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Henry J. Massman, IV, Treasurer
Stephen E. Sandherr, Chief Executive Officer
Jeffrey D. Shoaf, Chief Operating Officer

June 17, 2022

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

RE: File No. S7-10-22; Release Nos. 33-11042, 34-94478: The Enhancement and Standardization of Climate-Related Disclosures for Investors

Dear Ms. Countryman:

On behalf of the Associated General Contractors of America (AGC), I respectfully submit the following comments in response to the notice of proposed rulemaking concerning the disclosure of climate-related information (referred to as the "proposed regulations").

AGC is the leading association for the construction industry. AGC represents more than 27,000 firms, including over 6,500 of America's leading general contractors, and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings and industrial facilities, highway and public transportation infrastructure, water and wastewater systems, flood control and navigation structures, defense installations, multi-family housing, and more. The construction industry has played a powerful role in sustaining economic growth in the United States, in addition to producing structures that enhance productivity and quality of life. As outlined below, we provide the following comments herein:

- **I. The Construction Industry is Committed to Environmental Stewardship**
- **II. AGC's General Business Concerns with the Proposal**
  - A. The Proposal Fails to Account for the Undue Burden on the Regulated Community
  - B. The Proposal Threatens to Shroud Material Investment Disclosures Thereby Hampering the Ability of Reasonable Investors to Make Investment Decisions
- **III. AGC's Construction-Specific Concerns with GHG Emissions Reporting Generally**
- **IV. AGC's Concerns with Proposed Scope 3 Emissions Reporting Requirement**
  - A. The Construction Industry Faces Unique Challenges in Collecting GHG Emissions Data
- **V. Furnished vs. Filed and Independent Auditing of Climate-Related Financial Statement Metrics**
- **VI. The SEC's Legal Authority**
- **VII. Additional Concerns**
- **VIII. Conclusion**

I. The Construction Industry is Committed to Environmental Stewardship

The construction industry is the project delivery system for building a safer, healthier, and environmentally sustainable future. Our nation cannot simply wish for a greener future; it must build it. Likewise, the construction industry must be an integral part of the policymaking processes to help ensure that construction firms and the construction workforce can continue to grow and prosper. AGC is concerned about onerous requirements that add regulatory and other roadblocks to improving the efficiency of our infrastructure—working against the goals of the Administration.

In recent years, AGC has undertaken significant steps to better understand, and educate our members about, the challenges and opportunities the construction industry faces related to climate change. Over the decades of effort on sustainability in general, contractors have improved their operational efficiency and environmental performance on projects through advancements in equipment, fuel, technology, and practices such as recycling and lean construction that reduce waste.

According to a recent survey AGC conducted on sustainability practices, almost 80 percent of respondents have policies in place to encourage recycling.[1] More recently, environmental, social and governance (ESG) considerations are being looked at by construction industry stakeholders — lenders/investors, insurers, public- and private- sector developers of real-estate/infrastructure/industrial projects as well as their customers and clients. AGC expects the demand for, and company disclosure of, information about climate change risks, impacts, and opportunities to continue to grow—even without this proposed rule.[2]

In the first half of 2021, AGC convened a Climate Change Task Force to further review these issues, and in July 2021, the Task Force issued its final report and recommendations on ways to position construction firms, and the entire construction industry to respond to changing climate.[3] The report also discusses the top impacts associated with climate change for construction markets and construction firms, as well as provides details on opportunities and challenges specific to many of the projects that AGC members build, spanning all major construction markets.

In light of these and other efforts by the construction industry and industry stakeholders to address climate change, AGC is disappointed by the SEC's proposed framework for climate-related

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[1] AGC conducted the survey during May 2022. At the time of this writing, it is currently unpublished. AGC will make available a summary of the findings upon request.

[2] AGC construction firms are being asked how they are preparing for the impact of climate change on their business (including the impact of extreme weather changes, markets, access to human and material resources, and possible government regulations); the level of greenhouse gas emissions related to their direct, indirect and third party supply-chain operations; and the associated costs of climate change initiatives. Developing methods to estimate the impact of climate change on construction businesses is significantly challenging, particularly with a highly complex, fragmented, and project-based construction process. Some companies are reporting data on their public filings and annual reports, others are voluntarily publishing sustainability reports accessible to their clients and the public and/or voluntarily complying with third-party standards.

