June 17, 2022

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File Number S7-10-22

Dear Ms. Countryman:

The National Mining Association ("NMA") appreciates the opportunity to comment on the U.S. Securities and Exchange Commission's ("SEC" or the "Commission") proposed rule entitled "The Enhancement and Standardization of Climate-Related Disclosures for Investors," which was published in the Federal Register on April 11, 2022 ("Proposed Rule" or "Proposed Rule").[1] The NMA is a national trade association that includes the producers of most of the nation's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and the engineering and consulting firms, financial institutions, and other firms serving the mining industry. NMA members produce energy, metals, and minerals that are essential to economic prosperity and a better quality of life, while being committed to development that balances social, economic, and environmental considerations.

The NMA is committed to advancing solutions and reasonable policies, along with other industries across all sectors of the economy, to reduce greenhouse gas emissions consistent with the best available science. The NMA is committed to working with elected officials, policymakers, and other key stakeholders in the development of domestic and international policy to address the global climate challenge.[2] The NMA also aims to work with the Commission to ensure that any final rule is focused on the reporting of material climate change-related risks and opportunities without

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[1] 87 Fed. Reg. 21,334 (Apr. 11, 2002).

[2] *See* NMA Climate Change Position, http://www.nma.org/esg/nma-climate-change-position.

duplicating or conflicting with other mature reporting schemes and acknowledges the unique nature of the mining industry.

The NMA's members include publicly traded companies that will be subject to the Proposed Rule and therefore have a strong interest in the development of disclosure requirements that are feasible, lawful, and helpful to their investors. The NMA's members also include privately held companies that will be impacted by certain requirements in the Proposed Rule and therefore have direct interest in this rulemaking. Overall, the NMA believes the Proposed Rule's overly prescriptive and far-reaching approach, which is untethered to the core standard of materiality, will create an unworkable and unlawful disclosure program with significant costs and compliance burdens.

In 2021, the SEC asked for public input on climate change disclosures specifically and Environmental, Social, and Governance ("ESG") disclosures more generally,[3] and the NMA submitted comments to the Commission in response to this request on June 11, 2021.[4] Unfortunately, the SEC does not incorporate the NMA's 2021 Comments in several key respects, two of which we would like to reemphasize in our introductory comments.

First, the NMA explained that the SEC's current disclosure requirements, which already require companies to disclose material information with regard to their operations, including climate-related risks, adequately protect investors by providing them with material information on climate and climate-related issues to aid them in their decision-making.[5] In addition, as discussed below, many companies voluntarily provide additional information that may go beyond the materiality threshold.

The NMA is concerned that the Proposed Rule will overwhelm investors with additional non-material information that will make it difficult – if not impossible – for reasonable investors to understand what information is in fact material to an investment or voting decision and could lead to investors misunderstanding the significance (or lack thereof) of the information. If finalized without substantial

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[3] Statement of SEC Acting Chair Allison Herren Lee, "Public Input Welcomed on Climate Change Disclosures" (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

[4] Comments of the National Mining Association in Response to SEC Request for Public Input on Climate Change Disclosures (June 11, 2021) ("2021 Comments"). These comments are incorporated by reference and included herein as Attachment A.

[5] *Id.* at 2, 3-5.

changes, the Proposed Rule would push companies into the mode of ticking off a long list of requirements rather than focusing on qualitative content and limiting disclosures to those items that are material, thereby providing investors with potentially misleading and confusing disclosures.

Second, in its 2021 Comments, the NMA expressed concern that mandatory climate disclosure rules that would require the disclosure of non-material climate-related risks "could proliferate investment bias and practices by investors and financial institutions to exclude certain energy-intensive companies and sectors from investment portfolios or restrict access to or significantly increase the cost of capital."[6] As the NMA previously explained, these types of biases and practices have a negative impact on certain types of companies, including NMA members, regardless of the companies' results, strategy, or financial performance.[7]

Despite the NMA's expression of concern, the mandatory disclosure of certain climate information, without regard to whether the information is material, is exactly what is being required in the Proposed Rule.[8] As discussed in detail in Section IX below, this deviation from the bedrock principle of materiality as articulated by the U.S. Supreme Court and the Commission over decades renders the Proposed Rule unlawful.

Given the breadth and diversity of the NMA membership which includes companies that solely operate domestically as well as international companies listed on multiple exchanges, the views set forth in these comments are those of the association as a whole and do not necessarily represent the view of any individual NMA member.

I. Executive Summary

The NMA recognizes that mining is an energy intensive industry and global action is needed to reduce greenhouse gas emissions and help mitigate the adverse effects of human impacts on climate change. The mining industry continues to proactively undertake efforts to protect the environment, including measuring and reducing its carbon footprint through continual investment in and implementation of technology solutions, energy conservation and efficiency programs. The NMA does not dispute or

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[6] *Id*. at 2.

[7] *Id*.

[8] *See, e.g.*, Proposed 17 C.F.R. § 229.1504(b)(1) (requiring all registrants to disclose Scope 1 and Scope 2 emissions without any materiality limitation); *cf*. Proposed 17 C.F.R. § 229.1504(c)(1) (including a materiality limitation for Scope 3 emissions).

downplay the importance of public companies communicating relevant information, data, and risk factors – including for climate and ESG-related topics – to their shareholders and investors.

Importantly, most NMA member companies – whether publicly traded or privately held – already voluntarily disclose key ESG metrics, including climate-related information, through a variety of mechanisms. For any material climate or ESG issues, publicly traded NMA members meet this existing disclosure obligations – as appropriate for their businesses – in compliance with the SEC's existing disclosure laws, including SEC's 2010 climate disclosure guidance. Furthermore, members provide additional information voluntarily that goes beyond the materiality threshold as needed to be responsive to the evolving preferences and expectations of investors and other stakeholders. For example, member companies publish standalone sustainability reports and integrated financial and sustainability reports made accessible to shareholders and the public. The SEC's 2010 guidance notes the important role played by third-party frameworks and other voluntary reporting mechanisms in providing information outside the disclosure documents filed with the Commission. As detailed in NMA's June 2021 comments, these existing mechanisms are effective in providing investors material information to guide their decisions.

In contrast, the overly burdensome and prescriptive nature of the Proposed Rule undermines one of its main goals: "to improve the consistency, comparability, and reliability of climate-related disclosures."[9] The NMA's comments comprehensively detail how SEC's approach creates extensive practical barriers to compliance as well as significant legal vulnerabilities. While these problems are most evident in the requirements related to Scope 3 reporting and the Regulation S-X financial statement metrics, they are not limited to those provisions. Ultimately, the Proposed Rule goes too far, imposes too many burdens, and crosses a line into information overload that confuses, rather than illuminates, an investor's understanding of a company's climate-related risks.

As written, the enormity of the Proposed Rule and volume of non-material information required makes it unworkable and likely to collapse under its own weight. A major flaw underlying the Proposed Rule is the unrealistic assumptions about availability of data and modeling capabilities that will result in risk quantifications that are purely speculative, especially the required financial statement impact metrics and Scope 3 greenhouse gas emissions reporting. While financial accounting practices may be relatively consistent across business sectors, greenhouse gas quantification methods are not. As a result, the risks that are

[9] 87 Fed. Reg. at 21,335.

estimated cannot be consistently measured across companies, industries, regions, or sectors. Investors may not recognize the disparate nature of these disclosures and the fact that they cannot be fairly compared.

At the core, many of the Proposed Rule's flaws stem in large part from the SEC's one-size-fits-all climate disclosure requirements that are untethered to well-understood traditional interpretations of materiality. For example, the risk quantification problems identified above are exacerbated by the requirement to analyze non-material issues at a granular data level. As discussed in detail in Section IX below, this deviation from the bedrock principle of materiality as articulated by the U.S. Supreme Court and the Commission over decades renders the Proposed Rule unworkable and unlawful. Materiality is foundational to the SEC's principles-based approach to disclosure, allowing materiality determinations on a case-by-case basis rather than prescribing bright-line rules. The SEC should not adopt prescriptive, one-size-fits-all standards of reporting for all companies. Attempts to impose specific and non-material disclosure mandates relating to climate change is a proven recipe for clogging disclosure documents with unnecessary and meaningless data that obscure the truly material information being disclosed.

The materiality threshold for disclosures has stood the test of time due to its capacity to evolve to address new issues and to take into account the facts and circumstances relevant to individual reporting companies. Its self-adjusting nature means that changes over time in investor's expectations of what is important will require publicly traded companies to adjust their disclosures. Prescriptive SEC disclosure requirements in this area risk failing to keep pace with investor and other stakeholder-driven changes in climate and ESG disclosure best practices. The NMA believes the Commission should reevaluate the proposed rule with the lens of materiality, how it will continue to evolve, and the effectiveness of existing requirements in providing decision-useful information to investors. That reevaluation should more robustly take into consideration the important role and advantages of voluntary disclosure frameworks.

The NMA strongly believes that the most effective disclosure of climate- and ESG-related information occurs when individual companies collaborate with their investors, customers, local communities, and other priority stakeholders to identify and voluntarily disclose the relevant, financially material metrics – whether quantitative metrics or qualitative information – that are most useful to the decision-making process of those investors. Individual companies, informed by this engagement, determine the best course for their company, whether it be through internationally recognized third-party programs, sector-developed programs, or internally developed programs specific to the company. In stark contrast, the

Proposed Rule creates a one-size-fits-all, prescriptive, rules-based, mandatory disclosure program that removes all the flexibility that companies now have to be responsive to their stakeholders. The NMA believes that this work and these relationships will continue to drive appropriate climate- and ESG-related disclosures that are aligned with the importance of materiality and company decisions.

The NMA urges the SEC to seriously consider these comments and correct the deficiencies if it proceeds to a final rule. At a minimum, the SEC should: (1) eliminate any mandates to disclose non-material matters; (2) remove the financial statement metrics that require speculation about the impact of climate-related risks, weather events, and transition activities on each of the line items in an issuers consolidated financial statements; (3) eliminate the Scope 3 reporting requirement; (4) remove any requirements that interfere with the traditional roles of the company and its board of directors and management; (5) clarify and streamline the definition of physical risks; (6) allow for alternative reporting regimes to satisfy disclosure requirements; (7) provide an enhanced and expanded safe harbor protection for disclosures; (8) allow for climate-related disclosures to be "furnished" rather than "filed"; and (9) provide additional time to comply with new disclosure requirements.

II. The Proposed Rule Will Result in Incomparable, Inconsistent, and Unreliable Disclosures.

The Commission has expressed that one of its main goals with the Proposed Rule is "to improve the consistency, comparability, and reliability of climate-related disclosures."[10] Unfortunately, as discussed below, the Proposed Rule not only fails to meet this objective, it will actually have the opposite effect and render climate-related disclosures even less reliable and comparable.

For over 50 years, various groups have advocated to the Commission for various social and environmental disclosures. Appropriately, the SEC has resisted these efforts, recognizing that it is "impossible to provide every item of information that might be of interest to some investor" and that doing so would result in disclosure that would be "so voluminous as to render disclosure documents as a whole significantly less readable, and, thus, less-useful."[11] Former SEC Chair Mary Jo White correctly noted in 2013 that:

> When disclosure gets to be "too much" or strays from its
> core purpose, it could lead to what some have called

[10] *Id.*

[11] SEC Release No. 5627 (Oct. 14, 1975).

> "information overload" – a phenomenon in which ever-increasing amounts of disclosure make it difficult for an investor to wade through the volume of information she receives to ferret out the information that is most relevant.[12]

Unfortunately, this is the very outcome that would result from the Proposed Rule.

If the Commission wants "to improve the consistency, comparability, and reliability of climate-related disclosures,"[13] the NMA suggests that the Commission limit the rule only to those disclosures that are material and provide much more guidance about key aspects of the rule that are vague and ambiguous.

A. Any Attempts to Quantify Climate-Related Risks Are, by Their Nature, Highly Speculative.

The SEC fails to recognize in the Proposed Rule that many climate-related risks cannot be quantified with a degree of accuracy that is comparable to the audited financial data that appear in annual reports. In attempts to meet the requirements of the Proposed Rule to estimate climate-risk over the short-, medium-, and long-terms,[14] registrants will by necessity need to make many assumptions and engage in significant speculation, including projections over timeframes that go well beyond those typically covered in SEC reporting and over which the potential climate outcomes are highly variable and dependent on external factors such as global policy action on climate change. As a result, the risks that are estimated cannot be consistently measured across companies, industries, regions, or sectors. Investors may not recognize the disparate nature of these disclosures and the fact that they cannot be fairly compared, resulting in potentially misleading disclosures regardless of how thoroughly a registrant attempts to caveat its disclosures.

Further complicating matters is the fact that what constitutes a short, medium, and long-term time horizon will differ between registrants because registrants determine

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[12] SEC Chair Mary Jo White, *The Path Forward on Disclosure*, Speech to National Association of Corporate Directors – Leadership Conference 2013 (Oct. 15, 2013), http://sec.gov/news/speech/spch101513mjw.

[13] 87 Fed. Reg. at 21,335.

[14] *See, e.g.*, Proposed 17 C.F.R. § 229.1502.

these time horizons for themselves based on their business.[15] This means that comparing the medium-term risks for one registrant with another registrant may not result in information that is comparable or consistent. It also means that any particular investor may disagree with a company's categorization of risks and time periods selected, which could lead to arguments by the investor that the company's categorizations are false and misleading or could lead to the investor pressuring the company to give additional disclosure to meet different time horizons. Moreover, the reliability of the attempt to quantify risk diminishes as the time horizon for those estimates increase, due, for example, to intervening policy, technology, and strategy developments that could dramatically change these risks.

B. The Proposed Rule is Vague and Ambiguous with Regard to What Is Required.

As written, the Proposed Rule is vague and ambiguous in several important respects that make it difficult for a registrant to ascertain whether disclosure of an action or activity is required. Consequently, the NMA is concerned that the Proposed Rule will result in the unnecessary disclosure of non-material and incomparable information that will only confuse investors. We are also concerned that certain vague and ambiguous provisions will interfere with the traditional roles of the company and its board of directors and management.

