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June 11, 2021

Submitted Electronically: rule-comments@sec.gov

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

Re: Climate Change Disclosures – Request for Public Input (March 15, 2021)[1]

Dear Chairman Gensler:

The Associated General Contractors of America (AGC) appreciates the opportunity to provide comments to the Securities and Exchange Commission (SEC or Commission) in response to its request for public input on Environmental, Social and Governance (ESG) and climate change disclosures.[2]

AGC of America is the nation's largest and most diverse trade association in the construction industry. The association represents more than 27,000 member companies 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 members are engaged in the construction of commercial buildings, factories, warehouses, highways, bridges, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, and multi-family housing projects, and in-site preparation and utilities installation for housing developments.

Climate change is a critical topic for AGC and its members. The association is currently evaluating how the many anticipated policy initiatives are likely to impact the U.S. construction industry and its markets. Over the decades, 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. ESG considerations are being looked at by construction industry stakeholders — lenders/investors, insurers, public- and private-

[1] The SEC's request for public input is focused mainly on climate-related disclosures in public company filings, but recent statements from SEC Commissioners and staff have indicated that the Commission is considering a reporting framework that incorporates a broader universe of Environmental, Social and Governance (ESG) metrics. AGC's principles and policy positions outlined herein apply to both climate and ESG reporting under the federal securities laws. Notwithstanding, to improving the clarity and comparability of corporate disclosures, AGC urges SEC to take the incremental step of focusing first on financially material climate disclosures where there is sufficient data availability for effective reporting.

[2] *Public Input Welcomed on Climate Change Disclosures* (March 15, 2021). https://www.sec.gov/news/public-statement/lee-climate-change-disclosures

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.[3]

As the SEC evaluates its regulation of climate change disclosures within the context of its integrated disclosure system, AGC respectfully offers the following principal comments:

- AGC supports **voluntary, market-based disclosures** that provide companies with appropriate flexibility. ESG factors differ from company-to-company and should not be applied in a one-size-fits-all manner.
- The SEC's disclosure framework for **publicly traded companies** must remain rooted in the Supreme Court's **well-established financial "materiality" standard** and climate change disclosures are already adequately addressed under **existing rules such as Regulation S-K**.
- AGC maintains that all disclosures should provide **comparable, reliable, accurate information** to investors and be workable for companies of different sizes and industries.
- AGC urges the Commission to **establish boundaries on the scope of reporting for entities with complex carbon footprints** and include **limits on legal liability**.

We also encourage the Commission to provide fair notice, communicate explicit expectations, and adhere to the Administrative Procedure Act when taking future actions related to climate change and other ESG topics.

In addition, AGC is concerned about the Commission using the securities laws to implement policy preferences.[4] Our capital markets are valuable, and they have functioned very well to help people live better lives and achieve prosperity. Our goal should be to ensure that more Americans can participate in those capital markets without attempting to pressure companies into specific policy or business choices. Any disclosure requirements should support the SEC's mission to protect investors, maintain efficient markets, and facilitate capital formation.

Voluntary, Market-based Disclosures

Given the progress that companies have made regarding voluntary ESG reporting (not filed with a particular regulator or government body), AGC strongly maintains that more regulatory

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[3] Some 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 3rd-pary 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, other are voluntarily publishing sustainability reports accessible to client and the public and/or voluntarily complying with third-party standards.

[4] *See, e.g.,* "SEC Announces Enforcement Task Force Focused on Climate and ESG Issues" (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42?utm_medium=email&utm_source=govdelivery

requirements mandating ESG disclosures are not warranted. The number of companies that voluntarily publish annual sustainability reports has grown significantly in recent years. Best practices can help steer the development of a widely approved approach to voluntary ESG reporting without the need for additional regulatory mandates.[5]

It is important to allow companies to have discretion in how they report and discuss ESG information. Each company should maintain the flexibility to determine which ESG factors and related metrics are relevant to it and what disclosure is meaningful for its stakeholders and not necessarily what is identified in various third-party frameworks and standards. Furthermore, some disclosure variability is appropriate, because the relevance of certain ESG factors differs from industry-to-industry and company-to-company, and based on business model, geography, customer base, and other considerations.

Materiality and the SEC's Existing Disclosure Framework for Publicly Traded Companies

The materiality standard, which has long been the foundation of the SEC's approach to determining whether disclosure of information is required, remains the best approach for setting environmental disclosure requirements on a company-by-company basis.

More than 40 years ago, the 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.

This focus on materiality is all the more critical given the broad and largely undefined universe of topics that might fall under the ESG umbrella. AGC encourages SEC to focus its work on climate-related metrics (*see* footnote 1). SEC may seek to enhance its interpretive guidance to meet investors' needs for information material to their financial decision-making consistent with the Commission's Congressionally-mandated mission and authority.