[3] AGC of America Climate Change Task Force Final Report & Recommendations July 7, 2021, available at: https://www.agc.org/sites/default/files/Files/Communications/AGC_Climate_Change_Task_Force_Final_Report.pdf.

disclosures in the proposed regulations. The proposed regulations would have **an ongoing deleterious effect on the industry by**, amongst other things:

- Creating new risks for potential liability for publicly-traded (registrant) and privately-held construction firms;
- Diverting capital, time, and other resources away from technological investment and into compliance;
- Creating new incentives to actually scale back greenhouse gas (GHG) reduction goals; and
- Creating significant new inequities and competitive advantages within the industry, depending on how a construction firm is owned and organized.

II. AGC's General Business Concerns with the Proposal

A. The Proposal Fails to Account for the Undue Burden on the Regulated Community

In general, the proposed rule drastically expands the time and capital expenses associated with compliance without reasonably weighing those costs against the risks it purports to guard against. AGC anticipates a significant diversion of corporate leadership's attention and company resources away from developing new products, managing supply chains, reducing costs, and improving customer service in order to comply with these initiatives. These disruptions are not adequately accounted for in the proposed regulations. As such, they will be an undue burden on all companies directly or indirectly subject to the proposed regulations.

While there are some registrant construction firms that would be directly impacted by this proposed rule, the vast majority of construction firms are privately-held. Privately-held firms, theoretically, fall outside of the SEC's jurisdiction. However, the vast scope of this new rule would, in effect, commandeer thousands of these privately-held firms into the SEC's regulatory ambit. The proposal would require these firms to adhere to an inflexible, and in many cases unworkable, disclosure regime. And, as far as AGC can ascertain, the proposal fails to account for privately-held firms' costs to abide by such a disclosure regime.

In addition, and as explained further later in our comments, the sweeping up of privately-held firms under this proposal raises serious questions about the SEC's legal authority to mandate the collection and reporting of data from companies outside of the SEC's jurisdiction.

B. The Proposal Threatens to Shroud Material Investment Disclosures Thereby Hampering the Ability of Reasonable Investors to Make Investment Decisions

As AGC notes in our comment letter to the SEC in response to a request for input on climate change disclosures:

> "AGC strongly urges the SEC not to institute a top-down, one-size-fits-all mandate that would require companies to calculate and report both direct and indirect emissions. Counting supply chain as well as other types of indirect greenhouse gas emissions (associated with sources that the entity does not directly control) in a mandatory reporting scheme would significantly increase costs to public companies and potential legal liability by requiring them to track down information that may be difficult to access or verify and reduce the reliability of the disclosures for investors. The Commission should establish boundaries on the scope of reporting for entities with complex carbon footprints and include limits on legal liability."[4]

Contrary to our suggestion, the SEC's proposed climate-related disclosures are a very rigid reporting regime that is, as one former SEC division director said, "the most extensive, comprehensive and complicated disclosure initiative in decades."[5]

More than 40 years ago, the United States Supreme Court in 1976 established the materiality standard with the landmark decision *TSC Industries, Inc v. Northway*.[6] In recognizing the risk of overwhelming investors with information, the Court established a demanding standard that considers information to be material under the federal securities laws if there is a "substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[7] This standard was extended to determine if information is material to investment decisions as well. Justice Thurgood Marshall wrote for a unanimous Court in expressing concern that an unnecessarily low standard of materiality and the resulting fear of exposure to substantial liability may cause a company to "simply bury the shareholders in an avalanche of trivial information – a result that is hardly conducive to informed decision making." Limiting required disclosures to material information is key to providing meaningful and useful disclosures to investors, without imposing unreasonable costs on issuers and their shareholders.

