

Chris Netram

Vice President,
Tax and Domestic Economic Policy

November 8, 2021

The Honorable Gary Gensler
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Ms. Renee Jones
Director, Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: *Sample Letter to Companies Regarding Climate Change Disclosures*

Dear Chairman Gensler and Director Jones:

The National Association of Manufacturers (“NAM”) looks forward to the opportunity to provide comment on your forthcoming rule proposal related to climate change disclosures, as previewed by the Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions¹ published by the Securities and Exchange Commission (“SEC” or “Commission”). As you know, the NAM provided input on the Commission’s March 2021 request for public information² on climate change and other environmental, social, and governance (“ESG”) disclosures.³ As we said in our response, manufacturers believe it is critical that investors “have access to disclosures on material climate-related metrics, risks, and opportunities.”⁴

The NAM is the largest industrial trade association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturers are leaders in combatting climate change and believe in an all-of-government approach to solving its enormous challenges. Over the past decade, manufacturers in the U.S. have reduced the carbon footprint of their products by 21% while increasing their value to the economy by 18%. The NAM has called on Congress to enact a single unified climate policy that meets science-based targets, ensures a level playing field without carbon leakage, and preserves consumer choice and manufacturing competitiveness, as outlined in the NAM’s climate policy blueprint, “The Promise Ahead.”⁵ Our industry holds the keys to solving this global challenge: making the products and technologies needed to achieve ambitious goals.

The NAM appreciates that the Division of Corporation Finance (“Division”) continues to consider how issuers can best convey material climate-related information to investors, including via its ongoing review⁶ of companies’ disclosures in line with the Commission’s 2010 guidance on climate change

¹ *Securities and Exchange Commission Spring 2021 Unified Agenda of Regulatory and Deregulatory Actions*. Office of Information and Regulatory Affairs (11 June 2021). See RIN 3235-AM87, available at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=3235-AM87>.

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

³ NAM Comments on ESG RFI (8 June 2021). Available at <https://www.sec.gov/comments/climate-disclosure/cll12-8895803-241279.pdf>.

⁴ *Id.* at 1.

⁵ *The Promise Ahead: Manufacturers Taking Action on Climate*. National Association of Manufacturers (19 January 2021). Available at <https://www.nam.org/wp-content/uploads/2021/01/The-Promise-Ahead.pdf>.

⁶ *Statement on the Review of Climate-Related Disclosure* (24 February 2021). Available at <https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure>.

disclosures.⁷ In September 2021, this review resulted in an “illustrative letter” from the Division, providing “sample comments that the Division may issue to companies regarding their climate-related disclosure or the absence of such disclosure.”⁸ Public companies have begun to receive versions of this letter from the Division, tailored to their specific business and industry. The letter appears to be both a refresh of the 2010 climate change guidance and a precursor to more prescriptive rulemaking as envisaged by the Commission’s regulatory agenda. As such, the NAM offers the following perspectives on the Division’s application of the existing climate disclosure guidelines and the Commission’s work to promulgate a new climate change reporting framework.

I. **Commission-level notice-and-comment rulemaking is required under the Administrative Procedure Act for any new substantive reporting obligations—and necessary for the SEC’s climate change disclosure framework to be effective and reliable.**

First and foremost, it is critical that any substantive action to mandate enhanced climate change reporting come directly from the Commission in the form of Administrative Procedure Act (“APA”) rulemaking. The statutorily mandated APA notice-and-comment process ensures that the SEC understands public perspectives on its rule proposals, including those from the regulated entities (in this case, publicly traded companies) that would be directly impacted by any final regulation. The APA further requires that the SEC incorporate public feedback into its decision-making process so as to arrive at a final rule that is reasonable, appropriately tailored, and not arbitrary and capricious. This process is required by law, and it ultimately provides certainty to the marketplace and clarity to public companies as to what would be required of them under any final agency action.

