their rights. The UNDRIP further states that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,”<sup>125</sup> and have the right to “own, use, develop and control the lands,

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<sup>120</sup> Dinah Shelton et.al, *Indigenous Peoples in Voluntary Isolation and Initial Contact*, International Work Group for Indigenous Affairs, 2013, <https://www.iwgia.org/en/resources/publications/305-books/3107-indigenous-peoples-in-%20voluntary-isolation-and-initial-contact.html>.

<sup>121</sup> For example, over half the Nahua population was wiped out by disease in the months following contact in 1984. See G.H. Sheppard, *Pharmacognosy and the Senses in Two Amazonian Societies*. PhD. Thesis, Medical Anthropology Program, University of California, Berkeley, 1999.

<sup>122</sup> United Nations Permanent Forum on Indigenous Issues, *Op Cit*.

<sup>123</sup> United Nations Declaration on the Rights of Indigenous Peoples at Article 43 (UNDRIP), [http://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](http://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf).

<sup>124</sup> United Nations, United Nations Declaration on the Rights of Indigenous Peoples, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

<sup>125</sup> UNDRIP, *supra* note 125 at Article 26. Emphasis added.

territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”

In addition to the near-universal adoption of the UNDRIP, the member states of the Organization of American States (every country in the Americas except Cuba) have adopted the American Declaration on the Rights of Indigenous Peoples, which also affirms the right of Indigenous Peoples to self-determination.<sup>126</sup> Of particular relevance to the subject of this section, the American Declaration recognizes Indigenous Peoples as enjoying collective rights to “their lands, territories and resources,”<sup>127</sup> the “right to conserve, restore, and protect the environment and to manage their lands, territories and resources in a sustainable way,”<sup>128</sup> and “the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”<sup>129</sup> The American Declaration also includes specific provisions related to the rights of Indigenous Peoples living in voluntary isolation.<sup>130</sup>

While, like the UNDRIP, the American Declaration is a nonbinding declaration, 25 of the 35 OAS member states have ratified or adhered to the American Convention on Human Rights, which entered into force in 1978. In order to enforce the rights set forth in the Convention, the Convention created the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.<sup>131</sup> Though the Convention does not outline specific rights for Indigenous and tribal peoples, it does uphold fundamental rights like the right to property<sup>132</sup> and to judicial protection<sup>133</sup> which the Court has relied upon in judgements in favor of Indigenous and tribal peoples, as described below.

And finally, while less widely adopted, 23 countries have ratified International Labor Organization Indigenous and Tribal Peoples Convention (No. 169) and have thus taken on binding treaty obligations. ILO Convention No. 169 spells out specific rights for Indigenous and tribal peoples. Among other rights outlined in the Convention, Article 7 states that Indigenous and tribal peoples have “the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use.”<sup>134</sup>

In summary, nearly every country in the world has affirmed, some in multiple instances, that Indigenous Peoples have certain inalienable rights, including the right to self-determination and to manage, distribute, and effectively control their territory, in accordance with their customary laws and traditional collective land tenure system.

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<sup>126</sup> Organization of American States, American Declaration on the Rights of Indigenous Peoples, Article III <https://www.oas.org/en/sare/documents/DecAmIND.pdf>.

<sup>127</sup> *Id.* at Article VI.

<sup>128</sup> *Id.* at Article XIX.

<sup>129</sup> *Id.* at Article XXV. Emphasis added.

<sup>130</sup> *Id.* at Article XXVI.

<sup>131</sup> Inter-American Court of Human Rights, “History,” <https://www.corteidh.or.cr/historia.cfm?lang=en>.

<sup>132</sup> *Id.* at Article 21.

<sup>133</sup> *Id.* at Article 25.

<sup>134</sup> International Labor Organization, Indigenous and Tribal Peoples Convention, 1989 (No. 169), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312314](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314).

**c. Free, prior and informed consent.**

The UNDRIP, the American Declaration, ILO 169, and jurisprudence of bodies like the Inter-American Court of Human Rights have established that if activities related to a project would violate or infringe upon the rights of an Indigenous People, then the project may not go forward without the genuine consent of the Indigenous People concerned, and where inalienable rights would be violated, it may not go forward at all.<sup>135</sup>

From this has emerged the concept of free, prior and informed consent (FPIC), meaning consent that is given freely, by people fully informed of the consequences, prior to any decision being made, and according to their own decision-making processes.

**Free** means that Indigenous People are free from coercion or manipulation to make decisions in their own time, in their own ways, in languages of their own choosing and subject to their own norms and customary laws.

**Prior** means that Indigenous People understand and are involved in a decision-making process and have the opportunity to give or withhold their consent during the early planning stages (for example, before auctioning exploration concessions) before a project becomes an economic or political inevitability, and this participation and consent process continues through the design and implementation phases of the project.

**Informed** means that Indigenous People have the legal and technical expertise and access to information in forms and languages that allows them to understand the implications of any decision on their lives and their future, and that allows them to make informed choices and decisions and to have the capacity to negotiate with the company should they choose to do so.

If affected peoples choose to withhold their consent or to not enter into negotiations with a company or government, then with very few exceptions, an activity or project cannot proceed without violating their rights to self-determination and to control what happens on their land.

**d. Indigenous rights and investor risk.**

Because of the intimate – and acutely betrayed – relationship so many Indigenous and tribal peoples have with their territories, and the near-universal agreement that such peoples enjoy rights to self-determination and control over their lands, corporate disregard for these rights generates irreparable conflict and pain for impacted Indigenous and tribal peoples. That conflict will also inevitably generate legal, political, reputational, and operational risks for companies and their investors, and, as we describe below, this corporate lack of respect for Indigenous rights has resulted in financial losses for the companies involved.

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<sup>135</sup> Marcus Colchester, *Free, Prior and Informed Consent: Making FPIC work for forests and peoples*, The Forests Dialogue at the School of Forestry and Environmental Studies and Yale University, No. 11, July 2010. See also UNDRIP Article 23. *Note: Most human rights, such as those in the Universal Declaration of Human Rights, are inalienable and thus cannot be given up or diminished by consent.*

Notwithstanding the material financial risks to companies from their violations of the rights of Indigenous Peoples, a review of company 10-K and 6K filings demonstrates that, despite increasing attention to these concerns expressed by a subset of global investors, companies are not disclosing the risks deriving from their potential, or active, disrespect for Indigenous and tribal rights. The following are some examples of relevant, but nonetheless undisclosed, risks of this nature facing a variety of extractive industry companies around the world. In many of these cases, the companies were eventually forced to report—sometimes to the SEC or other public officials, sometimes to the media—significant financial losses resulting from their lack of attention to Indigenous and tribal peoples' land rights.

