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Submitted via rule-comments@sec.gov

The Honorable Vanessa Countryman
Secretary of U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

File No. S7-10-22

The Enhancement and Standardization of Climate-Related Disclosures for Investors

Dear Madam Secretary:

The Metallurgical Coal Producers Association (the MCPA)¹ appreciates this opportunity to comment on the Securities and Exchange Commission's (the Commission) proposed rules to enhance and standardize climate-related disclosures for investors (the Proposal).² We are concerned that the Proposal will not meaningfully advance the Commission's stated goal of providing "consistent, comparable, and reliable—and therefore decision-useful—information to investors to enable them to make informed judgments about the impact of climate-related risks on current and potential investments."³ We understand the challenges inherent in creating a climate-related disclosure framework, but urge the Commission to strongly consider the impact such framework will have on registrants if adopted.

I. The Proposal does not significantly enhance disclosure of material climate risks beyond what is required under existing rules.

Existing Commission rules require companies to disclose material climate risks, and the current Commission principles-based approach allows for more tailored information dissemination that the Proposal eliminates. The Proposal seeks to apply a one-size-fits-all approach to climate-related disclosure requirements that deviates from the Commission's existing disclosure regime. Current rules allow companies to consider what is financially material to their specific facts and circumstances and disclose those material considerations to investors. The Proposal will largely remove that discretion and require disclosure even when disclosure is not material to a specific company's situation.

¹ MCPA is a non-profit organization made up of metallurgical coal producers and those who support its producing members' operations. While coal has traditionally been understood through the thermal coal lens of power plants and light bulbs, MCPA seeks to expand the general public's understanding of metallurgical coal and its critical benefit to our everyday lives. Bridges, automobiles, and common products like kitchen appliances are made possible by metallurgical coal. By looking at coal through another lens and helping to create a link between metallurgical coal and its many end uses, MCPA strives to broaden the understanding of how coal powers our lives.

² The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334 (Apr. 11, 2022) (the Proposal).

³ Proposal at 21,335.



Regulation S-K's (Regulation S-K promulgated under the Securities Exchange Act of 1934, as amended,) existing rules significantly capture the climate-related information the Proposal compels all registrants to disclose. Item 101 of Regulation S-K requires a registrant to provide a general description of its business, including "the material effects that compliance with government regulations, including *environmental regulations*, may have upon the capital expenditure, earnings and competitive position of the registrant and its subsidiaries, including the estimated capital expenditures for environmental control facilities."⁴ Item 103 of Regulation S-K requires disclosure of administrative or judicial proceedings arising, except those deemed to be "ordinary routine litigation incidental to the business," under any Federal, State, or local provisions that were enacted or adopted to regulate discharge of material *into the environment*.⁵ Item 105 of Regulation S-K requires a discussion of the material factors that make an investment in the registrant speculative or risky. Each registrant must include an explanation of how each risk affects such registrant. As currently constructed, Item 105 allows a registrant to tailor the risk factor to its specific business and disclose only those risks it deems material to investors.⁶ Lastly, Item 303 of Regulation S-K compels disclosure of material information relevant to an assessment of the financial condition of a company. The discussion required under Item 303 must "focus specifically on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."⁷ We believe these four requirements of Regulation S-K already capture much of the information on which the Proposal focuses but in a much more tailored method.

Moreover, the existing disclosure regime already elicits increased disclosure of appropriate climate-related information. Between 2019 and 2020, the number of S&P 500 companies reporting climate-related issues as a material risk quadrupled, showing that companies are increasingly disclosing climate risks relevant to investors under the established framework.⁸

All of the Regulation S-K requirements detailed above compel each company to include climate-related information that such company deems material to investors based on its specific facts and circumstances. As currently constructed, the rules provide a company's management with the flexibility to determine what information is and is not material to investors. Many companies already include substantial amounts of climate-related information outside of required filings, targeting myriad additional non-investor stakeholders. The Proposal seeks to require companies to include this additional information geared toward non-investor stakeholders in required filings, without considering whether or not the material information is already being disclosed under the current disclosure regime.