For example, companies would be required to disclose actions that are taken to mitigate climate risks.[16] The ambiguity and vague nature of the Proposed Rule leaves registrants with little clarity on what it should disclose, especially because the disclosure requirement is not tethered to an appropriate materiality standard. The SEC provides little guidance to registrants in the Proposed Rule on how to decide whether disclosure is appropriate.

To illustrate, if a registrant upgrades a water treatment plant so that the plant can handle a greater volume of runoff, is this an action to mitigate risks of severe weather that must be disclosed? What if the registrant purchases additional water rights? Is this an action to mitigate climate risk that must be disclosed? Do mowing activities

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[15] 87 Fed. Reg. at 21,354 (requiring registrants "to disclose the time horizon for each described impact (*i.e.*, as manifested in the short, medium, or long term, as defined by the registrant when determining its material climate-related risks")).

[16] *See* Proposed 17 C.F.R. § 229.1503.

around registrant headquarters need to be disclosed because of a reduction in wildfire risk?

The answers to these questions are unclear under the Proposed Rule – particularly without a materiality qualifier. The sheer volume of activities that a registrant might engage in for a host of reasons entirely unrelated to climate change but that could have some sort of nexus to the effects of climate change are voluminous and incalculable. Given the liability risk associated with failing to make a disclosure later deemed to have been necessary, the regulations, if finalized, need to clarify exactly what is required or at a minimum add a materiality qualifier.

Another example of ambiguous language can be seen in the requirement for certain disclosures when a registrant "uses" a scenario analysis or "has adopted" a transition plan. As written, the NMA is concerned that these disclosures are required even if the scenario analysis or transition plan is for internal use only and has not been publicly disclosed, or if the scenario analysis was determined internally to be invalid. If that is indeed the case, then this is an intrusive requirement and will have the effect of disincentivizing companies from engaging in scenario analysis or adopting transition plans in the first instance.

More importantly, this part of the Proposed Rule could interfere with the roles of the board and management to oversee risk management of a company. By forcing companies to disclose their transition plans – even when a board and management may have determined that it is not in the best interest of the company to do so – the Proposed Rule runs the risk of interfering with management and the board's fiduciary duties. Allowing investors and other constituents to peer into the process to this extent runs the risk of giving them too much of a direct oversight function over a registrant. The NMA recommends that the SEC modify the Proposed Rule to make clear that disclosure of this information is required only when the information has been made public and the company determines the information is material.

C. The SEC Should Eliminate Any Requirement to Report Scope 3 Emissions.

The Proposed Rule would require registrants to disclose Scope 3 emissions under two circumstances: (1) those emissions are "material";[17] or (2) the registrant has set a

[17] Proposed 17 C.F.R. § 229.1504(c)(1). The Proposed Rule defines material as "a substantial likelihood that a reasonable investor would consider it important when determining whether to buy or sell securities or how to vote." 87 Fed. Reg. at 21,351.

greenhouse gas emissions target or goal that includes Scope 3 emissions.[18] The Proposed Rule discusses a number of items a registrant might consider when determining whether Scope 3 emissions are material, including: (1) whether those emissions make up a relatively significant portion of the overall emissions; (2) whether those emissions represent a significant risk factor; or (3) consideration of future impacts, including the probability of an event occurring and its magnitude should it occur.[19]

Scope 3 emissions encompass a company's indirect emissions throughout its entire value chain, excluding emissions from the generation of electricity that the company generates or purchases (which are captured in Scope 2 emissions). Scope 3 emissions include all of the emissions generated by a company's suppliers and all of the emissions generated by consumers of the company's products. The requirement to disclose Scope 3 emissions would also impose an obligation for emission disclosure on non-public companies if the non-public company is in the value chain of a registrant that has to report Scope 3 emissions. This would place an undue reporting burden on companies not otherwise subject to the Proposed Rule or the SEC's jurisdiction.

There are 15 categories of Scope 3 emissions.[20] The calculation of these figures is daunting and will require registrants to rely on third parties for data (which may or may not be available or verifiable), make assumptions about emissions (that could render the figure unreliable), and make calculations using methods that are in the nascent stages of development and are evolving. As these emissions may also be reported by the third parties as their Scope 1 and 2 emissions if the third-parties are also registrants, some emissions may be double- or triple-counted, leading to less clarity and more confusion.

Given these problems with calculating Scope 3 emissions, the NMA does not believe that this exercise will result in any information upon which investors can comfortably rely, and the NMA is very concerned that presenting this information in SEC filings will give investors a false sense that this information is more reliable than it actually might be. For these reasons, the NMA strongly recommends that the SEC not mandate the reporting of Scope 3 emissions for any company. Any disclosure of Scope 3 emissions should at most be voluntary.

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[18] Proposed 17 C.F.R. § 229.1504(c)(1).

[19] 87 Fed. Reg. at 21,379.

[20] *Id*. at 21,380.

The Commission itself recognizes in the Proposed Rule that there are myriad difficulties present with regard to reporting Scope 3 emissions.[21] Because of these difficulties, the SEC does provide a safe harbor for Scope 3 emissions disclosures.[22] Although a safe harbor is certainly needed and welcomed if the SEC retains this disclosure requirement, the NMA strongly encourages the SEC to remove any requirement for Scope 3 emissions reporting given the significant difficulties in obtaining Scope 3 information that is accurate or reliable.

If the SEC does require disclosure of Scope 3 emissions, the SEC should eliminate the requirement to disaggregate emissions data by each of the seven constituent greenhouse gases[23] because this is too much detail to collect from everyone in a registrant's value chain. Further, if the Scope 3 requirement is retained, the Commission should address the challenges associated with registrants using different reporting periods than its suppliers and customers, and should acknowledge and provide for relief (in the form of safe harbor protection and delayed reporting) for registrants that may have significant gaps in their ability to collect reliable and verifiable information.

III. The Proposed Rule Is Unduly Burdensome.

The Proposed Rule is overly prescriptive and would put burdensome and expensive obligations on registrants. These burdens are allocated unevenly, depending on whether Scope 3 emission disclosure is required for a registrant. The burdensome requirements fail to fulfill the Proposed Rule's mission to provide investors with comparable, consistent, and reliable information (*see* Section II) and with costs vastly exceeding any benefit the rule might provide (*see* Section X). This section provides an overview of some of the overly prescriptive obligations the Proposed Rule would impose with little additional benefit or value to investors.

A. Timing Requirements for Emissions Disclosures

The timing requirements in the Proposed Rule to report Scope 1 and Scope 2 emissions, along with an attestation where required, cannot be met. Under the Proposed Rule, registrants must disclosure their Scope 1, Scope 2, and Scope 3 (when required) greenhouse gas emissions as part of their annual 10-K reports. These

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[21] *See, e.g.*, *id.* at 21,390.

[22] *Id.* As discussed in Section VI.B, while the safe harbor provision is a good start, it does not go far enough.

[23] Proposed 17 C.F.R. § 229.1504(a)(1).

reports are due very soon after the close of a company's fiscal year – either 60, 75, or 90 days after the end of the fiscal year depending on the filer's status. Companies that have a fiscal year that matches the calendar year (which is the vast majority of companies) had to file their 10-K reports this year on March 1 (accelerated filers), March 16 (large accelerated filers), and March 31 (non-accelerated filers). Companies must finalize the data necessary to make these filings very quickly after the fiscal year end in order to meet these deadlines.

Greenhouse gas emissions data is not ready in this timeframe, and no mandatory or voluntary programs require disclosure of greenhouse gas emissions data that early in the year. For example, under the U.S. Environmental Protection Agency's ("EPA") greenhouse gas reporting program, Scope 1 emissions data for large emitting sources is due March 31 of each year, and EPA does not verify or report that data until much later. More than 80 percent of companies that publish sustainability reports release those reports in April, May, and June – after the 10-K filing deadline.[24] Voluntary programs also have much later deadlines. For example, the CDP does not require submission of emissions data for the prior year until July 27.[25]

These later delays are also seen in Canada, which has numerous jurisdictions with existing regulatory requirements. These jurisdictions also have an attestation requirement for their greenhouse gas emissions. These Canadian jurisdictions all set their deadlines late in the second quarter of the calendar year to provide time for the emissions to be calculated and verified. Emissions that need to be reported under Canada's Output-Based Pricing System Regulations, which must be accompanied by a reasonable assurance verification report, are due on June 1 of each year.[26] June 1 is also the deadline under the Saskatchewan Management and Reduction of Greenhouse Gases Act.[27] Finally, under Alberta's Technology Innovation Emissions

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[24] M. Filosa, et al., *The State of U.S. Sustainability Reporting*, Harvard Law School forum on Corporate Governance (Nov. 2, 2021), https://corpgov.law.harvard.edu/2021/11/02/the-state-of-u-s-sustainability-reporting/.

[25] CDP, *What is the timeline for responding?*, http://www.cdp.net/en/companies-discloser/how-to-disclose-as-a-company/faqs-for-companies#3-cycle.

[26] *Output-Based Pricing System Regulations*, SOR/2019-266, § 13, https://laws.justice.gc.ca/eng/regulations/SOR-2019-266.

[27] *The Management and Reduction of Greenhouse Gases (Baselines, Returns and Verification) Standard*, Saskatchewan, Aug. 2021, § 16(1), (3).

Reduction ("TIER") Regulation, compliance reports and accompanying verification reports are due by June 30.[28]

For these reasons, the SEC should give further consideration regarding the timing of any submissions involving Scope 1, 2, or 3 emissions. It is unrealistic for registrants, particularly those with multiple and diverse operating facilities and emission processes to undergo a thorough verification and furnish a third-party attestation statement, whether at a limited or reasonable assurance level, within the window of a 10-K filing.

The NMA suggests that any greenhouse gas emissions disclosures required by the SEC be filed outside of the 10-K process to allow registrants time to assemble and verify the necessary data. Importantly, this would not only ease the burden on registrants but also improve the reliability of the information. The filing of the greenhouse gas emissions data could be done in a separate report designed especially for this purpose. That report should be due after the conclusion of the second fiscal quarter of the following year. So, for example, for those companies whose fiscal years match the calendar year, these reports should be due after June 30.

If the SEC continues to believe, however, that greenhouse gas emissions should be reported in a registrant's 10-K report, then the NMA respectfully requests that there be a one-year lag in the reporting of greenhouse gas emissions data. For example, the Proposed Rule currently would require greenhouse gas emissions data from fiscal year ("FY") 2025 to be included in the FY 2025 10-K (which is due in early 2026 for companies using the calendar year as their FY). NMA suggests that the SEC instead allow greenhouse gas emissions data from FY 2025 to be disclosed in the FY 2026 10-K (which would be due in early 2027 for companies with a calendar year FY). This approach would provide registrants with sufficient time to compile, analyze, and have their emissions data verified. It would have the added benefit of ensuring that Scope 1 emissions data reported to the EPA under the Greenhouse Gas Reporting Rule would be publicly available by that time.[29]

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[28] *Technology Innovation and Emissions Reduction Regulation*, Alta Reg 133/2019, § 15, https://www.qp.alberta.ca/1266.cfm?page=2019_133.cfm&leg_type=Regs&isbncln=9780779818501_&_displace=html.

[29] EPA generally has updated Scope 1 greenhouse gas emissions data available on its website by early in the fourth quarter of each year. *See* http://www.epa.gov/ghgreporting (click on link to EPA's Facility Level Information on GreenHouse gases Tool (FLIGHT)).

The NMA also requests that the dates by which registrants must comply with the requirement to report greenhouse gas emissions be modified. If the Proposed Rule is finalized in 2022, then large accelerated filers will be required to report their Scope 1 and 2 emissions for FY 2023, accelerated filers will begin reporting those emissions for FY 2024, and non-accelerated filers begin reporting for FY 2025.[30] The NMA is concerned that this does not provide registrants with adequate time to comply. Large accelerated filers may have only a few weeks from the rule becoming final and the need to begin tracking emissions for FY 2023, which is unworkable. The NMA respectfully requests that the deadlines for companies to report their greenhouse gas emissions be extended to be no sooner than three fiscal years after finalization of the rule (e.g., assuming the rule is finalized in 2022, large accelerated filers would first report their emissions for FY 2025, accelerated filers for FY 2026, and non-accelerated filers for FY 2027). It is important that registrants be given the time needed to ensure that the information they report is accurate.

As discussed in Section II.C, the NMA strongly urges the Commission to withdraw the proposed requirement for certain registrants to report their Scope 3 emissions. Should the SEC decide to move forward with that requirement, however, additional time must also be given before compliance should begin. Assuming the rule is finalized in 2022, under the Proposed Rule, registrants that must report Scope 3 emissions begin doing so for FY 2024 (large accelerated filers), FY 2025 (accelerated filers), or FY 2026 (non-accelerated filers).[31] If the SEC moves forward with Scope 3 reporting and assuming the rule is finalized in 2022, these deadlines should be extended to FY 2026 (large accelerated filers), FY 2027 (accelerated filers), and FY 2028 (non-accelerated filers).

Further, any transition from a lower assurance level to a higher assurance level should allow a transition period of greater than one year to ensure there is adequate capacity both within the regulated organizations and the pool of attestation professionals to manage a lower level of engagement before transitioning to a higher level.

B. Board Climate Expertise

The Proposed Rule requires registrants to identify the members of the board who are responsible for the oversight of climate-related risks. Registrants must also disclose whether any board member has expertise in climate-related risk and if so, describe

[30] 87 Fed. Reg. at 21,346.

[31] *Id.*

the nature of that expertise.[32] The proposed disclosure of climate expertise on the board is unduly burdensome and unnecessary. The SEC does not currently require this type of disclosure for other areas of expertise (with the exception of an Audit Committee Financial Expert).[33] It is unclear why disclosing climate expertise is more important to investors than disclosing expertise in other critical areas and seemingly undermines a company's ability to have a well-functioning board with members with diverse skill sets who can effectively oversee the full range of issues that companies face. Moreover, it is unclear why a board without a climate expert should be considered ill-equipped to oversee climate-related strategy.

