



June 17, 2022

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

RE: The Enhancement and Standardization of Climate-Related Disclosures for Investors, File Number S7-10-22

Dear Chairman Gensler,

Today, I write on behalf of Americans for Prosperity (“AFP”) activists across all 50 states to oppose the U.S. Securities and Exchange Commission’s (“SEC” or “Commission”) proposed rule on so-called “climate-related” disclosures for investors. The proposed rule would go beyond the SEC’s statutory authority as defined by Congress by requiring public companies to provide non-material and/or highly speculative “climate-related” risk information in their disclosures. The disclosures would be extremely costly to produce, would inundate investors with information irrelevant to making economically sound investment decisions, and would therefore not be in the public interest. This exercise of regulatory power is not intended to inform investors about financial or economic risks (as intended by Congress), but rather seeks to facilitate the application of political pressure for the purpose of picking winners and losers in the marketplace, such as assisting the activist pension funds and fund managers in grading companies based on their adherence to the current Administration’s policy agenda.

Perhaps underscoring the illegitimacy of the proposed rules, the SEC has provided an inadequate comment period given the scope of the reporting changes that have been proposed. The Commission has requested comment on literally hundreds of questions, but as many commenters have mentioned<sup>1</sup> this short window of time does not allow for those directly impacted by this rule to submit meaningful and thoughtful feedback (thus calling into question whether the SEC is truly interested in such feedback). The proposed rule would be economically impactful, directly affecting every industry that provides goods and services around the world, the majority of which are outside the SEC’s purview.

These comments focus on the SEC’s lack of statutory authority to mandate “climate-related” disclosures, constitutional concerns regarding compelled speech under the First Amendment, the reshaping of materiality, the overreach of Scope 3 emissions requirements, the costly impact on businesses and investors, and the lack of need for such requirements given that

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<sup>1</sup> See <https://www.sec.gov/news/press-release/2022-82>.

investors and boards are perfectly capable of requiring such disclosures where they are truly valued by the current and prospective shareholders.

## **I. The Commission Lacks Statutory Authority to Mandate Expansive and Speculative Disclosures Designed to Coerce Registrants and Others to Implement the Current Administration’s Energy and Environmental Agenda**

As Commissioner Hester Peirce and former SEC deputy general counsel Andrew Vollmer have explained in detail, the Commission’s proposal to require certain environmental “climate-related” disclosures<sup>2</sup> (“Proposal”) exceeds its statutory authority.<sup>3</sup> We agree. At its core, the Proposal lacks statutory authority to mandate disclosures that have nothing to do with its mission to protect investors, maintain fair, orderly, and efficient markets, and to facilitate capital formation. As explained below, the Commission’s Proposal is ultra vires, unlawful, and should be withdrawn in its entirety.

The Commission is a creature of statute, which possesses only those powers Congress has chosen to confer upon it.<sup>4</sup> “Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.”<sup>5</sup> Congress need not expressly negate an agency’s claimed powers; “[w]ere courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with . . . the Constitution[.]”<sup>6</sup> No matter how well-intentioned its public policy goals may be, the Commission must not “assume . . . that whatever might appear to further the statute’s primary objective must be the law.”<sup>7</sup> It should “presume more modestly instead that the legislature says what it means and means what it says.”<sup>8</sup> The Commission has not done so here.

### **A. The Commission’s Proposal Would Make Major Public Policy Decisions of Vast Economic and Political Importance Without Statutory Authorization**

The Proposal amounts to a major policy decision of vast political and economic importance, as demonstrated by “the amount of money involved for regulated and affected parties, the overall impact on the economy, the number of people affected, and the degree of congressional and public attention to the issue.”<sup>9</sup> Yet the SEC has no statutory authority to make such a decision.

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<sup>2</sup> Sec. and Exch. Comm’n, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33- 11042; 34-94478 (Mar. 21, 2022).