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[5] To advance the work made so far towards more effective ESG disclosures on a voluntary basis, the Center for Capital Markets Competitiveness at the U.S. Chamber of Commerce has developed the following best practices around standalone ESG reports. https://www.projectgo.com/wp-content/uploads/2019/10/CCMC_ESG-Booklet_v4-DIGITAL.pdf

[6] 426 U.S. 438 (1976).

[7] Id. at 448-49.

Regulation S-K and the SEC's existing disclosure framework already require disclosure of climate-related risks and are designed to provide investors with information that bears on a company's financial condition and business prospects.[8] For example:

- Item 101 (Description of Business) specifically requires disclosure of the cost for complying with federal, state, and local environmental laws.
- Item 103 (Legal Proceedings) requires disclosure of the impact of international climate change accords and agreements.
- Item 303 (MD&A) requires disclosure of the indirect consequences of climate change regulation on business trends.
- Item 503 (Risk Factors) requires disclosure of the physical impact of climate change, such as the direct impact on facilities or operations due to rising sea levels and the indirect operational and financial impact on a company's operations due to decreased demand for products or services as a result of warmer temperatures.

The SEC should leverage the existing disclosure standards or framework rather than create new climate change disclosure standards.

In recent statements concerning the involvement of the Commission on climate and other non-financial matters, SEC Commissioner Allison Herren Lee pointed out that absent a duty to disclose, the importance or materiality of information alone does not mandate its disclosure.[9] AGC acknowledges that there may be instances where a certain climate-related, sustainability disclosure not currently itemized above in the prescriptive disclosure requirements may be material to investors in certain industries or on a unique company-by-company basis. However, a broad-based, one-size-fits-all disclosure regime would impose unnecessary costs on many companies to implement systems and produce disclosure that is ultimately not material to investors, except those with niche preferences.

Quantifiability

When possible, disclosure metrics should be grounded in science and data and derived from any consensus that exists in the scientific or other relevant expert community on a given issue. Quantitative, data-based disclosures reduce the inherent ambiguity often associated with qualitative concepts, as different people ascribe different meanings to qualitative concepts, creating the risk of miscommunication and misunderstanding. AGC respectfully encourages the SEC to strike a critical balance between providing comparable, reliable, accurate information to investors and providing the flexibility companies need to accurately reflect the diversity of their climate and ESG risks.[10]

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[8] *See* SEC Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106, 34-61469, and FR-82 (Feb. 8, 2010), available at http://www.sec.gov./rules/interp/2010/33-9106.pdf.
[9] https://www.sec.gov/news/speech/lee-living-material-world-052421
[10] If a framework includes industry-specific metrics, the SEC could provide guidance to issuers with respect to industry classifications (e.g., for companies that operate in more than one industry), as existing industry groupings

Establish Boundaries on the Scope of Reporting for Entities with Complex Footprints and Limit Legal Liability

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.

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 greenhouse gas 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. What is more, a top-down disclosure mandate would force some companies to double- or triple-report.

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 impossible for a contractor to independently collect and verify emissions data associated with material inputs or the outputs of a completed project. A key consideration is that contractors have direct control over only the means and methods of the construction process. It must be recognized that (with rare exception) general contractors do not—

- Decide what to build, or where to build it.
- Determine how structures will appear or how they will perform.

In most cases, contractors implement public and private decisions that others have made and are contractually bound to meet specifications that others have written.[11]

(e.g., NAICS codes) may not always be appropriate for a given business's metrics or risks. Consistent with a principles-based approach to climate and ESG reporting, companies should have the flexibility to report based on industry standards that are relevant to them, irrespective of their specific industry categorization(s).

[11] The public frequently blames the contractor for environmental problems not of its making or expects more environmental improvement than contractors can deliver.

In addition, and for the reasons stated above, 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, public 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, AGC encourages the SEC not to require in the context of a climate or ESG reporting framework the certification, third-party assurance, and internal controls traditionally associated with financial reports. Irrespective of whether disclosures are furnished or filed, the costly process of internal and external review would be a significant cost and liability burden on public companies.

AGC Responses to SEC's "Questions for Consideration"

Below please find AGC's detailed responses to some of the questions posed in the March 15, 2021, request for public input.

