Industrial Minerals Association — North America

June 17, 2022

Mr. Elliot Staffin
Special Counsel, Office of Rulemaking
US Securities and Exchange Commission
100 F Street NW
Washington, DC 20549

Re: IMA-NA Comments on File No. S7-10-22, The Enhancement and Standardization of Climate-Related Disclosures for Investors

Dear Mr. Staffin:

The Industrial Minerals Association – North America ("IMA-NA") writes to provide comments on the Securities and Exchange Commission ("SEC" or "the Commission")'s Proposed Rule entitled *The Enhancement and Standardization of Climate-Related Disclosures for Investors*[1] ("the Proposed Rule") which would require registrants to include climate-related information in annual SEC filings and audited financial statements.

Introduction

The IMA-NA is a nonprofit trade association representing industrial minerals producers throughout the United States, Canada, and Mexico. We represent a diverse set of member companies engaged in the mining and processing of ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, lithium, mica, perlite, potash, quartz, salt, soda ash, sodium bicarbonate, talc, wollastonite, and other minerals across North America.

Industrial minerals are vital to the manufacturing processes for many, if not all, of the products we use every day. They are used in the production of food supply chain elements (agricultural feed, human baking products, and water purification needs), batteries, protective masks, dialysis machines, semiconductors, solar panels, glass, ceramics, paper, plastics, rubber, detergents, insulation, pharmaceuticals, cosmetics, foundry cores and molds used for metal castings, paints, filtration, metallurgical applications, refractory products, and specialty fillers. Every sector of industry relies on a variety of industrial minerals to generate their end products, making a robust and stable supply chain critical for the continued growth and success of our economy as well as our national security.

IMA-NA members take great pride in the environmental stewardship they undertake as they conduct mining and processing operations. Our members adhere to federal, state, tribal, and local

[1] 87 FR 21334-21472

laws and regulations in order to provide the mineral resources needed for everyday life while protecting the air, land, water, and wildlife that surround those resources. IMA-NA members often also undertake voluntary conservation measures that are above and beyond those required by law or regulation in order to ensure the viability of the environments and communities in which they operate.

While IMA-NA supports the goal of conducting mining and processing as responsibly and transparently as possible, we cannot support the Proposed Rule as it is currently written. The Proposed Rule is far too expansive; is duplicative of previous efforts on this issue by both SEC and the Environmental Protection Agency (EPA); will be costly, time-consuming, and difficult for our members to comply with; and is beyond the scope of the SEC's authority. Therefore, for the reasons outlined in detail below, IMA-NA recommends that the SEC immediately withdraw the Proposed Rule.

The Requirement for the Disclosure of Scope 3 Emissions is Impractical, Costly, and Overly Expansive

The Proposed Rule contains several problematic provisions, but the provision requiring the disclosure of greenhouse gas (GHG) emissions by registrants and other entities will have the greatest negative impact on IMA-NA's members. The Proposed Rule identifies three classes – or "Scopes" – of GHG emissions: Scope 1 emissions which are defined as "direct GHG emissions from operations that are owned or controlled by a registrant;" Scope 2 emissions which are defined as "indirect GHG emissions from the generation of purchased or acquired electricity, steam, heat, or cooling that is consumed by operations owned or controlled by a registrant;" and Scope 3 emissions which are defined as "all indirect GHG emissions not otherwise included in a registrant's Scope 2 emissions, which occur in the upstream and downstream activities of a registrant's value chain."[2] The Proposed Rule would require all registrants to disclose their Scope 1 and Scope 2 emissions, and would require some registrants to disclose Scope 3 emissions "if those emissions are material, or if the registrant has set a GHG emissions reduction target or goal that includes its Scope 3 emissions."[3]

The requirement for the disclosure of Scope 3 emissions is particularly concerning. Because registrants would have to disclose GHG emissions from their upstream and downstream supply and value chain partners, those registrants would be required to somehow obtain data from those partners at least annually to determine the GHG emissions those companies produce, irrespective of materiality in order for a materiality determination to even be made. The sheer quantity of data involved in such a requirement would be colossal and unwieldy, particularly in a globalized marketplace where many companies' supply and value chains include both domestic and international partners that may change over the course of a given year. Such international value and supply chain entities may be located in numerous countries with a patchwork of inconsistent – or even nonexistent – requirements for tracking GHG emissions. The Proposed Rule fails to describe how registrants would be able to acquire the necessary data – if it is even available – and how to ensure that the data is consistent and meaningful.