Beyond this statutory requirement, public comment can help to ensure that any new disclosure mandate is effective for both companies and investors. As we said in our response to the SEC’s March 2021 request for public input, a final rule that reflects feedback from the businesses that will be asked to implement any new climate reporting requirements “will give companies the confidence they need to build the systems necessary for climate and ESG reporting and to set benchmarks that will allow for relevant and useful analysis in future years.”⁹ Public feedback is critical for any significant rulemaking, but it is particularly crucial in the climate context given that the issues related to climate change reporting are complex and ever-changing. A Commission-level rule proposal will allow all relevant parties to understand the potential approaches to climate reporting the SEC is considering and to provide comment on how any such approaches would impact the market.

In light of the importance of Commission-level rulemaking, manufacturers note that certain items in the Division’s sample letter could be read as new disclosure requirements or staff-driven additions to the Commission’s 2010 guidelines. The sample letter also implies an obligation for companies to justify management decisions not to report certain climate-related information to the Division staff— itself a type of new disclosure mandate. The NAM respectfully encourages the SEC to follow the statutorily mandated APA notice-and-comment process if it chooses to institute new climate reporting requirements for public companies rather than adopting a stance of *de facto* regulation via staff review of issuer filings.

⁷ *Commission Guidance Regarding Disclosure Related to Climate Change*, 75 Fed. Reg. 6290 (8 February 2010). Release Nos. 33-9106, 34-61469; available at <https://www.govinfo.gov/content/pkg/FR-2010-02-08/pdf/2010-2602.pdf>.

⁸ *Sample Letter to Companies Regarding Climate Change Disclosures* (22 September 2021). Available at <https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures>.

⁹ NAM ESG Comments, *supra* note 3, at 12.

II. Any climate change reporting requirements should support the disclosure of financially material climate-related information.

The NAM appreciates that the Division's sample letter emphasizes companies' obligation to disclose *material* information related to climate risks and opportunities. Conveying decision-useful information that businesses determine to be financially material to shareholders under the Supreme Court's *TSC Industries* standard¹⁰ is the ultimate goal of any reporting requirement, and we welcomed the letter's repeated emphasis that additional information would be requested from issuers only if financially material.¹¹ Basing disclosure obligations on financial materiality "will support companies' efforts to ensure that investors have information on metrics that drive value creation and long-term shareholder return."¹²

Manufacturers are taking the lead in innovating solutions to climate change, ensuring clean air and water, and more. Moreover, manufacturers believe it is critical that publicly traded companies communicate financially material information, data, and risk factors about these important efforts to their shareholders. When climate-related information is important to a reasonable shareholder's investment decisions, publicly traded manufacturers are diligent in ensuring that investors have the information they need.

As the Division reviews company filings with an eye toward climate-related disclosures and considers issuer responses to staff requests based on the new sample climate letter, the NAM respectfully encourages the SEC to focus on only those metrics that are financially material to a firm's investors. Notably, materiality does not encompass information that may be interesting to a small subset of investors, or that outside stakeholders have deemed noteworthy. Rather, the Supreme Court has made clear that data is 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."¹³ Further, the SEC's tripartite mission to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation does not extend further into the policymaking realm—which is to say that staff review of public company filings should focus on ensuring that investors have needed information about financially material business risks, not on achieving specific policy outcomes outside the SEC's purview. The financial materiality standard enables appropriate disclosure by focusing public reporting on the needs of the reasonable investor and, as such, on metrics that support value creation and long-term shareholder return.

Similarly, the NAM is hopeful that any new rule proposed by the Commission will adhere to the time-tested and well-understood materiality standard as it relates to an issuer's financial condition. Any new climate reporting framework should allow for fulsome and comparable disclosures of material climate data without imposing a one-size-fits-all mandate that obscures companies' disclosure of relevant, decision-useful information.

¹⁰ *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976).

¹¹ See, e.g., Corp Fin Sample Letter, *supra* note 8, Question 2 ("Disclose the *material* effects of transition risks..."); Question 3 ("Disclose any *material* litigation risks..."); Question 6 ("To the extent *material*, discuss the indirect consequences of climate-related regulation or business trends..."); Question 7 ("If *material*, discuss the physical effects of climate change..."); Question 8 ("Quantify any *material* increased compliance costs...") [emphasis added].