As FoE argued in a submission prior to the release of the draft rule currently being promulgated, and in a separate submission signed by twenty-two civil society organizations,<sup>136</sup> SEC should strongly consider incorporating mandated disclosures of the following risks that result when a company disregards the rights of Indigenous Peoples.

### **1. Legal risks**

Legal risks include the possibility of local courts overturning concessions on the basis of land rights violations, lawsuits resulting from human rights abuses committed in connection with projects and activities, and legal cases before international legal institutions like the Inter-American Court of Human Rights. As the examples below demonstrate, the continuation of activities or projects without FPIC can result in major delays due to domestic or international court decisions requiring a corporation to regress to an earlier stage in the development of the project and properly consult the communities affected.

Los Angeles-based oil company Occidental Petroleum (OXY) spent eight years fighting a lawsuit in U.S. courts filed by Achuar communities in Peru for the contamination and health impacts caused by Occidental's operations in Northern Peru, in an oil block known previously as 1-AB, more recently as Block 192 (more on this case below). The case was eventually settled in 2015, with an agreement by Occidental to spend an undisclosed amount on development programs in Achuar communities.<sup>137</sup> A review of Occidental's 10-K filings from 2007, when the suit was filed, through its settlement in 2015 shows no mention of the suit nor any mention of Indigenous land rights nor community opposition as a risk factor.<sup>138</sup>

Companies can also be indirectly affected by decisions in international courts against governments. In Suriname, for example, the Inter-American Court of Human Rights ordered a set of changes to law and practice in response to a petition filed by the Saramaka people in the face of logging and mining concessions granted by the State in their ancestral territory without their consent.<sup>139</sup> In its ruling, the Court affirmed Indigenous Peoples' communal property rights, rights which require special measures to guarantee physical and cultural survival under

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<sup>136</sup> Letter from Friends of the Earth, et. al, to The Hon. Gary Gensler, SEC (June 14, 2021), <https://www.sec.gov/comments/climate-disclosure/c1112-9061308-246408.pdf>.

<sup>137</sup> *Reuters*, "Peru indigenous groups settle U.S. court claims with Occidental," (March 5, 2015), <https://www.reuters.com/article/peru-occidental/peru-indigenous-groups-settle-u-s-court-claims-with-occidental-idUSL1N0W728I20150305>.

<sup>138</sup> 10-K review by Amazon Watch on May 28, 2021.

<sup>139</sup> *Saramaka People v. Suriname*, Inter-American Court of Human Rights, Judgment of 28 November 2007.

international human rights law,”<sup>140</sup> and asserted that State action and domestic legislation was “not sufficient to guarantee the Saramaka people the right to effectively control their territory without outside interference.”<sup>141</sup> The Court ordered Suriname to review and consider modification of existing mining and logging concessions in light of the judgement,<sup>142</sup> and update legal provisions to ensure full management and control of the lands and natural resources in the Saramaka’s collective territory.<sup>143</sup> While the Suriname government has been reluctant to implement the court’s ruling, the Saramaka people have pledged to continue their efforts to defend their customary lands.<sup>144</sup>

## 2. Political risks

Political risks may include referendums that outlaw extraction, such as the binding referendum in Cajamarca, Colombia in 2017 that rejected plans for a \$35 billion AngloGold Ashanti gold mine;<sup>145</sup> a local government canceling the contract for an oil block concession after massive local protests; passage of legislation that reforms national laws in regards to customary land tenure rights such as Liberia’s recent Land Rights Act;<sup>146</sup> or change in government leading to increased regulatory and enforcement action to protect land rights.

Social unrest and conflict caused by disagreement or disaffection with a project can also produce significant delays to operations in addition to reputational risk. In many cases, governments fail to consult adequately with affected Indigenous Peoples prior to leasing a concession or approving a project application. Even if affected peoples are initially in agreement with a project, negative impacts and a failure to involve affected peoples in decision-making and the participation in benefits throughout operations leads to disaffection that can manifest in protests or actions to block or shut down the company’s operations at significant cost to the company.

The case of Sime Darby clearly illustrates the political risk of ignoring the land rights of Indigenous and tribal peoples, and the interplay of the political risk with operational and legal risks. (Please note: Sime Darby is not publicly traded in the U.S. but is illustrative of the risks and of companies that may attempt to register in the U.S., or in which U.S. investors may be investing. Sime Darby is, however, a supplier of crude palm oil to numerous U.S.-listed Fast Moving Consumer Goods companies, making this case relevant in terms of the need for Scope 3, or value-chain, risks.)

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<sup>140</sup> *Id.* at para 85.

<sup>141</sup> *Id.* at para 115.

<sup>142</sup> *Id.* at para 194.

<sup>143</sup> *Id.* at para 194.

<sup>144</sup> Richard Price, “‘Development’ versus human rights: the Saramaka Maroons’ fight for the rainforests of Suriname,” London School of Economics Latin America and Caribbean Centre, 31 May 2018, <https://blogs.lse.ac.uk/latamcaribbean/2018/05/31/development-versus-human-rights-the-saamaka-maroons-fight-for-the-rainforests-of-suriname/>.

<sup>145</sup> Kejal Vejas, “Colombian Town Chooses Farming Life Over a \$35 Billion Gold Mine,” *Reuters*, <https://www.reuters.com/article/us-liberia-landrights-lawmaking/liberia-passes-landmark-law-to-secure-ancestral-%20land-rights-idUSKCN1M02FG>. NOTE: AngloGold Ashanti did make mention of community opposition in its 2017 annual filings to the SEC.

<sup>146</sup> FAO, FAO Database, Liberia Land Rights Act, <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC182407/#:~:text=Land%20Rights%20Act.,used%2C%20transferred%20and%20otherwise%20managed>.

In 2009 Sime Darby, a Malaysian palm oil conglomerate, signed a 63-year concession contract for 220,000 hectares of land in northwestern Liberia, making up fully one-fifth of the company's land bank. The government agreed to allocate land 'free of encumbrances' to Sime Darby, and the company agreed to pay US\$5 per hectare per year for land and to provide employment for more than 30,000 Liberians.<sup>147</sup> The project was initially expected to involve capital expenditures of \$3.1 billion over 15 years.<sup>148</sup>

However, Sime Darby never sought or secured free, prior, and informed consent from local rights holders. In November 2012, more than 150 representatives of communities affected by Sime Darby's palm oil plantations issued a declaration stating that no consultation had taken place before their land was taken over by Sime Darby and that affected communities did not give their consent to giving away the land to Sime Darby.

