



**AmericanCoatings**  
ASSOCIATION<sup>SM</sup>

June 15, 2022

Submitted Electronically

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

Re: SEC File Number S7-10-22; Release No. 33-11042  
The Enhancement and Standardization of Climate-Related Disclosures for Investors; Proposed Rule, 87 Fed. Reg. 21,334 (Apr. 11, 2022)

Dear Secretary Countryman:

The American Coatings Association (“ACA”)<sup>1</sup> appreciates the opportunity to comment on the proposed rule entitled, “The Enhancement and Standardization of Climate-Related Disclosures for Investors.”<sup>2</sup> We understand that the U.S. Securities and Exchange Commission (“SEC”) intends this rule to provide investors with “consistent, comparable, and reliable—and therefore decision-useful—information...to enable”<sup>3</sup> investors “to make informed judgments about the impact of climate-related risks on current and potential investments”<sup>4</sup> and to “help issuers more efficiently and effectively disclose” climate risks.<sup>5</sup> ACA appreciates SEC’s efforts to propose climate-related disclosures; however, the proposed rule should not be adopted. In order to have a meaningful impact on climate-related issues, it is imperative that the United States Environmental Protection Agency (“EPA”) retain broad authority over this issue as it has the expertise required to implement climate-related policies that apply to a broad range of industries and companies. In the alternative, the proposed rule should be significantly revised to allow for

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<sup>1</sup> ACA is a voluntary, non-profit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services. ACA’s membership represents over 90 percent of the total domestic production of paints and coatings in the country.

<sup>2</sup> The Enhancement and Standardization of Climate-Related Disclosures for Investors; Proposed Rule, 87 Fed. Reg. 21,334 (Apr. 11, 2022).

<sup>3</sup> See Proposed Rule, p. 7.

<sup>4</sup> Id.

<sup>5</sup> Chair Gary Gensler, Statement on Proposed Mandatory Climate Risk Disclosures, March 21, 2022 (<https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321>).

effective implementation and to ensure investors have access to meaningful information related to climate change.

ACA's membership represents ninety percent (90%) of the paint and coatings industry, including downstream users (or processors) of chemicals, as well as chemical manufacturers. ACA appreciates SEC's willingness to interact with stakeholders during this process.

On behalf of its membership, ACA respectfully submits the following comments:

## **I. Introduction**

Although ACA appreciates SEC's efforts to propose a rule that provides investors with "consistent, comparable, and decision-useful information" about climate risk and to "help issuers more efficiently and effectively disclose"<sup>6</sup> climate risks, respectfully, the current SEC proposal falls short of achieving such goals. If adopted, this rule would impose new, complex, and extensive obligations on registrants to provide certain climate-related information in their registration statements and annual reports, including requiring registrants to rely on third-party data out of registrants' control. Moreover, the SEC has limited authority regarding climate-related disclosures as such authority only applies to a very limited universe of companies. In addition, the mechanisms for developing and reporting climate-related data systematically do not exist and would be unduly burdensome and in some cases impossible to comply with in such a short time.

ACA argues that the proposed rule should not be adopted as the SEC does not have sufficient expertise on climate-related issues to develop and implement disclosure requirements that are meaningful and provide investors with uniform, consistent data points. EPA has historically had broad authority to establish regulatory requirements relative to climate-related disclosures that would apply to a broader range of industries. In the alternative, the proposed rule could be significantly revised to ensure registrants are reporting consistent, comparable, and decision-useful information about climate-related risks that is, in fact, useful to investors. In addition, such reporting requirements should be clear, not unduly burdensome, and acknowledge the complexity, uncertainty, and limitations associated with climate-related disclosures. SEC should also provide a more realistic timeframe to comply with the extensive, complex reporting requirements.

