

June 13, 2021

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

Re: Public Input on Climate Change Disclosures; <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>

Dear Ms. Countryman:

Introduction

The Society for Mining Metallurgy & Exploration submits these comments in response to the Securities and Exchange Commission's (SEC or Commission) March 15, 2021 statement requesting public input on whether current disclosure requirements adequately inform investors of the "known material risks, uncertainties, impacts and opportunities" posed by climate change and whether "greater consistency can be achieved." The March 15 notice also more generally requests public comment on environmental, social and governance (ESG) risks. To that end, the Commission poses fifteen (15) questions (including numerous sub-categories of questions) to assist in its evaluation of climate disclosure requirements. In this comment letter, we respond to some of those questions.

The Society for Mining Metallurgy & Exploration ("SME")

Who we are –SME is a professional society formed under Section 501(c) (3) of the Internal Revenue Code with more than 15,000 members serving the minerals industry? Its members include engineers, geologists, metallurgists, educators, students, and researchers. SME also advances the worldwide mining and underground construction community through information exchange, education, and professional development. In supporting responsible mining, SME seeks to educate lawmakers, policymakers, and the general public on the complex technical issues associated with mineral development through technical briefing papers, studies, scientific and engineering articles.

Experience in Prior SEC Rulemakings – SME has participated in prior SEC proceedings including the 2018 rules modernizing the property disclosure requirements for mining registrants, generally referred to as Regulation S-K 1300, 83 Fed. Reg. 66344 (December 26, 2018). Regulation S-K 1300 was the culmination of SME's October 1, 2012 Petition for Rulemaking to the Commission to amend Industry Guide 7, the longstanding benchmark for SEC disclosures concerning mining properties and development. It was the goal of that rulemaking petition, and in large part the ultimate result of S-K 1300, to more closely align the Commission's disclosure requirements and policies for mining properties with current industry and global regulatory practices and standards.

Need for Additional Regulations Not Established - The first question posed by the March 15 notice is "how can the Commission best regulate, monitor, review and guide climate change disclosures in order to provide more consistent, comparable and reliable information for investors while also providing greater

clarity to registrants as to what is expected of them?” This question presumes that additional rulemaking is necessary and inevitable. The better question is whether and not how the SEC should issue additional climate risk disclosure standards in the first place.

Congress has yet to enact comprehensive legislation regulating greenhouse gas emissions (GHG), nor has Congress passed laws mandating disclosure of climate related risks. Although the preamble to the SEC’s 2010 interpretive guidance warned of the consequences of pending climate change legislation, including bills to impose a “cap and trade” system, ultimately none of those bills secured passage. *See*, 75 FR 6290 (February 8, 2010). Fn. 4. As companies are already disclosing climate risks that meet traditional standards of materiality, the SEC should not adopt any broader disclosure standards absent congressional action.

The SEC’s mission is to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation. It does not have any authority to independently establish environmental disclosure standards for the conduct of GHG emitting operations by public companies subject to its jurisdiction. Congress has not given the SEC the authority to 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. Irrespective of the merits of such additional disclosure in other contexts, it is not the Commission’s prerogative to mandate disclosure unless it is material within the meaning of the federal securities laws, i.e., important to investment decisions concerning securities.¹

Rulemaking is at best premature – the SEC must complete its Review of the 2010 Climate Change Guidance before Mandating Climate Risk Disclosures

Even if the SEC decides to proceed with rulemaking, it should first assess the effectiveness of the 2010 Climate Change Guidance and whether there are gaps in providing material information on climate-related risks to investors. Since the issuance of the 2010 guidance, mining companies and other businesses have been reporting voluntarily on climate risks to their investors to the extent that such risks may be material. On Feb. 24, 2021, then Acting Chair 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.² The Commission should complete this work first, publicize the results, and provide an opportunity for public comment on its analyses of the data and recommendations. The SEC should complete that review before imposing additional mandatory disclosure standards.

Summary of Comments

If regulations are drafted concerning disclosure standards for climate change and its potential impact on SEC registrants, the Commission should avoid the imposition of prescriptive, one-size-fits-all standards of reporting for all companies, or even for all companies in specific industries like mining. The Commission should also avoid the imposition of detailed, burdensome requirements on specific industries regarding any climate-related disclosures, recognizing that overall mandate of the federal securities laws already requires the disclosure of “material risks” to investors. Attempts to pigeonhole industries with specific and often irrelevant disclosure mandates relating to climate change is a proven recipe for the generation of meaningless data that obscure the truly material information being disclosed.

¹ *See*, Comments of the National Mining Association (June 15, 2021) for a detailed discussion of the legal authority of the SEC to adopt disclosure standards.