C. Management Expertise

The Proposed Rule would require registrants to disclose information regarding management's oversight of climate-related risks, including identifying the positions or committees responsible for such oversight and disclosing the relevant expertise of the persons holding those positions or serving on those committees.[34] These proposed requirements are overly prescriptive and go far beyond the disclosure requirements for other areas of risk. For example, these types of disclosures are not required with regard to other areas such as human capital management, strategy, liquidity, or compliance.

D. Attestation Requirement for Scope 1 and Scope 2 Emissions

The Proposed Rule would require certain registrants to provide an attestation report from an independent attestation service provider of their Scope 1 and Scope 2 emissions disclosures.[35] This proposed requirement is burdensome as discussed below, and the NMA urges the SEC to take these concerns into account when finalizing the Proposed Rule.

Notably, there are practical considerations that the Commission should consider to ensure that Scope 1 and Scope 2 emissions can be adequately evaluated by an independent verifier and to ensure that registrants are able to meet regulatory filing

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[32] *Id.* at 21,359-60. The requirement to place this information in the filed 10-K seems misplaced. If the requirement to disclose board climate expertise remains, it should be included with other governance disclosures in the proxy or in a furnished specialized report.

[33] 17 C.F.R. § 228.401(e).

[34] 87 Fed. Reg. at 21,360.

[35] *Id.* at 21,346.

deadlines. First, the methods used to quantify Scope 1 and Scope 2 greenhouse gas emissions will vary significantly across business sectors and industries, and even within organizations with diverse and complex manufacturing processes. While financial accounting practices may be relatively consistent across business sectors, greenhouse gas quantification methods are not. The supporting data and the calculation methods used for greenhouse gas emission quantifications can be numerous and varied depending on the emission processes being evaluated.

For example, greenhouse gas quantifications are complex and can involve data collection and emissions calculations that may consider hundreds of supporting documents and data points. This can be true for mining companies, especially when considering a variety of mining methods and further processing technologies that may be deployed throughout different facilities within an organization. These often include internal monthly production accounting reports, metering equipment records, calibration records, process flow diagrams, third-party invoices, third-party lab reports, and emission test reports – some of which may not be available until several weeks following the end of the reporting period.

Importantly, this data must be available before a company can finalize its emission quantifications. For large operations with multiple facilities and emissions sources, it may take a period of several more weeks to aggregate and quantify emissions prior to providing the data to an attestation professional to begin their evaluation. At some facilities, physical data that could be used to directly calculate the portion of the facility's emissions may not be available due to valid limitations, and the facility must rely instead on other calculation methodologies to estimate emissions. The timing of the availability of data to complete an annual emissions inventory for a complex organization followed by any level of assurance engagement does not align with current regulatory filing deadlines, as explained further in Section III.A.

Second, further complicating the timing of the attestation requirement, site visits by verification practitioners may be required as part of a greenhouse gas assurance engagement.[36] Under the Proposed Rule, it would not be unusual for attesting entities to require site visits at operations with significant Scope 1 emission contributions that have unique quantification techniques or data collection processes, or complex or specialized chemical or physical processes. Therefore, attestation would be a challenge to complete in a timely manner for large organizations with diverse

[36] *See, e.g.*, International Standard on Assurance Engagements (ISAE) 3410, *Assurance Engagements on Greenhouse Gas Statements*, https://www.iaasb.org/publications/glance-international-standard-assurance-engagements-isae-3410-assurance-engagements-greenhouse-gas.

processes and operations across multiple locations, including international operations, as attestation practices might require visits to multiple sites. Further, the number of facilities that may require a site visit may be significantly higher under a reasonable assurance engagement (as the Proposed Rule contemplates) than a limited assurance engagement.

If attestation is required, the NMA urges the SEC to limit it to only those disclosures that the registrant has determined are material. The SEC should also extend the deadline for when attestation must begin as discussed in detail in Section III.A. Further, should attestation continue to be required, limited assurance should be sufficient for the attestation requirement given the evolving nature of climate change and the evolving nature of how these emissions are calculated. Finally, the NMA also recommends that the Commission remove the requirement from the Proposed Rule that would mandate assurance at the higher "reasonable assurance" level.

E. Scope 3 Emissions

The requirement for certain registrants to disclose their Scope 3 emissions will be overwhelmingly burdensome for those companies given the complexities associated with calculating Scope 3 emissions. This is particularly true because the SEC essentially applies a presumption of materiality for Scope 3 emissions disclosures. The Commission states that Scope 3 emissions may be material "for many registrants" given their "relative magnitude" and importance to helping investors "assess the registrants' exposure to climate-related risks."[37] The SEC then recommends that issuers that determine that Scope 3 emissions are not material should provide disclosure justifying their decision to enable investors "to understand the basis for that determination."[38] Consequently, companies will be pressured to report Scope 3 emissions data that is not truly material to their business operations.

This problem is amplified when considering the categories of Scope 3 emissions disclosure. For example, the emissions associated with the commutes of the registrant's employees must be included.[39] Does this mean employees need to provide information on the length of their commutes and the cars they drive to prove whether this one discrete category is material? What if the employee sometimes uses public transit and sometimes drives? What happens on the day an employee uses their spouse's car (which has a different emissions profile) instead of their own? Does this

[37] 87 Fed. Reg. at 21,378.

[38] *Id.* at 21,379.

[39] *Id.* at 21,380.

mean the employee must report information on their commute daily? How is this information collected? How should remote work be considered? Could a company make broad assumptions such as basing its emissions on an "average" car and "average" commute, or could that be considered false and misleading?

The Proposed Rule also would require that emissions associated with transportation and distribution of purchased good, raw materials, and other inputs be included in Scope 3 emissions.[40] Does this mean a registrant has to keep information on every FedEx or UPS delivery that they receive and calculate the emissions associated with those to determine whether this discrete category is material? How would this information be collected?

These are just two examples from the list of 15 separate categories that the Proposed Rule lists as part of the categories of activities that can give rise to Scope 3 emissions. It is not difficult to see how quickly this calculation can become unwieldy, how burdensome the collection of information to make this calculation would be, and the speculative nature of the calculation given the assumptions that will need to be made – all while providing very little benefit to the reasonable investor.

The calculation of Scope 3 emissions is particularly challenging for a registrant owning passive interests in multiple (and in some cases hundreds) of third-party properties, such as a mineral royalty or streaming company. The Proposed Rule should limit any disclosure of emissions information required by a passive owner to the properties that the passive owner determines are material to it (subject also to the registrant's ability to omit the required information when such information is unknown or not reasonably available to the registrant). Moreover, mineral royalty and streaming companies rarely have contractual rights to emissions information from the operators of the properties, and if mineral royalty and streaming companies do have contractual rights, they are generally subject to confidentiality restrictions.

As discussed in Section II.C, the requirement to report Scope 3 emissions should be removed from the rule and any reporting of those emissions should be voluntary at most. In the event the SEC does continue to require Scope 3 emissions in some instances, it should provide registrants with the option to use existing Scope 3 reporting methods, such as the methods established by the Task Force on Climate-Related Financial Disclosures ("TCFD") or the Greenhouse Gas Protocol. Companies should also be allowed to use other methods that provide Scope 3 emissions data material to their operations.

[40] *Id.*

F. Financial Impact Metrics

The Proposed Rule requires registrants to disclose, on each consolidated financial statement line item, the impacts (both positive and negative) of severe weather events, natural conditions, transition activities, and other items, provided the events collectively have an impact in excess of one percent of the total line item for the relevant fiscal year.[41] Each line item in financial statements and percent changes that are significant for that line item are different. A "one-size-fits-all" change threshold like that in the Proposed Rule is not appropriate.

The Proposed Rule's application of a one-percent threshold for impacts of climate events on financial statement line items and financial statement footnote disclosures should be eliminated because it does not align with other materiality guidance issued by the Commission with respect to preparing financial statements and footnote disclosures. SAB 99[42] provides effective and well-considered guidance on assessing materiality for financial statement line items and related disclosures and should not be undermined by a bright-line one percent standard. SAB 99 is more than adequate to provide guidance on evaluating whether the impact of climate events is sufficiently material from a quantitative and qualitative standpoint to warrant disclosure.

In addition, this requirement is extremely burdensome and requires a registrant to determine for each severe weather event, transition activity, or other natural condition all of the positive impacts of the item and all of the negative impacts of the item. Examples given in the Proposed Rule include determining how revenue is impacted by a severe weather event and quantifying any negative impact of the event (such as supply chain difficulties leading to increased costs) and the positive impact of the event (such as increased demand for a product because of the weather event). It is unclear, however, at what point a weather event is considered to have occurred because of climate change or whether it is a normal weather event. This makes disclosure in this area particularly problematic.

Registrants also need to determine how technology may impact these events, as well as what operational flexibility from business continuity planning may mitigate potential impacts. It is further difficult to determine what portion of a technology expense may be climate related. Technology can be deployed to address many factors in addition to helping meet climate targets such as safety or efficiency. Determining the exact dollar amounts for many of these types of effects is going to by necessity involve speculation, which means the information will not be reliable or useful to

[41] *Id.* at 21,365-68.

[42] SEC, Staff Accounting Bulletin Regarding Materiality, No. 99 (Aug. 12, 1999).

investors. Requiring registrants to make assumptions based on these uncertainties is not appropriate for financial statement disclosures.

In addition to its burdensome nature, the one-percent requirement also gives rise to significant liability concerns. If it is later determined that a registrant should have disclosed something as being above the one-percent threshold and failed to do so, it can be subject to liability for failing to make a required disclosure. The problem, however, is that the list of items that can meet this threshold is endless, and it is practically impossible for companies to go through every possible scenario that could meet such a low bar. This is an unfair standard for registrants to meet.

IV. The Proposed Rule Lacks the Definitional Clarity Necessary to Provide Investors with Meaningful, Comparable Information Regarding Physical Climate Risks.

A. The Breadth and Vagueness of the Proposed Rule's Physical Risk Disclosure Requirements Pose Significant Challenges for Registrants and Will Not Provide Useful Information to Investors.

The Proposed Rule would define physical risks to "include both acute risks and chronic risks to the registrant's business operations or the operations of those with whom it does business."[43] The Proposed Rule notes a series of potential physical risks that a registrant should consider including flooding, extreme water stress, increased temperatures, wildfires, and sea level rise.[44] When these risks are "reasonably likely" to cause a material impact, the Proposed Rule would require that they be disclosed at the ZIP code level,[45] which is an unnecessary level of detail.

Each of these potential risks are difficult, if not impossible, to quantify for any specific location. Even the government is not yet able to provide useful direction on the climate change-related implication of fire danger to existing communities within the western United States. Specifically, there are no mandates for community relocation, changes to community land use planning or building codes, or other methods of moving populations potentially at risk out of harm's way. As a result, any effort to quantify the financial ramifications of these physical risks is speculative and unreliable. Neither the likelihood or consequence of these risks is within the control

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[43] Proposed 17 C.F.R. § 229.1500(c)(1).

[44] 87 Fed. Reg. at 21,351.

[45] Proposed 17 C.F.R. § 229.1502(a).

of an individual company, and the true magnitude or probability of these risks may not be known or even knowable, leading to a disclosure that is speculative and serves little purpose in informing the investor. The potential consequence of a catastrophic fire, for example, depends on the exact location of the fire, the emergency response of the government, atmospheric conditions that could either exacerbate or mitigate the fire situation, as well as the pre-fire mitigation efforts implemented by the property owner where the fire starts (which in the western United States is most likely either the U.S. Forest Service or the Bureau of Land Management). The Proposed Rule's focus on potential climate impacts places undue attention on extreme consequences, without an understanding of the likelihood of those extreme consequences. This imbalance is driven by the abandonment of traditional standards of materiality and will lead to disclosure of physical climate risk information that is unhelpful to the investor community as the aggregation of extreme potential consequences of wildfire events can quickly lead to an inaccurate view of the future.

Similarly, the ramifications of episodic high-intensity storm events are also linked to the likelihood of such an event, the duration of the event, the exact area impacted by the event (in the western United States, a storm event could occur miles away in the headwaters of an ephemeral drainage or it could occur directly over the general area where the asset sits), and the planning decisions of the surrounding community. While a company may plan and design for containing or managing the water generated by such storm events, it is unlikely that the surrounding infrastructure has been designed to address the same situation. Communities within the United States are built around 100-year flood plains, which has no linkage to a probable maximum precipitation event that is factored into facility design. Therefore, the impacts at the community level will be far more catastrophic than at an asset that has planned for mitigating such an event.

The Proposed Rule's definition of physical risks also includes risks to "the operations of those with whom [a company] does business." The Proposed Rule does not provide *any* limiting principle on how a company should define those with whom it does business, seemingly sweeping in a company's *entire* supply chain through the definition of physical risks.[46] As explained in more detail below, subjecting companies to granular physical risk disclosure requirements for operations of its suppliers or customers, which they neither own nor control, would require companies to gather,

[46] There are other areas of the Proposed Rule outside of the definition of physical risk that have this problem. There are various disclosure requirements related to a company's "value chain," *see, e.g.*, 87 Fed. Reg. at 21,349, 21,351, 21,354, and it is unclear what that means or how companies are supposed to determine what is, or is not, part of their value chain.

assess, and potentially disclose information about those operations that will be difficult, if not impossible, to obtain or might be merely speculative, and would not provide value to investors. More importantly, it demands a level of understanding of integrated global supply chains that does not currently exist and will likely not exist for many years to come.[47]

For example, if applied literally as written, the Proposed Rule's physical risk definition could ultimately require the disclosure of ZIP code-level information regarding the flood risks of a company's suppliers or customers be included in an annual report, which information is likely difficult or even impossible to obtain.[48] In addition, the resulting disclosures would be so broad that the information is unlikely to prove useful or material to an investor.