¹² NAM ESG Comments, *supra* note 3, at 2.

¹³ *TSC Industries*, *supra* note 10; see also *Basic, Inc. vs. Levinson*, 485 U.S. 224 (1988).

III. The SEC should continue to support companies' efforts to convey climate-related information to investors and other stakeholders via a range of appropriate public platforms.

As noted, manufacturers believe it is critical that publicly traded companies communicate relevant climate-related information to their shareholders. Many manufacturers are already taking steps—as appropriate for their businesses and in compliance with existing disclosure laws—to publicize climate-related information, including by reporting data in their public filings and annual reports, publishing sustainability reports and corporate social responsibility reports accessible to shareholders and other stakeholders, and voluntarily complying with third-party standard setters like the Sustainability Accounting Standards Board (“SASB”), the Task Force on Climate-related Financial Disclosures (“TCFD”), and the Global Reporting Initiative (“GRI”). Each business, in consideration of its individual climate-related risks and opportunities and in consultation with its shareholders, can decide on an appropriate blend of these methods to communicate climate-related information.

The Division’s sample letter appears to cast doubt on any method for conveying climate-related information other than SEC filings. Question 1 asks companies to justify why they might have been “more expansive” in their corporate social responsibility report than in their SEC filings.¹⁴ However, the 2010 guidance that the Division’s letter purports to bolster makes clear that it is appropriate, and indeed beneficial to investors, for companies to provide climate-related information outside of their SEC filings. The guidance specifically notes that other venues for climate reporting “can provide important information to investors outside of disclosure documents filed with the Commission.”¹⁵ The guidance does remind companies that “some” information provided in voluntary contexts “may be” required to be included in SEC filings¹⁶—but it does not require all climate information provided by companies in any context (including corporate social responsibility reports) to always be included in their SEC filings.

The NAM respectfully encourages the Division to recognize the utility of corporate social responsibility reports, sustainability reports, third-party frameworks, and other climate reporting mechanisms that continue to serve businesses and their investors well. There are legitimate reasons to use these reporting methods as a complement to SEC filings, and the inclusion of information in one document and not another does not mean that an issuer has in any way violated its duty to provide financially material climate data to shareholders via SEC disclosures. The NAM believes that the Division should encourage companies to use the range of platforms available to them, up to and including SEC filings, so they can effectively and appropriately disclose the wide variety of climate-related data that they wish to share with investors and other stakeholders.

IV. The SEC should allow issuer disclosures to reflect the uncertainty inherent in climate-related reporting and, further, should limit issuer liability by permitting any new climate change disclosures to be furnished to the Commission.

The Commission’s 2010 guidance addresses the importance of disclosures related to uncertain future climate-related events, including via an issuer’s Item 105 risk factors and its Item 303 management’s discussion and analysis (“MD&A”). The Division’s sample letter emphasizes many of these issues by asking for additional information on transition risks, pending or existing legislation and regulations, business trends, physical effects of climate change, and increased compliance costs. To the extent they are material to a given business, these items are already required to be

¹⁴ See Corp Fin Sample Letter, *supra* note 8.

¹⁵ 2010 Climate Change Guidance, *supra* note 7, at 6292.

¹⁶ *Ibid.*

disclosed by the Commission’s guidance—and in fact are explicitly mentioned in the 2010 release.¹⁷ The NAM is concerned that the staff letter appears to build on this existing requirement, though it is unclear what additional prognostication the Division expects from public companies.

Further, the 2010 guidance illustrates the difficulty of evaluating potential climate-related risks, particularly with respect to political and business trends. Throughout, it focuses on the potential impacts of so-called “cap and trade” legislation, which had been passed by the House of Representatives in 2009. This “pending” bill and several of its individual provisions are cited as potential risks and opportunities about which companies should be prepared to provide disclosure.¹⁸ Yet the bill never became law, and any disclosures about its impacts were ultimately of limited utility to investors.