[2] Ibid, 21374
[3] Ibid, 21377

The Proposed Rule appears to assume that such data on emissions by upstream and downstream entities, which may be smaller, non-registrant private companies, is readily available to registrant companies. This is patently false, as many small, private companies – including many IMA-NA members – do not gather or track such emissions data. Even in cases where a company may track emissions data, the emissions are not aggregated among each of the companies' value and supply chains. The Proposed Rule itself acknowledges the impracticality of tracking Scope 3 emissions when it states that "Unlike Scopes 1 and 2 emissions, Scope 3 emissions typically result from the activities of third parties in a registrant's value chain and thus collecting the appropriate data and calculating these emissions would potentially be more difficult than for Scopes 1 and 2 emissions."[4] The Environmental Protection Agency (EPA) further underscored this fact by excluding Scope 3 emissions from its Greenhouse Gas Reporting Program[5] which tracks GHG output from high-emission sources. That program requires the disclosure and tracking of what would be both Scope 1 and Scope 2 emissions (because it requires reporting by electric utilities) under the Proposed Rule, along with requirements for data calculation and certification, but does not do so for Scope 3.

Given the EPA's subject matter expertise on this issue compared to that of the SEC, it is curious that the SEC believes it can require something that even the EPA does not believe to be doable or necessary. The EPA asserts that its Green House Gas Reporting programs captures between 85 and 90 percent of all GHG emissions in the US,[6] making the currently unreported Scope 3 emissions immaterial to business and investors. The Proposed Rule would also result in double and triple counting emissions because a registrant's own Scope 1 emissions would also be counted amongst the Scope 3 by other registrants in that same company's own value and supply chains, completely distorting any meaningful analysis of the reported data.

The Proposed Rule's attempt to limit the burden of reporting Scope 3 emissions to only those instances when they are material is also disingenuous. Registrants would bear the burden of proof that their Scope 3 emissions are not material, and would therefore have to expend a large amount of time and resources to support that position. Further, the requirement for Scope 3 emissions renders hollow the argument that only publicly-traded registrants will be impacted by the Proposed Rule. If a registrant must obtain data on the emissions of its supply and value chain partners to comply with the Scope 3 disclosure requirement, they will naturally turn to those same partners asking for the data. This may require those non-registrant entities to undertake the time, manpower, and costs to track and calculate their emissions in order to share it with the appropriate registrants. Given that many upstream suppliers and downstream customers do business with multiple registrants across multiple economic sectors, the burden upon them to document emissions data related to each value and supply chain will be substantial. A registrant may have dozens or even hundreds of suppliers, vendors, and distributors, thereby multiplying the amount of data they and their supply and value chain partners would need to obtain.

This is precisely the predicament that would befall many IMA-NA members if the Proposed Rule is enacted. Many of our members are small businesses operating in remote areas with limited resources and extract or process mineral resources with high input costs and low profit

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[4] Ibid

[5] 40 CFR 98

[6] https://www.epa.gov/ghgreporting/learn-about-greenhouse-gas-reporting-program-ghgrp

margins. Such companies do not possess the resources for the kind of GHG data tracking and analysis that their value and supply chain partners that are registrants would be required by the Proposed Rule to obtain.

Although the Proposed Rule concedes that registrants neither own nor control the equipment or operations that emit Scope 3 emissions, it nonetheless suggests that registrants "may influence those activities, for example, by working with its suppliers and downstream distributors to take steps to reduce those entities' Scopes 1 and 2 emissions (and thus help reduce the registrant's Scope 3 emissions) and any attendant risks. As such, a registrant may be able to mitigate the challenges of collecting the data required for Scope 3 disclosure."[7] This argument is an attempt to sidestep the reality that the requirement for a registrant to gather such data is not realistically possible. The challenges of collecting data for Scope 3 emissions will not change simply because those in a registrant's value chain produce fewer emissions, particularly given the global and multi-faceted nature of many registrants and their markets.