The breadth and lack of clarity of these proposed requirements are untenable and are unlikely to result in the disclosure of information that is useful to investors. NMA members are participants in the global commodities industry. Their products are shipped all over the world for processing, refining, sale, and end use. The complexity of international supply chains is particularly present in the hardrock mining sector, where the lack of mineral processing and refining capacity in the United States necessitates the shipping of concentrates overseas for refining and often results in intermediate products being shipped back to the United States or to other third-party countries for further processing. To the extent the proposed definition of physical risks is intended to cover this entire value chain, it will require registrants to gather detailed information about the physical risks to every entity in their global value chain. In most instances, registrants will not have the contractual rights to collect such information on physical risks from commercial counterparties – if it is available at all.

The Proposed Rule also provides no guidance with respect to how the accuracy of any physical risk information collected on suppliers or vendors can be verified.

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[47] Of note, the degree of understanding regarding the supply chains for critical minerals needed for domestic electric vehicle manufacturing is just in its infancy. *See, e.g.*, U.S. Dept. of Energy, AMERICA'S STRATEGY TO SECURE THE SUPPLY CHAIN FOR A ROBUST CLEAN ENERGY TRANSITION (2022).

[48] *See* Proposed 17 C.F.R. § 229.1500(k) (defining "location" to mean "ZIP code or in a jurisdiction that does not use ZIP codes, a similar subnational postal zone or geographic location"); *id.* § 229.1500(c)(1) (defining physical risk as "acute risks and chronic risks to the registrant's business or operations of those with whom it does business").

Accordingly, companies will be left to speculate on these effects, leading to disclosures that are not reliable and could be misleading, no matter how thoroughly caveated.

B. The Proposed Rule's Physical Risk Disclosure Requirements Are Defined in a Manner That Risks Conflating Precision with Accuracy and Are Unlikely to Provide Useful Information to Investors.

The Proposed Rule requires registrants to disclose "any climate-related risks reasonably likely to have a material impact on the registrant, … which may manifest over the short, medium, and long term." The Proposed Rule suggests that companies should look to the test articulated in *Basic Inc. v. Levinson*[49] to determine when a climate risk is "reasonably likely" to have a material impact.[50] Under the Commission's articulation of this test, the registrant must look at both the probability the event will occur and the potential magnitude or significance to the registrant.[51] Over the long time horizons and range of climate scenarios contemplated by the Proposed Rule, however, this guidance does not provide sufficient assurance that the information to be disclosed will provide any meaningful information to investors.

In most cases, the physical risk disclosures required under the Proposed Rule will ask a registrant to speculate on the occurrence of a low probability, but potentially high consequence, event (even though there is a much higher though undefined probability of far less significant consequence from the same event). While the Proposed Rule declines to define "short, medium, and long term," the NMA notes that the emerging standard practice among companies is to think about greenhouse gas emission reduction goals in the 2030- and 2050-time horizons. At most, these should be the outer bounds of analysis for physical climate risk assessments. As the Intergovernmental Panel on Climate Change has explained, there are a wide range of potential climate scenarios that are possible by the year 2100, with significant uncertainty related to the potential for national and global policy and technological developments.[52]

Although it may be theoretically possible for companies to assess a range of these scenarios to provide the outer bounds of climate risks, without clear guidance on how

[49] 485 U.S. 224, 231-32 (1988).

[50] 87 Fed. Reg. at 21,351.

[51] *Id.*

[52] Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis 562, 571 (2021).

to weigh timing, likelihood, and magnitude of impacts, reporting on physical climate risks over such long time horizons will inevitably lead to widely varying disclosures that are unlikely to be useful to investors. Based on currently available climate projections at the asset level, even projections of physical climate risk exposures at the ZIP code level beyond the end of the decade have such a broad range of uncertainty that disclosures based on the outer bounds of these projections would be purely speculative.

The Proposed Rule's vague guidelines are unhelpful when considering physical climate risks that will manifest over a variety of different timelines—some of which stretch decades or even centuries into the future—and where the magnitude of potential impacts remains subject to significant variability depending on policy (particularly federal, state and local government action or inaction) and technology developments in the intervening time period.[53] For example, conventional technologies for milling ores and handling tailings at hardrock mine sites are highly water dependent,[54] but significant research and development processes are underway to permit the industry to transition to less water-intensive techniques.[55] Even in these instances, however, it is important to note that mining is likely to use less than 10% of the water in any basin where it occurs, with the principal water use typically being agricultural, residential, and urban industrial. This means that the resilience of any mining activity to water stress is inextricably linked to state and local water use policies over which the company has no control.

In a similar vein, the lack of definitions around specific physical risks is likely to result in widely varying disclosures that may not be useful to investors. For example, the Proposed Rule would require disclosure at the ZIP code level of the percentage of

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[53] *Id.* at 221.

[54] *See, e.g.*, S. Meißner, *The Impact of Metal Mining on Global Water Stress and Regional Carrying Capacities—A GIS-Based Water Impact Assessment* (2021), https://pubag.nal.usda.gov/catalog/7608692.

[55] *See, e.g.*, T. de Oliveira Bredariol, IEA, *Reducing the Impact of Extractive Industries on Groundwater Resources* (Mar. 22, 2022), https://www.iea.org/commentaries/reducing-the-impact-of-extractive-industries-on-groundwater-resources; B. Christiansen, *6 Ways to Improve Water Conservation in Mining Operations*, WATER TECH. (Aug. 13, 2021), https://www.watertechonline.com/industry/article/14207319/6-ways-to-improve-water-conservation-in-mining-operations.

assets that are located in flood hazard areas.[56] No definition is provided for flood hazard areas, leaving companies to fill in the gaps. Without further clarity on what a flood hazard area is, each registrant will create their own definitions that are likely to vary across companies.

The Proposed Rule seeks similarly granular disclosures for operations in locations with "high or extremely high stress," without defining these terms.[57] For these disclosures, the Proposed Rule seeks information on the "percentage of a registrant's total water usage from water withdrawn in these regions."[58] For the NMA's members, many of whom have operations that are wholly located in arid regions, it is not clear how they should define high water stress. Furthermore, it is not clear how requiring disclosures of water use within these areas will provide investors with useful information.

C. The Proposed Rule Has the Potential to Conflict with Existing Regulatory Requirements to Which NMA Members are Subject.

The Proposed Rule would require registrants to make disclosures regarding whether and how any identified climate risks are considered as part of a company's business strategy, financial planning, and capital allocation.[59] The Proposed Rule does not acknowledge that capital allocation decisions are typically driven both by the need to sustain current operations and invest strategically for the future, such as, for example, the opening of new mines or the expansion of operations to respond to increased demand for metals to enable the energy transition. As a result, the Proposed Rule seems to conflate the allocation of capital to efficient business operation with the allocation of capital to address physical climate risks.

It is not clear if or how the proposed rule would segregate these capital expenditures or if it intends for registrants to disclose marginal additional capital disclosures that are solely intended to address physical climate risks. It is also unclear if this disclosure would serve as material information for an investor or if the efficient operation of the facility is sufficient, considering all reasonable risk associated with business continuity planning. For example, a mining facility expands the capacity of a tailings facility to accommodate further expansion but includes excess capacity that serves the function of accommodating potential intense precipitation events as well

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[56] Proposed 17 C.F.R. § 229.1502(a)(1)(i)(A).

[57] *Id.* § 229.1502(a)(1)(i)(B).

[58] *Id.*

[59] *Id.* § 229.1501(c).

as an increase in groundwater from dewatering functions in a portion of the strata. This strategic expansion serves a dual purpose of reasonably accommodating development activities as well as providing a buffer for potential physical risks. Similarly, the capital invested to expand water treatment capacity for this facility could be viewed for both purposes.

As discussed above, the Proposed Rule's requirements seemingly require NMA members to make disclosures over timeframes that span decades or longer and for risks that have a low probability of materializing. Requiring a discussion of how these highly attenuated risks are considered in financial planning and capital allocation is in tension with the significant regulatory requirements to which NMA members are already subject under a variety of federal and state regulations and accounting practices. Finalizing these requirements based on "potential climate impacts" that are "reasonably likely to be material" could create burdensome and overlapping requirements that do not provide investors with useful information. In the alternative, we would urge the Commission to consider clarifying that the requirements of the Proposed Rule are satisfied when companies disclose that they are complying with existing engineering, financial assurance, or asset retirement obligation estimation requirements.

Over time, as physical climate risks materialize and as developing scientific knowledge allows registrants to assess the climate-related risks called for by the Proposed Rule on the basis of something other than speculation, detailed information regarding the economic impacts of those risks will be captured in the statement of a company's asset retirement obligations. Such information would be far more reliable to investors than a requirement to make forward-looking statements about projected impacts as required under the Proposed Rule. To avoid this burdensome overlap, the Commission should clarify that to the extent climate risks are already addressed through existing regulatory requirements, such as engineering requirements, asset retirement obligations, or financial assurance requirements, companies may simply note this fact in their Part 1500 disclosures.

V. Investors Already Have Access to Adequate Information to Inform Them of Known Climate-Risks and Opportunities.

The NMA does not dispute or downplay the importance of public companies communicating relevant information, data, and risk factors – including for climate and ESG-related topics – to their shareholders and investors. Indeed, NMA members already make such disclosures – as appropriate for their businesses – in compliance with the SEC's existing disclosure laws. Many NMA members also participate in voluntary reporting programs and publish standalone sustainability reports and integrated financial and sustainability reports that are made accessible to shareholders and the public. Finally, EPA's Greenhouse Gas Reporting Rule requires large greenhouse gas emitters in the United States to report their Scope 1 emissions (including requiring electric generators to report their Scope 1 emissions, which are in turn the Scope 2 emissions of non-electric generating companies).

As a result, there is more than sufficient information already available to meet the needs of investors and stakeholders, and the Proposed Rule is not necessary. To the extent the Commission has identified any gaps in the information available, it should fill those gaps in a much more targeted fashion than currently contemplated by the Proposed Rule.

A. 2010 Climate Change Guidance

Pursuant to guidance released by the SEC in 2010,[60] registrants already provide material, climate-related risk disclosures in their SEC filings. In the Proposed Rule, the SEC specifically says that it is not proposing a compensation-related disclosure requirement because the Commission "believe[s] that [its] existing rules requiring a compensation discussion and analysis should already provide a framework for disclosure of any connection between executive remuneration and achieving progress in addressing climate-related risks."[61] The same conclusion can – and should – be made with regard to climate-related disclosure more broadly.

Pursuant to the 2010 Climate Change Guidance and related Regulation S-K items, companies already disclose material climate-related information. If the Commission believes that companies are not making adequate disclosures under the 2010 Climate Change Guidance, the SEC could provide issuers updated or additional interpretive guidance, including industry-specific guidance, regarding potential disclosure topics and considerations that registrants should be making. The SEC could also use the comment letter process for this purpose.

These SEC-mandated disclosures provide investors with adequate decision-useful information of a company's known climate risks and opportunities. The SEC can fill any gaps that may exist in what is currently provided to investors through a much more targeted and streamlined method if needed. This focused approach would provide more valuable information to investors than the broad approach suggested

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[60] SEC, Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 2, 2010), 75 Fed. Reg. 6290 (Feb. 8, 2010) ("2010 Climate Change Guidance").

[61] 87 Fed. Reg. at 21,360.

by the Proposed Rule, which is prone to information overload that would confuse rather than illuminate an investor's understanding of a company's climate-related risks.

B. Voluntary Disclosure Frameworks

In addition, there are a variety of voluntary disclosure frameworks and platforms that companies use to provide information beyond the materiality threshold if they choose to do so or if their shareholders ask that of them.

A whole host of voluntary disclosure frameworks exist for companies to report their greenhouse gas emissions and their climate-related risks and opportunities.[62] Two prominent voluntary frameworks come from the TCFD and the Greenhouse Gas Protocol, both of which are referenced in the Proposed Rule and used as a foundation for the Proposed Rule.[63] These voluntary frameworks provide valuable information to investors but do not impose the same burdens on registrants as the Proposed Rule would. Many of the NMA's members voluntarily comply with internationally recognized third-party standards such as the CDP (formerly known as the Carbon Disclosure Project), Global Reporting Initiative (including the coal and mining sector supplements), Sustainability Accounting Standards Board (including the coal and metal mining industry standards), the TCFD, the International Organization for Standardization 14000, and others. Disclosures made in sustainability reports and in response to these third-party programs are often broader in scope than the materiality principle that underpins the SEC's current disclosure program.

Voluntary disclosures of climate-related information are effective because they allow individual companies to collaborate with their investors, customers, local communities, and other priority stakeholders to determine what information is important for their operations and business and report it in a manner suitable for their collective needs. Individual companies, informed by engagement with these stakeholders, determine the best course for their company and what their stakeholders want to see specific to that company, whether it be through internationally recognized third-party programs, sector-developed programs, or internally developed programs specific to the company. Companies can also differentiate themselves by presenting information and analysis in an informative

[62] *See generally id.* at 21,340-45 (discussing voluntary reporting frameworks and platforms).

[63] *Id.* at 21,345 (noting "[t]he proposed climate-related disclosure framework is modeled in part on the TCFD's recommendations, and also draws upon the [Greenhouse Gas] Protocol").

way as opposed to providing only quantitative data as one part of a financial report. Disclosure of material information is already required in public filings by the SEC. The additional disclosures that the Proposed Rule would require are simply not necessary.

The Proposed Rule creates a one-size-fits-all, prescriptive, rules-based, mandatory disclosure program that removes all of the flexibility that companies now have to be responsive to their stakeholders. Companies are actively working with their investors and other pertinent stakeholders to identify and disclose the relevant, financially material metrics – whether quantitative metrics or qualitative information – that are most useful to the decision-making process of those investors. The NMA believes that this work and these relationships will continue to drive appropriate climate-related disclosures that are aligned with the importance of materiality and company-specific decisions.

In addition, if companies are not reporting their emissions voluntarily, shareholders and investors have the ability to request them to do so through shareholder proposals. Shareholder proposals provide a method through which investors can gain the information that they deem to be of interest.[64] Shareholders and investors also have the ability to request which voluntary reporting program they would like a company to use if they feel that some reporting programs provide better information than others.