## **II. SEC Does not Have the Expertise to Develop and Implement Disclosure Requirements for Climate-related Claims**

Climate-related issues and reporting requirements have historically been regulated by the EPA. EPA has traditionally been the oversight agency charged with monitoring, regulating, and enforcing climate-related issues, and as such EPA has longstanding expertise to implement meaningful climate-related disclosures/policies. EPA has developed an expertise in this area and has broad jurisdiction over a wide range of industries as well as both public and private entities. Conversely, the SEC does not have experience in developing requirements focused on climate-related issues and only has jurisdiction over publicly traded companies. Consequently, the SEC's proposed rule should not be adopted.

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<sup>6</sup> Id.

### III. The Proposed Rule Presents an Unnecessary and Undesirable Departure from SEC's Current Materiality Standard

The proposed rule represents a significant departure from the materiality standard, presents obscure quantitative and qualitative metrics at which emissions may be material, and does not provide clear guidance on assessing materiality. SEC's existing rules are rooted in the materiality principle, which require companies to disclose "material" risks. As defined by the SEC and consistent with Supreme Court precedent, a matter is material if 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. The proposed rule represents a significant departure from the SEC's current materiality standard by removing the materiality standard for some disclosures in its entirety and recasting the materiality standards in other instances. For example, Scope 1 and 2 greenhouse gas ("GHG") emissions reporting and financial metrics reporting are not conditioned on materiality; while other required disclosures refer to a specific threshold well below any standard materiality determination (e.g., disclosure of certain climate-related impacts on existing financial statement line items to the extent the aggregate impact is one percent (1%) or more of the particular line item for a given year).

Moreover, the proposed rule requires Scope 3 GHG emissions reporting *only* 1) if material, or 2) if a GHG emissions reduction target has been set.<sup>7</sup> However, the proposed rule appears to create a presumption that Scope 3 GHG emissions are material, as the proposed rule notes Scope 3 GHG emissions represent the majority of the carbon footprint for most companies. Creating a presumption is yet another departure from the SEC's current materiality standard.

Furthermore, the SEC also provided examples of where Scope 3 GHG emissions may be material, including: (1) if an industry is in the process of transitioning to lower-emission products or processes that may result in financial risks; (2) if a company is required to allocate capital to invest in lower emissions equipment; or (3) if Scope 3 emissions make up a relatively significant portion of a company's overall GHG emissions.<sup>8</sup> Although the proposed rule does not explicitly require a company to disclose its basis for determining Scope 3 GHG emissions are not material, the proposed rule notes "it may be useful to investors to understand the basis for that determination."<sup>9</sup> As such, the proposed rule imposes significant deterrents to omitting Scope 3 GHG emissions data, even if not material, and presents obscure quantitative and qualitative metrics at which emissions may be material.

Additionally, with respect to climate-related risks, the proposed rule introduces the concept of materiality over the short, medium, and long term and further states that the materiality determination "is similar to what is required when preparing the MD&A [management discussion and analysis] section in a registration statement or annual report."<sup>10</sup> Conversely, the proposed rule does not define short, medium, or long term and acknowledges that assessing the present materiality of potential consequences of ongoing and future climate change will be difficult. Typically, materiality is considered in the context of a company's current financial condition and may or may not explicitly consider future

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<sup>7</sup> SRCs are exempt from Scope 3 GHG emissions reporting requirements under the proposed rule. See 17 CFR 229.1505(c)(3).

<sup>8</sup> See Proposed Rule, p. 163.

<sup>9</sup> *Id.* at 166.

<sup>10</sup> *Id.* at 65.

periods, especially periods that extend as far in the future as many potential climate-related impacts. This evaluation is challenging to say the least, given the uncertainty around many climate developments.

Although, in some instances, the SEC purports to leverage the definition of materiality used in SEC filings today, questions remain about how it may be applied. In light of the foregoing, the proposed rule should adopt a clear materiality standard for all climate-related disclosures that is consistent with SEC's existing materiality standard and related Supreme Court precedent. The existing materiality standard would provide companies continued flexibility in crafting disclosures that actually inform investor decision-making, rather than requiring a more rigid climate disclosure framework that could suggest certain climate-related information is more material to investor decision-making than it actually is (particularly with respect to the inclusion of non-material emissions information and the requirement that companies analyze the impact of climate-related risks, events, and transition activities on each line item of their consolidated financial statements).