<sup>3</sup> See Hester M. Peirce, We are Not the Securities and Environment Commission—At Least Not Yet (March 21, 2022), <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>; Comment of Andrew N. Vollmer, Release Nos. 33-11042; 34-94478; File No. S7-10-22 (submitted April 12, 2022), available at [https://www.mercatus.org/system/files/vollmer\\_-\\_pic\\_-\\_comment\\_on\\_secs\\_proposed\\_rule\\_on\\_climate\\_disclosure\\_-\\_v1.pdf](https://www.mercatus.org/system/files/vollmer_-_pic_-_comment_on_secs_proposed_rule_on_climate_disclosure_-_v1.pdf) [hereinafter Vollmer Comment].

<sup>4</sup> See *La. Pub. Serv. Com v. Fed. Commc’ns Comm’n*, 476 U.S. 355, 374 (1986); see also *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 554 (D.C. Cir. 2020) (“[A]n agency cannot purport to act with the force of law without delegated authority from Congress.”).

<sup>5</sup> *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (cleaned up).

<sup>6</sup> *Ry. Labor Executives’ Assn.’s v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

<sup>7</sup> *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (cleaned up).

<sup>8</sup> *Id.* (cleaned up). “It’s a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.” *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (cleaned up).

<sup>9</sup> See generally *United States Telecomms. Ass’n v. FCC*, 855 F.3d 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (listing generally relevant factors to major question inquiry).

The SEC Chair’s Statement on Proposed Mandatory Climate Risk Disclosures claims that “[t]oday, investors representing literally tens of trillions of dollars support climate-related disclosures[.]”<sup>10</sup> This is inaccurate—the Chair’s statement refers to large fund managers, not the millions of small retail investors and their life savings whose money the fund managers are misrepresenting as their own. As Commissioner Peirce notes, the Proposal would make “fundamental changes to . . . [the Commission’s] disclosure regime” that **harm** the actual investors themselves, particularly retail investors saving for retirement.<sup>11</sup> She continues: “The whole economy, and all of the consumers and producers it sustains, could also be hurt.”<sup>12</sup> Echoing Commissioner Peirce, former SEC deputy general counsel Andrew Vollmer (who has deep experience with the SEC’s legal authority and mission) has observed: “The [Proposal’s disclosure] requirements also would dominate the public disclosure process so much that they would, in effect, create a second disclosure regime.”<sup>13</sup> He continues: “The Proposal seeks to use the securities disclosure system to advance a public policy goal extraneous to the federal securities laws.”<sup>14</sup>

The Commission’s proposal has also not escaped the attention of the political branches of government and the public at large. But Congress has repeatedly declined to pass legislation authorizing the Commission to require “climate-risk” disclosures,<sup>15</sup> demonstrating both that proponents in Congress do not believe the SEC currently has such authority, and that Congress as a whole does not want the SEC to have such authority.<sup>16</sup> Numerous Senators at the U.S. Senate Committee on Banking, Housing, and Urban Affairs put the Commission on notice that this Proposal was intruding on decisions that must, under our system of representative self-government, be made by the people’s elected representatives:

The push for more disclosure related to global warming has little to do with providing material information for investment purposes. Rather, activists with no fiduciary duty to the company or its shareholders are trying to impose their progressive political views on publicly traded companies, and the country at large, having failed to enact change via the elected government. . . . [F]ederal securities regulations are not the appropriate vehicle to advance climate change policy goals. The SEC is an independent financial regulator, whose political insulation reflects its narrow focus on the financial markets. It does not have a mission of remaking society or our economy as a whole. . . . If our laws are inadequate to deal with

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<sup>10</sup> Chair Gary Gensler, Statement on Proposed Mandatory Climate Risk Disclosures (March 21, 2022),

<sup>11</sup> See We are Not the Securities and Environment Commission, *supra* note 3.

<sup>12</sup> *Id.*

<sup>13</sup> Vollmer Comment, *supra* note 3, at 20.

<sup>14</sup> *Id.* at 13.