Disclosing information using these voluntary methods is more effective than a prescriptive, rules-based, mandatory disclosure program like the one set forth in the Proposed Rule because it is more responsive to the investors and tailored to their specific requests. Furthermore, investor preferences and expectations for climate and ESG disclosure are rapidly evolving and likely will continue to do so. Specific SEC disclosure requirements in this area risk failing to keep pace with investor and other stakeholder-driven changes in climate and ESG disclosure best practices.

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[64] Harvard Law School Forum on Corporate Governance, *Analysis and Recommendations on Shareholder Proposal Decision-Making under the SEC No-Action Process* (July 26, 2018), http://www.corpgov.law.harvard.edu/2018/07/26/analysis-and-recommendations-on-shareholder-proposal-decision-making-under-the-sec-no-action-process, ("Shareholder proposals … offer a flexible mechanism for investors with diverse goals and objectives to request enhanced disclosures and increased accountability of corporate boards and managers regarding emerging, neglected, or systemic long-term risks and opportunities.").

C. The SEC Should Base Scope 1 and Scope 2 Emissions Reporting Requirements on Existing EPA Greenhouse Gas Disclosure Requirements.

Many companies report their Scope 1 greenhouse gas emissions to the EPA, including electric generating companies whose Scope 1 emissions are non-electric generating companies' Scope 2 emissions.[65] These EPA disclosure requirements should suffice for any Scope 1 and Scope 2 requirements adopted by the SEC, especially considering that the Commission states that greenhouse gas "emissions data compiled for the EPA's own [greenhouse gas] emissions reporting program would be consistent with the [Greenhouse Gas] Protocol's standards."[66] As a result, the SEC concludes that "a registrant may use that data in *partial* fulfillment of its [greenhouse gas] emissions disclosure obligations pursuant to the" Proposed Rule.[67]

It is not clear why these data would not *completely* fulfill a registrant's obligations under the Proposed Rule with regard to their Scope 1 and Scope 2 emissions. There is no need for the SEC to deviate from the EPA's standards. The EPA has been requiring reporting on this information for years and is the lead environmental agency in the U.S. government. Rather than require additional information, registrants that report to EPA should simply be allowed to furnish the information to the SEC within a certain period of time (such as the four-business-day requirement for Form 8-K) after the report is filed with the EPA.

D. The SEC Should Consider Allowing Alternative Reporting Regimes to Satisfy the Requirements of the Proposed Rule.

The Proposed Rule is particularly burdensome on registrants that file disclosures in multiple jurisdictions, and the SEC should confirm that allowing registrants that file under the Multijurisdictional Disclosure System ("MJDS") to do so with regard to the Proposed Rule. For example, MJDS filers might report climate-related information under the European Union's Corporate Sustainability Reporting Directive or under Canada's securities laws. The Commission should explicitly allow reports filed in

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[65] 40 C.F.R. part 98 (Mandatory Greenhouse Gas Reporting); *see also* EPA, Scope 1 and Scope 2 Inventory Guidance, http://www.epa.gov/climateleadership/scope-1-and-scope-2-inventory-guidance.

[66] 87 Fed. Reg. at 21,374.

[67] *Id.* (emphasis added).

those jurisdictions to satisfy the climate-related disclosure requirements of the Proposed Rule.

The SEC should also include in any final rule the ability to rely on alternate reporting regimes that many registrants are already familiar with and already participate in. There are a number of reputable reporting frameworks and voluntary disclosure frameworks. These include the TCFD, the Greenhouse Gas Protocol, the CDP, the Global Reporting Initiative, the International Sustainability Standards Board, The International Organization for Standardization, and others. The SEC cites to and relies on many of these frameworks in the Proposed Rule.[68]

By providing registrants with the option of satisfying the final rule's requirements by complying with these alternative frameworks, the burden on those companies that have already been reporting under these methodologies and frameworks would be substantially eased. For example, a company that has been reporting under the Greenhouse Gas Protocol could simply use that information to satisfy the requirements of the Proposed Rule. This approach would eliminate duplicative reporting and result in cost savings.

VI. The Proposed Rule Unnecessarily Increases Liability Risks for Registrants.

A. The SEC Should Allow for Climate-Related Disclosures to be "Furnished" and not "Filed."

As discussed throughout these comments, there are myriad uncertainties that are inherent in any climate-related disclosures. Because of these uncertainties and because of the developing nature of climate-related disclosures, the SEC should allow any climate-related disclosures that are required under a final rule to be "furnished" and not "filed." There is no reason to subject this information to the strict legal liability that accompanies filings with the SEC for any material misstatement or omission. By allowing the documents to be furnished to the SEC rather than filed, potential liability would be minimized and would not be triggered unless a statement is materially misleading. This reduced liability standard is appropriate for climate-related disclosures given the ever-evolving nature and inherent uncertainty of the data, metrics, benchmarks, and forward-looking models associated with this information.

[68] *Id.* at 21,341, 21,344.

Simply stated, these disclosures are not sufficiently mature to support the more rigorous liability structure associated with "filed" information. By allowing issuers to furnish this information, the SEC would ensure public companies have the maximum flexibility to provide information to investors, while at the same time preserving the accuracy, reliability, and comparability of the information. Moreover, the SEC would appropriately reduce the cost and liability burdens on public companies complying with a new mandatory disclosure program in good faith.

B. The SEC Should Provide an Enhanced and Expanded Safe Harbor.

The NMA appreciates the SEC's efforts to provide a safe harbor for Scope 3 emissions disclosure.[69] As the Commission correctly recognizes, "the calculation and disclosure of Scope 3 emissions may pose difficulties…."[70] The SEC is correct that "[i]t may be difficult to obtain activity data from suppliers and other third parties in a registrant's value chain, or to verify the accuracy of that information. It may also be necessary to rely heavily on estimates and assumptions to generate Scope 3 emissions data."[71] While the proposed safe harbor is a good start, it does not go far enough.

The challenges identified by the SEC with regard to Scope 3 emissions reporting also exist for the other mandatory disclosures required by the Proposed Rule. The required disclosures call for significant speculation, estimates, and judgment by management. The required disclosures also rely in whole or in part on information provided by third parties. The various reporting regimes are in their infancy. Portions of the Proposed Rule, such as emissions targets and goals, are inherently subjective and forward-looking. Indeed, even the Commission and Staff's familiarity with climate-reporting concepts and methodologies are only just emerging.

The NMA recommends that the SEC significantly expand the safe harbor to include not just Scope 3 requirements but also all of the other disclosure requirements mandated in the Proposed Rule, including Scope 1 and Scope 2 emissions disclosures. At a minimum, a safe harbor is needed where disclosures are necessarily forward-looking (and thus speculative), where the registrant will be dependent on third-party information to make the disclosure, and where methods and standards are subject to change.

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[69] *Id.* at 21,390-91.

[70] *Id.* at 21,390.

[71] *Id.*

And, if Scope 3 reporting remains a requirement of the Proposed Rule, the NMA strongly urges the SEC to expand the safe harbor protections for Scope 3 disclosures. As currently proposed, the safe harbor is too narrow and does not provide adequate protection because it does not recognize the estimation and speculation required for Scope 3 disclosures. Given the significant concerns with disclosure of Scope 3 emissions discussed herein, we believe that the Commission should not require disclosure of Scope 3 emissions. If disclosure is mandated, however, the SEC should provide strong safe harbor protection, such as the safe harbor protection of the Private Securities Litigation Reform Act. Under this approach, protection would be available if emissions data is labeled as such and is accompanied by cautionary language explaining why the data may not be accurate.

VII. The Proposed Rule Will Lead to Counterproductive and Unintended Results.

As written, the Proposed Rule's requirements are so onerous, overburdensome, and costly, that if finalized, there will be several counterproductive and unintended results. First, it will have the effect of discouraging companies from entering the public markets and may drive some publicly traded companies out of the public markets. In Section X, the NMA discusses the substantial costs that will be associated with compliance with the Proposed Rule, including hiring climate specialists; retaining third-party environmental consultants; hiring attestation firms; developing new systems and controls to track and report climate data at an extremely granular level; and imposing new responsibilities on managers, executives, and board members. The result will be that for some companies the benefits of participating in a U.S. public market will be outweighed by the burdens. In these cases, some private companies may choose not to enter the public markets, and some publicly traded companies may choose to leave the public markets.

Second, those companies that have not yet adopted any climate-related goals or targets will be discouraged from doing so given the onerous obligations and requirements that would follow. This is particularly true for Scope 3 emissions, a metric for which the vast majority of U.S. companies have not adopted any climate pledges. It is hard to imagine that the SEC intended to dissuade companies from making and trying to meet climate goals, yet this is the effect the Proposed Rule will have.

Third, currently registrants provide climate disclosures in their SEC filings pursuant to a materiality standard. Many companies choose to provide additional information to the public that goes beyond the materiality threshold. This additional information often takes the form of sustainability reports or other materials that are posted on a company's website or otherwise made publicly available. The Proposed Rule will likely have a chilling effect on companies providing any additional information because registrants will be hesitant to provide various stakeholders with additional climate-related disclosures beyond those that are required in their SEC filings to avoid any possible implication that the additional information in those reports is also material and should have been included in filed documents (and thus subject to securities liability). The end result will be that the sustainability reports and ESG reports that companies now release will be eliminated and the information available will be limited to what is in the company's SEC filings.

Finally, requiring registrants who "use" scenario analysis to disclose such analysis in a filing with the SEC[72] could cause registrants to forgo scenario analysis, which is a potentially valuable process, to avoid disclosure – especially if there is no materiality requirement for disclosure of such analysis.

VIII. The Proposed Rule Exceeds the SEC's Statutory Authority to Issue Reporting Rules.

A. Existing Statutes Do Not Authorize the SEC to Issue the Proposed Rule.

In the Proposed Rule, the Commission claims it has "broad authority" to issue "disclosure requirements that are 'necessary or appropriate in the public interest or for the protection of investors.'"[73] Although certain statutory provisions direct the Commission to consider the "public interest" when engaging in rulemaking,[74] the Commission disregards the fact that this general rulemaking authority is limited by the context and structure of the relevant statutes. Indeed, the Supreme Court has explained that statutory directives for an agency to consider the "public interest" do not grant the agency "broad license to promote the general public welfare."[75] Rather,

[72] *Id.* at 21,356; Proposed 17 C.F.R. § 229.1502(f).

[73] 87 Fed. Reg. at 21,335.

[74] *See, e.g.*, 15 U.S.C. § 77b(b).

[75] *Cf. NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976) (holding that references to "public interest" in the Federal Power Act and Natural Gas Act did not authorize the Federal Power Commission to promulgate rules prohibiting employment discrimination because it was unrelated to the statutes' charge to promote the orderly production of energy and natural gas at reasonable rates).

the scope of the "public interest" must "take meaning from the purposes of the regulatory legislation."[76]

For purposes of the SEC, "public interest" refers to the objectives of the Securities Act and the Securities Exchange Act. The Commission's core mission "is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation."[77] This means the Commission's rulemaking authority as it relates to the "public interest" should further these goals. With regard to public disclosures, the relevant statutory provisions limit the type of information that the Commission can require to be disclosed. Section 13(a) of the Exchange Act, for instance, authorizes the Commission to issue rules and regulations it deems "necessary or appropriate for the proper protection of investors to insure fair dealing" in securities.[78] These contextual limits are consistent with Congress's intention to ensure that the Commission does not have "unconfined authority to elicit any information whatsoever."[79] Generally, this means that the Commission is limited to issuing rules that are necessary for the protection of investors and financial in nature. In issuing the Proposed Rule, however, the Commission has gone well beyond these limits because, for the vast number of registrants, the proposed disclosures will be entirely superfluous and do nothing to further protect investors or ensure fair dealing of securities.

Notably, the SEC has historically rejected the notion that it has the authority to require registrants to make sweeping environmental disclosures. In a 2016 concept release, for example, the Commission acknowledged its historical position that it is not authorized to require all registrants to disclose "environmental and other matters of social concern" unless required under a specific congressional mandate or particular facts and circumstances make such information material.[80]

Moreover, prior attempts to require the SEC to issue disclosure rules that are divorced from securities laws have been rejected by courts. For instance, in *Natural Resources Defense Council v. SEC*, the D.C. Circuit upheld the Commission's decision to deny a petition for rulemaking that would have required registrants to make comprehensive disclosures concerning their environmental and equal employment

[76] *Id.* at 669.

[77] SEC, *About the SEC*, http://www.sec.gov/about.shtml.

[78] 15 U.S.C. § 78m(a).

[79] H.R. Rep. No. 73-1383, at 23 (1934).

[80] 81 Fed. Reg. 23,916, 23,970 (Apr. 22, 2016).

policies.[81] In declining to issue such rules, the Commission explained that its authority to require disclosures is limited "to contexts related to the objectives of the federal securities laws," which only require disclosure of "financial information in the narrow sense."[82] The D.C. Circuit agreed and found that the petition for rulemaking "lacked adequate grounding in securities laws."[83]

For similar reasons, the SEC should refrain from finalizing the Proposed Rule. The Commission lacks any basis in securities law to require the vast majority of registrants to make the proposed disclosures because it cannot show that the disclosed information would be material or that such information is necessary to protect investors. The Commission's general claims that it retains broad authority to issue disclosure rules do nothing to alter the fundamental fact that it lacks statutory authority to issue the Proposed Rule.[84]

B. The Proposed Rule Runs Afoul of the Major Questions Doctrine.

Given the Commission's lack of statutory authority to require such broad climate-related disclosures, the Proposed Rule also implicates the Major Questions Doctrine, which dictates that agency actions of vast economic and political significance require clear authorization from Congress.[85] It is undeniable that the Proposed Rule if finalized would have a significant impact on the U.S. economy as the vast majority of corporations (both publicly traded and non-publicly traded) will incur consequential compliance costs.[86] The proposed disclosures could also have the practical effect of fundamentally altering registrants' climate-related policies. Yet, as discussed above, the SEC lacks any congressional authority to issue such broad climate-related disclosures on all registrants or impact company policies regarding climate change.