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> **QUESTION: What is the best approach for requiring climate-related disclosures? For example, should any such disclosures be incorporated into existing rules such as Regulation S-K or Regulation S-X, or should a new regulation devoted entirely to climate risks, opportunities, and impacts be promulgated?**

AGC does not believe that a new regulation or standard related entirely to climate risks, opportunities and impacts is required. The securities laws and SEC regulations require public companies to provide disclosures in such forms as audited financial statements, quarterly and annual statements on forms 10-Q and 10-K, and individual sections within reports, such as the Management Discussion and Analysis. AGC believes that **materiality** should remain as the cornerstone of any climate change disclosures for publicly traded companies and such disclosures should remain within the Regulation S-K and Regulation S-X framework.

At the current stage of climate change science, it is difficult to accurately predict short term or future climate change impacts accurately or with some degree of statistical confidence. The necessary degree of precision is already incorporated into the concept of materiality (or immateriality), and one's reasonable judgment of what is material is limited as the attainable degree of precision decreases. As more information becomes available or the degree of precision of climate change impacts are known, the materiality of any climate change impacts and disclosures will reflect that information.[12]

[12] AGC recommends that SEC not require disclosures any more frequently than on an annual basis, considering existing reporting deadlines for metrics that some companies already disclose. For instance, reports pursuant to the EPA's Greenhouse Gas Reporting Program are generally due by March 31 of each year. The SEC should schedule the reporting deadlines under any climate or ESG reporting framework for mid-year, after these existing regulatory deadlines—as the data for climate or ESG disclosures will likely come from these reports.

If the Commission adopts a new climate or ESG reporting framework, SEC should also provide flexibility in the form of an extended transition period for businesses to adjust to the new disclosure regime, as well as scaled compliance obligations for small, medium-sized, and newly public companies.

QUESTION: What are the advantages and disadvantages of permitting investors, registrants and other industry participants to develop disclosure standards mutually agreed by them?

AGC strongly advises and recommends that the SEC allow registrants, banking institutions and other industry participants to develop any required SEC Disclosure Standard. The input from those closest to being regulated is critical to the success in developing workable SEC disclosure standards and practices. We support that the core standard for the disclosure requirement be the well-established "Regulation S-K materiality." Whether the alleged "Climate Change" impact creates material economic "Climate Risk" is the primary question and determines whether and to what extent Climate Risk Disclosure is relevant to the Investor or required by the SEC for any company. In addition, there needs to be a guideline that only information that is "reasonably obtainable" be defined and required on Climate Change Disclosures. Requiring companies to speculate into the unknown future should not be a requirement nor would it help investors make rational economic decisions. Also, the information that is reasonably obtainable and known at the time of the SEC disclosure should be a limitation. Should future information become material or relevant to the Climate Change Disclosure, future SEC filings can be modified as needed by the company.

For example, the construction industry's experience with ASTM Standard E-1527 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" may provide insight into the valuable role banking institutions and industry have played in a standard setting process. That industry ASTM standard was a voluntary effort developed by the ASTM International Committee on Environmental Assessment, Risk Management and Corrective Action. Currently, the ASTM standard practice is used to define what is "good and customary" practice for conducting environmental site assessments by lending institutions, companies, and the government. It has been determined by the U.S. Environmental Protection Agency (EPA) as equivalent to EPA's standards and practices for "All Appropriate Inquiries."[13]

QUESTION: What climate-related information is available with respect to private companies, and how should the Commission's rules address private companies' climate disclosures, such as through exempt offerings, or its oversight of certain investment advisers and funds?

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[13] *See* 42 USC Section 9601(35)(B)(i) and 40 CFR 312.11.

AGC believes that requiring private companies to report climate or ESG-related disclosures would exceed the SEC's mandate and would present significant challenges and excessive compliance costs for companies ill-equipped to deal with these reporting requirements. The SEC's jurisdiction over private company disclosure requirements are limited to solicitations to raise capital, such as through Crowdfunding or Regulation D. Such solicitations are fundamentally different than ongoing public company reporting requirements, including the intended audience and consumers of the information in these disclosures, who are generally more sophisticated, long-term investors. Mandating climate or ESG disclosures for smaller, private companies would dramatically increase their cost of raising capital through exempt offerings, with little, if any, improvement to investor protection. AGC respectfully encourages the SEC to focus its attention on public company disclosures rather than expanding any reporting framework to include private companies not subject to regular public reporting obligations.

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AGC urges SEC to ensure that any new climate or ESG reporting framework is flexible, principles-based, and materiality-driven – and that SEC aims to provide publicly traded companies with greater clarity on how to furnish material information about risks and opportunities to investors. SEC must avoid the pitfalls of a one-size-fits-all mandate that increases costs and liability for businesses without providing quantitative, comparable data to investors.

Thank you for the opportunity to provide comments on the questions that you raised, and we look forward to working with the Commission as it considers ESG and climate-related financial disclosures.

Respectfully Submitted,

/s/ Leah Pilconis

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