#### **IV. The Data Required to be Produced under the Proposed Rule would be of Limited Value to Investors**

##### **a. The Proposed Rule will Result in Unreliable Data**

The SEC notes climate-related disclosures pursuant to the proposed rule, "would provide 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."<sup>11</sup> ACA respectfully disagrees that the rule, as proposed, will provide reliable data to investors. Data based on assumptions and estimates produces unreliable data, the value of which is questionable and potentially misleading to investors. SEC should limit its inquiry to available, reliable data from registrants to better align with its goals, and to ultimately provide investors with decision-useful information.

##### **b. The Proposed Rule Would Result in Duplicative and Conflicting GHG Emissions Reporting**

In the proposed rule, the SEC recognizes a registrant's Scope 3 GHG emissions may "consist of the Scopes 1 and 2 emissions of its suppliers, distributors, and other third parties in the registrant's value chain." If a registrant's Scope 3 GHG emissions are being reported by a third party in the registrant's value chain, it is duplicative, time consuming, and unnecessary for registrants to report the same data.

In addition, many large industrial companies in the United States are already required to report their GHG emissions to the EPA. To further complicate duplicative reporting requirements, the EPA's reporting requirements and the SEC's proposed disclosure requirements differ. Generally, EPA's GHG reporting rule is facility-specific with some limited exceptions; while, the SEC's proposed rule is focused on "organizational" emissions, with the organization defined by reference to all entities that are included in the registrant's consolidated financial statements. Consequently, a registrant who collected all the information necessary to comply with the EPA's requirements may have to collect additional emissions-related information to comply with the SEC's proposed GHG emission disclosure requirements. For these reasons, Scope 3 GHG emissions reporting should be removed from the proposed rule and GHG emissions reporting should be aligned with existing EPA reporting requirements.

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<sup>11</sup> Id. at 7.

c. The Proposed Rule Requires Dependence on Unreliable Third-Party Data and Assumptions

Scope 3 GHG emissions reporting will require registrants to rely on data generated from sources that are neither owned nor controlled by the reporting registrant and/or to make certain assumption where data does not exist. Registrants would need to disclose both upstream and downstream emissions in its value chain, relying on data compiled and created by third parties, assumptions, and/or estimates. As a result, registrants could potentially be exposed to liability for disclosures beyond their ability to verify and control. Again, ACA recommends SEC limit inquiry to available, reliable data.

**V. Scope of Data Collection Requirements and Costs Associated with Reporting are Unduly Burdensome**

If adopted, the proposed rule will have immediate and significant ramifications on how companies collect, disclose, and verify climate-related data and plans, and will significantly increase the cost and complexity of SEC compliance. Registrants will need to devote substantial human and financial resources to develop climate-related information required under the proposed rule.

The SEC estimates annual costs of compliance with the proposed rule over the first six years as follows:

- For non-Small Reporting Company (“SRC”) registrants<sup>12</sup>, costs are estimated to be **\$640,000** (\$180,000 for internal costs and \$460,000 for outside professional costs) for the first year, while annual costs in subsequent years are estimated to be **\$530,000** (\$150,000 for internal costs and \$380,000 for outside professional costs). Additional costs will be incurred for limited and reasonable assurances. For limited assurance, costs that accelerated filers will incur are estimated to range from \$30,000 to \$60,000 (with a median of \$45,000), while large accelerated filers will incur costs ranging from \$75,000 to \$145,000 (with a median of \$110,000). For reasonable assurance, costs that accelerated filers will incur are estimated to range from \$50,000 to \$100,000 (with a median of \$75,000), while large accelerated filers will incur costs ranging from \$115,000 to \$235,000 (with a median of \$175,000).
- For SRC registrants, costs are estimated to be **\$490,000** (\$140,000 for internal costs and \$350,000 for outside professional costs) for the first year, while annual costs in subsequent years are estimated to be **\$420,000** (\$120,000 for internal costs and \$300,000 for outside professional costs).<sup>13</sup>

The SEC bases these estimates on companies that voluntarily disclosed climate-related information under the Task Force for Climate-related Financial Disclosures (“TCFD”). Companies who have voluntarily disclosed under TCFD have typically done so with respect to certain matters only. As a result, SEC’s costs estimates grossly underestimate the costs associated with compliance.