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[81] 606 F.2d 1031, 1058 (D.C. Cir. 1979).

[82] *Id.* at 1039.

[83] *Id.* at 1058.

[84] *See NYSC LLC v. SEC*, 962 F.3d 541, 546 (D.C. Cir. 2020) (stating that courts do not "simply assume that a rule is permissible because it was purportedly adopted pursuant to an agency's rulemaking authority").

[85] *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'") ("*UARG v. EPA*").

[86] *See infra* Section X.

In the context of agency rulemakings, the Supreme Court has previously invalidated rules that would have resulted in a transformative expansion of an agency's regulatory authority without an explicit directive from Congress. In *Utility Air Regulatory Group v. EPA*, the Court partially struck down an EPA rule that sought to tailor the agency's air permitting programs to regulate greenhouse gases from stationary sources,[87] finding the agency's threshold for regulating previously unregulated sources was unreasonable because it would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."[88]

The Proposed Rule implicates even greater concerns under the Major Questions Doctrine than those presented in *Utility Air Regulatory Group*. First, the Proposed Rule would have significantly broader application than the partially invalidated EPA rule. For that rule, EPA estimated that approximately 67 percent of greenhouse gas emissions from EPA-regulated stationary sources would be covered under the rejected 100,000 tons per year threshold.[89] The Court ultimately found that a permitting scheme that would apply to two-thirds of the greenhouse gas emissions from a subset of sources of air pollution constituted a "transformative expansion" of its regulatory authority.

The Commission's Proposed Rule on the other hand has no similar applicability constraints, as the majority of proposed disclosures would apply to *all* registrants (and have indirect impacts on some private companies).[90] Given the expansive reach

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[87] Under the Clean Air Act, a stationary source with the potential to emit 250 tons per year of "any air pollutant" or 100 tons per year for certain types of sources is subject to preconstruction and operating permit requirements. 42 U.S.C. § 7479(1). EPA acknowledged that the application of the 250 and 100 tons per year thresholds for sources based on their greenhouse gas emissions would "radically expand those programs." 75 Fed. Reg. 31,514, 31,555 (June 3, 2010). In order to address this issue, EPA finalized a rule that: (1) would have subjected previously unregulated sources to permitting requirements, if they emitted 100,000 tons per year or more of CO_2e; and (2) required those sources already subject to permitting requirements ("anyway sources") to install best available control technology to control greenhouse gas emissions, if they emit over 75,000 tons per year of CO_2e. *UARG v. EPA*, 573 U.S. at 326, 333.

[88] *Id.* at 324.

[89] 75 Fed. Reg. at 31,540.

[90] *See infra* Section IX.

of the Proposed Rule, it is difficult to imagine a scenario in which the Proposed Rule would not be deemed by a reviewing court as an "enormous and transformative expansion" of the SEC's regulatory authority that has significant economic and political significance.

Furthermore, unlike EPA in *Utility Air Regulatory Group*, the Commission seeks to wade into a subject matter (i.e., climate change) in which it lacks any agency expertise. The Supreme Court has repeatedly expressed skepticism towards agencies' attempts to regulate in areas generally outside of its "sphere of expertise."[91] Congress did not bestow the SEC with the authority to be an environmental regulator; rather, that duty primarily resides with EPA. The fact that the Proposed Rule seeks to regulate in an area generally reserved to another agency further suggests that it lacks the congressional authority to require the proposed disclosures.

The SEC may contend that its Proposed Rule does not regulate registrants' environmental practices and is limited to the type of information they must disclose. But as mentioned previously in Section VII, in reality, many of the proposed disclosure requirements will have the practical effect of altering registrants' climate-related policies. For instance, the Proposed Rule's corporate governance-related disclosures could force management of some registrants to prioritize and allocate resources to address climate change rather than engage in the registrants' primary businesses. The Proposed Rule will also impact how a company manages climate change risk, with management having to answer to stakeholders who are not involved in the day-to-day operation and management of the business – and thus are not in the best position to recognize which practices make the most sense for a specific company. The Commission proposes to require a registrant to disclose information on its board's oversight of climate-related risks, management's role in assessing and managing those risks, and whether any board members has expertise in climate-related matters.[92] Boards for registrants that have not historically considered climate-related risks because they are immaterial to their business may now be inclined to enhance their focus on climate change, rather than face scrutiny from

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[91] *See Nat'l Fed. of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022) (finding that the Occupational Safety and Health Administration lacked authority to issue a broad COVID-19 vaccine mandate where public health was not within the agency's sphere of expertise); *Alabama Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (per curiam); *King v. Burwell*, 576 U.S. 473 (2015) (refraining to defer to the Internal Revenue Service's interpretation of a provision in the Affordable Care Act because it had "no expertise in crafting health insurance policy….").

[92] 87 Fed. Reg. at 21,432.

environmental activists. This increased focus toward addressing immaterial climate risks could make it more difficult and even interfere with a company's ability to achieve other goals such as diversity, human capital management, industry specific goals, or financial expertise.

IX. The Proposed Rule Violates the Materiality Principle.

A. The Proposed Rule Does Not Meaningfully Consider the "Reasonable Investor."

The Proposed Rule, as currently constituted, does not comport with the traditional notion of "materiality" as articulated by the Supreme Court and the SEC. The Supreme Court and the Commission has long recognized materiality as a bedrock principle in securities law that generally defines the scope of the information that publicly traded companies must disclose. The Supreme Court explained that information is material if there is a substantial likelihood that a reasonable investor would consider the information as significantly altering the "total mix" of information made available.[93] Put another way, the information is important in deciding how to vote or make an investment decision.[94] In articulating this standard, the Supreme Court expressly rejected a lower court's interpretation that material facts include "*all facts* which a reasonable stockholder might consider important."[95]

The Commission has set forth a definition of materiality that largely tracks with the Supreme Court's articulation of the term. Specifically, the Commission's regulations state:

> The term material, when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.[96]

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[93] *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

[94] *Basic Inc.*, 485 U.S. at 231-32.

[95] *See Northway, Inc. v. TSC Industries,* 512 F.2d 324, 330 (7th Cir. 1975) (emphasis added).

[96] 17 C.F.R. § 230.405.

The Commission disregards this core concept and proposes many of the disclosure requirements without any in-depth consideration of the materiality standard. Both the Supreme Court and the Commission define materiality as information that is substantially likely to be important to a reasonable investor. While there is no precise definition for what constitutes a reasonable investor, case law suggests that reasonable investors grasp basic market fundamentals but are not necessarily expected to possess skills rising to the level of a trained investment analyst.[97]

Aside from a general claim that many investors seek information about climate-related risks, for the majority of the proposed disclosures, the Proposed Rule omits any discussion or consideration of whether reasonable investors would deem the granular, detailed information the Proposed Rule would require as important to their investment decisions. Instead, the Commission attempts to justify many of the proposed disclosures because they *may* be useful to *some* investors.[98] For example, the proposed requirement to provide ZIP code level information regarding climate risk is justified by the Commission because of a suggestion by a lone specific shareholder.[99] The Commission very well may be correct that a certain party with particular interests may seek out such information. This, however, does not mean that the vast majority of reasonable investors want that information.

B. The Proposed Rule Inconsistently Invokes the Materiality Standard.

While the Commission disregards the concept of materiality for certain disclosures (e.g., Scope 1 and Scope 2 emissions, governance disclosures), it seemingly attempts to rely on the concept to justify the disclosure of some of the more controversial disclosure requirements. The proposed treatment of registrants' greenhouse gas emissions highlights this point.

Under the Proposed Rule, all registrants must disclose their Scope 1 and 2 emissions – regardless of whether those emissions are material.[100] The Supreme Court has

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[97] *See Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1097 (1991).

[98] *See, e.g.*, 87 Fed. Reg. at 21,432 (claiming that proposed governance disclosures could allow for investors to "be better positioned to assess whether and how the firm's board and management consider climate-related risks…").

[99] *Id.* at 21350 & n.195 (citing letter from Wellington Management Co. as the "*[o]ne* commenter [that] cited location information as a key component of how it, as an investor, assesses the climate risk facing a company" (emphasis added)).

[100] *Id.* at 21,434.

explained that such bright-line disclosure requirements should generally be avoided because they will be both overinclusive and underinclusive.[101] Yet, the Commission adopts such an approach without providing any explanation as to why Scope 1 and Scope 2 emissions would be material for *all* registrants, regardless of such factors as the industry to which they belong or their actual level of greenhouse gas emissions.

Considering how such disclosures would work in practice demonstrates the issues with the SEC's proposed one-size-fits all approach. For instance, if a registrant's employees all work remotely from home, would its employees have to submit information regarding their electricity use as part of the registrant's Scope 2 emissions? If so, how would employees be able to separate their electricity use for work purposes from general use? Finally, and most importantly, unless these types of emissions are material for a registrant, which for the vast majority of companies will not be the case, why would a reasonable investor want this information? Unless the consumption of electricity is of material concern to the extent that it could potentially impact business continuity or operational efficiency, will this information be used in decision making by a reasonable investor?

Instead of considering such questions, the SEC simply reasons that requiring this information from all registrants may benefit investors by providing them "access to a more comprehensive set of emissions data."[102] Without the limiting principle of materiality in place, however, the SEC could feasibly require all companies to disclose information that is unimportant or irrelevant to most registrants, simply to obtain a "more comprehensive [data]set."

The Commission's treatment of Scope 3 emissions fares no better. Despite completely abandoning the concept of materiality for Scope 1 and 2 emissions, the Proposed Rule would require a registrant's Scope 3 emissions only if they are material or if the registrant has a greenhouse gas reduction goal that includes Scope 3 emissions.[103] The Commission suggests, however, that Scope 3 emissions might still be material, even in instances where those emissions do not make up a significant portion of a registrant's overall greenhouse gas emissions.[104] But again, this position disregards the actual materiality standard. If a registrant's Scope 3 emissions are an insignificant portion of its overall greenhouse gas footprint, there is little reason to assume that the information would be material to a reasonable investor. At the very

[101] *Basic Inc*, 485 U.S. at 236.

[102] 87 Fed. Reg. at 21,434.

[103] *Id.* at 21,379.

[104] *Id.*

least, the Commission should take a consistent approach in allowing materiality to guide the disclosure requirements for publicly traded companies as it traditionally has.

C. Investors Will Be Harmed by the Commission's Disregard of the Materiality Standard.

As previously mentioned, for many of the proposed disclosures, the Proposed Rule eschews the company-specific inquiry that is generally required to determine if information is material by simply mandating the disclosure of information for all registrants. Because many of the proposed disclosures are untethered from materiality, they ultimately will harm investors. The Supreme Court explained that the materiality standard serves an important gatekeeping function that ensures that investors are not inundated with information that will ultimately not be useful to them.[105]

The Proposed Rule will frustrate this purpose by forcing companies to share an exorbitant amount of information that will not be relevant to reasonable investors. In all likelihood, the Proposed Rule will result in the majority of shareholders being buried "in an avalanche of trivial information that is hardly conducive to informed decisionmaking,"[106] such as the commuting practices of a registrant's employees.[107] The Proposed Rule also risks arming potentially adversarial stakeholders – rather than interested investors – with metrics and data that could be used to evaluate and rank companies (however flawed those metrics might be). These types of evaluations and rankings may result in punitive and possibly bad faith actions against companies within the financial markets, regulatory arena, and elsewhere. One unintended consequence may be further industry divestment in fossil fuel and mining companies. A recent study found that the expected 2022 capital expenditures of the 30 largest publicly-traded fossil fuel and mining companies were at 15 year lows.[108] While these divestments are occurring due to multiple market factors, the Proposed Rule may increase this pressure, which would negatively impact the future supply of energy and metals resources needed to meet global demand.

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[105] *TSC Industries*, 426 U.S. at 448-49.

[106] *Id.*

[107] 87 Fed. Reg. 21,374.

[108] *See CHART: Big oil, mining on capex* strike, https://www.mining.com/chart-big-oil-mining-on-capex-strike/.

X. The Proposed Rule is Arbitrary and Capricious Because Its Costs Vastly Exceed Any Benefits.

The costs of the Proposed Rule vastly exceed any benefits that it provides, and as a result, the Proposed Rule is unlawful, arbitrary, and capricious. The D.C. Circuit has explained that "the Commission has a unique obligation to consider the effect of a new rule upon 'efficiency, competition, and capital formation.'"[109] In order to properly assess a new rule's effect, the Commission must include an assessment of the "baseline level" of information disclosure under currently existing laws.[110] Failure of the Commission to apprise itself "of the economic consequences" of a proposed regulation will make the proposal arbitrary and capricious.[111]

In *Business Roundtable v. SEC*, the D.C. Circuit struck down an SEC rule on proxy access as arbitrary and capricious because of a defective cost-benefit analysis.[112] The rule, which was intended to improve corporate governance, would have required registrants to include information about "dissident shareholder nominees" in proxy materials if they met certain minimum requirements.[113] The D.C. Circuit held that the Commission committed numerous errors in estimating the rule's costs and benefits in violation of its statutory duty to consider economic consequences of its regulatory actions. Among other things, the court found that the Commission relied on insufficient data to conclude that the rule would improve board performance and increase shareholder value and failed to "estimate and quantify" costs companies would incur opposing shareholder nominees.[114]

With the Proposed Rule, the Commission commits the same errors identified in *Business Roundtable.* Despite the clear directives from the D.C. Circuit, the Commission forgoes undertaking a legitimate cost-benefit analysis and simply maintains that it cannot "reliably quantify [the] potential benefits and costs" of the

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[109] *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (citing 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a–2(c)).

[110] *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 178 (D.C. Cir. 2010).

[111] *Business Roundtable*, 647 F.3d at 1148*; see also Chamber of Commerce v. SEC,* 412 F.3d 133, 144 (D.C. Cir. 2005).

[112] *Business Roundtable*, 647 F.3d at 1156.

[113] *Id.* at 1147.

[114] *Id.* at 1150-51.