<sup>15</sup> See, e.g., H.R.2570 - Climate Risk Disclosure Act of 2021; H.R.3623 - Climate Risk Disclosure Act of 2019. See also Warren, Casten, *Colleagues Reintroduce Bill Requiring Public Companies to Disclose Climate-Related Risks The Climate Risk Disclosure Act Would Accelerate the Transition from Fossil Fuels*, Press Release (April 15, 2021), <https://www.warren.senate.gov/newsroom/press-releases/warren-casten-colleagues-reintroduce-bill-requiring-public-companies-to-disclose-climate-related-risks>; Senator Elizabeth Warren and Representative Sean Casten, The Climate Risk Disclosure Act of 2021, available at <https://www.warren.senate.gov/imo/media/doc/The%20Climate%20Risk%20Disclosure%20Act%20of%202021.pdf>

<sup>16</sup> Ironically, the disclosure-related legislation that Congress has actually passed in recent years indicate that Congress wants more simplified disclosures, which is the exact opposite of what the Commission’s Proposal will do. See Vollmer Comment, *supra* note 3, at 11 & n.19 (citing Section 108 of the JOBS Act, Pub. L. No. 112-106, 126 Stat. 306 (2012); Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, § 72002, 129 Stat. 1784, 1784 (December 4, 2015); *Id.* § 72003, 129 Stat. 1784, 1785).

climate change, then it is job of members of Congress—who are accountable to the voters through elections—to address them and not the SEC.<sup>17</sup>

Seventeen state attorney generals have also noted their statutory and constitutional objections to the SEC’s proposal.<sup>18</sup> And the Proposal itself has sparked significant public debate, as demonstrated by the number of unique comments the public submitted in response to the Commission’s March 2021 Request for Public Input, as the Proposal itself acknowledges.<sup>19</sup>

Thus, it is clear the Proposal seeks to address and decide a major public policy question the Constitution reserves to the people’s elected representatives in Congress. Even if Congress could constitutionally grant the Commission the power to restructure entire sectors of the economy, Congress must clearly have said so.<sup>20</sup> It did not, by any reasonable account.<sup>21</sup> That is why the Commission cannot point to any statute clearly and specifically authorizing it to issue environmental regulations of national import.<sup>22</sup> Instead, the Proposal vaguely claims “[t]he Commission has broad authority to promulgate disclosure requirements that are ‘necessary or appropriate in the public interest or for the protection of investors.’”<sup>23</sup> But none of the cited provisions support the Commission’s newly discovered environmental policymaking authority.<sup>24</sup>

Numerous commenters raised this fundamental defect in response to the Commission’s March 2021 Request for Public Input.<sup>25</sup> One would expect that if the Commission could point to any source of power to mandate these types of disclosures, it would have gone out of its way to do so in the 490-page Proposal it posted on its website prior to publication in the Federal Register.<sup>26</sup> It did not.<sup>27</sup> Nor did it meaningfully respond to significant comments raising this issue.<sup>28</sup> Under these circumstances, it appears certain the Commission’s “claim[] to discover in a long-extant

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<sup>17</sup>Comment of Senators at the U.S. Senate Committee on Banking, Housing, and Urban Affairs Re: Public Input on Climate Change Disclosures, 1–3 (June 13, 2021), available at <https://www.sec.gov/comments/climate-disclosure/cl12-8911330-244285.pdf>

<sup>18</sup> See Comment of State Attorneys General Re: Climate Change Disclosures (June 14, 2021), <https://www.sec.gov/comments/climate-disclosure/cl12-8915606-244835.pdf>

<sup>19</sup> 87 Fed. Reg. at 21,338 (“On March 15, 2021, Acting Chair Alison Herren Lee requested public input on climate disclosure . . . . The Commission received approximately 600 unique letters and over 5800 form letters . . . . We received letters from academics, accounting and audit firms, individuals, industry groups, investor groups, registrants, non-governmental organizations, professional climate advisors, law firms, professional investment advisors and investment management companies, standard-setters, state government officials, and US Senators and Members of the House of Representatives.”).

<sup>20</sup> See *Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.” (cleaned up)).

<sup>21</sup> See also Vollmer Comment, *supra* note 3, at 15 (“Congress has not spoken directly and plainly to give the SEC the power to write regulations requiring disclosure of climate-related information.”).

