NSSGA®

NATIONAL STONE, SAND
& GRAVEL ASSOCIATION

June 17, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 10458-1090

Re: The Enhancement and Standardization of Climate-Related Disclosures for Investors, File No. S7-10-22

Dear Ms. Countryman:

The National Sand, Stone and Gravel Association ("NSSGA") appreciates the opportunity to provide this comment letter to the U.S. Securities and Exchange Commission (the "SEC") to respond to the SEC's rulemaking proposal on The Enhancement and Standardization of Climate-Related Disclosures for Investors published in the Federal Register on April 11, 2022 (the "Proposed Rule"). NSSGA represents aggregates producers, as well as those who manufacture equipment and provide services that support the construction industry. Our members are essential to the work that keeps this country moving, and we represent more than 90 percent of the crushed stone and 70 percent of the sand and gravel produced annually in the United States. Our members employ more than 100,000 hard-working people, who are responsible for the essential raw materials found in every home, building, road, port, dam and public works project.

It should be noted that NSSGA members are doing their part to voluntarily report emission and work every day to improve environmental stewardship. Even though the aggregates sector consistently generates the lowest greenhouse gas emissions footprint among construction materials sectors, NSSGA members are committed to doing our part to address and reverse emissions trends to reduce potential impacts of climate change worldwide. Importantly, aggregates are an essential component as we design and build our cities, waterways, airports, ports and other critical infrastructure to be durable and resilient in addressing future changes in the climate.

While NSSGA members appreciate the work of the SEC to advance our shared climate goals, NSSGA has substantial concerns with the Proposed Rule and believes it to be unnecessary. In light of the SEC's current disclosure requirements and statutory limitations, as well as public company voluntary disclosures in response to investor requests, we write specifically to explain our view that (1) the SEC lacks the legal authority to adopt the Proposed

Rule and (2) the SEC should not adopt greenhouse gas ("GHG") emissions reporting as proposed.

The SEC Lacks the Authority to Adopt the Proposed Rule

NSSGA agrees with SEC Commissioner Hester M. Peirce, multiple state attorneys general, and members of academia, among others, that the scope of the Proposed Rule exceeds the SEC's statutory rulemaking authority.[1]

Neither the Securities Act of 1933, as amended (the "Securities Act") nor the Securities Exchange Act of 1934, as amended (the "Exchange Act") provide the SEC with the authority to mandate disclosure of the climate-related information that would be required by the Proposed Rule. The Securities Act and the Exchange Act authorize the SEC to promulgate rules or regulations requiring disclosure of information that it believes is "necessary or appropriate in the public interest or for the protection of investors,"[2] but that authority is not without limitation. The Supreme Court has "consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare[; r]ather, the words take meaning from the purposes of the regulatory legislation."[3] Furthermore, the Securities Act and the Exchange Act specifically limit the SEC's power to promulgate rules governing disclosure of specific types of information that are closely related to a disclosing company's value and prospects for financial success. Accordingly, Congress, with some exceptions, has consistently restricted the subjects of mandatory disclosures to financial statements, core business information, directors and management, and a description of the securities being sold. And, as the SEC itself explained, when Congress has determined that the SEC should require mandatory disclosure of matters that are not necessarily financial in nature, it specifically directed the SEC by statute.[4] Given the Supreme Court's interpretation and the legislative history of the SEC's enabling statutes, the conclusion that the SEC required reporting of GHG emissions data, specifically Scope 3 emissions, is necessary or appropriate in the public interest or for the protection of investors, is misguided and clearly exceeds the SEC's statutory authority.

