



June 13, 2021

U.S. Securities and Exchange Commission
Ms. Kristina Wyatt, Senior Special Counsel
Attn: Climate Change Disclosures
100 F Street, NE
Washington, DC 20549

afpm.org

Submitted Via Webform: <https://www.sec.gov/>

RE: Public Input Welcomed on Climate Change Disclosures¹

Dear Ms. Wyatt:

The American Fuel & Petrochemical Manufacturers (“AFPM”) welcomes and is thankful for the opportunity to comment on the U.S. Securities and Exchange Commission’s (“SEC” or “Commission”) “Questions for Consideration” provided in the March 15, 2021 public statement. The public statement seeks input on questions concerning whether current climate change disclosures adequately inform investors. AFPM’s response focuses on guidelines to which the Commission should adhere as it considers whether mandatory climate reporting is warranted.

I. AFPM’s Interest in the Public Statement

AFPM is a national trade association representing the U.S. refining and petrochemical manufacturing industries. AFPM members provide jobs, directly and indirectly, to more than three million Americans, contribute to our economic and national security, and enable the production of thousands of vital products used by families and businesses throughout the United States. AFPM’s and its stakeholders’ interests are directly affected by any potential rulemaking as many of its members are publicly traded companies subject to SEC regulation.

AFPM supports transparent and timely disclosure of information shareholders need to make sound investment and voting decisions. AFPM’s publicly traded members regularly prepare filings and provide disclosures as specified in Regulation S-K concerning relevant and material aspects of their financial performance and prospects, which may include climate change and ESG information. Many members also discuss climate change and ESG issues in voluntary forums, such as company web pages and sustainability reports of various kinds. These supplemental disclosures enrich public discussion of climate change and ESG issues, but may not be material under securities law and should not be conflated with disclosures required under Regulation S-K applying the longstanding principles of financial relevance and materiality, upon which the securities markets rely.

¹ U.S. Securities and Exchange Commission, Public Input Welcomed on Climate Change Disclosures (Mar. 15, 2021), <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.



As the Commission explores changes to the regulatory disclosure framework permissible under its existing legislative authority, AFPM urges the Commission to maintain a focus on the materiality standard that has served to ensure the reliability and efficiency of securities markets.

AFPM is willing to serve as a resource to the SEC as it determines whether and how to further address climate change disclosure. AFPM's comments should not be taken to express any view on the prudence or importance of climate change policies as a general matter, but rather as input on whether rulemaking by the Commission is the most appropriate way to address important policy goals on climate issues. As Commissioner Elad L. Roisman stated in a recent speech "[i]t is entirely reasonable for a person to feel that climate change deserves immediate attention from lawmakers and still question whether the SEC mandating new disclosures from U.S. public companies is an appropriate step for the agency."²

II. The Importance of the Materiality Standard

Materiality is the cornerstone of the disclosure system established in Regulation S-K under the Securities Act of 1933³ and the Securities Exchange Act of 1934⁴ (together, the "Acts").

Materiality is viewed through the lens of the reasonable investor's financial interests. As articulated in two long-standing U.S. Supreme Court cases that have guided our securities markets for decades, material information is information a reasonable investor would consider important in deciding how to vote or make an investment decision.⁵ Facts are only "material" if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."⁶

The materiality standard in effect distinguishes material financial interests from nonfinancial interests that investors may have, such as promoting policy goals. Importantly, this definition does not mean that important disclosures with respect to ESG and climate change are not important to an investment decision.

Regulation S-K requires the reporting of environmental and social issues that bear on the company's financial condition and business prospects, including climate change. In its 2010

² <https://www.sec.gov/news/speech/roisman-amac-2021-03-19>.

³ See <https://www.sec.gov/about/laws/sa33.pdf>.

⁴ See <https://www.sec.gov/about/laws/sea34.pdf>.

⁵ *TSC Industries v. Northway*, 426 U.S. 438, 445 (1976).

⁶ *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).



Climate Change Guidance, the Commission identifies the key disclosure requirements in Regulation S-K that relate to climate change: Items 101, 103, 105 and 303.

- Item 101 requires reporting the material effects (including on capital expenditures, earnings and competitive position) of complying with environmental laws.⁷
- Item 103 requires disclosing material pending legal proceedings, including environmental litigation that is material, and administrative or judicial proceedings arising under environmental laws if such proceedings involve a government entity and could reasonably result in monetary sanctions exceeding a certain threshold (currently capped at a maximum of \$1 million, an amount that is far less than 1% of assets for most public companies).⁸
- Item 105 requires discussing “Risk Factors,” i.e., the material factors that make investing in the registrant speculative or risky.⁹
- Item 303 requires the disclosure termed the Management’s Discussion and Analysis of Financial Condition and Result of Operations (“MD&A”). The MD&A requires discussion of known trends or uncertainties that are reasonably likely to have a material effect on the company’s financial condition or operating performance.¹⁰

Regulation S-K is based in materiality, and such materiality determinations depend on each registrants’ individual circumstances. Regulation S-K thus acknowledges the diversity of registrants and the diversity of the risks they face—a risk that is material for one registrant may not be material for another. That is why AFPM has concerns with an approach that deems some information universally material to investors.