The proposed regulations would instead create a blizzard of new paperwork requirements to be included in a registrant's 10-K, and the disclosure of far too much immaterial information. As the SEC previously noted in a section on Management's Discussion and Analysis (MD&A) disclosure from its 2010 *Guidance Regarding Disclosure Related to Climate Change*:

> "The nature of certain MD&A disclosure requirements places particular importance on a registrant's materiality determinations. *The Commission has recognized that the effectiveness of MD&A decreases with the accumulation of unnecessary detail or duplicative or uninformative disclosure that obscures material information*. Registrants drafting MD&A disclosure should focus on material information and *eliminate immaterial information that does not promote understanding of registrants'*

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[4] AGC letter to Securities and Exchange Commission (June 11, 2021); available at: https://www.agc.org/sites/default/files/Galleries/enviro_members_file/AGC%20Letter%20to%20SEC%20Climate%20Disclosure%20-%20FINAL%206%2011%202021.pdf.
[5] Available at: https://www.wsj.com/articles/sec-to-float-mandatory-disclosure-of-climate-change-risks-emissions-11647874814
[6] 426 U.S. 438 (1976).
[7] *Id.* at 448-49.

> *financial condition, liquidity and capital resources, changes in financial condition and results of operations*" [Emphasis added].[8]

The proposed regulations would turn this standard on its head by presuming a disclosure framework of "more is better." In balancing the priorities for limiting information disclosed on form 10-K to that which is material to investors, with the proposed regulations' disclosure of, for example, short, medium and (especially) long-term climate risk, the net effect of the proposed regulations will be to bury pertinent, *material* investment information under a mountain of *immaterial* information for many reasonable investors.

The physical climate system and the global economy present too many unknowns to give rise to a set of stable, coherent, and actionable definitions of climate financial risk. For many registrants, it will be too difficult to project what the impact of long-term risks will be and could conclude that it is better to over disclose, and thus dilute other disclosures and pertinent information.

III. AGC's Construction-Specific Concerns with GHG Emissions Reporting Generally

The U.S. Environmental Protection Agency (EPA) estimates that the construction industry emits around 1-2 percent of the total U.S. manmade GHG emissions.[9] These emissions come from equipment use and energy consumption on jobsites. In discussions with AGC, contractors have provided multiple examples of strategies to reduce emissions through choices about equipment and vehicles, efficient lighting and jobsite facilities (e.g., trailers), and even the power tools used on projects. For example, routine equipment maintenance and voluntary "no idling" policies could lead to reduced fuel consumption and related emissions.

AGC members have varied sources of emissions and likewise varied and limited options that are feasible for them to reduce emissions. On top of the unique attributes for each individual construction project (scope, purpose, materials used), each construction firm itself will have unique equipment and energy needs, so much so that meaningful comparisons in carbon performance will be impossible—regardless of the amount of data collected. The SEC is proposing to require an overwhelming amount of data that will obscure material information for reasonable investors to

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[8] Available at: https://www.sec.gov/rules/interp/2010/33-9106.pdf

[9] There is not a definitive percentage of GHG emissions for the construction industry. AGC uses the estimate of 1-2% of U.S. total emissions based on two resources. The U.S. EPA inventory of GHG emissions and sinks indicates that the equipment from construction and mining combined emitted 1.1 percent of total U.S. manmade GHG emissions in 2019. This does not reflect electricity use onsite. *See* https://www.epa.gov/sites/production/files/2021-04/documents/us-ghg-inventory-2021-main-text.pdf. Another report from the U.S. EPA focuses solely on construction and estimates that construction industry accounts for 1.7 percent of total U.S. GHG emissions. *See* U.S. Environmental Protection Agency, Potential for Reducing Greenhouse Gas Emissions in the Construction Sector, February 2009, archived copy available online at https://archive.epa.gov/sectors/web/pdf/construction-sector-report.pdf. This report is dated; however, it is the only comprehensive look at the construction industry's emissions as well as the intensity of those emissions. The construction industry's carbon intensity is low, meaning a small amount of emissions come from many discrete sources (i.e., equipment, project sites).

determine if they can make an investment return.[10] Furthermore, as discussed below, many of these variables are outside the scope of a contractor's control.

AGC recently conducted a sustainability reporting and practices survey[11] and the results are illustrative about the challenges the construction industry would face if the SEC moves forward with its proposed Scope 3 reporting protocol. Of the respondents to the survey:

- Only 14 percent currently report GHG emissions on *any* project (emphasis added). Six percent report their GHG emissions voluntarily, and 8 percent are required to do so.

- Only 11 percent calculate embodied carbon of materials used on [a] project.

- 61 percent have *zero* full-time, in-house employees dedicated to sustainability (e.g. greenhouse gas reporting, ESG, green building, sustainable purchasing, etc.). An additional 15 percent have an employee with part-time responsibilities only.