In addition, the proposed rule notes heightened litigation risk and the potential disclosure of proprietary information may increase costs. For example, the proposed rule may result in additional litigation risk since the proposed climate-related disclosures may be new and unfamiliar to many registrants. To the

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<sup>12</sup> Non-SRCs include large accelerated, accelerated, and non-accelerated issuers.

<sup>13</sup> See Proposed Rule, p. 373, 382-383.

extent this leads to inadvertent non-compliance, registrants may face additional exposure to litigation or enforcement action.

Moreover, under the proposed rule, registrants would be required to disclose a wide range of climate-related information, including potential impacts on its business operations or production processes, types and locations of its operations, products or services, and supply chain and/or value chain. Registrants would be further required to disclose whether they have emissions-related targets and metrics or an internal carbon price, and if they do, what they are. To the extent a registrant's business model or strategy relies on the confidentiality of such information, the required disclosures may put the registrant at a competitive disadvantage.

Furthermore, compliance with Scope 3 GHG emissions reporting requirements would be extremely time consuming, challenging, and burdensome for the paint and coatings industry due to the sheer number of suppliers and customers in companies' value chains. As discussed below, some Scope 3 GHG emissions reporting may be duplicative if already reported as Scope 1 or Scope 2 emissions by suppliers, distributors, and other third parties in the registrant's value chain. The resources required to collect, quantify, and ensure the accuracy of Scope 3 GHG emissions data will be significant for the paint and coatings industry, not just in terms of the volume of required information, but also because of the liability risk that companies may face for inaccuracies in their disclosures.

Additionally, the proposed rule requires disclosure of Scope 3 GHG emissions *only* 1) if material, or 2) if targets have been set;<sup>14</sup> and financial impacts and expenditure metrics if the impacted amount is more than one percent (1%) of the related line item. However, companies will still need to calculate Scope 3 GHG emissions, financial impact metrics, and expenditure metrics to determine materiality in the first instance, resulting in significant costs to a company even if they ultimately determine that disclosure is not required.

ACA is also concerned that the proposed reporting requirements would be misleading to investors and discourage companies from participating in programs that provide significant environmental benefits. For example, if companies set Scope 3 GHG emission targets, companies will be required to report Scope 3 GHG emissions. Liability concerns associated with Scope 3 GHG emissions reporting discourage companies from setting Scope 3 GHG emissions targets and participating in programs, such as Science Based Targets. In addition, the proposed rule emphasizes climate-related environmental impacts, potentially overlooking wholistic environmental impacts associated with registrants' activities. For instance, the end-of-life management of consumer products, such as recycling, could potentially be deterred under the proposed rule because the rule focuses solely on GHG emissions.

If adopted, the proposed rule will serve only to massively burden registrants without any real impact on the policy issues. SEC should focus on material disclosures, striking the right balance among investor protection, the production of decision-useful information, and cost burden to companies. For these reasons, Scope 3 GHG emissions reporting should be completely removed from the proposed rule.

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<sup>14</sup> SRCs are exempt from Scope 3 GHG emissions reporting requirements under the proposed rule. See 17 CFR 229.1505(c)(3).

## **VI. External Audit/Assurance Requirements and CEO/CFO Certifications are Inappropriate**

If adopted as proposed, climate-related disclosures would be subject to the same auditing mechanisms and confidence levels as financial data. Given that there is no one, single correct value for climate impacts, as emission factors, datasets, tools, and organizations differ in their approach, allocation of impacts, and system boundaries, it is not appropriate to subject climate-related disclosures to the same auditing mechanisms and confidence level as financial data nor use such for possible enforcement actions. These factors change yearly and should be treated as directional instead of a financial metric. For example, Scope 3 GHG emissions impacts can vary by an order of magnitude based on which tools or methodology is selected by a company; however, all options are still considered conformant or even best-practice. Another example is Life Cycle Assessment Global Warming Potential impacts, including those that are externally validated and/or commercially available as Life Cycle Inventories. These impacts regularly shift by wide margins yearly as data continues to improve.