⁴ 17 CFR § 229.101(c)(2)(i) (emphasis added).

⁵ 17 CFR § 229.103(c)(3) (emphasis added).

⁶ 17 CFR § 229.105.

⁷ 17 CFR § 229.303(a).

⁸ See Andrew Ramonas & Jacob Rund (March 25, 2021), <https://news.bloomberglaw.com/securities-law/climate-change-risks-surge-in-companies-annual-reports-to-sec>.

II. The Proposal deviates from the longstanding bedrock feature of the existing disclosure framework: materiality.

Materiality is a central tenet of today's disclosure framework and has been since it was first introduced in the Securities Act of 1933, as amended.⁹ Justice Thurgood Marshall, in *TSC Industries v. Northway*, described a fact as "material" if there is "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote," or "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."¹⁰ Significantly, the Supreme Court expressly rejected the idea that material facts include "all facts which a reasonable stockholder might consider important."¹¹ The Supreme Court has since adopted this definition for the Rule 10b-5 securities fraud context,¹² and the Commission has adopted a very similar definition of materiality. Specifically, the Commission has defined materiality, "when used to qualify a requirement for the furnishing of information as to any subject," as "those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security."¹³ The longstanding acceptance of materiality as the underlying theme of U.S. securities laws and related disclosure requirements would be significantly altered by the Proposal. Many of the Proposal's requirements either apply to all companies universally without a materiality qualifier or attempt to alter the existing materiality standard. If adopted, these changes would deviate significantly from the Commission's traditional company-specific approach to disclosure.

Removing the concept of materiality from certain disclosure requirements, and universally applying a set of climate-related disclosures to companies regardless of industry, would eliminate a company's ability to tailor information to what a reasonable shareholder would consider important. For example, the proposed rules require all companies to disclose Scope 1 and 2 greenhouse gas (GHG) emissions without a materiality qualifier, regardless of the industry in which they operate. GHG emissions vary greatly by industry. What is important to a reasonable shareholder investing in an energy company is certainly different than a reasonable shareholder investing in a technology or media company and should be treated as such. Without a materiality qualifier, many companies would be forced to include disclosures in their required filings better suited for an annual sustainability report.

Further, many requirements of the Proposal that include materiality thresholds seek to significantly alter its definition. For instance, the Proposal desires to "ensure that management consider the dynamic nature of climate-related risks" by proposing to "require a registrant to discuss its assessment of the materiality of climate-related risks over the short, medium, and long term."¹⁴ Requiring a company to consider climate-related risks over three different time horizons needlessly burdens its management and deviates from the current concept of materiality. Such a concept would be challenging at best to implement, if not impossible.

⁹ David A. Katz & Laura A. McIntosh (May 1, 2021), <https://corpgov.law.harvard.edu/2021/05/01/corporate-governance-update-materiality-in-america-and-abroad/>.

¹⁰ *Id.*

¹¹ *Northway, Inc. v. TSC Industries*, 512 F.2d 324, 330 (7th Cir. 1975).

¹² David A. Katz & Laura A. McIntosh (May 1, 2021), <https://corpgov.law.harvard.edu/2021/05/01/corporate-governance-update-materiality-in-america-and-abroad/>.

¹³ 17 CFR § 230.405.

¹⁴ Proposal at 21,352.