<sup>22</sup> 87 Fed. Reg. 21,334, 21,335 (April 11, 2022) (citing 15 U.S.C. §§ 77g, 78l, 78m, 78o); see also 87 Fed. Reg. 21,334, 21,464 (April 11, 2022) (“VIII. Statutory Authority[.] The amendments contained in this release are being proposed under the authority set forth in Sections 7, 10, 19(a), and 28 of the Securities Act, as amended, and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act, as amended.”).

<sup>23</sup> 87 Fed. Reg. at 21,335 (15 U.S.C. §§ 77g, 78l, 78m, 78o).

<sup>24</sup> As the U.S. Court of Appeals for the D.C. Circuit recently reminded the Commission: “[a]n agency’s general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority.” *N.Y. Stock Exch. LLC v. SEC*, 962 F.3d 541, 546 (D.C. Cir. 2020) (cleaned up). “Merely because an agency has rulemaking power does not mean that it has delegated authority to adopt a particular regulation.” *Id.* at 554.

<sup>25</sup> 87 Fed. Reg. at 21,339 (“[C]ommenters stated that they opposed implementation of climate-related disclosure rules and argued that such rules would exceed the Commission’s statutory authority.”).

<sup>26</sup> Sec. and Exch. Comm’n, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33- 11042; 34-94478 (Mar. 21, 2022), <https://www.sec.gov/rules/proposed/2022/33-11042.pdf>.

<sup>27</sup> See 87 Fed. Reg. at 21,335, 21,464.

<sup>28</sup> *Id.* at 21,338–21,340.

statute an unheralded power to regulate a significant portion of the American economy” should be greeted skeptically by the courts.<sup>29</sup> And rightfully so.

## **B. The Commission’s Lack of Scientific Expertise Underscores that the Proposal is Ultra Vires and Unlawful**

Bolstering the commonsense conclusion that Congress did not grant the Commission authority to mandate costly and burdensome “climate-risk” disclosures is the complete and utter mismatch between the Commission’s mission of protecting investors and the goal of the Proposal, which appears to be *primarily* designed to advance the Administration’s *environmental* and *degrowth* priorities by reducing energy use.

The Proposal replaces the Commission’s authority to require disclosures that are in the interests of the public or investors with purported authority to advance the Administration’s own policy interests. This is made clear by the Commission’s attempts to define climate-related risks, about which it has zero expertise. The Commission proposes to define “physical” climate-related risk as: “both acute and chronic risks to a registrant’s business operations or the operations of those with whom it does business.” “Acute risks” is defined as event-driven risks related to shorter-term extreme weather events, such as hurricanes, floods, and tornadoes. “Chronic risks” is defined as those risks that the business may face as a result of longer-term weather patterns and related effects, such as sustained higher temperatures, sea level rise, drought, and increased wildfires, as well as related effects such as decreased arability of farmland, decreased habitability of land, and decreased availability of fresh water.<sup>30</sup> The Commission has no expertise to define these terms, let alone review any associated disclosures.

The proposed rules would define transition risks to mean “the actual or potential negative impacts on a registrant’s consolidated financial statements, business operations, or value chains attributable to regulatory, technological, and market changes to address the mitigation of, or adaptation to, climate-related risks. Transition risks would include, but are not limited to, increased costs attributable to climate-related changes in law or policy, reduced market demand for carbon-intensive products leading to decreased sales, prices, or profits for such products, the devaluation or abandonment of assets, risk of legal liability and litigation defense costs, competitive pressures associated with the adoption of new technologies, reputational impacts (including those stemming from a registrant’s customers or business counterparties) that might trigger changes to market behavior, changes in consumer preferences or behavior, or changes in a registrant’s behavior. A registrant that has significant operations in a jurisdiction that has made a GHG emissions reduction commitment would likely be exposed to transition risks related to the implementation of the commitment.”<sup>31</sup> Here, again, the Commission is well beyond its area of expertise, creating a definition that is so broad and lacking any underlying basis in current law and regulation as to be meaningless. For example, the proposal references these “transition risks” hundreds of times throughout the proposal and repeatedly makes clear, including in the definition above, that it includes a registrant’s plans for complying with the Biden Administration’s own self-imposed pledges under the Paris Agreement (of 50-52 percent emissions reductions from 2005 levels by 2030), which has never been reviewed, let alone approved by Congress. To underscore the illegitimacy of the Proposal and these definitions, the Biden Administration itself has refused

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<sup>29</sup> *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (cleaned up).