In addition, the SEC is required by statute, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider, in addition to the protection of investors, whether the action will

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[1] *See, e.g.*, SEC Commissioner Hester M. Peirce, We are Not the Securities and Environment Commission - At Least Not Yet (Mar. 21, 2022); Patrick Morrisey, West Virginia Attorney General, State of West Virginia, Office of the Attorney General, on behalf of 16 state attorneys general (Jun. 14, 2021); Lawrence A. Cunningham, Professor of Law, George Washington University, Corresponding Author, on Behalf of Twenty-Two Professors of Law and Finance (Apr. 25, 2022).
[2] *See, e.g.*, Section 7 of the Securities Act [15 U.S.C. 77g] and Sections 12, 13, and 15 of the Exchange Act [15 U.S.C. 78l, 78m, and 78o].
[3] *NAACP v. FPC*, 425 U.S. 662, 669 (1976).
[4] *See* Securities and Exchange Commission, Concept Release, Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,922, 23,969-70 (Apr. 22, 2016).

promote efficiency, competition, and capital formation.[5] The Proposed Rule, if adopted, will clearly do the opposite by:

- hindering efficiency by subjecting companies to onerous reporting requirements that are not material and diverting management's attention from running the business;

- constraining competition by making it more difficult for smaller companies to compete with larger companies that have more resources to establish a disclosure program to comply with the Proposed Rule;

- and impairing capital formation by incentivizing private companies to stay out of the public market—or worse, by incentivizing public companies to go private.

Rather than provide the SEC with the authority to require disclosure of GHG emissions data, Congress has explicitly provided this authority to the Environmental Protection Agency (the "EPA").[6] We find it difficult to believe that Congress would pass a law expressly instructing the EPA to collect this information, but that the SEC's authority to require emissions disclosure that may not be material to a company is somehow implied. Rather, absent action from Congress, the SEC does not have the authority to adopt the Proposed Rule.

The SEC Should Not Require GHG Emissions Reporting as Proposed

We believe that there is good reason why the SEC has not been tasked by Congress with requiring GHG emissions disclosure. Specifically, we do not believe that the staff of the SEC, largely comprised of securities law attorneys and accountants, has the experience or expertise to fully appreciate the ramifications of mandating, for example, Scope 3 GHG emissions disclosure. For the same reason, it is unclear how those attorneys and accountants would be able to meaningfully review this information if provided in SEC filings. Calculation of GHG emissions data is an extensive, complicated process that is not only time and labor intensive, but also subject to assumptions and methodologies that will not produce consistent or comparable disclosure from companies. Furthermore, this information is not material to many companies. For these reasons, we oppose the SEC's proposal to require disclosure of GHG emissions.

We wish to highlight that NSSGA members are not opposed to reporting GHG emissions because they are not prepared to do so. To the contrary, many NSSGA members have been reporting GHG emissions for years in response to requests from stakeholders. In fact, best practices for computing GHG emissions have already been established for the industry. Recognizing that our members seek to track, calculate, and report their GHG emissions data efficiently and accurately, NSSGA has invested in hiring scientists and other climate change experts to create a tool for our industry to calculate emissions. The SEC should recognize that

[5] *See* 15 U.S.C. 77b (b); 17 U.S.C. 78c(f).
[6] 42 U.S.C. §§ 7414, 7542.

companies, at least in the aggregates industry, need to produce emissions data to compete in the marketplace, and they need to report it in the way that makes the most sense for their specific industry and those stakeholders who are requesting the information. Applying a one-size-fits-all approach to emissions reporting is nonsensical and will result in companies calculating and reporting GHG emissions data in two different ways: one way that reflects industry-specific best practice, and another way as requested by the SEC that would not be useful to those who actually analyze this information, whether the action will promote efficiency, competition, and capital formation.