As the survey shows, most construction firms do not currently have systems in place to collect and meaningfully report GHG emissions data to registrant companies in order to comply with the proposed Scope 3 emissions reporting requirements.

For commercial construction companies, climate data is not easily aggregated or consistently measured throughout the business's footprint. Many construction firms manage a highly fragmented multi-employer workforce that uses downstream vendors and materials suppliers across multiple jobsites. Some of those businesses may already report GHG estimates. For others, their data collection and analysis processes may be nonexistent or evolving. Data collection and analysis processes continue to evolve, as do the standards for auditing and assurance of climate and ESG information. A requirement to collect information from suppliers, subsidiaries, purchasers, or consumers would impact the reliability of the relevant data. There could also be significant roadblocks related to data accessibility, sharing, or privacy—creating problems for both reporting and assurance.

Specifically in the case of commercial construction, it is difficult to quantify direct mobile source emissions from equipment on the jobsite that the contractor owns or directly controls, as testing methods and calculations are subjective and inaccurate at best. Moreover, it becomes nearly

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[10] For the purposes of these comments, AGC assumes a reasonable investor is someone who seeks a positive return on their investment. While the SEC states in the proposed regulations that some investors are requesting detailed emissions data from registrants, it should be noted that many, if not all, of these investors are also requesting that companies actively reduce and/or eliminate their GHG emissions. See, for example, Blackrock CEO Larry Fink's 2022 Letter to CEOs: "…We are asking companies to set short-, medium-, and long-term targets for greenhouse gas reductions." Available at: https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter. The SEC should distinguish between the demands of a "reasonable investor" and one focused on policy outcomes related to GHG emissions.

[11] AGC conducted the survey during May 2022. At the time of this writing, it is currently unpublished. AGC will make available a summary of the findings upon request.

impossible for a contractor to independently collect and verify emissions data associated with material inputs or the outputs of a completed project.

IV. AGC's Concerns with the Proposed Scope 3 Emissions Reporting Requirement

The proposed rule would require all registrants other than Small Reporting Companies (SRCs) to track and disclose their Scope 3 emissions—which are defined in the regulation as eight "upstream" and seven "downstream" [12] activities encompassed in a registrants' value chain—if the emissions are determined to be material, or if the registrant "has set a GHG emission reduction target or goal that includes its Scope 3 emissions."[13] The value chain is further defined as including upstream activities that:

> "…May include activities by a party other than the registrant that relate to the initial stages of a registrant's production of a good or service (e.g. materials sourcing, materials processing, and supplier activities),"[14]

Downstream activities are defined as including:

> "…Activities by a party other than the registrant that relate to processing materials into a finished product and delivering it or providing a service to the end user (e.g. transportation and distribution, processing of sold products, use of sold products, end of life treatment of sold products, and investments)."[15]

As noted earlier, most construction firms are privately-held, and thus outside the scope of the proposed regulations. Therefore, AGC's primary concern with the proposed regulations is the inclusion of a new Scope 3 reporting regime for registrants, which would have the effect of mandating emissions tracking and disclosure for many, if not most, commercial construction firms.

The Scope 3 emissions standard developed by GHG Protocol is still relatively new and there remains significant uncertainty about the data and methodologies necessary to achieve a robust Scope 3 reporting system. It is important to note that Scope 3 emissions are also "overlapping" emissions with Scope 1 and Scope 2 emissions. In other words, one company's Scope 1 emissions are another company's Scope 3 emissions, and vice versa. In the proposed regulations, registrants who determine that their Scope 3 emissions are material,[16] or those who have set emissions reduction targets would thus require privately-held construction firms to track and report their Scope 1 and 2 emissions, as well as data, such as embedded carbon in building materials, that may or may not be available. The utility of this information to reasonable investors is low. The disclosures

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[12] Proposed CFR § 229.1500.
[13] Proposed CFR §229.1504(c)(1).
[14] Proposed CFR § 229.1500(t).
[15] *Ibid.*
[16] According to an unnamed SEC official quoted in the Wall Street Journal, "most companies in the S&P 500 would likely have to report Scope 3 emissions." See *SEC Floats Mandatory Disclosure of Climate-Change Risks, Emissions*, available at: https://www.wsj.com/articles/sec-to-float-mandatory-disclosure-of-climate-change-risks-emissions-11647874814.

will be an exercise in data gathering rather than having a meaningful impact on emissions reduction, where corporate resources would be more usefully deployed.