At the same time, legislative developments in Liberia strengthened community rights. In the years following Sime Darby's initial investment Liberia passed several laws that heightened its legal risk, including:

- Free, Prior and Informed Consent formalized in the Community Rights Law (2009)
- Land Commission established (2009)
- Customary land recognized as a land category in the Land Rights Policy (2013)
- Land Authority Act established the Land Authority (2016)
- Land Rights Act provides automatic protection of customary land rights (2016)

With new laws in place and continuous unrest among affected communities, Sime Darby was forced to reckon with the fact that full concession development would require engaging in FPIC negotiations with 55 distinct villages. The company's experience indicated that a single process could take up to two years and that some communities may not want to give up their land or may negotiate on the exact amount of land for plantation development.<sup>149</sup>

Sime Darby ultimately spent more than \$200 million on its Liberian operations and filed a \$26.81 million impairment for the financial year that ended in June 2018.<sup>150</sup> In 2019, Sime Darby sold its plantation assets for \$1 plus an earn-out payment.<sup>151</sup> During the three months during which the sale took place the company reported a net loss of \$10.6 million USD, and an overall drop in revenue of 3.5%.<sup>152</sup>

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<sup>147</sup> Friends of the Earth Europe, Fact sheet: Sime Darby and land grabs in Liberia, [https://www.foeeurope.org/sites/default/files/news/foee\\_simedarby\\_factsheet\\_010213.pdf/](https://www.foeeurope.org/sites/default/files/news/foee_simedarby_factsheet_010213.pdf/).

<sup>148</sup> Chain Reaction Research, "Sime Darby: Liberian Crossroads," 1 November 2016, <https://chainreactionresearch.com/report/sime-darby-liberian-crossroads/>.

<sup>149</sup> *Id.*

<sup>150</sup> Reuters, "Sime Darby to sell Liberia plantation to local manufacturer," 5 December 2019, <https://www.reuters.com/article/us-sime-darby-liberia/sime-darby-to-sell-liberia-plantation-to-local-manufacturer-idUSKBNIYA00P>.

<sup>151</sup> Fara Aisyah, "Sime Darby Plantation sells Liberia unit for US\$1 plus an earn-out payment," *The Malaysian Reserve*, 17 February 2020, <https://themalaysianreserve.com/2020/01/17/sime-darby-plantation-sells-liberia-unit-for-us1-plus-an-earn-out-payment/>.

<sup>152</sup> Reuters, "Malaysia's Sime Darby Q4 flips to loss on Liberia operations, lower FFB production," 27 February 2020, <https://www.reuters.com/article/sime-darby-plant-results/malysias-sime-darby-q4-flips-to-loss-on-liberia-%20operations-lower-ffb-production-idUSL3N2AR22Z>.



### 3. Reputational risks

Reputational risks may arise from the local, national and/or international negative publicity caused by the exposure of human rights abuse, deforestation, and pollution. Society has the basic expectation that companies should do no harm,<sup>153</sup> and in a globalized world a toxic dump or an oil spill in a remote corner of the Amazon or the Congo Basin no longer goes unnoticed. Images of environmental destruction can cause lasting damage to a company's image and reputation. Indigenous Peoples are organizing, travelling to shareholder meetings, speaking to the press, and filing lawsuits. A company's actions in a remote area of rainforest on the other side of the world can directly affect their reputation and ultimately their relationships with customers, shareholders and financial institutions.

The case of the Standing Rock Sioux Tribe's fight against the siting of the Dakota Access Pipeline (DAPL) on their treaty territory is illustrative of reputational risk and its intersections with political, legal, and operational risks. As early as 2014, the Tribe had expressed its desire for the proposed pipeline to be rerouted away from their treaty territory and in 2016 filed a legal case to that effect, while simultaneously launching media and social media campaigns about how the pipeline violated their most fundamental rights. Despite this, DAPL's parent company, Energy Transfer Partners, continued construction, in the process decimating objects with cultural and spiritual value not just to the Standing Rock Sioux but also to tribes across the Great Plains. In opposition to this disrespect for the Standing Rock Sioux and other tribes, Indigenous Peoples and allies from around the world gathered in Standing Rock to physically protest continued pipeline construction. At the protest's biggest moment, 15,000 people were present at Standing Rock as part of the #NoDAPL movement, with millions more following closely on social media and in the press. The company and local security forces' response to the protests led to arrests and further human rights violations.<sup>154</sup>

Not only did the Standing Rock Sioux Tribe's opposition generate reputational, operational, and legal risks to Energy Transfer partners and the DAPL project, but the Tribe successfully activated a shareholder advocacy campaign targeting the financial institutions providing funding for the pipeline's construction. After the Tribe organized socially responsible investors and met with various financial institutions, several European banks pulled their financing commitments from the pipeline. A 2018 analysis by First Peoples Worldwide found that, though initially estimated to cost \$3.8 billion, the pipeline cost more than \$12 billion by the time it was operational in June 2017, losses accumulated from the long delays in construction due to social unrest and legal filings. Furthermore, Energy Transfer Partners' stock price significantly underperformed relative to market expectations during the event study period, and it experienced a long-term decline in value that persisted after the project was completed. In fact, from August

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<sup>153</sup> John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights (A/HRC/8/5)*, United Nations Human Rights Council, 2008, para. 9;24.

<sup>154</sup> Carla F. Fredericks & Kate R. Finn, "Indigenous Peoples' Human Rights as a Minimum Standard for Corporate Practice," *Stanford Social Innovation Review*, 18 February 2021, [https://ssir.org/articles/entry/indigenous\\_peoples\\_human\\_rights\\_as\\_a\\_minimum\\_standard\\_for\\_corporate\\_practice](https://ssir.org/articles/entry/indigenous_peoples_human_rights_as_a_minimum_standard_for_corporate_practice).

2016 to September 2018—while the S&P 500 increased by nearly 35 percent—ETP’s stock declined by almost 20 percent.<sup>155</sup>

In a different case involving reputational and other risks that is still unfolding, a Canadian oil company, ReconAfrica, is currently facing growing scrutiny for its exploratory drilling for oil and gas in the sensitive wilderness in Namibia and Botswana, home to the watershed of the UNESCO World Heritage site, the Okavango Delta, and six community-run wildlife reserves.