As outlined above, NSSGA opposes requiring GHG emissions reporting in SEC reports. As such, any reporting regime considered by SEC or any other agency should provide that companies calculate and report emissions data using industry-specific best practices. NSSGA members have invested significant amounts of time, money, and energy to ensure they are calculating GHG emissions in the most accurate, efficient, consistent and best possible way; that will be most useful to stakeholders and investors. At a minimum, with GHG emissions reporting that ultimately may be ceded to SEC, we urge that alternative reporting regimes be allowed to satisfy GHG disclosure requirements. Similar to the SEC's decision to allow companies to comply with resource extraction rules by reporting consistent with alternative reporting regimes, the SEC should at a minimum similarly allow for industry-specific reporting of GHG emissions disclosure to comply with any GHG emissions reporting requirements.[7]

With respect to Scope 3 GHG emissions, we recognize that the SEC proposed only to require this disclosure if it is material or if a company has disclosed reduction goals or targets. However, even with those exceptions, mandating Scope 3 GHG emissions disclosure is simply not appropriate or logically feasible at this time. Specifically, NSSGA members are not able to accurately or completely collect all of the relevant data given their complicated supply chains. They have no control over how their products are used and we are therefore unable to create a useful model to collect this data. Perhaps in the future, technologies will develop in a manner that allows for accurate tracking of the data which would allow for complete reporting, but that is unfortunately not currently realistic.

For example, one NSSGA member operates 125 quarries that are open 365 days each year. For those facilities in total, 100,000 trucks drive to the quarry each day to pick up the sand, stone and gravel in their haul trucks and deliver these loads to construction sites or for other industrial uses. Many of these truckers are independent, and many of the construction sites are operated by small, private businesses. In order to report Scope 3 emissions data, this NSSGA member would have to not only track GHG emissions for each of these 36,500,000 truckloads of product each year, but then also track the product for its entire life cycle once it leaves their

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[7] *See* Securities and Exchange Commission, Final Rule, Disclosure of Payments by Resource Extraction Issuers, 86 Fed. Reg. 10, 4662 (Jan. 15, 2021); Securities and Exchange Commission, Order Recognizing the Resource Extraction Payment Disclosure Requirements of the European Union, the United Kingdom, Norway, and Canada as Alternative Reporting Regimes that Satisfy the Transparency Objectives of Section 13(q) Under the Securities Exchange Act of 1934, 86 Fed. Reg. 10, 4726 (Jan. 15, 2021).

control. Furthermore, obtaining this information from independent truckers and small private companies who do not track it themselves would be impossible given current technology limitations. Finally, for a company at the top of the supply chain, it is also impossible to predict where the product might ultimately end up. Multiply this scenario over several companies and the complexity, uncertainty and logistical impossibilities are substantially amplified.

One of our member companies shared that a minority owned trucking company that they do business with has told them that they simply do not have the expertise or understanding to inventory their emissions and would no longer quote the member company for trucking materials from plants to jobs, should this requirement be put in place. Again, this counters the SEC's mission and further exacerbates the supply chain problem, raises prices (and inflation), and harms DBE businesses. Similarly, NSSGA member equipment manufacturers will have unworkable challenges with collecting, validating, and reporting GHG emissions from their manufactured equipment once it is sold to a customer who has no obligation to cooperate and support the equipment manufacturer's SEC reporting obligations. As these examples clearly demonstrate, the proposed requirement to disclose Scope 3 emissions data is not only unreasonable, but unrealistic.

As the science in this area is rapidly developing, we ask that the SEC commit, at a minimum, to revisiting any adopted rule mandating emissions disclosure at least every five years to determine whether amendments to the rules are appropriate. Without this commitment, any final rule will become outdated as the science for GHG emissions calculations develops. By requirement, the Product Category Rule process, which allows for review and comparison of different environmental product attributes among products in a defined category, is reviewed and updated every five years to reflect the best science available at the time. For the SEC not to take the same approach would defeat the entire purpose of codifying such prescriptive disclosure requirements as those proposed.

Thank you for the opportunity to comment on the Proposed Rule. Please do not hesitate to contact the undersigned if NSSGA can provide any further information.

Sincerely,

Michele Stanley

Michele Stanley
Vice President, Government and Regulatory Affairs
National Stone, Sand & Gravel Association