Even if reducing emissions would resolve the compliance challenge – which it will not - by promoting such a compliance strategy, the Proposed Rule is creating a thinly-veiled GHG reduction requirement for registrants and their value and supply chain partners. There is no other logical interpretation for the above-cited portion of the rule that suggests that the way for registrants to overcome the challenges of collecting Scope 3 data is to reduce their Scope 3 emissions. Establishing and/or implementing such an environmental policy goal is well outside the bounds of the SEC's authority and mission. The SEC has neither the resources, the subject matter expertise, nor the statutory mission to determine which measures may lead to reduced GHG emissions or prescribe those means as de facto requirements for registrants. In addition, the fact that the agency that *does* have such expertise – the EPA – chose not to include Scope 3 in its GHG Reporting Program should inform SEC as to both the practicality and materiality of such a requirement and lead the Commission to the conclusion that this requirement is excessively impractical and expensive.

In addition, this roundabout method of environmental regulation would effectively reassign the responsibility for reducing emissions from an agency-to-company context to a company-to-company one. While companies collaborate for a mutually beneficial relationship, tasking one company with encouraging a reduction in emissions other companies to achieve regulatory compliance can easily create an unbalanced relationship. Companies should not be implicitly or explicitly required to police each other's emissions. That is a role that neither the SEC nor companies are equipped or empowered to undertake.

Further, many IMA-NA members' operations are not easily transitioned or converted to drastically lower emissions. The remote and geographically constrained locations of mineral deposits and the high energy output required to extract and process them do not afford our members with a variety of lower-emission alternative supply and value chain partners from which to choose. Mining trucks, excavators, bulldozers, processing plants, storage facilities, kilns, furnaces, conveyors, trains, and other large equipment involved in the mining industry require consistent, high levels of energy output that is not currently available in low or zero carbon emissions technologies that are economically or commercially viable. While future

[7] 87 FR 21377

technologies may come to augment or supplement some of those applications, it is currently not possible for those in the mining industry to reduce carbon emissions by choosing different supply or value chain partners in the manner that the Proposed Rule references.

Finally, requiring the disclosure of Scope 3 emissions for registrants who have set GHG reductions targets or goals which include Scope 3 emissions may also produce the opposite effect the Proposed Rule intends. Given the considerable costs and challenges associated with gathering and disclosing Scope 3 emissions, many registrants are likely to refrain from creating such a reduction plan at all, and thus disincentivizing them to prioritize lowering emissions levels.

The Proposed Rule is an Overlap of Existing Requirements

As mentioned previously, the Proposed Rule is unnecessary and redundant because existing SEC rules and guidance already facilitate the disclosure of climate-related information for investors. For example, Item 303 of Regulation S-K, Management's Discussion and Analysis of Financial Conditions and Results of Operations requires disclosure of "material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."[8] Item 101 of Regulation S-K, Description of Business, requires a description of the registrant's business, including each reportable segment,[9] including disclosure of the material effects that compliance with environmental regulations may have on capital expenditures.[10] Item 103 of Regulation S-K, Legal Proceedings requires a description of material pending legal proceedings, as well as administrative or judicial proceedings relating to the environment under specific conditions.[11] Item 105 of Regulation S-K, Risk Factors, also could include climate-related risks under its broad requirement to discuss the "material factors that make an investment in the registrant or offering speculative or risky."[12] In totality, these rules enable the disclosure of many climate-related risks, factors, and registrants' responses to them, but with a proper focus on requiring disclosure of information that rises to a proper level of materiality for registrants.

Moreover, the SEC issued guidance in 2010 to help registrants apply existing disclosure requirements to the context of climate change.[13] From 2010 until 2021, companies regularly included climate-related information in SEC filings. The efficacy of this regime is found in the fact that the SEC's own Division of Corporation Finance evaluated those disclosures during filing reviews and only rarely issued comment letters relating to unsatisfactory submissions. This demonstrates that current disclosure standards rise to the level required by the SEC's own statutes and regulations. In February 2018, the Government Accountability Office (GAO) issued a report on the 2010 guidance which noted that the 2010 requirements represented a significant

[8] 17 CFR § 229.303(a)
[9] 17 CFR § 229.101(c)(1)
[10] 17 CFR § 229.101(c)(1)(xii)
[11] 17 CFR § 229.103(c)(3)
[12] 17 CFR § 229.101(c)(5)
[13] 75 FR 6290 (Feb. 8, 2010)

step in clarifying climate-related disclosures.[14] The report stated that industry groups as well as the SEC's own Investor Advisory Committee found the then-current level of disclosure requirement to be adequate. The GAO also cautioned that additional disclosure mandates could "have mission and resource implications for the SEC's Division of Corporation Finance."[15] The GAO's report should serve as reassurance that the SEC has taken the necessary steps to provide investors with information regarding registrants' climate information, as well as a cautionary tale against additional regulation like the Proposed Rule.