Local community members have voiced concerns that ReconAfrica’s initial exploration activities have already violated Indigenous rights and human rights. Namibian law requires companies to ensure not just that Indigenous and tribal peoples are consulted, but also that members of the general public are aware of the proposed project, fully understand it, and have a chance to raise concerns. Any such concerns must be addressed in the assessment’s final report in order to get government approval. ReconAfrica released the thousand-plus-page draft of the assessment on March 26, 2021, yet numerous people and advocacy organizations who participated, or sought to participate, in the consultation process, said the consultation was extremely limited, with translation unavailable, limits on attendance, ignored questions, and cancelled sessions.<sup>156</sup> Legal action has also been threatened against journalists covering the project,<sup>157</sup> and the head of a tribal-run conservation area says he fears for his life for speaking out.<sup>158</sup> A local farmer has filed a lawsuit against ReconAfrica for failing to consult with local peoples.<sup>159</sup>

In the wake of this negative publicity storm, on May 5, 2021, an anonymous whistleblower filed a complaint with the SEC, alleging that ReconAfrica misled investors about its plans to explore for oil and gas deposits in the region by promoting revenue projections to investors based on activities for which it has not secured permission or permits. The whistleblower also alleges that the company “fail[ed] to disclose the compensation paid to the publications of third-party materials or their financial interests in the company’s stock.”<sup>160</sup> *National Geographic* reports that

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<sup>155</sup> First Peoples Worldwide, “Social Cost and Material Loss: The Dakota Access Pipeline,” University of Colorado, 2018, <https://www.colorado.edu/program/fpw/DAPL-case-study>.

<sup>156</sup> See, e.g.: *National Geographic*: “Oil company exploring in sensitive elephant habitat accused of ignoring community concerns;” *Al Jazeera*: “Namibia: Indigenous leaders want big oil out of Kavango Basin.”; *Oxpeckers*: “Mission to the Kawe”; *The Namibian*: “ReconAfrica adviser calls oil-drilling concerns 'stupidity'.”

<sup>157</sup> Tuyakula Musheko and Shinovene Immanuel, *The Namibian*, “Canadian oil driller threatens to sue The Namibian,” 16, February 2021, <https://www.namibian.com.na/208788/archive-read/Canadian-oil-driller-threatens-to-sue-The-Namibian>.

<sup>158</sup> Laurel Neme and Jeffrey Barbee, “Oil company exploring in sensitive elephant habitat accused of ignoring community concerns,” 11 May 2021, <https://www.namibian.com.na/208788/archive-read/Canadian-oil-driller-threatens-to-sue-The-Namibian>.

<sup>159</sup> Laurel Neme and Jeffrey Barbee, “A whistleblower complaint to the U.S. Securities and Exchange Commission cites ‘egregious’ violations by ReconAfrica and executives,” *National Geographic*, 12 May 2021, <https://www.nationalgeographic.com/animals/article/oil-exploration-company-in-okavango-wilderness-misled-investors-sec-complaint-says>.

<sup>160</sup> Geoffrey York and Emma Graney, “As Calgary’s ReconAfrica drills for Namibian oil, a global outcry over endangered elephants grows,” *The Globe and Mail*, 30 May 2021, <https://www.theglobeandmail.com/business/article-as-calgarys-reconafrika-drills-for-namibian-oil-a-global-outcry-over/>.

the day following the magazine's request for comment to ReconAfrica, the company filed new disclosures and amended reports with Canadian regulators.<sup>161</sup>

#### 4. Operational risks

Operational risks can stem from community protests and blockades, which may delay or even permanently obstruct a project, or necessary inputs may not be accessible. As research conducted by the Corporate Social Responsibility Initiative at Harvard Kennedy School and the Centre for Social Responsibility in Mining at the University of Queensland demonstrated, “most extractive companies do not currently identify, understand and aggregate the full range of costs of conflict with local communities.”<sup>162</sup>

In the most extreme cases, investors can lose their entire stake when the project is forced to cancel, as in the case of a series of companies—including Occidental Petroleum, Talisman (now Repsol), and GeoPark—that have attempted to explore and drill for oil in Block 64 in Peru.

The oil field known as Block 64 is located in the Peruvian Amazon province of Loreto, in the heart of a region where Achuar, Wampis, and Kichwa indigenous peoples have historically resisted the oil industry. When the government originally created the concession in 1995, local Achuar communities immediately and continuously denounced it, noting “the grave contamination to the environment, water, and resources on which indigenous communities depend” in adjacent Blocks 1AB and 8.<sup>163</sup> After years of Achuar protest, the original concessionholder, ARCO, transferred Block 64 to Occidental Petroleum and two other companies, with Oxy acting as lead operator.<sup>164</sup> In fact, since Block 64's creation in 1995, at least nine oil companies have purchased leases, and all have subsequently withdrawn after fierce opposition from local community members.<sup>165</sup> An Amazon Watch review of SEC company filings during the periods they held Block 64 leases shows limited to no mention of Achuar or Wampis opposition to Block 64 oil development. The closest any company got to describing the opposition of local Indigenous community was Talisman's March 5, 2012, 6-K filings, which described how a “local federation” (Indigenous community groups in Peru often use the term “federation” in their name, as is the case of the Federation of the Achuar People of Peru-FENAP) had blockaded a river and impeded the transport of Talisman contractors.

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<sup>161</sup> Neme, Laurel and Jeffrey Barbee, “A whistleblower complaint to the U.S. Securities and Exchange Commission cites “egregious” violations by ReconAfrica and executives,” *Op. Cit.*

<sup>162</sup> Davis, Rachel and Daniel Franks, “Costs of Company-Community Conflict in the Extractive Sector,” CSR initiative at the Harvard Kennedy School, 2014, [http://www.csr.uq.edu.au/media/docs/603/Costs\\_of\\_Conflict\\_Davis-Franks.pdf](http://www.csr.uq.edu.au/media/docs/603/Costs_of_Conflict_Davis-Franks.pdf).

<sup>163</sup> Press conference, Peruvian Congress, Lima, Peru, 16 February 2004. “Ayuda memoria de la situación petrolera en el Lote Petrolero 64 a cargo de la empresa Oxy en tierras de las comunidades Achuar de la Cuenca de Pastaza.” AIDSESP press release, February 12, 2004, Lima, Peru. As recorded in EarthRights International et. al., “A Legacy of Harm: Occidental Petroleum in Indigenous Territory in the Peruvian Amazon,” 2007, <https://earthrights.org/wp-content/uploads/publications/A-Legacy-of-Harm.pdf>.