Proposed Rule.[115] Instead, the Commission attempts to justify the Proposed Rule by generally claiming that the overbroad disclosure requirements may yield some potential benefits to some investors. Without more, these alleged benefits are nothing more than "mere speculation" that the D.C. Circuit found inappropriate to justify the Commission's assumption underlying its cost-benefit analysis in *Business Roundtable.*[116]

Unlike the amorphous attempts to quantify benefits associated with the Proposed Rule, the enormous costs associated with it can be more easily identified. Specifically, the Proposed Rule will lead to nearly 24.7 million additional paperwork hours each year, with associated costs of approximately $6.7 billion.[117] These new costs represent 131 and 164 percent increases over current baselines, respectively. Notably, however, these estimates significantly *underestimate* the actual costs the Proposed Rule would impose because they do not include costs associated with supplier and vendors providing information on Scope 3 emissions.

Like in *Business Roundtable* the Commission's incomplete cost analysis is problematic because it fails to estimate and quantify foreseeable costs associated with the Proposed Rule. In particular, the Commission overlooks the connected nature of supply chains and fails to acknowledge the impacts the new requirements would have on private companies not directly subject to the Proposed Rule.

For example, many electric power providers, such as municipal public power companies and electric cooperatives, are not-for-profit entities that are not publicly traded and would not be required to directly disclose their emissions under the Proposed Rule. Nonetheless, those same electric providers would need to provide their customers with information on their Scope 2 emissions (i.e., the indirect emissions of the registrant from purchased or acquired power) to enable those customers to be able to report to the Commission. While many power providers may already supply information to aid their customers with the voluntary reporting of

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[115] 87 Fed. Reg. at 21,428.

[116] *Business Roundtable*, 647 F.3d at 1150.

[117] Verdantix, *U.S. TCFD-Aligned Reporting Will Trigger $6.7bn Of Spend On Climate Risk And Carbon Management* (Mar. 28, 2022), http://www.verdantix.com/newsroom/press-releases/us-tcfd-aligned-reporting-will-trigger-6-7bn-of-spend-on-climate-risk-and-carbon-management; *see also* 87 Fed. Reg. at 21,455 (estimating a six-year average cost of $124,127 per year for each large-accelerated filer's Scope 1 and 2 emissions and $52,500 per year for each accelerated filer's Scope 1 and 2 emissions).

carbon emissions, the scope and scale of reporting in the Proposed Rule is much more sweeping than what is required for voluntary reporting and, importantly, subjects the registrant to securities liability. Unlike publicly traded companies, not-for-profit electric providers cannot pass some or all of these additional costs onto shareholders, but instead will need to pass these costs directly to their customers. These types of electric service providers often operate in very rural areas that are economically disadvantaged.

Similarly, the reporting of Scope 3 emissions (i.e., all indirect emissions from upstream and downstream activities in a registrant's value chain) by certain registrants will also have a cascading effect to non-publicly traded companies because of information needing to be provided to the registrants. Among other things, the Commission anticipates that a registrant's Scope 3 emissions may include its purchased goods and services.[118] These costs to companies indirectly impacted by the proposed requirements have not been accounted for or adequately considered in the Proposed Rule. The NMA urges the SEC to include these costs in the cost-benefit analysis for the Proposed Rule in order to accurately capture its financial impact.

XI. Conclusion

For all of the reasons stated herein, the NMA believes that the SEC should not finalize the Proposed Rule. The NMA does not dispute or downplay the importance of public companies communicating relevant information, data, and risk factors – including for climate and ESG-related topics – to their shareholders and investors. The NMA believes, however, that the existing provisions of Regulation S-K and the 2010 Climate Change Guidance, which require the disclosure of material climate information, along with the voluntary reporting programs that can provide additional information to investors, provide reasonable investors with the information that they need to make informed voting and investment decisions. To the extent the SEC believes there are gaps that need to be filled or that companies are not adequately disclosing material climate-related risks and information, the NMA encourages the Commission to work with stakeholders to identify guidance or a targeted, narrow rulemaking to fill that gap. Unfortunately, however, the Proposed Rule abandons the core concept of materiality and requires the disclosure of so much information that investors will have difficulty determining what is important and meaningful.

The NMA remains committed to working with the SEC to advance a disclosure framework that takes into consideration the unique aspects of the mining industry,

[118] 87 Fed. Reg. at 21,380.

is focused on reporting material climate change-related risks and opportunities, and reduces duplication and inconsistencies with other mature reporting schemes.

Sincerely,

Tawny A. Bridgeford
Deputy General Counsel & Vice President
Regulatory Affairs

Attachment A

June 11, 2021

The Honorable Gary Gensler
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Chairman Gensler:

The National Mining Association ("NMA") appreciates the opportunity to provide comments in response to the U.S. Securities and Exchange Commission's ("SEC" or "Commission") request for public input on climate change disclosures specifically, and environmental, social and governance ("ESG") disclosure more generally.[1] The primary question underlying the request is whether current disclosures on climate change adequately inform investors of known material risks and opportunities. Underneath that broad inquiry, the SEC poses 15 specific questions, many containing multiple sub-questions, to facilitate the SEC's evaluation of its disclosure rules "with an eye toward facilitating the disclosure of consistent, comparable, and reliable information on climate change."

NMA is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA members produce energy, metals and minerals that are essential to economic prosperity and a better quality of life and are committed to development that balances social, economic and environmental considerations. Among NMA's members are publicly traded companies listed in the United States that are subject to the SEC's disclosure requirements. Additionally, most NMA companies, whether publicly traded or privately held, already voluntarily disclose key ESG matters (including climate) through a variety of mechanisms.

[1] *See* Public Statement of Acting Chair Allison Herren Lee, "Public Input Welcomed on Climate Change Disclosures" (March 15, 2021), *available at* https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.

NMA is concerned that mandatory disclosure rules—particularly related to non-material climate-related risks— could proliferate investment bias and practices by investors and financial institutions to exclude certain energy-intensive companies and sectors from investment portfolios or restrict access to or significantly increase the cost of capital. The SEC should not contribute to this problem because such biases and practices unnecessarily devalue companies and create an inequitable financial environment for certain companies, regardless of their results, strategy, or financial performance. Furthermore, climate-related risk (and ESG-related risk in general) is not limited to traded entities and any mandatory SEC requirement would place an undue burden and cost on public companies.

NMA firmly believes that current disclosures serve the purpose of providing financially material information on climate- and ESG-related risks that is decision-useful for investors. For example, public companies have diligently disclosed in various SEC filings material climate risks, especially since the SEC issued its 2010 "Guidance Regarding Disclosure Related to Climate Change."[2] As described below, companies are also going farther and developing annual robust sustainability reports and/or utilizing third-party reporting programs and standards that go beyond financially material risk disclosure. These voluntary disclosures are tailored to the issues of greatest importance to the individual company and its investors and other identified stakeholders. Any SEC efforts to supplement existing disclosure efforts with mandatory reporting requirements risks duplication of information and potentially disclosure of information that would not be material to our members' investors.

Given the breadth of NMA membership from companies that solely operate domestically to international companies listed on multiple exchanges, the views set forth here are those of the association as a whole and are not necessarily the views of any individual NMA member.

The SEC Must Complete its Review of the 2010 Climate Change Guidance Before Pursuing a Rulemaking to Mandate Climate Disclosures

The NMA believes it is premature for the SEC to move forward with a rulemaking to incorporate mandatory climate-related risk disclosures in financial reports without first completing an assessment of the effectiveness of the 2010 Climate Change Guidance and whether there are gaps in providing material information on climate-related risks to investors. On Feb. 24, 2021, Acting SEC Chair Allison Herren Lee announced that the Division of Corporation Finance would begin a review of the 2010 Climate Change Guidance to enhance its focus on climate-related disclosure in public company filings.[3]

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[2] *See* SEC, Commission Guidance Regarding Disclosure Related to Climate Change, Release No. 33-9106 (Feb. 2, 2010), 75 Fed. Reg. 6290 (Feb. 8, 2010) ("2010 Climate Change Guidance").

[3] *See* SEC, Public Statement of Acting Chair Allison Herren Lee, "Statement on the Review of Climate-Related Disclosure" (Feb. 24, 2021), *available at* https://www.sec.gov/news/public-statement/lee-

Specifically, she directed staff to: (1) review the extent to which public companies address the topics identified in the 2010 guidance; (2) assess compliance with disclosure obligations under the federal securities laws; (3) engage with public companies on these issues; and (4) absorb critical lessons on how the market is currently managing climate-related risks. Based on this review, staff are charged with updating the 2010 guidance to reflect developments in the last decade.

NMA strongly encourages the SEC to complete this work first, share the results with the public, and offer an opportunity for public comment on the SEC's analysis, recommendations, and any proposed revisions before finalizing any changes to the guidance. It is critical that the SEC start with a solid foundation of information related to existing disclosures under this guidance and the separate evolution in voluntary disclosures of climate-related risk that has occurred over the last decade. The analysis underpinning this review must be transparent and completed before the SEC makes any decisions regarding a rulemaking to require mandatory disclosure. NMA believes that such an analysis will likely reveal that an updated guidance rather than a rulemaking is the more appropriate mechanism to address any disclosure gaps.

Current Voluntary Disclosures on Climate Change Adequately Inform Investors of Known Material Risks and Opportunities

NMA believes it is important for public companies to communicate relevant information, data, and risk factors, including climate- and ESG-related topics, to their shareholders. NMA's members already make such disclosures—as appropriate for their businesses, in compliance with existing disclosure laws, and responsive to the evolving preferences and expectations of investors and other stakeholders. NMA's member companies whose shares are listed on U.S. stock exchanges already report climate and other ESG data and information that they deem have a material impact on their current and future financial performance in their regulatory filings with the SEC. Many of NMA's member companies also publish standalone sustainability reports and integrated financial and sustainability reports made accessible to shareholders and the public, and voluntarily comply with internationally recognized third-party standard setters like the Carbon Disclosure Project, Global Reporting Initiative (including the coal and mining sector supplements), Sustainability Accounting Standards Board (including the coal and metal mining industry standards), the Task Force on Climate-Related Financial Disclosures,

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statement-review-climate-related-disclosure. Notably, on Mar. 4, 2021, Commissioners Hester Pierce and Elad Roisman released a public statement regarding this review, stating that they believe "the new initiative is simply a *continuation* of the work the staff has been doing for more than a decade and not a program to assess public filers' disclosure against any *new* standards or expectations." (emphasis in original). The Commissioners assert that "[this] announcement cannot foreshadow a plan for the staff to issue guidance that would elicit more specific line items or otherwise convert the Commission's generally principles-based approach to a prescriptive one." According to the Commissioners, any changes "would require a new Commission vote." *See* Public Statement of Commissioners Hester Pierce and Elad Roisman, "Enhancing Focus on the SEC's Enhanced Climate Change Efforts."

the International Organization for Standardization 1400, among others. Disclosures made in sustainability reports and in response to these third-party programs are often broader in scope than the materiality principle that underpins the SEC's regulatory program.[4]

Existing voluntary disclosures of climate- and ESG-related information are exceptionally effective as they allow individual companies to collaborate with their investors, customers, local communities, and other priority stakeholders to determine what information is material for their operations and business and report it in a manner suitable for their collective needs. Individual companies, informed by engagement with these stakeholders, determine the best course for their company, whether it be through internationally recognized third-party programs, sector-developed programs, or internally developed programs specific to the company. Companies can also differentiate themselves by presenting information and analysis in an informative way as opposed to solely providing quantitative data as one part of a financial report. Existing voluntary disclosure methods have become accepted practices for issuers and have also satisfied the needs of investors who are now making decisions based on climate- or ESG-related factors. A SEC rulemaking mandating companies to file additional information with the Commission is simply not necessary.

The SEC should not create a one-size-fits-all, prescriptive, rules-based mandatory disclosure program given the breadth and scope of information already provided on a voluntary basis. The SEC should trust that companies are actively working with their investors to identify and disclose the relevant, financially material metrics—whether quantitative metrics of qualitative information—that are most decision-useful. The NMA believes that this work and these relationships will continue to drive appropriate climate- and ESG-related disclosures that are aligned with the importance of materiality and company-specific decisions.

Moreover, investor preferences and expectations for climate and ESG disclosure are rapidly evolving and likely will continue to do so, which has been the case with other disclosure topics (e.g., mining property disclosure). Specific SEC disclosure requirements in this area risk failing to keep pace with investor and other stakeholder-driven changes in climate and ESG disclosure best practices. Finally, mandating

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[4] *See e.g.,* GRI 101: Foundation 2016, available at ("In financial reporting, materiality is commonly thought of as a threshold for influencing the economic decisions of those using an organization's financial statements, investors in particular. The concept of a threshold is also important in sustainability reporting, but it is concerned with a wider range of impacts and stakeholders. Materiality of sustainability reporting is not limited only to those sustainability topics that have a significant financial impact on the organization. Determining materiality for a sustainability report also includes considering economic, environmental, and social impacts that cross a threshold in affecting the ability to meet the needs of the present without compromising the needs of future generations. These material issues will often have a significant financial impact in the nearterm or long-term on an organization. They will therefore also be relevant for stakeholders who focus strictly on the financial condition of an organization.")

disclosures of non-material information could lead to confusion among investors, undermining the SEC's goal to protect and educate investors.

NMA strongly encourages the Commission to look toward providing more guidance on this matter before jumping to a costly and potentially duplicative rulemaking that complicates existing reporting efforts.

The SEC's Authority Regarding the Disclosure of Climate and ESG-Related Risks

Federal securities laws are silent on requiring disclosure of specific climate-related risks. However, as discussed in the SEC's 2010 "Guidance Regarding Disclosure Related to Climate Change," a public company may need to disclose climate-related risks that are "material" to investors.[5] The same reasoning applies with equal force to disclosure of risks related to ESG. "Materiality" has served as the cornerstone of disclosure requirements under the U.S. securities laws since Congress passed the Securities Act of 1933.[6] The SEC subsequently codified this principle in its governing regulations recognizing that addressing nonmaterial issues distracts from its mission of investor protection and maintenance of fair, orderly and efficient markets.[7] Ultimately, the principle of materiality is designed to help identify information most relevant to investors.