<sup>30</sup> See proposed 17 CFR 229.1500(c)(2) and (c)(3).

<sup>31</sup> See proposed 17 CFR 229.1500(c)(4) and 17 CFR 229.1502(a)(1)(ii).

repeated requests from Congress to supply the technical or cost basis for its pledges under the Paris Agreement.<sup>32</sup>

As Commissioner Peirce explained: “the [Commission] regulators designing the framework have no expertise in capital allocation, political and social insight, or the science used to justify these [politically and socially] favored ends.”<sup>33</sup> All of this is to say that just as the CDC lacked the power to reimagine landlord-tenant law,<sup>34</sup> OSHA lacked the power to mandate vaccinations,<sup>35</sup> and the IRS lacked power to make national health policy,<sup>36</sup> the SEC is not allowed to go on a frolic into environmental policymaking, as it has brazenly sought to do here. The Commission’s lack of scientific expertise is yet additional evidence that the Commission’s Proposal is ultra vires and unlawful.

### **C. It Would Be An Unconstitutional Delegation of Legislative Power for Existing Statutes to Grant the Commission Discretion to Reimagine SEC Disclosure as a Tool For Transforming Sectors of the National Economy**

Even if Congress had intended to grant the SEC the power to set national environmental policy, the underlying statute would be unconstitutional.<sup>37</sup> After all, “[t]he federal government’s powers . . . are not general but limited and divided. Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate . . . . It must also act consistently with the Constitution’s separation of powers.”<sup>38</sup> “Under our Constitution, the authority to make laws that impose obligations on the American people is conferred on Congress, whose Members are elected by the people.”<sup>39</sup> Subject to bicameralism and presentment,<sup>40</sup> Article I of the Constitution vests “[a]ll legislative Powers herein granted” in Congress<sup>41</sup>—not the Executive branch.<sup>42</sup> Thus, Congress may not delegate “powers which are strictly and exclusively legislative.”<sup>43</sup> Instead, the Constitution requires “important subjects . . . must be entirely regulated by the legislature itself[.]”<sup>44</sup> In other words, “important choices of social policy” must be “made

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<sup>32</sup> See <https://www.capito.senate.gov/news/in-the-news/why-the-white-house-never-released-its-2030-climate-strategy>.

<sup>33</sup> See *We are Not the Securities and Environment Commission*, *supra* note 3; Vollmer Comment, *supra* note 3, at 17.

<sup>34</sup> *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (per curiam).

<sup>35</sup> *Nat'l Fed'n of Indep. Bus. v. DOL, OSHA*, 142 S. Ct. 661, 665 (2022) (“The Act empowers the Secretary to set workplace safety standards, not broad public health measures.”).

<sup>36</sup> *King v. Burwell*, 576 U.S. 473, 486 (2015) (“It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.”).

<sup>37</sup> See also *NFIB v. DOL, OSHA*, 142 S. Ct. at 669 (Gorsuch, J., concurring) (“[I]f the statutory subsection the agency cites really did endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority.” (emphasis in original)); *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 672 (6th Cir. 2021) (“[T]o put ‘extra icing on a cake already frosted,’ the government’s interpretation of § 264(a) could raise a nondelegation problem.” (citation omitted)).

<sup>38</sup> *NFIB v. DOL, OSHA*, 142 S. Ct. at 667 (Gorsuch, J., concurring). To guard against tyranny and protect liberty, “the Constitution . . . vest[s] the authority to exercise different aspects of the people’s sovereign power in distinct entities.” *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

<sup>39</sup> *Biden v. Missouri*, 142 S. Ct. 647, 659 (2022) (Alito, J., dissenting).

<sup>40</sup> U.S. Const. Art. I, § 7, cl. 2.