Additionally, the Proposal would require companies to disclose Scope 3 GHG emissions if they have set an emissions reduction target or goal that includes Scope 3 GHG emissions or if Scope 3 GHG emissions are material. Although the Proposal seems to include a typical materiality threshold for such disclosure, in reality the Proposal departs from the current standard. The Proposal notes that “even if the probability of an adverse consequence is relatively low, if the magnitude of loss or liability is high, then the information in question may still be material.” It further states that “if a registrant determines that certain categories of Scope 3 emissions are material, registrants should consider disclosing why other categories are not material.”¹⁵ These show the presumption by the Commission set forth in the Proposal that all Scope 3 GHG emissions are material and should be disclosed. If a registrant determines that certain categories of Scope 3 GHG emissions are not material, why should it consider disclosing the rationale behind the determination? Even being told to consider doing so significantly alters the materiality standard underlying the current disclosure regime.

III. The limitations, uncertainties, and assumptions inherent in the required climate information undermine the Proposal’s central goal of comparable, consistent, and reliable disclosures.

The Commission states that the Proposal’s fundamental goal is to ensure that investors receive “consistent, comparable, and reliable” climate-related information across public companies.¹⁶ Given the proliferation of voluntary climate-related reporting frameworks and concerns about greenwashing, we appreciate the desire to bring more clarity to these matters. However, the Proposal is unlikely to accomplish this goal.

The Proposal would require significant speculation on issues that are far beyond the knowledge of any company. For example, a company would be required to make certain disclosures with respect to transition risks, including the impact or potential impact of transition risks on the company’s financial statements. “Transition risks” are defined very broadly in the Proposal, such that they may originate from potential changes in law or policy, market demand, technologies, or a company’s reputation.¹⁷ These matters are fundamentally unpredictable and often change rapidly and unexpectedly, making companies’ assumptions about them inherently unreliable. Requiring companies to prophesy publicly about such matters does not advance the goal of comparable, consistent, and reliable disclosures. In fact, it may cause more

¹⁵ *Id.* at 21,379.

¹⁶ *Id.* at 21,335.

¹⁷ The Proposal defines “transition risks” as:

the actual or potential negative impacts on a registrant’s consolidated financial statements, business operations, or value chains attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate-related risks, such as increased costs attributable to changes in law or policy, reduced market demand for carbon-intensive products leading to decreased prices or profits for such products, the devaluation or abandonment of assets, risk of legal liability and litigation defense costs, competitive pressures associated with the adoption of new technologies, reputational impacts (including those stemming from a registrant’s customers or business counterparties) that might trigger changes to market behavior, consume preferences or behavior, and registrant behavior.

Proposed 12 § CFR 229.1500(c)(4).

discrepancies and confusion among investors since there are many ways companies could, and likely will, make the necessary predictions.

Even the data-driven disclosures required under the Proposal are subject to inherent uncertainties. These imprecisions mainly stem from the existence of different climate models, which necessarily rely on numerous estimates and assumptions, as well as the largely imprecise nature of climate data itself. The Basel Committee on Banking Supervision aptly highlighted these calculation challenges, noting:

the range of impact uncertainties, time horizon inconsistencies, and limitations in the availability of historical data on the relationship of climate to traditional financial risks, in addition to a limited ability of the past to act as a guide for future developments, render climate risk measurement complex and its outputs less reliable as risk estimators.¹⁸

Moving the needle even further away from comparable, consistent, and reliable disclosures is the requirement for companies to provide information about the company's suppliers and consumers in the form of Scope 3 GHG emissions. Obtaining accurate information from upstream vendors and downstream users will, at best, be very challenging, and such information will unavoidably be subject to such vendors' or users' own models, estimates, and assumptions, which may not (and likely will not, for the reasons described above) align with those of the company or the company's other vendors and users. In the event a company cannot obtain information from suppliers and consumers, the company may have to estimate these values, but Scope 3 GHG emissions, particularly downstream Scope 3 GHG emissions, are impossible to estimate with the level of accuracy of other information provided in Commission filings.