One-size-fits-all climate reporting requirements could require some registrants to disclose climate-related information that is not material to their specific business operation or investors and adds burdensome costs to corporate reporting. The ultimate decision concerning materiality should be a principles-based determination made by each registrant depending on their individual circumstances.

AFPM is concerned that overly prescriptive disclosure requirements would not be adequately tailored to specific companies’ material climate change matters and processes and are unlikely to give companies the latitude needed to provide targeted material information to investors about individual companies’ climate change business considerations.

⁷ 17 C.F.R. § 229.101(c)(2)(i), 101(h)(4)(xi).

⁸ 17 C.F.R. § 229.103.

⁹ 17 C.F.R. § 229.503(c).

¹⁰ 17 C.F.R. § 229.303.



III. The Value of the APA

If the SEC moves forward, it should do so through a process that comports with the Administrative Procedure Act (“APA”), so all stakeholders have an opportunity to comment on specific proposals and help address the challenges in this complex issue of climate disclosure.

As part of this process, AFPM believes it is critical for the SEC to articulate why it believes existing disclosure requirements are deficient and why mandatory reporting will materially alter the total mix of information made available in a manner that enhances investors’ understanding of financial performance.¹¹ The total mix of information is voluminous, particularly in energy markets. Energy is traded globally, has highly inelastic demand, and features some of the most extensive scrutiny by market analysts and information services.

We also believe it is incumbent on the SEC to precisely delineate any additional requirements it seeks to impose and demonstrate how they would cure the existing regulation’s deficiency.¹²

Finally, the SEC must allow an opportunity for public comment under APA notice-and-comment procedures.¹³ AFPM believes that the SEC should provide companies with clear expectations and advance notice of a possible change, and should seek thoughtful consideration and input from all market participants while providing a long enough period for companies to respond, prepare, and adapt.

IV. Additional Considerations

If the SEC issues a proposed rule, there are several additional considerations AFPM respectfully suggests the SEC contemplate.

First, AFPM does not think that the Commission should outsource the development of a mandatory reporting framework to a non-governmental third party. There are numerous sources the Commission can consult while retaining final and independent decision-making authority. Private entities do not have the same transparency and participation requirements because they are not governed by the APA.

Second, given AFPM members’ long experience with EPA’s regulatory reporting program, AFPM is committed to being a resource to the Commission as it considers the climate, emission, and other data already being collected and reported by companies. For example, EPA’s Greenhouse Gas Reporting Program (“GHGRP”) requires reporting of GHG data from large GHG emission sources, which EPA makes publicly available through its “Facility Level

¹¹ *Cf. Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

¹² *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹³ 5 U.S.C. § 553(c).



Information on Greenhouse gases Tool.”¹⁴ Through websites and climate, sustainability, or other reports, many AFPM members voluntarily provide climate and other information as a result of shareholder engagement, even though such information is not presently required to be disclosed by the SEC. Indeed, a significant subset of public companies across all sectors voluntarily disclose climate information. Investors have large quantities of information to use in evaluating climate change and ESG issues, and can actively engage with companies to obtain additional information. AFPM shares the Commission’s concern about how to ensure the information is reliable, consistent, and comparable.

Third, the Commission should ensure that only *material information* is required to be “filed” with the SEC. Relatedly, to the extent the Commission pursues a rulemaking with new disclosure requirements, such requirements should only have to be “furnished” and not filed. Given that many such climate disclosures are often (i) forward-looking, (ii) include information that is based on assumptions or for which there is not a universally-established set of definitions and metrics, and/or (iii) not material, registrants should not be subject to strict liability for such disclosures. For these reasons, the SEC should consider providing a safe harbor for climate change disclosures to limit registrants’ potential liability, as is customary for forward-looking statements accompanied by meaningful cautionary statements.

Finally, any new requirements should be phased in over time. New requirements, especially those without an established or uniform market practice, will likely entail registrants collecting new information or facing new burdens concerning their information collection activities, and the Commission should afford registrants the opportunity to develop the expertise, practices, and resources needed to comply.

Conclusion

AFPM supports the SEC’s goal of maintaining fair, orderly and efficient markets through transparent and timely disclosure of material information. AFPM urges the Commission to adhere closely to the original and abiding purposes of the Acts to ensure the reliability and efficiency of the securities markets. Climate and other ESG issues can and should be disclosed mandatorily only according to the longstanding rubric of materiality. Beyond that, the widely varying non-financial interests of investors are best served by a robust, flexible and dynamic public discourse in which companies participate to the extent their particular investors, corporate objectives, and strategies dictate.

AFPM thanks the SEC for the opportunity to comment on the Public Statement. Please contact the undersigned if you wish to discuss these issues further.

¹⁴ Facility Level Information on GreenHouse gases Tool (FLIGHT), <https://ghgdata.epa.gov/ghgp/main.do>.



Respectfully submitted,

Tyler Kubik
Associate Counsel