² *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-statement-review-climate-related-disclosure>.

For example, mining operations differ dramatically in methods of extraction and commodities produced. Adopting a one size fits all standard requiring the disclosure of detailed metrics about GHG emissions, speculation about the impact of weather events or even pending legislation would impose an unfair burden on many, if not most, mining registrants and would only seek to bury the truly material information needed by investors. For that reason, SME strongly favors a simpler approach to climate change disclosure that provides mining companies and other registrants with general guidelines that provide sufficient flexibility to determine materiality of those disclosures on an individualized basis.

What information related to climate risks can be quantified and measured?

Under current law, public companies generally must disclose developments, known trends, and uncertainties likely to have a *material impact* on the company's financial condition or operations through annual and periodic reporting. See, Congressional Research Service publication "Climate Change Risk Disclosures and the Securities and Exchange Commission." (April 25, 2021) Such material risks may include the potential impact of pending or proposed legislation, including laws designed to establish requirements for climate related risks. It would also include risks associated with weather or climate related events.

While it may be possible to measure GHG emissions and some other impacts from individual operations, the question is whether it would be appropriate to establish prescriptive requirements to do so and report them to the Commission, given the widely divergent carbon footprints of individual mining operations. Imposing detailed requirements for the collection of information would have no meaningful impact on the assessment of any material risk to shareholders. As to assessing the risks of climate legislation, the legislative and regulatory landscape has shifted from one end of the spectrum to the other, making it more challenging for companies to determine what impact any specific law or regulation might have upon their operations or business over the long term.

Climate change issues may be or become material risks for an individual operator, but the issue and/or extent of that risk will vary significantly from one mining company to another. For example, a law prohibiting or curtailing the burning of fossil fuels would have a significant adverse impact on coal mining and use.³ Such a limitation on burning fossil fuels would have less impact on a wide variety of other mining operations if and to the extent they were able to secure other sources of electricity for their operations at reasonable cost.

Interestingly, the infrastructure for alternative fuel sources such as wind turbine and solar panels requires the use of numerous minerals, metals, and mineral products; see for example the Mineral Education Coalition's fact sheets for solar panels and wind turbines.⁴ This would create potential competitive advantages for producers of these minerals in any transition to alternative energy sources, but would also create challenges due to the lengthy regulatory delays in securing permits for mining operations located in the United States. Alternative energy providers and manufacturers of such equipment could also face challenges from their reliance on foreign supply chains to source rare earth and other minerals, such as lithium and rare earth elements. The disclosures necessary to describe these countervailing business circumstances and pressures are necessarily complex, casting further doubt on the advisability of general disclosure mandates about GHG emissions or the impact of climate change generally.

³ Because coal is used as the basic source for a wide variety of products, some coal mines would remain open even in the event of a ban on coal burning. See Coal—A Complex Natural Resource: US Geological Survey Circular 1143, 2003, 51 p.

⁴ https://mineraleducationcoalition.org/wp-content/uploads/mec_fact_sheet_solar_panel_07-19.pdf and <https://mineraleducationcoalition.org/wp-content/uploads/MEC-Fact-Sheet-Wind-Turbines.pdf>.

The Commission should provide flexibility to companies in describing the risks of climate related events, laws, or regulations. In particular, there is no single rule or regulation that may be developed to account for the diverse risks and opportunities faced by mining companies in connection with climate change events or legislation.

The highly variable impacts of a potential climate law, regulation, or guideline on individual registrants dictates against the utility of the SEC attempting to write detailed climate change disclosure rules. The SEC should continue to maintain its general standard of defining material risk per Regulation S-K without any special accommodation for the effects of climate change or GHG emissions.

Delegation of Authority to Outside Groups

The difficulty is sharing this type of responsibility with “other industry participants,” a group that will necessarily include environmental activists, regulators and others who are pursuing missions that are entirely separate from the SEC’s missions. The companies whose disclosures are being prescribed and the investors who will be reviewing those disclosures should be the ones in the dialogue over setting any standards.

The SEC should not, for example, delegate its authority over defining the nature and types of climate risks to outside groups like the Task Force on Climate-Related Financial Disclosures. The Task Force advocates for the transition to a low carbon economy and away from fossil fuel use. It is not the SEC’s job to set environmental standards or to advocate for any particular policy result such as a reduction in fossil fuel use. Its only role is to ensure the proper disclosure of material risks to investors.

SME appreciates the opportunity to provide feedback on this important issue. We look forward to evaluating and providing additional comments in response to any future Commission proposals. If you have any questions about this letter, or if we can be of assistance in any way, please feel free to contact the undersigned at [REDACTED] or [REDACTED].

Sincerely,


David L. Kanagy
Executive Director and CEO