The Proposal's climate disclosures are rife with uncertainties, estimates, and assumptions due to the very nature of the information the Commission seeks to elicit with these rules. Up to this point, Commission filings have necessitated high levels of precision and accuracy. Adding the proposed climate disclosures to Commission filings gives this information an imprimatur of reliability that is, at least currently, impossible to obtain for the reasons highlighted above. Consequently, at best, these disclosures will seemingly do little to truly clarify investors' decision-making, and, at worst, the disclosures will give investors exaggerated confidence in their understanding of the climate risks companies face and their ability to compare these risks across companies.

IV. The purported benefits of the Proposal do not outweigh its extremely burdensome costs.

Implementing the Proposal's requirements will unquestionably be very expensive for companies, likely even more expensive than the Commission estimates. However, the purported benefits of the Proposal are amorphous and speculative, particularly to most shareholders who will be paying for such disclosures.

In estimating the costs of the Proposal on companies, the Commission fails to acknowledge the critical distinction between preparing voluntary disclosures versus Commission filings. Voluntary disclosures are not subject to the mandatory assurances or the heightened

¹⁸ Basel Committee on Banking Supervision, Climate-Related Financial Risks—Measurement Methodologies (April 2021) p. 17 <https://www.bis.org/bcbs/publ/d518.pdf>.

levels of scrutiny and liability that apply to Commission filings. Voluntary disclosures also provide companies with the flexibility to address environmental, as well as social and governance, matters that are most important to their shareholders in the broader context of other cost-benefit considerations that are also significant to shareholders. The Proposal leaves no room for companies to make these bespoke cost-benefit analyses based on what makes sense for their specific shareholders and business or what their shareholders want.

The Proposal also goes even farther than existing Commission filing requirements by mandating a new third-party attestation for large accelerated filers and accelerated filers. This attestation report must cover Scope 1 and Scope 2 GHG emissions and will be another significant required expenditure for companies. This cost is in addition to the new expenses companies will incur in connection with the expanded audit services that will be necessary to produce and verify the proposed metrics for the notes to the financial statements.

In addition to the increased costs that will be necessary for companies to be comfortable including their own climate disclosures in Commission filings, companies will have to expend even more resources to obtain and verify their customers' and suppliers' climate information for purposes of calculating Scope 3 GHG emissions. Private companies will also have to incur costs to track and report their GHG emissions to public companies, which the Commission fails to consider. Even if customers and suppliers are able to provide this information, companies will likely be unwilling to include it in their Commission filings without further verification given the greater scrutiny and litigation risks associated with Commission filings. Other customers and suppliers may be unable or unwilling to provide this information. This leaves companies with no choice but to estimate these values for purposes of reporting Scope 3 GHG emissions. However, as noted above, it is a complicated and imprecise exercise to estimate Scope 3 GHG emissions. Companies, therefore, will have to rely heavily on third-party consultants to estimate and/or verify customers' and suppliers' climate information, which will be yet another expense.

Despite these very clear expenses, however, the benefits of the Proposal remain unclear. This is evident in the Proposal's wording, which refers to "expected" benefits that "could" materialize. The Commission itself acknowledges that it cannot "reliably quantify [the] potential benefits and costs" of the Proposal.¹⁹ It is also apparent when the stated "primary benefit" of the Proposal is examined. The stated "primary benefit" of the Proposal is that investors will "have access to more comparable, consistent, and reliable disclosures with respect to registrants' climate-related risks."²⁰ As discussed above, the Proposal is unlikely to accomplish this goal due to the multitude of choices to be made and uncertainties inherent in producing the disclosures the Proposal would require. Comparable, consistent, and reliable disclosures are an unlikely outcome given the many necessary, and likely divergent, choices, assumptions, and estimates facing companies. Glossing over these difficulties will, at best, provide little useful decision-making information to investors and will, at worst, give investors an inflated sense of their understanding of the climate risks companies face and the comparability of these risks. In any case, these disclosures will come at a steep cost to shareholders, at a time when the importance of these disclosures to individual investors remains uncertain.

¹⁹ Proposal at 21,428.

²⁰ *Id.* at 21,413.