Despite this clear illustration, the Division’s sample letter appears to raise the specter of *more* political prognostication about “pending” legislation, regulation, and international accords. The NAM is concerned that companies might now be expected to analyze bills earlier and earlier in the ever-uncertain legislative process. For example, Question 4 alleges that the sample company has ignored “significant developments” at the federal, state, or international level,¹⁹ but it is difficult to imagine a business failing to analyze the impacts of policies that actually *became law*. As such, it is unclear how issuers are expected to correct for the alleged “significant” omissions if not via scenario analysis related to some subset of “pending” bills that the Division staff believes have some likelihood of passage.

This high degree of uncertainty illustrates the importance of allowing disclosures under any forthcoming climate reporting framework to be furnished to, rather than filed with, the Commission. If the SEC plans to require scenario analyses as implied by the Division’s sample letter and explicitly endorsed by the recent Financial Stability Oversight Council (“FSOC”) report on climate-related financial risk,²⁰ the liability associated with disclosures filed with the SEC could pose a significant limitation given the evolving state of climate and ESG information infrastructure, regular changes to reporting standards as well as companies’ usage thereof, and the uncertain nature of forward-looking political, business, and scientific predictions.

Regardless of the forum, public companies are held to a general standard for statements made in good faith and with due diligence—so the question of “filed vs. furnished” will not affect the accuracy or reliability of the information being disclosed. However, companies are held to a more rigid liability standard for any material misstatement or omission in a statement filed with the SEC. It is also important to note the inherent uncertainty, wide variation, and ongoing evolution of much of the information that companies might be required to disclose under a climate reporting framework. The

¹⁷ See, e.g., *id.* at 6296 (“Legal, technological, political and scientific developments regarding climate change may create new opportunities or risks for registrants... These business trends or risks may be required to be disclosed as risk factors or in MD&A.”); at 6295 (“[T]here have been significant developments in federal and state legislation and regulation regarding climate change. These developments may trigger disclosure obligations under Commission rules and regulations...”); at 6296 (“Registrants whose businesses may be vulnerable to severe weather or climate related events should consider disclosing material risks of, or consequences from, such events in their publicly filed disclosure documents.”).

¹⁸ See, e.g., *id.* at 6290 (“This legislation, if enacted, would limit and reduce greenhouse gas emissions...”); at 6291 (“New trading markets for emission credits related to ‘cap and trade’ programs that might be established...”); at 6296 (“[I]f a ‘cap and trade’ type system is put in place, registrants may be able to profit from the sale of allowances...”); at 6296 (“Costs required to improve facilities and equipment...to mitigate the financial consequences of a ‘cap and trade’ regime...”).

¹⁹ See Corp Fin Sample Letter, *supra* note 8.

²⁰ *Report on Climate-Related Financial Risk*. Financial Stability Oversight Council (21 October 2021). Available at <https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf>.

degree of certainty required to *file* a disclosure based on a forward-looking climate model or a prediction of policymakers' actions would be extraordinarily difficult to meet. As such, the NAM strongly encourages the Commission to allow disclosures under any new climate reporting framework to be furnished to, rather than filed with, the SEC.²¹

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The NAM is hopeful that the purpose of the Division's sample letter is to provide clarity to businesses on their existing climate-related disclosure obligations pursuant to the 2010 guidance—and it is not used as a means of imposing new reporting requirements on public companies. Manufacturers look forward to working with the SEC as it considers a potential new climate disclosure framework via APA notice-and-comment rulemaking. We appreciate your ongoing efforts to craft a proposed rule that will leverage companies' experiences producing sustainability reports and utilizing third-party frameworks, be responsive to current and evolving data tracking and reporting practices, reflect the diversity of climate-related risks and opportunities that businesses face, and limit unnecessary costs and liability—all while ensuring that investors have access to financially material climate change information.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Netram". The signature is fluid and cursive, with a long horizontal stroke at the end.

Chris Netram
Vice President, Tax and Domestic Economic Policy

²¹ A more fulsome discussion of this critical issue can be found in the NAM's June 2021 ESG Comments, *supra* note 3, at 9.