<sup>164</sup> EarthRights International, *Op. Cit.*

<sup>165</sup> Mongabay News, “Perú: Denuncian que pasivos ambientales no son remediados en lote petrolero de Loreto”, October 12 (2016), <https://es.mongabay.com/2016/10/contaminacion-petroleo-pueblosindigenas/>; Amazon Watch, “Indigenous Resistance Expels Oil Company GeoPark from Peruvian Amazon,” 17 July 2020, <https://amazonwatch.org/news/2020/0717-indigenous-resistance-expels-oil-company-geopark-from-peruvian-amazon>.

The most recent oil company to leave Block 64 after local Indigenous opposition was GeoPark, which announced its departure in July 2020. FENAP (see above) had publicly communicated its opposition to oil drilling in Block 64 and its intention to force GeoPark out ever since GeoPark's October 2014 announcement of its intention to initiate oil extraction within Block 64.<sup>166</sup> The Wampis Nation later voiced their opposition, denouncing GeoPark beginning in August of 2018.<sup>167</sup> Indigenous opposition led GeoPark to withdraw its Environmental Impact Study in June 2019, and that same year communities filed a lawsuit to annul Block 64 entirely for lack of consultation. In 2020, the Wampis Nation filed a criminal complaint against GeoPark, given the danger the continued presence of company workers during the COVID-19 pandemic posed to the Wampis peoples.<sup>168</sup>

GeoPark's 2020 SEC filings discuss the company's decision to withdraw from the Block 64 contract, though make no mention of community opposition to the project. The filings do, however, note an impairment loss of \$34 million; 2017 and 2018 filings note construction costs in the block of at least \$36.8 million.<sup>169</sup>

**e. The SEC should require disclosure about local environmental damage and appropriation of Indigenous lands because they contribute to GHG emissions.**

Damage to local environments through deforestation and land degradation directly results in increased GHG emissions and contributes to climate risk. Therefore, describing and measuring this damage and disclosing the estimated GHG emissions are directly material and germane to the purpose of the SEC's proposed rule. The production of agricultural commodities in the developing world — including soy, palm, timber, cocoa, pulp & paper and cattle — contribute to deforestation and climate change in multiple ways. First, tropical agriculture is a leading cause of greenhouse gas emissions.<sup>170</sup> If tropical deforestation were a country, it would be the third largest emitter in the world.<sup>171</sup> Forests hold more carbon than humans have emitted for the past 30 years through fossil fuel use. However, deforestation now accounts for roughly 8% of global emissions,<sup>172</sup> and converting forests into farmland is the number one cause.<sup>173</sup> Second, farming

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<sup>166</sup> *Peruvian Indigenous Federation Tells Oil Company: Stay Out of Our Territory*, AMAZON WATCH (Dec. 20, 2016), <https://amazonwatch.org/news/2016/1220-peruvian-indigenous-federation-tells-oil-company-stay-out-of-our-territory>.

<sup>167</sup> Wampis Nation, "Pueblos Wampís y Achuar exigen anulación del Lote Petrolero 64 a ser operado por GEOPARK," 15 August 2018, <https://nacionwampis.com/pueblos-wampis-y-achuar-exigen-anulacion-del-lote-petrolero-64-a-ser-operado-por-geopark/>.

<sup>168</sup> María Cervantes, "Indigenous groups in Peru are suing government over oil, mining plans - and winning," *Reuters*, 27 June 2019, <https://www.reuters.com/article/us-peru-indigenous/indigenous-groups-in-peru-are-suing-government-over-oil-mining-plans-and-winning-idUSKCN1TS240>.

<sup>169</sup> Amazon Watch review of GeoPark's 6-K and 20-F filings from 2017-2020.

<sup>170</sup> Special report on climate change and land use, Intergovernmental Panel on Climate Change (2019) <https://www.ipcc.ch/srccl/>.

<sup>171</sup> *By the Numbers: The Value of Tropical Forests in the Climate Change Equation*, WORLD RESOURCES INSTITUTE (Oct. 8, 2018) <https://www.wri.org/insights/numbers-value-tropical-forests-climate-change-equation>

<sup>172</sup> *Id.*

<sup>173</sup> *Deforestation and Forest Degradation*, WORLD WILDLIFE FUND, <https://www.worldwildlife.org/threats/deforestation-and-forest-degradation> (last visited May 4, 2022).

activities (including plowing and irrigation) and inputs (such as fertilizer and fuel) also produce emissions. This accounts for another 11% of global emissions. Finally, forests act as a carbon sink and help mitigate carbon dioxide from the atmosphere. Deforestation reduces the amount of carbon that the world's forests can remove from the atmosphere through photosynthesis. In the 1990s, intact tropical forests removed around 46 billion tons of CO<sub>2</sub> from the atmosphere, a total of 17% of anthropogenic CO<sub>2</sub> emissions in the decade. This figure decreased to 6% of emissions during the subsequent decade in part because tropical forests are shrinking. One recent study from 2017 estimated that forests could mitigate over a third of the total carbon needed to limit global temperature rise to only 2° Celsius by 2030.<sup>174</sup> If historical trends continue, we stand to lose another 131.21 million hectares of standing forest cover over the next 30 years, an area approximately the size of Peru. The SEC should require registrants to disclose their impacts on deforestation and land degradation as part of this rule because these impacts directly relate to climate risk.

As discussed below, in addition to deforestation and land degradation, the SEC should require registrants to identify and recognize their impact on lands managed by Indigenous Peoples through traditional customary tenure or Indigenous Community Conservation Areas, and encourage registrants to protect these lands as part of climate mitigation efforts. The case for protecting these lands as a climate mitigating strategy is backed by recent authoritative studies showing that these lands are subject to significantly less degradation and deforestation than other areas.<sup>175</sup> Indigenous Peoples have conserved and nurtured forests and other lands for time immemorial, so their removal from the land would result in a greater risk of ecological degradation.

**f. SEC should unequivocally mandate prescriptive management strategies to protect Indigenous Peoples' rights.**

As it stands, governments and laws – in the U.S. and abroad – are woefully insufficient to meaningfully protect Indigenous Peoples' rights. As the examples above – in addition to countless others - clearly demonstrate, **there are significant legal, operational, reputational**

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<sup>174</sup> Bronson W. Griscom, et al., *Natural Climate Solutions*, 114 PNAS 44 (2017)

<https://www.pnas.org/content/114/44/11645>.

