NACCO Industries, Inc.

June 11, 2021

VIA Electronic Submission

The Honorable Gary Gensler
Chair
U.S. Securities and Exchange Commission
100 F Street, NE Washington, DC 20549-1090

Re: **Climate Change Disclosures**
Comments of NACCO Industries, Inc.

Dear Chair Gensler:

NACCO Industries, Inc. appreciates the opportunity to furnish comments with respect to the Securities and Exchange Commission's ("SEC" or the "Commission") request for public input regarding additional climate change disclosures. NACCO Industries, Inc., through a portfolio of mining and natural resources businesses, operates under three business segments: Coal Mining, North American Mining and Minerals Management. The Coal Mining segment operates surface coal mines under long-term contracts with power generation companies and an activated carbon producer pursuant to a service-based business model. The North American Mining segment provides value-added contract mining and other services for producers of aggregates, lithium and other minerals. The Minerals Management segment acquires and promotes the development of oil, gas and coal mineral interests, generating income primarily from royalty-based lease payments from third parties. In addition, the Company's Mitigation Resources of North America business provides stream and wetland mitigation solutions.

Regulation of Climate Change Disclosures

Federal securities laws are based on the principle that investment decisions "should only be made on the basis of full disclosure of all information necessary 'to bring into full glare of publicity those elements of real and unreal values which lie behind a security.'"[1] These laws make it unlawful to disclose any untrue statement of material fact or to omit a material fact that is necessary to prevent statements already made from becoming misleading, in connection with the purchase or sale of securities.[2]

According to the United States Supreme Court, the general rule that has judicially evolved for determining the materiality of particular information is "if there is a substantial likelihood that a reasonable shareholder would consider it important".[3] "Put another way, there must be a substantial likelihood that the misstated or omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information available." So defined, the materiality requirement acts as a "filtering mechanism," excluding "[s]ome information [that] is of such dubious significance that insistence on its disclosure may accomplish more harm than good." The Supreme Court later explained

[1] George S. Branch & James A. Rubright, "Integrity of Management Disclosures Under the Federal Securities Laws," 37 Bus. Law. 1447, 1453 (1982) (citing H.R. Rep. No. 85-73, at 1-2 (1933)).
[2] See 15 U.S.C. 77k to 771 (1994); 15 U.S.C. 78j (1994).
[3] TSC Industries v. Northway, 426 U.S. 449 (1976).

that determining materiality is an "inherently fact-specific finding" and excluding non-material information benefits shareholders by sparing shareholders from an "avalanche of trivial information."[4]

NACCO believes the existing disclosure requirements sufficiently address materiality with respect to climate change.[5] The 2010 Commission Guidance Regarding Disclosure Related to Climate Change (Release Nos. 33-9106; 34-61469; FR-82) requires a description of the registrant's business along with the business of its subsidiaries (which "Item 101 expressly requires disclosure regarding certain costs of complying with environmental laws")[6], a summary of legal proceedings (including the disclosure of certain environmental litigation), description of risk factors that make investment speculative or risky, management's discussion and analysis, and a suite of climate change related disclosures.[7] These disclosures include a discussion of the impact of legislation and regulation, international accords, indirect consequences of regulation or business trends, and physical impacts of climate change.[8] As a result, registrants are already required to disclose climate-related information that a reasonable shareholder would consider important.

The Securities Act Rule 408 and Exchange Act Rule 12b-20 require a registrant to disclose, in addition to the information expressly required by Commission regulation, "such further material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not misleading."[9]

The Commission 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 allow companies to work with their stakeholders to identify and disclose material metrics—whether quantitative metrics or qualitative information—that are relevant to the individual business or sector.

If the Commission elects to move forward with requiring additional climate disclosures, these disclosures should be considered "furnished" and not "filed." This information should not be subject to the additional legal liability that accompanies filings with the Commission (e.g., strict liability for any material misstatement or omission). In contrast, documents furnished to the Commission must be materially misleading to trigger potential liability. 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.

The underlying data and associated disclosures are not sufficiently mature to support the more rigorous liability structure associated with "filed" information. By allowing issuers to furnish this information, the Commission 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. In addition to allowing information to be furnished with the Commission, 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.