<sup>41</sup> U.S. Const. Art. I, § 1.

<sup>42</sup> See *Gundy*, 139 S. Ct. at 2123 (confirming “assignment of power to Congress is a bar on its further delegation”); *Loving v. United States*, 517 U.S. 748, 758 (1996) (“[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity.”).

<sup>43</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 20 (1825) (Marshall, C.J.).

<sup>44</sup> *Id.* at 43; see also *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari).

by Congress, the branch of our Government most responsive to the popular will.”<sup>45</sup> “It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people.”<sup>46</sup> “[I]t would frustrate ‘the system of government ordained by the Constitution’ if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.”<sup>47</sup>

The assortment of general rulemaking provisions the Commission identifies as allowing it to issue regulations it deems “necessary or appropriate in the public interest” lack even any semblance of the specifics necessary to comprise a specific, intelligible legislative grant of authority. To interpret these provisions as authorizing the SEC to implement a new disclosure regime for the purpose of fundamentally transforming entire sectors of the economy would be an unlawful delegation of legislative authority.<sup>48</sup>

## II. SEC Climate Disclosure Mandates Risk Compelling Speech at Odds with the First Amendment

Any proposed mandatory disclosures must be consistent with the First Amendment. Compelled speech is a particularly egregious intrusion on First Amendment freedoms.<sup>49</sup> In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633 (1943), the Court stated that “involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.” Content-based regulation of speech is inherently suspect. Such laws “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”<sup>50</sup> And as the Supreme Court recently explained in *NIFLA v Becerra*, compelled speech is a content-based regulation because it “alters the content of [their] speech.”<sup>51</sup>

The Commission made passing acknowledgment of commenters to the March 2021 Request for Public Input who raised First Amendment concerns but made no effort to address such comments. Thus, the concerns raised at that time apply with equal force now. The proposed disclosures would require disclosing entities to speak on topics wholly unrelated to the SEC’s legitimate regulatory purposes, expressing views they may not hold or would prefer to express in different ways.<sup>52</sup>

Compelling responses to the categories of speech suggested in the proposed climate-related disclosures<sup>53</sup> could imply the speaker adopted a position on the topic of climate change, the relevance of the disclosed information to that topic, or whether either had any bearing on the business.

Such compelled statements would go beyond conveying neutral information but would use a regulatory sword of Damocles to compel the speaker not only to speak, but to speak contrary to its actual beliefs. Such a requirement would exceed even the allowed regulation in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), which required radio frequency licensees to air

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<sup>45</sup> *Indus. Union Dep’t, AFL-CIO v. API*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in judgment).

<sup>46</sup> *Id.* at 687 (Rehnquist, J., concurring).

<sup>47</sup> *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (Harlan, J.)).

<sup>48</sup> Cf. *NFIB v. DOL, OSHA*, 142 S. Ct. at 669 (Gorsuch, J., concurring); *Tiger Lily*, 5 F.4th at 672.

<sup>49</sup> *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>50</sup> *Reed v. Town of Gilbert*, 576 U. S. 155 (2015).

<sup>51</sup> *Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795 (1988).

<sup>52</sup> *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 575 (1995) (“[I]t boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government’s power to control.”)

<sup>53</sup> See Proposed 17 CFR 29.1500 *et seq.*

speech by others—but not to compel the speech from the licensees themselves. The proposals here, by contrast, risk fostering the appearance the speaker is expressing its own opinion—even where such disclosures are contrary to its true position—creating confusion in messaging as well as violating the First Amendment rights of the speaker. The government is free to express its own views. It is not free to command private parties to speak.