In 1976, the U.S. Supreme Court articulated the time-honored standard for materiality still followed by courts today to determine whether information at issue in securities litigation is material to investors: "there must be a substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of the information available."[8] In that decision, the Court expressly noted the harms associated with defining materiality too broadly stating that "some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good" and that "a minimal standard might bring an overabundance of information within its reach, and lead management simply to bury the shareholders in an avalanche of trivial information, a result that is hardly conducive to

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5 *See* 2010 Climate Change Disclosure Guidance, supra fn 2.

6 15 U.S.C. § 77q(a)(2), ("[i]t shall be unlawful for any person in the offer or sale of any securities ... to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading.")

7 17 CFR § 230.405 ("The term *material,* when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered.")

8 *TSC Industries Inc. Northway, Inc.*426 U.S. 438 (1976).

informed decisionmaking."[9] The Court has continued to reaffirm this materiality standard in the subsequent decades.[10] Pursuant to Supreme Court precedent, courts have found that the fact that an investor subjectively considered something important, or that a reasonable investor would find the information to be of interest, is not sufficient to meet the materiality standard.[11]

Correspondingly, over the decades the SEC has repeatedly endorsed the concept of materiality as the basis for disclosure requirements, regardless of the type of issue (environmental, financial or otherwise). In its first interpretive statement on environmental disclosures, the Commission outlined the requirements for such disclosures *if material.*[12] Additionally, in response to a number of petitions for rulemakings to require more comprehensive disclosures by corporations of their environmental and equal employment policies, the SEC remained laser-focused on materiality as a disclosure threshold,[13] a position subsequently upheld by the U.S. Court of Appeals for the District of Columbia Circuit.[14] The 2010 Climate Disclosure Guidance is a more recent example. In that interpretive release, the SEC took the position that climate change disclosures may be required as material under particular disclosure items in Regulation S-K, depending upon a company's circumstances.[15]

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[9] *Id.* at 448-449.

[10] *See Basic v. Levinson*, 485 U.S. 224, 234 (1988); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014).

[11] *See e.g.*, *United States v. Litvak*, 889 F.3d 56, 65 (2d Cir. 2018) (testimony regarding traders' "own point of view" was relevant only insofar as it was "shown to be within the parameters of the thinking of reasonable investors in the particular market at issue"); *Resnik v. Swartz*, 303 F.3d 147, 154 (2d Cir. 2002) ("Disclosure of ... information is not required ... simply because it may be relevant or of interest to a reasonable investor.").

[12] SEC, *Disclosures Related to Matters Involving the Environment and Civil Rights*, 36 Fed. Reg. 13,989 (July 29, 1971).

[13] *See e.g.,* SEC, *Proxy Disclosure Enhancements*, 74 Fed. Reg. 68,334, 68,335-37 (Dec. 23, 2009) (disclosure limited to risks "reasonably likely to have a material adverse effect on the company"); SEC, *Proxy Disclosure and Solicitation Enhancements*, 74 Fed. Reg. 35,076, 35078 (July 17, 2009) ("[D]isclosure [of compensation policies] under the proposed rule amendment would only be required if the materiality threshold is triggered."). SEC, *Executive Compensation Disclosure*, 57 Fed. Reg. 29582, 29584 (June 23, 1992) (limiting disclosure to "material pay-related information"). The compensation disclosure rules referenced in the petition were premised on the very reasonable conclusion that the amounts and methods of compensation are material to shareholders because they make clear the monetary incentives of high-level corporate officials in exercising their duties.

[14] *Natural Resources Defense Council v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979).

[15] *See* SEC, 2010 Climate Change Guidance at 6293-95. For example, information about climate change-related risks and opportunities might be required in a registrant's disclosures related to its description of business, legal proceedings, risk factors, and management's discussion and analysis of financial condition and results of operations.

For approximately eight decades, the principle of materiality has been embedded in the framework that governs how public companies disclose information to the investing public. Not only does this foundational principle serve investor protection well by filtering out irrelevant material, but what may be considered "material" also naturally evolves over time to address new issues and developments and takes into account the facts and circumstances that are relevant to each company, including changes in investor expectations or informational needs. As the SEC continues to review its next steps on climate and ESG disclosure, it must ensure that materiality continues to act as the cornerstone of any public company disclosure regime under the federal securities laws. Materiality is foundational to the SEC's principles-based approach to disclosure, allowing materiality determinations on a case-by-case basis rather than prescribing bright-line rules.[16]

SEC Disclosure Rules Are Not the Appropriate Means to Drive Other Policy Initiatives

The SEC must avoid disclosure obligations designed to further specific policy goals outside of the SEC's tripartite mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. Congress has not given the SEC the authority to pressure companies into or mandate specific policy or business choices. For example, corporate disclosures should not be used as mechanisms for achieving any national targets or goals to reduce greenhouse gases or to enforce certain environmental standards. Corporate disclosures should focus on a company's material risks and opportunities that bear a sufficient potential to impact the company's long-term operational and financial performance and shareholder value creation considering its business. The SEC does not have the expertise or authority to make policy decisions about climate change, nor the authority to expand the public company disclosure obligations beyond the Commission's mission to ensure that public companies convey material information to investors.

Important Considerations if the SEC Decides to Pursue a Rulemaking to Mandate Climate or Other ESG Disclosures

If the SEC identifies reporting gaps that cannot be addressed through guidance and decides to move forward with a rulemaking to mandate climate or other ESG disclosures, NMA offers the following considerations and recommendations:

- **Materiality is Paramount**: As summarized in detail above, any disclosure requirements must be rooted in the materiality standard. Specifically, the Supreme Court's traditional materiality standard as established in *TSC* should

16 *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38-39 (2011) (declining to adopt plaintiff's bright-line test for materiality and stating that "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive").

continue to be the benchmark that the SEC uses when developing new climate or ESG disclosure obligations for public companies. The SEC should not use the federal securities laws to mandate public companies to disclose information that does not pass this test. Companies must be able to have the latitude to make determinations of materiality and uncoupling metrics that can be quantified (such as greenhouse gas emissions) from broader discussions around strategy and approach would be detrimental.

- **Recognize Limitations on Quantifying Risks**: Many climate-related risks cannot be quantified, or, if the risk were to be quantified, many assumptions and speculations would be required. Companies should not be unnecessarily compelled to estimate or quantify factors that are unknown or could not be consistently measured across companies, industries, regions, or sectors. Quantitative metrics should be limited to the company and should not extend upstream or downstream. While a company can qualitatively identify possible risks associated with its supply chain, it can only quantify those risks based on assumptions and speculations that are not reasonably known or appropriate for financial filings.

  Additionally, the SEC should carefully consider that certain climate disclosures like greenhouse gas emissions taken simply alone are not always a direct indicator of financial risk, especially to infrastructure or company facilities. For example, there may be entities that have a high future financial risk due to sea level rise, wildfires, or floods even if that entity itself has zero greenhouse gas emissions. In that case, disclosure of emissions would not provide the complete picture of risk. The opposite scenario can also be true. Accordingly, *if* the SEC proceeds with developing disclosure requirements, it should incorporate this type of nuance into the requirements rather than using overly simplistic approaches where greenhouse gas emissions are treated as a risk proxy, without further analysis or consideration of other factors.

- **Flexibility is Critical**: Any new disclosure requirements should afford each public company flexibility to adapt its disclosures, so they appropriately fit the company's business, operations, financial performance, and evolving investor preferences and expectations. Climate- and ESG-related disclosures are in their infancy compared to traditional financial disclosures and will continue to evolve and mature. The SEC must afford companies the time and flexibility to implement their disclosure programs, acknowledging that climate- and ESG-related disclosure is an ever-changing subject matter that requires continual learning and presents implementation challenges.

  Accordingly, any SEC disclosure mandate should not be an overly prescriptive, rules-based approach that would easily become obsolete in the short term. Companies must be afforded flexibility to respond to relevant changes in facts, risks, and other circumstances that may arise at the company and tailor their reporting appropriately. Additionally, disclosure mandates should be phased in over time to allow companies the appropriate time to establish the infrastructure necessary to collect and report this information with appropriate internal oversight.

- **Liability**: The SEC should allow climate- and ESG-related disclosures to be "furnished" and not "filed." There is no reason to subject this information to the strict legal liability that accompanies filings with the SEC for any material misstatement or omission. In contrast, documents furnished to the SEC do not trigger potential liability unless they are materially misleading. The reduced liability standard that attaches to furnished disclosures is appropriate for climate- and ESG-related disclosures given the ever-evolving nature and inherent uncertainty of the data, metrics, and benchmarks and forward-looking models associated with this information.

  Simply stated, these disclosures are not sufficiently mature to support the more rigorous liability structure associated with "filed" information. By allowing issuers to furnish this information, the SEC would ensure public companies have the maximum flexibility to provide decision-useful information to investors, while at the same time preserve the accuracy, reliability, and comparability of the information. Moreover, the SEC would appropriately reduce the cost and liability burdens on public companies complying with a new mandatory disclosure program in good-faith.

  In addition to allowing information to be furnished with the SEC, the Commission should provide an enhanced safe harbor for climate change disclosures similar to the protections afforded under the Private Securities Reform Act of 1995 for certain forward-looking statements. Finally, the SEC should also institute a "comply or explain" mechanism to ease the compliance burden for public companies, ensure that disclosures are not irrelevant or immaterial, and allow room to explain uncertainties inherent to climate and ESG data and information.

- **Existing Frameworks Should be Leveraged:** The SEC should not operate in a vacuum, ignoring the tremendous strides companies have already taken to report material climate and other ESG-related risks to their investors and the public and the proliferation of third-party programs that help to accomplish these disclosures. The SEC must be careful not to create a redundant reporting scheme or a reporting scheme that becomes out of date or inconsistent with third-party reporting standards. Accordingly, we do not believe the SEC should develop an ESG disclosure framework that is divorced from existing third-party standard-setters for ESG reporting. At the same time, however, the SEC must recognize there are a multitude of ways companies can appropriately disclose this information—including not using existing third-party standard-setters—that is right for their business and the needs of their investors and other stakeholders. The SEC should give companies the maximum flexibility to choose how each discloses this information, whether by using an existing third-party disclosure scheme or by disclosing material information apart from these schemes. In the end, it is critical that companies are allowed to choose which data they will report on, and how, based on the particulars of their business and what is material.

- **Regulatory Authority Should Not Be Delegated to An External Body:** While NMA believes existing third-party programs should be leveraged since many companies have committed extensive financial and staff resources in adopting and implementing these programs based on their own corporate needs, we strongly object to the SEC delegating its regulatory authority to any of these external bodies.

  Every third-party standard-setter has its own organizational governance, mission and objectives, funding sources, and contributors to the standard-setting process. The ESG reporting marketplace produces a diversity of standards, some more transparently developed and inclusive of industry and investor feedback than others. These third-party entities often require substantial amounts of data or information that is not material. Consequently, the standards they create may be inconsistent with financial materiality thresholds underlying U.S. securities disclosure requirements. Additionally, delegation of rulemaking authority to these third-parties would violate the Administrative Procedures Act. Such delegation would require explicit Congressional statutory authorization that does not currently exist.

  Moreover, these third-party entities are not regulated or always adequately governed to eliminate bias or conflicts of interest from special interest groups against the primary business of the industry being asked to report certain metrics. Finally, in NMA's experience, some of these programs have not historically incorporated the recommendations of associations or impacted companies into their standards, ignoring critical stakeholder input and missing opportunities to verify the workability and legitimacy of the standards.

  While NMA believes companies should have the right to choose to report under these programs, we do not support the SEC requiring all issuers to use a specific reporting framework or create an exclusive list of possible reporting frameworks to choose from. Each company should be allowed to choose for themselves how they report in consultation with their own investors and other identified stakeholders.

- **Disclosure Submissions**: The NMA does not necessarily believe the Annual Report on Form 10-K is the only proper forum for climate- or ESG-related disclosures. Not all investors are concerned with a company's climate or ESG performance with the same level of importance and significance as a company's financial performance. The volume and level of detail of certain ESG and climate disclosure frameworks may not align with the principles of disclosure effectiveness through focused, brief and material company-specific disclosures which underly Form 10-K reporting.

  Accordingly, we believe allowing issuers to present their disclosures separately from filed documents, such as on their websites, would be more appropriate. We do not believe this would burden investors as those interested in climate- or ESG-related disclosures could simply read this separate report(s) and make informed investment decisions. Alternatively, issuers could furnish this information on a separate form (e.g., a specialized report, similar to the approach for Form SD for conflict minerals issuers).

  To the extent that any new rule making was to add provisions to Form 10-K for such disclosures, we would also recommend allowing companies the option to disclose in the report or to incorporate by reference subsequently. The internal resourcing burden on companies in connection with new reporting requirements can be significant and time consuming. This additional timeline, subsequent to the Form 10-K calendar, could be used to somewhat mitigate those internal infrastructure burdens and allow newly adopting companies time to focus on verification and encourage enhanced reliability and fulsome reporting.

Conclusion

The NMA does not believe that the SEC should mandate climate or ESG-related disclosure at this time. The SEC has a tremendous amount of work to undertake to adequately understand the current universe of voluntary disclosures. We strongly encourage the SEC not to jump immediately into a rulemaking and instead seriously analyze and consider, with adequate public consultation, whether additional guidance could fill reporting gaps, if any are found.

Based on our review of our members' disclosures, we believe that voluntary disclosures sufficiently capture the investor needs for each individual company. We respect our companies' choices of how best to disclose their climate- and ESG-related risks and opportunities and believe the SEC can learn more from these choices.

If the SEC pursues a rulemaking to mandate climate or ESG-related disclosures, NMA is committed to working with the Commission to advance a disclosure framework that takes into consideration the unique aspects of the mining industry, is focused on reporting material risks and opportunities, and reduces duplication and conflicts with other mature reporting schemes.

Sincerely,

Tawny Bridgeford

Tawny Bridgeford
Deputy General Counsel & Vice President, Regulatory Affairs