Finally, the requirement for disclosing GHG emissions is redundant of the EPA's aforementioned Greenhouse Gas Reporting Program. The program requires disclosure of Scope 1 emissions from large GHG emission sources, fuel and industrial gas suppliers, and CO2 injection sites in the United States. Emissions defined as Scope 2 under the Proposed Rule are also reported to the EPA by the electric utilities which emit them as their own Scope 1 emissions. As previously mentioned, those combined requirements equal the Proposed Rule's disclosure requirement for Scope 1 and Scope 2 emissions. Information about GHG emissions from these sources is available on the EPA's website and can be searched by several different criteria, making it readily accessible to investors and the public. Overall, investors already have access to a wealth of climate-related data from SEC filings as well as EPA disclosure requirements, thereby rendering the Proposed Rule unnecessary.

The SEC is Using the Proposed Rule to Create De Facto Environmental Regulations That are Beyond its Authority

The Proposed Rule exceeds the SEC's lawful mission and authority. The SEC's three-part mission – To Protect Investors; To Facilitate Capital Formation; and To Maintain Fair, Orderly and Efficient Markets [16] – is one inherently focused on ensuring investors can maximize their investments for capital and monetary gains. These are goals that Congress has empowered the SEC to pursue, but addressing climate change and reducing GHG emissions are not. To the extent that such goals are to be pursued by the federal government, Congress has empowered agencies other than the SEC – most notably the EPA – with that mission, and such goals should be left to those agencies and the attending subject matter expertise which they possess but the SEC lacks.

The Proposed Rule violates this partitioning of authority by not only mandating disclosure of climate-related information beyond what is already required, but by also providing – as discussed above – recommendations and suggestions for how registrants can lower their carbon emissions as well as those in their supply and value chains. Such recommendations are beyond the SEC's statutory authority as well as its practical area of expertise. Congress has neither envisioned nor sanctioned the idea that the SEC should be a source of suggested actions for reducing GHG emissions or addressing climate change.

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[14] U.S. Government Accountability Office, Climate-Related Risks: SEC Has Taken Steps to Clarify Disclosure Requirements (Feb. 2018)

[15] Ibid

[16] https://www.sec.gov/about/what-we-do

The argument that the Proposed Rule is necessary because investors and other stakeholders desire more climate-related information from companies assumes that the motives for both investors desiring such information and the companies already willingly providing it are strictly financial or investment-oriented, which is the limit of the SEC's domain. Many companies provide voluntary climate disclosures not because of a material impact on their financial situation or viability, but to satisfy demands from environmental and non-governmental organizations and other interest groups about the company's contribution to or mitigation of climate change.

Such groups often use that information to either praise a company for attributes or actions deemed to address climate change, or to deride, criticize, or even litigate against companies or industries whom the interest groups view as actively contributing to climate change. These groups may be stakeholders in the issue of environmental or climate policy, but they are not necessarily investors who focus on the financial viability of a company in order to maximize capital returns. The SEC should not conflate these two things, as it has in the Proposed Rule. Considerations of social responsibility or environmental stewardship are in and of themselves outside the bounds of the priorities that the SEC is permitted to consider when regulating registrants.

As SEC Commissioner Hester Peirce pointed out in her comments during the March 21, 2022 meeting about the Proposed Rule, "many calls for enhanced climate disclosure are motivated not by an interest in financial returns from an investment in a particular company, but by deep concerns about the climate or, sometimes, superficial concerns expressed to garner goodwill."[17] This places much of the information desired outside the materiality standard by which the SEC disclosures are limited. The SEC should focus on requiring disclosure that is actually and directly material to the financial well-being of a company, rather than in satiating the desires of political special interests to use the Commission as an indirect means of achieving climate change or environmental objectives by imposing such regulatory requirements on registrants.