The First Amendment would prohibit mandating this speech even if it were deemed to be “professional speech”, *i.e.*, speech based on expert knowledge and judgment. The Supreme Court “has not recognized ‘professional speech’ as a separate category of speech merely because it is uttered by ‘professionals.’”<sup>54</sup> Instead, the “Court has afforded less protection for professional speech only for “factual, noncontroversial information in . . . ‘commercial speech,’”<sup>55</sup> or regulations of professional conduct that incidentally burden speech.<sup>56</sup>

The *Zauderer* standard would not permit mandating the proposed disclosures because the proposals do not relate to either “commercial speech” or “noncontroversial” speech. Indeed, as the Commission previously recognized in questions 6 and 9 of the March 2021 Request for Public Input, the proposals relate to information that is unsettled, subject to change over time, and lacking any recognized standards.<sup>57</sup> The Commission continues to acknowledge the unsettled nature of relevant standards, presenting a variety of requests for input on whether to apply standards, and, if so, which ones?<sup>58</sup> Accordingly, as the Court held in *NIFLA*, requiring disclosure about “anything but an ‘uncontroversial’ topic” falls outside of the *Zauderer* standard.<sup>59</sup> The second circumstance, merely “incidental” burden, likewise does not apply. There is no issue here of professional conduct and thus no “incidental” speech. Moreover, the burden is anything but “incidental”. The scope of the proposed disclosures would be burdensome for any entity that did not already perform such analysis because the proposed categories of disclosures relate largely to data-gathering, modeling, analysis, and framing not within the expertise of any entity that does not operate squarely within those fields. Thus, undertaking such studies would impose a material obligation outside the expertise of many speakers and would exceed the allowable burden.

Lacking any basis for special treatment, the proposals that may result from this process would be subject to the same First Amendment speech protections as any other content-based regulation.<sup>60</sup> As such, the proposed disclosures, which “target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves

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<sup>54</sup> *Nat'l Institute of Family and Life Advocates v. Becerra*, (“NIFLA”), 138 S. Ct. 2361, 2371–72 (2018).

<sup>55</sup> *Id.* citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985).

<sup>56</sup> *Id.* at 2373.

<sup>57</sup> See <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures> “6. How should any disclosure requirements be updated, improved, augmented, or otherwise changed over time? Should the Commission itself carry out these tasks, or should it adopt or identify criteria for identifying other organization(s) to do so? If the latter, what organization(s) should be responsible for doing so, and what role should the Commission play in governance or funding? Should the Commission designate a climate or ESG disclosure standard setter? If so, what should the characteristics of such a standard setter be? Is there an existing climate disclosure standard setter that the Commission should consider?”; “9. What are the advantages and disadvantages of developing a single set of global standards applicable to companies around the world, including registrants under the Commission’s rules, versus multiple standard setters and standards? If there were to be a single standard setter and set of standards, which one should it be? What are the advantages and disadvantages of establishing a minimum global set of standards as a baseline that individual jurisdictions could build on versus a comprehensive set of standards? If there are multiple standard setters, how can standards be aligned to enhance comparability and reliability? What should be the interaction between any global standard and Commission requirements? If the Commission were to endorse or incorporate a global standard, what are the advantages and disadvantages of having mandatory compliance?”

<sup>58</sup> See <https://www.sec.gov/rules/proposed/2022/33-11042.pdf>,

<sup>59</sup> NIFLA, 138 S. Ct. at 2372.

<sup>60</sup> *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”).

that they are narrowly tailored to serve compelling state interests.”<sup>61</sup> To meet that standard, the government would have to show that the proposed disclosures are neither overinclusive: compelling disclosures not necessary to address the proffered governmental interest; nor underinclusive: failing to compel disclosures equally or more necessary to address the proffered governmental interest. Here, any interests identified are subjective, amorphous, generalized, and ever-changing. But even were that hurdle to be overcome, establishing parameters for the mandated information to satisfy narrow tailoring would be infeasible.

The lack of clear statutory authority for SEC climate disclosure requirements undermines the arguments in favor of a compelling government interest. As West Virginia Attorney General Patrick Morrisey explained, “merely meeting a ‘demand’ for company statements” does not satisfy this requirement.<sup>62</sup> Commissioner Hester Peirce identified some of the risk of compelled speech in this context during June 2019 remarks before the American Enterprise Institute, including public shaming and shunning based on nebulous, incomplete, arbitrary, inconsistent, and political information which would be incorporated as part of an SEC climate or ESG disclosure regime.<sup>63</sup>