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[4] Basic, Inc. v. Levinson, 485 U.S. 224 (1988)
[5] Commission Guidance Regarding Disclosure Related to Climate Change, 2010, Interpretation: Commission Guidance Regarding Disclosure Related to Climate Change (sec.gov) (last accessed 6/4/21)
[6] Id.
[7] Id.
[8] Id.
[9] 17 CFR 230.408 and 17 CFR 240.12b-20.

Climate Change Reporting Frameworks

NACCO recognizes the potential benefit of sector specific guidance to align reporting requirements under existing SEC guidance; however, reliance on third-party standards or frameworks to determine reporting requirements is problematic. Certain of these standards or frameworks (such as those of GRI and TCFD) focused on developing climate-related disclosure standards are not primarily focused on the goals of financial securities disclosure, which is to provide investors with the timely, accurate, and complete financially material information they need to make informed investment decisions.

Moreover, NACCO believes the Commission should allow the still evolving framework and standard-setting institutions to continue their consolidating activities and efforts on building a consensus for a comprehensive system of corporate sustainability reporting, while in the meantime permitting registrants to make their own determinations as to which frameworks and standards are most appropriately applicable to their businesses and their understanding of the interests of their investors. NACCO supports the ultimate goal of providing consistent, comparable and reliable information regarding existing and potential climate change impacts to investors, but without a consensus as to which standards and frameworks would best achieve those goals, NACCO believes it is premature for the Commission to mandate any one or more of them, or in what manner such disclosures should be made.

Accordingly, NACCO believes that at this time it is appropriate for the Commission to encourage and permit registrants to provide such informal disclosure as they think most useful to investors, necessarily subject to all of the Commission's regulations that applies to informal corporate disclosures, such as Regulation FD, Regulation G, etc. To the extent that any such information is judged by an issuer to be material under the *Basic* and *TSC Industries* Supreme Court definitions, registrants should continue to be free in their discretion to furnish such disclosures on Form 8-K or other broadly disseminated public means in accordance with Regulation FD. Also, NACCO believes that any newly required climate change disclosure should be principles-based and not highly prescriptive (as is the case now), and registrants and investors would benefit from further Commission guidance (i.e., updating its 2010 Climate Change Guidance) on how registrants might more meaningfully provide climate change disclosure under existing rules, for example under the existing risk factors and MD&A "trends and uncertainties" disclosure requirements. We believe that registrants would benefit also from additional guidance, including by setting forth examples of climate change related issues issuers should consider, as to ways in which climate change issues might trigger disclosure required by the existing rules within and beyond the topics discussed in the 2010 Climate Change Guidance.

If the SEC nonetheless determines to mandate new climate related disclosure requirements, the SEC should be responsible for developing and updating such disclosure requirements. Permitting a third party that is not subject to SEC oversight to promulgate new disclosure rules could result in disclosure requirements that are inconsistent with the federal securities law regime.

Any new climate related disclosure requirements the SEC mandates, and updates thereto, should be governed by the Administrative Procedures Act ("APA"), i.e., undertaken only with notice of proposed and final rulemaking and with ample opportunity for public comment. Should the Commission decide to delegate regulatory responsibility to a third-party framework (like TCFD), registrants would lose the ability to challenge promulgation of the regulatory regime vis-à-vis the APA. Adherence to the APA is important because it provides standards for judicial review if an entity has been adversely affected or aggrieved by an agency action. When the third-party framework decided to modify/update their reporting framework requirements, NACCO could be left with no legal remedy and thus no choice but to comply.

Conclusion

NACCO Industries appreciates the opportunity to submit these comments in response to the Commission's request for public participation. We believe the Commission's requirements to address information that a reasonable investor would want to know precludes additional development of climate metric reporting requirements.

However, if the Commission determines additional climate related disclosure metrics should be mandatory, NACCO Industries believes it is the duty of the Commission to develop those standards internally. Standards development should be consistent with the Commission's mission and statutory authorities, reporting requirements, and longstanding materiality principles. Even if there were legal authority for the Commission to delegate this important work to a private entity, there is simply too much opportunity for any standards that are developed to be diverted by special interests from the primary purpose of informing investors and their investment decisions.

NACCO Industries also believes any additional disclosure requirements should be based on financial materiality, provide appropriate legal safe harbors and involve appropriate due process and sufficient time to develop appropriate processes and control.

If you have any questions or concerns regarding these comments, please do not hesitate to contact me.

Very truly yours,

J.C. Butler, Jr.
President and Chief Executive Officer
NACCO Industries, Inc.