Moreover, if adopted, the rule would require external audit and assurance requirements as well as CEO/CFO certifications with respect to certain climate-related disclosures. External audit and assurance providers are limited, making this a very burdensome requirement. In addition, there are no established processes for the financial statement analyses and disclosure requirements, meaning there are no objective standards on which to base a third-party audit/assurance. Any audits/assurances would be subjective, expensive, and of low value. The lack of standards and processes for data collection and validation further compound the problems surrounding third-party auditing and assurances. In the absence of established standards and processes, and especially given that companies will have to rely on data provided by third parties, a requirement for external assurance or auditing poses an undue burden to companies and such requirements should be removed from the rule.

## **VII. The Requirement to Include Climate-Related Disclosures in a Registrant's Annual Report is Misguided**

The proposed rule would require climate-related disclosures to be "filed" in a company's annual report, rather than "furnished," resulting in heightened liability for registrants. Many companies currently publish sustainability reports several months after completing the year-end audit process and filing annual reports, which provides companies with more time to collect data, access third-party published data, and complete climate-related disclosure review and third-party verification processes. Companies will now have to file climate-related disclosures in their annual reports and the timeline for reporting climate-related disclosures will be accelerated.

For example, the proposed rule would require an "accelerated filer" or a "large accelerated filer" to include in the relevant filing an attestation report covering, at a minimum, the disclosure of its Scope 1 and Scope 2 GHG emissions and provide certain related disclosures about the service provider. New audit and assurance activities will have to be performed at the same time as the year-end financial statement audit. The accelerated reporting timeline will create significant challenges for companies if information for reporting and resources are not available.

In recognition of the timing constraints and as an additional liability consideration, climate-related disclosures should be furnished later in the year, rather than filed in an annual report. Climate-related disclosures are more aligned with SEC's noted purpose for furnishing certain disclosures (transparency of corporate operations, as opposed to investor protection). In addition, reducing the liability associated with reporting climate-related disclosures will encourage companies to provide broader

climate-related disclosures, rather than disclosing in the manner most limited to meet the specific requirement, avoiding more robust explanation due to liability concerns.

Although ACA appreciates SEC's efforts and recognition that actual GHG emissions data may not be reasonably available for fourth fiscal quarter reporting, using reasonable estimates for the fourth quarter and promptly disclosing any material differences between the estimate used and the actual, determined GHG emissions data in subsequent filings is burdensome and tacks on yet another reporting requirement. Registrants will constantly be required to compare fourth quarter estimates against actual emissions data, determine if the difference is material, and report in subsequent years. Providing additional flexibility for companies to furnish GHG emissions data after their annual reports will provide more reliable data to investors and greatly reduce the unnecessary complexities, costs, and liability concerns that are involved with including such data in the annual report.

### **VIII. The Proposed Rule's Scope 3 GHG Emissions Reporting Requirement Imposes Undue Burdens on Third Parties**

Scope 3 GHG emissions reporting requirements may also impact third parties in a registrant's value chain, not otherwise required to report GHG emissions. For example, registrants may request GHG emissions data from third parties in its value chain to support a registrant's reporting of Scope 3 GHG emissions, placing unduly burdensome expensive requests on third parties, some of which lack financial resources to provide such data. The SEC excludes SRCs from Scope 3 GHG emissions reporting citing, "...the proportionately higher costs they [SRCs] could incur, compared to non-SRCs, to engage in the data gathering, verification, and other actions associated with Scope 3 GHG emissions reporting" and notes, "many of which may have fixed cost components."<sup>15</sup> Requesting Scope 3 GHG emissions data from third parties in a registrant's value chain would essentially raise the same concern the SEC notes for SRCs, proportionately higher costs for third parties to engage in the data gathering, verification, and other actions associated with supporting a registrant's Scope 3 emissions reporting.