Additionally, AGC has concerns that the effect of mandating Scope 3 emissions disclosure would actually create a perverse incentive for registrant companies to curtail, or eliminate entirely, GHG reduction goals that include Scope 3 emissions. The net effect would be to set less ambitious goals for GHG reductions or setting no goals at all.

AGC is also concerned about how this proposal could create significant new competitive disparities within the industry between registrant companies and non-registrant companies. A registrant company that concluded its Scope 3 emissions are material, or one that had set a Scope 3 emissions reduction target or goal, would henceforth have to demand emissions data from their subcontractors, whereas a non-registrant company would not. This could place the registrant company at a competitive disadvantage relative to their non-registrant competitors.

As outlined elsewhere, collecting emissions data from subcontractors, especially in construction, can be particularly challenging. Requiring such disclosures of subcontractors could put into conflict other ESG priorities, such as meeting contractual obligations, or internal goals, for contracting or subcontracting to disadvantaged and minority businesses under the federal Small Business Act program, federal-aid transportation Disadvantaged Business Enterprise program, and state, local or publicly-held business's women-owned or minority-owned business enterprise programs.

It is also important to note that, in the cost analysis of the proposed regulations, the SEC notably does not include an analysis of the financial impact Scope 3 emissions disclosure will have on private companies. This is an oversight, as many AGC members perform work for registrants that would qualify as both upstream and downstream activities as defined in the proposed regulations.

A. The Construction Industry Faces Unique Challenges in Collecting GHG Emissions Data

While AGC has taken proactive steps to better understand the industry's impact on climate change, we have also emphasized some of the limitations that the construction industry faces in assessing and reducing its environmental impact. Importantly, contractors have direct control over *only* the means and methods of the construction process.

With rare exception, AGC members do not decide what to build or where to build or determine how structures will appear or how they will perform. Additionally, while the industry has taken strides to develop tools to track, for example, embedded carbon in building materials and/or on-site carbon emissions, these tools are still in their infancy and will need time to develop.

The construction industry faces many unique challenges in both tracking and reporting GHG emissions data, which would add to the difficulty of registrants disclosing their Scope 3 emissions. Some of these unique challenges include:

- Construction firms conduct most of their work on project-specific job sites, most of which are not owned/operated by the firm. Each project and job site is unique, including, for

example the equipment, subcontractors, and materials used for the project. Whereas there could be fewer variables when tracking GHG emissions at fixed facilities, collecting that data on construction job sites has proven to be challenging.

- Included in the challenges of collecting GHG emissions data from job sites are the job and contract specific use of, for example, on-site energy usage. If a contract specifies that the project owner pays for electricity usage on project, a contractor would have to rely on the owner to willingly provide them with information about the electricity usage on the site. Some contractors have relayed to AGC that this information can be difficult to obtain.

- Additionally, on any given project there could be hundreds, if not thousands, of pieces of equipment and tools used that are not easily tracked—or where the technology to track use or resultant emissions is not widespread or does not yet exist.

- AGC members familiar with tracking have shared with AGC their challenges with Scope 1 and 2 emissions: including availability of data, staff to track down and manually process/enter data, expense and availability of qualified consultants, and the time it took to initiate this type of analysis. Several of these firms are large businesses, and, even so, they do not have the resources and in-house expertise to effectively track and report the vast scope of Scope 3 emissions.

- General contractors vary in their use of subcontractors compared to work that is self-performed. For contractors that perform as a construction management firm, very little work is self-performed. Collecting GHG emissions data from subcontractors can be very challenging.

- Environmental product declarations (EPDs) for materials used in construction projects are increasing in use and availability. They are not, however, currently available for every product. Even if EPDs were universal, capturing and extrapolating that data across an entire portfolio of projects would be a herculean task—and one that could have to be repeated anew each year with varying results dependent on the projects themselves for that reporting period.

- Furthermore, EPDs or sourcing of materials thought of as “green” may not tell the whole story. For example, materials may have supply chain and availability concerns resulting in longer shipping distances (and associated emissions). Other materials may have better environmental performance under a life cycle assessment approach than EPDs.