Gathering Data Needed for Compliance Will Be Time-consuming and Costly for Registrants

The volume and diversity of information required for disclosure under the Proposed Rule will make compliance an expensive and time-consuming proposition for many registrants. Specifically, the Proposed Rule would require disclosure of information regarding:

- "The oversight and governance of climate-related risks by the registrant's board and management;
- How any climate-related risks identified by the registrant have had or are likely to have a material impact on its business and consolidated financial statements, which may manifest over the short-, medium-, or long-term;
- How any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model and outlook;

[17] https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321#_ftn48

- The registrant's processes for identifying, assessing, and managing climate-related risks and whether any such processes are integrated into the registrant's overall risk management system or processes;
- The impact of climate-related events (severe weather events and other natural conditions as well as physical risks identified by the registrant) and transition activities (including transition risks identified by the registrant) on the line items of a registrant's consolidated financial statements and related expenditures, and disclosure of financial estimates and assumptions impacted by such climate-related events and transition activities.
- The registrant's climate-related targets or goals, and transition plan, if any."[18]

Compliance would require not only a substantial amount of raw data, but also a considerable amount of analysis and assessment, some of which would be quantitative and some that would be qualitative. Such an undertaking would require a considerable amount of specialized equipment, personnel, and processes that many companies currently do not possess and which may not be readily attainable. The Proposed Rule also requires a blend of both factual measurements of current GHG emissions and speculative disclosure of future effects from climate-related risks, which again begs the question of how registrants are expected to meet a requirement with such a subjective underpinning.

In addition, the Proposed Rule requires registrants to disclose the methodologies and metrics from which they derive disclosed climate information. This suggests that the SEC will be evaluating the processes and metrics and regulating them accordingly, which in turn raises the possibility that registrants' disclosures could be arbitrarily rejected by the SEC based upon the SEC's disapproval of either the company's conclusions or the metrics from which they were derived. Attempting to satisfy such a requirement will not only be costly for registrants, but for SEC staff as well who would be required to take on the additional responsibilities of vetting such metrics and conclusions about issues on which SEC staff are not subject matter experts. The SEC is neither statutorily permitted nor practically capable of undertaking the kind of environmental evaluation that the Proposed Rule seeks to impose.

Further, the Proposed Rule requirement of Scope 1, Scope 2, and in some cases, Scope 3 GHG emissions is complicated by the fact that those emissions are required to be disclosed both in the aggregate and disaggregated by individual greenhouse gases, in addition to disclosing them in both absolute and intensity terms. The Proposed Rule would also require accelerated filers and large accelerated filers to include attestation reports for Scope 1 and Scope 2 emissions, and would impose minimum attestation requirement as well as standards for firms providing the attestation service.[19] Hiring and retaining such firms would be yet another significant cost of compliance for registrants, particularly given that there the demand for attestation services would likely outstrip the supply of firms providing such services should the Proposed Rule be finalized. That scarcity would further drive up the cost of attestation, as well as likely result in delays for registrants as attestation entities confront a significant backlog of requests. Delays in obtaining and receiving service could put registrants at risk of being found to be noncompliant with the SEC's requirements, resulting in possible legal consequences from the

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[18] 87 FR 21345
[19] 87 FR 21346

SEC and further compounding the cost and difficulty of compliance. Neither the SEC, registrants, nor investors would benefit from such a situation.

Providing all the forms of emissions data required by the Proposed Rule will require specialized methods and analysis, which may not be either affordable or accessible for many IMA-NA members. As discussed previously, many IMA-NA members are small businesses with limited resources that produce low-margin mineral resources. Those that are not registrants are in the supply and value chains of companies that are, meaning those members would be asked by all of their varied upstream or downstream registrant partners to provide GHG emissions data for the registrants' compliance with the Proposed Rule. Gathering, tracking, and analyzing such varied and complex data would be extremely challenging and costly for many of IMA-NA's members.

Conclusion

IMA-NA appreciates the opportunity to provide comments to the SEC and inform the Commission on the negative impacts this rule will have on the mining industry. The Proposed Rule would have significant negative impact on our members, and by consequence, the economy as a whole. The data our members would be required to provide would be of questionable reliability, very costly, difficult to provide, and would often be duplicative of existing requirements and voluntary efforts by registrants. The Proposed Rule also exceeds the SEC's statutory mission as well as the Commission's subject matter expertise. Therefore, the IMA-NA cannot support the Proposed Rule as currently written and recommends that the SEC withdraw this rule.

Sincerely,

Chris Greissing
President, IMA-NA