V. The safe harbor under the Proposal is too narrow to adequately limit the unnecessarily heightened liability risks for registrants.

Climate disclosures are inherently uncertain. As discussed above, the production of such disclosures currently requires numerous estimates and assumptions, which are further compounded by the use of different models. Despite these uncertainties, the Proposal would require inclusion of these disclosures in Commission filings, which are subject to heightened liability. While the Proposal does provide a safe harbor, the safe harbor is far too narrow given the realities of producing climate disclosures.

The Proposal provides a limited safe harbor for forward-looking statements related to climate disclosures and Scope 3 GHG emissions disclosure. Outside of these limited matters, the disclosures required by the Proposal would be subject to the same standards as all other information currently included in Commission filings. Yet, the information required by the Proposal is incapable of being produced at the same level of reliability as the other information included in Commission filings. If the Commission requires the disclosures set forth in the Proposal, a significantly broader safe harbor is necessary to account for the uncertainties that are fundamental in producing climate information. Otherwise, companies will face unreasonable levels of risk to comply with the Proposal.

VI. The disclosures required by the Proposal do not advance the Commission’s mission of investor protection.

The appropriate responses to climate change and disclosures regarding climate risks are far from settled topics, as legislators, regulators, and investors continue to grapple with these issues. While the Commission heavily invokes “investor demand,” and therefore the necessity of investor protection, as a basis for this Proposal, investors’ opinions are far from settled on climate disclosure matters. For example, recent survey results found that, when making investment decisions, most individual investors rank environmental factors as the least important, and traditional financial factors, such as the potential of earnings returns, as the most important.²¹

Moreover, it is not the Commission’s job to ensure that all the information an investor may want in making an investment decision is available. Indeed, given the many different priorities and motivations of investors, this likely would be an impossible task. Instead, the Commission’s three-part mission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.²² The Commission has accomplished investor protection in the past by focusing on disclosure of “material information.” Material information is information that a reasonable investor would consider important in making an investment decision, meaning that it is connected to the company’s financial value. As discussed above, to the extent climate-related information is material to a company, the company is already required to disclose such information under the Commission’s current rules. Additionally, many companies provide voluntary climate-related disclosures. To the extent investors want more climate information from a company, they also have the power to require the reporting of such

²¹ See Lauren Foster, Investors Know Little About ESG, a New Study Finds, Barron’s (Apr. 12, 2022), <https://www.barrons.com/articles/esg-meaning-sustainable-investing-study-51649719876> (citing survey of 1,228 retail investors).

²² See U.S. Securities and Exchange Commission, “The Role of the SEC,” available at: <https://www.investor.gov/introduction-investing/investing-basics/role-sec#:~:text=The%20U.%20S.%20Securities%20and%20Exchange,Facilitate%20capital%20formation.>

information through shareholder proposals. The Proposal seeks to rearrange this balance and make investors bear the exceedingly high costs, outlined above, of mandatory climate disclosures, regardless of investors' desires or needs.

Congress is also still in the midst of debating these important topics, and it has not given the Commission a mandate to decide these significant issues unilaterally. In the past, Congress has given the Commission clear statutory mandates when it wanted to expand required disclosures beyond financial matters.²³ In 2016, the Commission itself noted that "disclosure relating to environmental and other matters of social concern should not be required of all registrants unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material."²⁴ As was the case in 2016, there is still no such congressional mandate, and we believe the Commission should wait for Congress to resolve matters of such global significance and attendant cost.

VII. The Proposal is ultimately unlikely to be in the best interests of investors or the economy.

We appreciate the Commission's attention to the important topic of the impact of climate risks on companies' businesses and operations, as well as the financial system. However, we believe that addressing these matters in the way proposed by the Commission may cause harm to investors and the economy.