- Climate policies, such as the SEC’s proposal, that would encourage wide-spread reporting of non-material (and even speculative, especially when conducting medium- or long-term analysis) climate risks, can impact material selection and supply chains leading to shortages of common materials or creating demand for products that are not widely available. This may increase costs for capital expenditures.

- Across industries, the cost for compliance will likely be passed on to consumers. In the construction of infrastructure, that can mean passing along the cost to public owners—which is a detrimental unintended consequence of the rule on the public.

For all these reasons, AGC makes the following recommendations regarding Scope 3 emissions reporting in the proposed regulations:

- Scope 3 emissions reporting should be optional for registrant companies.
- To the extent a registrant elects to disclose their Scope 3 emissions, allow registrants to disclose only the Scope 3 categories they deem material to investors.

V. Furnished vs. Filed and Independent Auditing of Climate-Related Financial Statement Metrics

The proposed regulations would treat required climate-related disclosures as "filed" and therefore subject to potential liability under Exchange Act Section 18.[17] AGC urges the Commission to allow disclosures under any reporting framework to be furnished to, rather than filed with, the SEC. In reporting pursuant to any new framework, registrant companies should have the flexibility to disclose what they know, or can reasonably access, about various climate and ESG metrics, along with an explanation that contextualizes the data if necessary.

Further, the proposed regulations would require registrant companies to consider the impacts of climate-related financial metrics for all line items in the consolidated, annual, audited financial statements. AGC encourages the SEC not to require, in the context of a climate disclosure reporting framework, the certification, third-party assurance, and internal controls traditionally associated with financial reports.

As outlined above, calculating Scope 1, 2, and 3 GHG emissions for constructions firms is extremely challenging and, in some cases, impossible. As the SEC acknowledges, registrant firms will likely encounter "data gaps" in their calculations of GHG emissions.[18] Conflating emissions data, which is necessarily reliant on the use of estimates, proxy data, and other imperfect data collection methods, with the precision and accuracy of financial reporting implies a level of accuracy that is illusory. It is also far beyond the SEC's mission of investor protection, market efficiency, competition, and capital formation.

VI. The SEC's Legal Authority

As the preamble acknowledges, disclosure of GHG emissions is currently required by the EPA under the Greenhouse Gas Reporting Program (GHGRP) for large stationary sources of emissions.[19] Unlike the proposed regulations, however, the authority for the EPA to establish the GHGRP was well established both by Congressional intent and statute.[20]

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[17] 15 USC § 78.

[18] For example, proposed CFR § 229.1504(e)(7).

[19] Notably, the EPA estimates that 85 to 90 percent of annual man-made U.S. GHG emissions have been reported under the program, despite the GHGRP only applying to, generally, (1) direct GHG emissions sources that emit at least 25,000 metric tons of CO2-equivalent (CO2e, the amount of CO2 emissions with the same global warming potential as the number of metric tons of another GHG) per year; (2) fuel and industrial gas suppliers; and (3) facilities with

While the SEC has broad authority to protect investors, and promote efficiency, competition, and capital formation, it has no authority to regulate GHG emissions, or any other form of emissions. The words "emission" or "emissions" do not appear *anywhere* in the text of the *Securities Act of 1933* or the *Exchange Act of 1934*,[21] whereas those words, collectively, appear 1438 times in the text of the *Clean Air Act*.[22] And yet, if the proposed regulations go forward as proposed, the SEC would become the *de facto* primary GHG emissions regulator for the United States. Emissions disclosure under the proposed regulations would dwarf current disclosure rules, and the SEC would assume enforcement of registrants' emissions disclosure, or, in effect, outsource enforcement through shareholder litigation. As such, it is fair to question if such a disclosure scheme falls under existing statutory authorities of the SEC.

The proposed regulations also distort the concept of materiality and what a "reasonable investor" requires to make an investment decision.[23] While there is no doubt a loud chorus of environmentally-focused investment funds requesting additional information from registrants, it is not at all clear that the GHG disclosure regime proposed in these regulations are actually necessary for a reasonable investor to decide where and when to invest. The effect of the proposed regulations would be to elevate significant amounts of immaterial climate-related disclosure into a special status above all other information on a registrant's financial statement, short of actual financial performance.