<sup>175</sup> See generally Jocelyne S. Sze et al., *Reduced Deforestation and Degradation in Indigenous Lands Pan-Tropically*, 5 NATURE SUSTAINABILITY 123 (2022) <https://www.nature.com/articles/s41893-021-00815-2.pdf> (“Deforestation is reduced in [Indigenous Lands] relative to non-protected areas across the tropics, avoiding deforestation comparably to [Protected Areas] and [Protected Indigenous Areas]. . . . Similarly, degradation is reduced in [Indigenous Lands] relative to non-protected areas, broadly performing comparably to [Protected Areas] and [Protected Indigenous Areas]. Indigenous support is central to forest conservation plans. . . .”); Lisa Cornish, *For Preventing Deforestation, New UN Report Shows Indigenous Approach is Best*, DEVEX, (Mar. 30, 2021) <https://www.devex.com/news/for-preventing-deforestation-new-un-report-shows-indigenous-approach-is-best-99500> (““Forest Governance by Indigenous and Tribal Peoples,” the new report released last week, reviewed more than 300 studies published since 2000 to identify the impact of Indigenous forest management on the environment. In Latin America and the Caribbean, Indigenous peoples occupy 404 million hectares of land — approximately one-fifth of the total area. Of this, 60% lies in the Amazon Basin, and 80% are forests. According to the report, almost half of Indigenous-managed forests remain fully intact, with Indigenous and tribal territories having lower deforestation rates than other forest areas.”); *Forest Governance by Indigenous and Tribal Peoples: An Opportunity for Climate Action in Latin America and the Caribbean*, FAO (2021) <https://www.fao.org/3/cb2953en/cb2953en.pdf>.

**and political risks associated with the possible or actual abuse of Indigenous and tribal peoples' rights, which in turn can impact issuers' finances. In order for investors to have full knowledge of these risks, the SEC should require all issuers to document, for their direct operations as well as direct and indirect suppliers, the following information:**

- a) how their business model implicates issues of Indigenous and/or tribal peoples' rights, including through their supply chains, contractors and subcontractors, etc.
- b) the names of any and all Indigenous and/or tribal peoples whose territories (both legally recognized as well as any territories currently under request of legal recognition) in any way overlap with operations or would be directly impacted by them, for example by downstream pollution from oil drilling waste products;
- c) any and all land rights grievances or complaints filed by local communities in the company's areas of operations (for a comparable example, see Land Conflict Watch<sup>176</sup> in India or Environmental Justice Atlas<sup>177</sup>), the company's response, and statements from complainants on how they assess the response;
- d) description of any open processes in which the issuer is seeking to consult with or obtain the consent of Indigenous or tribal peoples that would be impacted by a planned or in-process activity by the issuer, subsidiary, or supplier;
- e) list of any and all consultation processes carried out in the past reporting year, including information on what entity carried out the consultation, and if consent was obtained, how the impacted Indigenous Peoples expressed that consent;
- f) list of any and all legal processes in U.S. and/or foreign jurisdictions related to land rights disputes, consultation or consent processes, or other Indigenous rights matters; and
- g) a list of any and all projects undertaken by the issuer or subsidiaries that require the relocation of Indigenous and/or tribal communities, including any and all compensation, monetary or otherwise, provided in exchange for relocation.

These disclosure requirements should apply to any issuer whose operations, or the operations of subsidiaries or suppliers, require the use of land, including the subsoil. Key sectors include agriculture, mining, oil and gas, energy infrastructure, logging, and biofuels, though these are not the only sectors that implicate such issues. For example, a wind farm project in Oaxaca, Mexico was successfully challenged in 2016 by impacted Indigenous communities for failing to include the community in project design.<sup>178</sup> As such, these disclosures should apply to any sector whose operations, or those of subsidiaries and suppliers, involve any kind of land use.

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<sup>176</sup> LAND CONFLICT WATCH, <https://www.landconflictwatch.org/> (last visited May 5, 2022).

<sup>177</sup> Global Atlas of Environment Justice, EJATLAS, <https://ejatlas.org/> (last accessed May 5, 2022).

<sup>178</sup> Leonardo Crippa, *Inter-American Development Bank Confirms Mexico Wind Farm Project Violated Indigenous Peoples Policies*, INDIAN L. RES. CTR. (September 23, 2016), <https://indianlaw.org/mdb/inter-american-development-bank-confirms-mexico-wind-farm-project-violated-indigenous-peoples>.

## **VII. Safe Harbors in the Proposed Rule.**

### **a. Safe harbor for Scope 3 emissions disclosure.**

The proposed rule asks if safe harbor provision for Scope 3 emissions disclosure should be included and if sunset conditions should be implemented.<sup>179</sup> As it stands, the proposed safe harbor is too broad and could shield fraudulent actors from liability. Rather, only a limited safe harbor provision should be kept in the rule, and sunset conditions should be implemented.

SEC indicates that the safe harbor provision is being considered to protect registrants from liability for inaccurate Scope 3 emissions disclosures due to concerns regarding the challenges and costs posed by gathering accurate data.<sup>180</sup> The safe harbor will allow the registrants to fully report on their Scope 3 emissions using the data that they have without the fear of retaliation for inaccurate that they did not knowingly represent as accurate.<sup>181</sup>

The justification for a sunset provision is both reasonable and clear. As the challenges and financial burdens of retrieving and stating accurate data in emissions disclosures will decrease as more companies disclose their Scope 1 and 2 emissions to the public;<sup>182</sup> therefore, the need for the safe harbor should also correspond over time.

Under Securities Act Rule 409 and Exchange Act Rule 12b-21, a registrant may omit any information that “is unknown and not reasonably available to the registrant, either because the obtaining thereof could involve unreasonable effort or expense, or because it rests peculiarly within the knowledge of another person not affiliated with the registrant . . . .”<sup>183</sup> As the Securities Act and the Exchange Act already have regulations in place that allows registrants to omit data that poses unreasonable effort or expense to gather, a safe harbor provision regarding Scope 3 emissions disclosures without any sunset conditions is unnecessary.

Because information that poses “unreasonable effort or expense” is not required to be reported under the Securities Act or the Exchange Act,<sup>184</sup> even after the sunset, companies will still be protected from disclosing information that is unduly challenging or expensive to report. The sunset of the safe harbor will only open the registrants to liability for inaccurate disclosures, thus encouraging companies to be as accountable and accurate as possible .

We acknowledge the importance for companies to be able fully disclose their emissions data, including their Scope 3 data, without fear of legal retaliation, but this only stands for inaccurate data that a company submitted in good faith, believing it to be accurate. And our hope is that companies which are not subject to mandatory Scope 3 disclosures in the final rule will go above-and-beyond SEC’s requirements and undertake this additional level of reporting. These

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<sup>179</sup> SEC Proposed Rule, *supra* note 12, at 214-15.