In an unprecedented deviation from its current practices, the Commission seeks to direct companies' attention and resources to a very specific risk—climate issues—in a one-size-fits all approach. The Commission goes even further and suggests how companies might run their businesses to comply with the disclosure requirements. For example, the Proposal suggests that companies pursuing a target to reduce net GHG emissions could have "a strategy to increase energy efficiency, transition to lower carbon products, purchase carbon offsets or [renewable energy credits], or engage in carbon removal and carbon storage."²⁵ Similarly, the Proposal suggests that companies could "mitigate the challenges of collecting the data required for Scope 3 disclosure" by "choosing to purchase from more GHG emission-efficient suppliers, "working with existing suppliers to reduce emissions," "producing products that are more energy efficient or involve less GHG emissions when consumers use them," or "contracting with distributors that use shorter transportation routes."²⁶ We believe that the issues covered by the Proposal are extremely complicated and concern matters that scientists, government officials, and society at large are continuing to debate. At present, there is no clear path forward with respect to these climate issues, and yet, the Proposal attempts to place all companies on one path.

If the Proposal is adopted, while investors will be left paying for compliance for going down this path, as discussed, it is very uncertain of the corresponding benefits. First, investors will have to absorb the significant costs of compliance with the Proposal's requirements, as described above. Additionally, investors' financial returns may decrease as companies are required to divert their focus from financial metrics to other matters. No substantial evidence

²³ For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act specifically required the Commission to adopt disclosure provisions relating to corporate governance, executive compensation, and conflict minerals. See Public Law 111-203, 124 Stat. 1376 (2010).

²⁴ Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,970 (Apr. 22, 2016).

²⁵ Proposal at 21,406.

²⁶ *Id.* at 21,377.

exists that a greater focus on climate matters increases a company's economic performance.²⁷ Retail investors also are likely to have fewer choices for investment since the high burden of complying with the Proposal may cause companies to leave the public markets. Finally, investors may receive less climate-related information overall. Many companies currently provide voluntary climate disclosures that exceed the materiality threshold. However, companies may become increasingly hesitant to provide more expansive voluntary disclosures to avoid the possible implication that these disclosures are, in fact, material, and therefore, must be included in Commission filings. Additionally, the Proposal requires significant disclosure in relation to any publicly disclosed climate targets and goals. This heavy disclosure burden will likely discourage companies from setting such targets and goals.

We are also concerned that the Proposal may negatively impact the economy. We believe the Commission has designed the Proposal to direct capital in specific ways and to particular ends. However, this is contrary to how markets solve issues. Issues, even large ones like climate risks, can be resolved through the efficient direction of capital that the market permits. Trying to circumvent that process by dictating the means and ends for companies has the potential to cause other, perhaps better paths, to be passed over. Diverting capital to one risk over others also has the potential of causing other important issues to remain unresolved, while potentially having destabilizing effects by focusing too much capital on one segment of the market. Finally, the burdens inherent in complying with the Proposal may drive companies into private markets, undermining the Commission's equally important mission of supporting capital formation.

VIII. Conclusion

We respectfully urge the Commission to reconsider its issuance of this Proposal. While we respect the Commission's intentions, we are deeply concerned about the negative lasting effects the Proposal could have on investors, companies, and the economy. We encourage the Commission to continue to rely on the principles-based disclosure that it has pursued in the past to enable companies to provide bespoke, tailored, and meaningful disclosures, while we await greater clarity on these issues from scientists and legislators.

Thank you for the opportunity to provide these comments. Please feel free to contact me [REDACTED] or our environmental affairs director and counsel, Brooks Smith [REDACTED] with questions.

Sincerely,



Benjamin R. Beakes
President

²⁷ See, e.g., Sanjai Bhagat, An Inconvenient Truth About ESG Investing, Harvard Business Review (Mar. 31, 2022), <https://hbr.org/2022/03/an-inconvenient-truth-about-esg-investing>; Bradford Cornell & Aswath Damodaran, Valuing ESG: Doing Good or Sounding Good? (2020), https://papers.ssrn.com/abstract_id=3557432.