VII. Additional Concerns

The SEC has not appropriately considered the following—

- **Adequate Time for Public Comment** – The draft proposal is extensive with approximately 700 unique questions on which the SEC is requesting feedback. Even with the extended comment period, the SEC provided only three hours per question assuming the respondent did not sleep or have other commitments (or 45 minutes per question if the respondent worked on this eight hours a day, five days a week). The SEC did not provide enough time to thoroughly ascertain the impacts and prepare substantive and helpful

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underground CO2 injection wells. Using these EPA estimates at face value, the proposed regulations would exponentially increase registrants GHG reporting compliance to account for, at best 10 to 15 percent of "undisclosed" U.S. GHG emissions.

[20] The Consolidated Appropriations Act, 2008 (P.L. 110-161) provided $3.5 million for EPA to develop and publish a rule that would "require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States." In the accompanying joint explanatory statement, Congress directed EPA to "use its existing authority under the Clean Air Act" to promulgate this rule and stated that EPA "shall have discretion to use existing reporting requirements for electric generating units under Section 821 of the Clean Air Act." In its initial 2009 GHGRP rulemaking, EPA also cited Clean Air Act (CAA) Sections 114 and 208 as providing "broad authority to require the information mandated" by the reporting rule.

[21] 15 USC § 77 and 15 USC § 78, respectively. Per Section VIII of the proposed regulations, the statutory authority relies on both the Securities Act and the Exchange Act.

[22] 42 USC § 85.

[23] *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976); see *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (as the Supreme Court has noted, determinations of materiality require "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him...." TSC Industries, 426 U.S. at 450).

feedback. This is especially true when you consider the potential impacts to non-publicly traded companies within the value chain who have not previously had to understand and provide data for registrant SEC filings.

- **Risk** – The proposed rule creates new risks for publicly-traded and privately-held construction firms without sufficient safeguards. The proposal would require filing of GHG emissions data, which carries a significant amount of liability for companies. Instead, this data could be made available or furnished to investors in a way that provides protection against unknowns and the lack of familiarity with reporting the data. The SEC has proposed a safe harbor related to Scope 3, which should be extended to Scopes 1 and 2. Furthermore, due to the uncertainty and unavailability of Scope 3 emissions data in particular, the SEC should expand its proposed safe harbors for such disclosures if registrants choose to disclose.

- **Timeframe** – AGC also is concerned with the aggressive timeline the SEC proposes. The proposed timeline is not workable for *any* issue that is not already being tracked and reported on broadly, much less for climate change risks which are complex and not widely understood. AGC is also concerned with potential staffing shortages and the availability of qualified consultants and other professionals. Some portions of the filing would also need to be third-party verified. It will take a considerable amount of time and expense to comply with the proposal, even for those who are not disclosing Scope 3 emissions.

- **Impact on Small Businesses** – Policies that are overly burdensome or unworkable in practice can strain larger firms and push small businesses and minority-held businesses out of the market—decreasing their ability to compete for work on projects. AGC considers this proposal a "major rule" that will have far reaching impacts on privately held companies (especially small businesses) due to the *de facto* requirements for Scope 3 reporting. The proposal would result in novel legal and policy issues associated with possible new data collection and public availability requirements for publicly traded and privately-held companies. The SEC drastically underestimates the additional time and money companies will need to spend (above what they currently spend) to comply with the proposal. As such, the SEC's Initial Regulatory Flexibility Analysis (IRFA) is insufficient for the purposes of meeting the SEC's obligations under the Regulatory Flexibility Act.

VIII. Conclusion

On behalf of AGC, thank you for considering our comments on the proposed regulations. AGC urges SEC to ensure that any new GHG reporting framework is flexible, principles-based, and materiality-driven – and that SEC aims to provide registrant companies with greater clarity on how to furnish material information about risks and opportunities to investors. The SEC must avoid the pitfalls of a one-size-fits-all mandate that increases costs and liability for businesses. AGC hopes that the SEC will consider these suggestions.

If you have any questions please direct them to Matthew Turkstra, Senior Director, Building and Infrastructure Finance at 202-547-4733, or matthew.turkstra@agc.org.

Sincerely,

Matthew Turkstra
Senior Director, Building and Infrastructure Finance