<sup>180</sup> *Id.* at 210-11.

<sup>181</sup> *See id.*

<sup>182</sup> *Id.* at 209.

<sup>183</sup> *See* 17 C.F.R. 230.409 and 17 C.F.R. 240.12b-21.

<sup>184</sup> *See* Securities Act Rule 409, 17 C.F.R. 230.409; Exchange Act Rule 12b-21, 17 CFR 240.12b-21.

actions, when taken in good faith, should be protected from liability. However, the safe harbor provision should not allow any shield from liability for fraudulent or misleading reports. As described above, the perceived challenges of gathering and reporting novel data for Scope 3 emissions should decrease over time.<sup>185</sup> One possible sunset condition could be the elimination of the Scope 3 safe harbor after a reasonable number of years in which Scope 1 and Scope 2 emissions data would be reported (allowing for registrants to use such data in their Scope 3 disclosures). The elimination of the safe harbor could also be contingent on a certain threshold of Scope 1 and Scope 2 disclosures being made.

#### **b. Safe harbor for forward-looking statements.**

Numerous inquiries in the proposed rule ask whether various safe harbors to protect registrants from liability for forward-looking statements should be integrated as part of the rule.<sup>186</sup> As safe harbors regarding forward-looking statements were already integrated into Section 27A of the Securities Act and Section 21E of the Exchange Act under the Private Securities Litigation Reform Act of 1995,<sup>187</sup> it would be unnecessary and redundant to do so.

### **VIII. Investors Need Credible Nonfinancial Disclosures to Make Informed Investment Decisions.**

The current proposed rule requires SEC registered companies to identify their climate-related risks that are “reasonably likely to have a material impact on the registrant’s business or consolidated financial statements over the short, medium, and long-term and describe the actual and potential impacts of those risks on its strategy, business model, and outlook”<sup>188</sup> The rule is a great start, but some companies may be hesitant to comply. Currently it is mainly foreign companies that add climate related disclosures, with disclosures from domestic companies lagging behind.<sup>189</sup> Without the proposed rule, current market practices will only continue, exacerbating the climate crisis, increasing risk exposure, and keeping investors in the dark.

Although domestic companies may be hesitant to make climate related disclosures, there is an increased demand for the disclosures among both retail and institutional investors. A PWC survey found that in 2021, 70 percent of asset and wealth management CEOs were concerned about physical risks resulting from climate change; a stark increase from the 39 percent the survey found in 2016.<sup>190</sup> This percentage figures to increase over the next few years as more institutional and retail investors weigh these risks in their investment decisions.

An increasing number of investors have begun to consider environmental risks when making decisions. A study conducted by Harvard Business Review found that the perception that investors do not consider Environmental, Social, and Governance planning initiatives when

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<sup>185</sup> SEC Proposed Rule, *supra* note 12, at 209.

<sup>186</sup> SEC Proposed Rule, *supra* note 12, at 91-2, 109.

<sup>187</sup> See 15 U.S.C. § 77z-2 and 15 U.S.C. § 78u-5.

<sup>188</sup> SEC Proposed Rule, *supra* note 12.

<sup>189</sup> *Id.* at 313.

<sup>190</sup> *Id.* at 331.



making investment decisions is outdated.<sup>191</sup> Harvard Business Review interviewed 70 senior executives from Blackrock, Vanguard, and State Street – the world’s three largest asset managers – and found that ESG initiatives are now almost always at the forefront of their investment decisions. As stated by Cyrus Taraporevala, the President and CEO of State Street, “ESG issues have become much more important for us as long-term investors.”<sup>192</sup> Even if investors are not focused on impact investing, they are growing increasingly aware of environmental-related risks, specifically on long term investments where the risks would be much more prevalent.<sup>193</sup>

The shift to more sustainable investing can be aptly described as a function of risk management. Investors will do what they can to avoid investing in assets that will likely result in major losses. This is why environmental disclosures are paramount to the future of safer, more sustainable investing. With this proposed rule, the retail and institutional investors the SEC protects will be given the full scope of a company’s environmental risk profiles before making investment decisions.

The proposal will also benefit consumers and the general public. For example, consumers are increasingly demanding information and assurances that their purchases are as sustainable as possible, including having minimal carbon footprints and impacts on the climate. Mandatory financial-related climate risk disclosure will make it possible for consumer advocacy organizations, the press, and even other federal agencies to compile information to inform consumers of the climate impacts of their purchasing. Meanwhile, FoE and other public interest organizations which are advocating for the reform of financial institutions, fossil fuel companies, and agro-commodity firms will benefit from disclosed information to guide our advocacy work, and inform our public constituencies and the press.

There are always compliance costs associated with new, binding regulation. However, the benefits here of reducing exposure to climate-related financial risks will far outweigh any costs. In addition, the majority of these costs will likely be incurred up-front, declining over time. Moreover, without these regulations, companies stand to lose. A study by consulting firm Ernst and Young found that with the growing importance of ESG investing, domestic companies who fail to meet investor expectations could risk losing access to the funding provided by capital markets.<sup>194</sup> EY found that most investors want a comprehensive view of how companies are planning for long term environmental risks, but most investors note that there is not much of a connection between the required financial reporting and the nonfinancial reports that are pivotal to their investment decisions.<sup>195</sup> EY further notes that the reports that are provided are only useful if investors find the reports to be credible.<sup>196</sup> This will not be possible without more stringent reporting regulations from the SEC.

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<sup>191</sup> Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV. (May-June 2019), <https://hbr.org/2019/05/the-investor-revolution>.

<sup>192</sup> *Id.*

<sup>193</sup> *See id.*

<sup>194</sup> Mathew Nelson, *Companies failing to meet investor expectations on environmental, social and governance (ESG) factors risk losing access to capital market*, EY (July 22, 2020), [https://www.ey.com/en\\_us/assurance/how-will-esg-performance-shape-your-future](https://www.ey.com/en_us/assurance/how-will-esg-performance-shape-your-future).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

## **Conclusion**

FoE strongly supports the SEC's efforts to mandate trustworthy and comprehensive environmental risk disclosures in the face of the ever-increasing material risks posed by climate change. The SEC must do everything in its power to require companies to provide this data to investors. Principally, we support the proposal's treatment of Scope 1 and 2 emissions accounting and disclosure. We urge SEC to strengthen its requirements for Scope 3 emissions so that all large registrants are mandated to report this important and significant category. SEC should also remove the ability for companies to self-determine materiality on this crucial point. The safe harbor for Scope 3 reporting should also be narrowed so that fraudulent reporting is not shielded from liability. Finally, there is a critical gap in mandated disclosures related to the risks created by violating the rights of Indigenous Peoples and participating in business activities that cause or contribute to environmental degradation.