### **IX. SEC has not Proposed Adequate Time for Registrants to Comply with the Complex Rule**

If the rule is adopted in 2022, a year-end reporting large accelerated filer would be required to make its first disclosure under the new rule in 2024 for Fiscal Year 2023. This is not a realistic timeframe considering the complexity and sheer number of new reporting requirements under the rule. The proposed rule will meaningfully increase the cost and complexity of reporting. Frankly, many registrants will not be capable of responding by the proposed deadlines.

SEC rationalizes the accelerated timeframe for reporting based on modeling the proposed disclosure rules in part on the TCFD framework and investor and issuer familiarity with the framework.<sup>16</sup> Further, SEC notes modeling the proposed disclosure rule in part on the TCFD framework should help mitigate the compliance burden for issuers already providing climate-related disclosures based on this framework.<sup>17</sup> However, as noted by the SEC, companies have been selecting which climate-related disclosures they report; therefore, the proposed rule will still present significant compliance burdens for registrants. Considering the complexity and extensive reporting requirements this rule would impose,

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<sup>15</sup> See the Proposed Rule, p. 213.

<sup>16</sup> *Id.* at 48.

<sup>17</sup> *Id.* at 49.



registrants need more time to digest the new requirements, plan, and develop systems and processes to ensure compliance.

To comply, registrants will need to enhance data collection procedures, including from third parties in their value chain, and develop internal processes and controls, which will require substantial internal and external resources, including audit oversight of new financial statement requirements and external validation of climate data if the rule is adopted as proposed. In addition, given the number of registrants required to report and the external support many companies would need to comply with the proposed rule, qualified reviewers, assessors, and auditors will not have sufficient capacity to meet the spike in demand. At a minimum, ACA suggests the proposed phase-in period for all registrants and disclosures set forth in the SEC's proposed rule be extended by an additional two years to allow sufficient time to plan and comply with the proposed rule's extensive reporting requirements.

## **X. Conclusion**

ACA appreciates the opportunity to submit comment on SEC's proposed rule regarding climate-related Disclosures. However, EPA is better suited to implement meaningful climate-related disclosures/policies as EPA has broader authority and longstanding expertise. For these reasons, the SEC's proposed rule should not be adopted.

In addition, the proposal signifies a substantial change to existing law and, if adopted, would have wide-ranging implications for companies' disclosure requirements and internal procedures. The Proposed Rule would impose significant additional expense on public companies and would fail to achieve the SEC's goal of providing investors with "consistent, comparable, and decision-useful information" about climate risk. Accordingly, in the alternative, ACA requests SEC modify the proposal as follows:

- Apply a materiality standard to all disclosures that is consistent with current SEC rules and Supreme Court precedent;
- Provide additional guidance regarding the materiality standard as it applies to climate-related disclosures;
- Limit inquiry to available, reliable, consistent, and comparable data;
- Focus on disclosures that are most relevant to a registrant and their investors and material to their businesses;
- Remove Scope 3 GHG emissions reporting requirements from the rule;
- Align GHG emissions reporting with EPA's reporting requirements;
- Remove external audit/assurance requirements and CEO/CFO certifications;
- Climate-related disclosures should be furnished later in the year, rather than filed in a company's annual report;
- Extend the phase-in period for all registrants and disclosures by at least an additional two years; and
- Endorse trends towards harmonization and standardization, aligning with EU-wide reporting requirements, such as the EU Taxonomy and the upcoming Corporate Sustainability Reporting Directive to avoid duplication and misalignment in efforts and with current proposals by IASB (ISSB) and Value Reporting Foundation.

ACA looks forward to working with the SEC on this issue. Please do not hesitate to contact me directly or Melissa Gibbons, ACA's Associate General Counsel, for more information on the impact of this rule on the paint and coatings industry.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Andrew Doyle', with a long horizontal flourish extending to the right.

J. Andrew Doyle  
President and CEO  
American Coatings Association, Inc.