## Index

Specific questions raised in the proposed rule are discussed on the following designated pages:

10. We define transition risks to include legal liability, litigation, or reputational risks. Should we provide more examples about these types of risks? Should we require more specific disclosures about how a registrant assesses and manages material legal liability, litigation, or reputational risks that may arise from a registrant's business operations, climate mitigation efforts, or transition activities? **Page: 29-30**

24. If a registrant has used carbon offsets or RECs, should we require the registrant to disclose the role that the offsets or RECs play in its overall strategy to reduce its net carbon emissions, as proposed? Should the proposed definitions of carbon offsets and RECs be clarified or expanded in any way? Are there specific considerations about the use of carbon offsets or RECs that we should require to be disclosed in a registrant's discussion regarding how climate-related factors have impacted its strategy, business model, and outlook? **Page: 8-9**

28. To the extent that disclosure that incorporates or is based on an internal carbon price constitutes forward-looking information, the PSLRA safe harbors would apply. Should we adopt a separate safe harbor for internal carbon price disclosure? If so, what disclosures should such a safe harbor cover and what should the conditions be for such a safe harbor? **Page: 31-32**

31. Would the PSLRA forward-looking statement safe harbors provide adequate protection for the proposed scenario analysis disclosure? Should we instead adopt a separate safe harbor for scenario analysis disclosure? If so, what disclosures should such a safe harbor cover that would not be covered by the PSLRA safe harbors and what should the conditions be for such a safe harbor? **Page: 31-32**

32. Should we adopt a provision similar to 17 CFR 229.305(d) that would apply the PSLRA forward-looking statement safe harbor to forward-looking statements made in response to specified climate-related disclosure items, such as proposed Item 1502 and Item 1505 (concerning targets and goals) of Regulation S-K? If so, which proposed items should we specifically include in the safe harbor? **Page: 31-32**

47. If a registrant has adopted a transition plan, should we require it, when describing the plan, to disclose, as applicable, how the registrant plans to mitigate or adapt to any identified physical risks, including but not limited to those concerning energy, land, or water use and management, as proposed? Are there any other aspects or considerations related to the mitigation or adaptation to physical risks that we should specifically require to be disclosed in the description of a registrant's transition plan? **Page: 28-29**

51. To the extent that disclosure about a registrant's transition plan constitutes forward-looking information, the PSLRA safe harbors would apply. Should we adopt a separate safe harbor for transition plan disclosure? If so, what disclosures should such a safe harbor cover and what should the conditions be for such a safe harbor? **Page: 31-32**

94. Should we require a registrant to disclose its GHG emissions both in the aggregate, per scope, and on a disaggregated basis for each type of greenhouse gas that is included in the Commission’s proposed definition of “greenhouse gases,” as proposed? Should we instead require that a registrant disclose on a disaggregated basis only certain greenhouse gases, such as methane (CH<sub>4</sub>) or hydrofluorocarbons (HFCs), or only those greenhouse gases that are the most significant to the registrant? Should we require disaggregated disclosure of one or more constituent greenhouse gases only if a registrant is obligated to separately report the individual gases pursuant to another reporting regime, such as the EPA’s greenhouse gas reporting regime or any foreign reporting regime? If so, should we specify the reporting regime that would trigger this disclosure? **Page: 10**

96. Should we require a registrant to express its emissions data in CO<sub>2</sub>e, as proposed? If not, is there another common unit of measurement that we should use? Is it important to designate a common unit of measurement for GHG CO<sub>2</sub>e emissions data, as proposed, or should we permit registrants to select and disclose their own unit of measurement? **Page: 10**

101. Should we require a registrant to exclude any use of purchased or generated offsets when disclosing its Scope 1, Scope 2, and Scope 3 emissions, as proposed? Should we require a registrant to disclose both a total amount with, and a total amount without, the use of offsets for each scope of emissions? **Page: 8-9**

106. Should we require a registrant that is required to disclose its Scope 3 emissions to describe the data sources used to calculate the Scope 3 emissions, as proposed? Should we require the proposed description to include the use of: (i) emissions reported by parties in the registrant’s value chain, and whether such reports were verified or unverified; (ii) data concerning specific activities, as reported by parties in the registrant’s value chain; and (iii) data derived from economic studies, published databases, government statistics, industry associations, or other third-party sources outside of a registrant’s value chain, including industry averages of emissions, activities, or economic data, as proposed? Are there other sources of data for Scope 3 emissions the use of which we should specifically require to be disclosed? For purposes of our disclosure requirement, should we exclude or prohibit the use of any of the proposed specified data sources when calculating Scope 3 emissions and, if so, which ones? **Page: 8-9**

133. Should we provide a safe harbor for Scope 3 emissions disclosure, as proposed? Is the scope of the proposed safe harbor clear and appropriate? For example, should the safe harbor apply to any registrant that provides Scope 3 disclosure pursuant to the proposed rules, as proposed? Should we limit the use of the safe harbor to certain classes of registrants or to registrants meeting certain conditions and, if so, which classes or conditions? For example, should we require the use of a particular methodology for calculating and reporting Scope 3 emissions, such as the PCAF Standard if the registrant is a financial institution, or the GHG Protocol Scope 3 Accounting and Reporting Standard for other types of registrants? Should we clarify the scope of persons covered by the language “by or on behalf of a registrant” by including language about outside reviewers retained by the registrant or others? Should we define a “fraudulent statement,” as proposed? Is the level of diligence required for the proposed safe harbor (*i.e.*, that the statement was made or reaffirmed with a reasonable basis and disclosed in good faith) the appropriate standard? Should the safe harbor apply to other climate-related disclosures, such as

Scopes 1 and 2 emissions disclosures, any targets and goals disclosures in response to proposed Item 1505 (discussed below), or the financial statement metrics disclosures required pursuant to Proposed Article 14 of Regulation S-X? Should the safe harbor apply indefinitely, or should we include a sunset provision that would eliminate the safe harbor some number of years, (*e.g.*, five years) after the effective date or applicable compliance date of the rules? Should the safe harbor sunset after certain conditions are satisfied? If so, what types of conditions should we consider? What other approaches should we consider? **Page: 31-32**