### III. The Proposal Reshapes Materiality

The SEC’s argument on behalf of the Proposal and its attempt to redefine materiality largely hinges on the claim that “there has been significant investor demand for information about how climate conditions may impact their investments.”<sup>64</sup> The Proposal goes on to argue that “Several major institutional investors, which collectively have trillions of dollars in investments under management, have demanded climate related information from the companies in which they invest because of their assessment of climate change as a risk to their portfolios, and to investments generally, and also to satisfy investor interest in investments that are considered “sustainable.””<sup>65</sup> However, a recent survey conducted by the FINRA Investor Education Foundation with NORC of the University of Chicago indicates that retail investors are not as interested in or aware of ESG investing, citing that just 24 percent of retail investors could define ESG investing, and only 9 percent claimed to have ESG-related investments.<sup>66</sup> The survey suggests the Proposal prioritizes the preferences of some institutional investors and proxy advisory firms over the vast majority of retail investors who may not share the same sentiments about the need for climate-related disclosures.

Under current rules, companies can already disclose information regarding “climate-related risk” if determined as material as part of their disclosures. In fact, in 2010, the SEC even released the *Commission Guidance Regarding Disclosure Related to Climate Change* that “outlines our views with respect to our existing disclosure requirements as they apply to climate change matters” in order to “assist companies in satisfying their disclosure obligations under the federal securities laws and regulations.”<sup>67</sup> Richard Morrison, Senior Fellow at the Competitive Enterprise Institute, notes that “By introducing specific, prescriptive requirements rather than ones based on general materiality principles, the agency is trying to suggest that anything climate-related should be considered presumptively material.”<sup>68</sup> And as AFP pointed out in previous comments to the SEC, “to the extent the climate-related disclosures will require non-material

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<sup>61</sup> *Id.* at 163.

<sup>62</sup> <https://www.sec.gov/comments/climate-disclosure/cl12-8563794-230748.pdf>.

<sup>63</sup> <https://www.sec.gov/news/speech/speech-peirce-061819>.

<sup>64</sup> 87 21340.

<sup>65</sup> *Id.*

<sup>66</sup> <https://www.barrons.com/articles/esg-meaning-sustainable-investing-study-51649719876>.

<sup>67</sup> <https://www.sec.gov/rules/interp/2010/33-9106.pdf>.

<sup>68</sup> <https://cei.org/studies/the-secs-costly-power-grab/>.

information, it is unclear why the SEC is the appropriate agency to implement such a requirement.”<sup>69</sup>

The Proposal goes lengths to warp the concept of materiality and disclosure to impose a specific agenda to the detriment of companies and investors. Commissioner Peirce’s dissenting remarks note that “Some of the proposed disclosure requirements apply to all companies without a materiality qualifier, and others are governed by an expansive recasting of the materiality standard.”<sup>70</sup> The Commissioner goes on to explain that “the proposed rules require all companies to disclose all Scope 1 and 2 greenhouse gas emissions, and the financial metrics do not have a materiality qualifier.”<sup>71</sup> And to illustrate how impractical and unrealistic some of the disclosure requirements are, the Proposal would require disclosure of information on “How any climate-related risks identified by the registrant have had or are likely to have a material impact on its business and consolidated financial statements, which may manifest over the short-, medium-, or long-term.”<sup>72</sup> We are unaware of any precedent for SEC-mandated disclosures by registrants of theoretical risks to shareholders based on policies that may or may not be in effect decades into the future; the Commission does not provide one either.

By distorting materiality, the Proposal attempts to influence and regulate the ways companies choose to operate and do business. David Burton, Senior Fellow in Economic Policy at the Heritage Foundation, argued in previous comments to the SEC on climate change disclosures that “The focus of the materiality standard should remain on what investors need to know to meet their financial, economic or pecuniary objectives, not a regulator’s preferred political or social objectives or those of politically motivated fund managers or proxy advisor.”<sup>73</sup> The Proposal would go above and beyond these standards.

#### **IV. Overreach of Scope 2 and 3 Emissions Requirements for Reporting**

Through the requirement of Scope 2 and 3 emissions the Biden administration is asking publicly traded companies to calculate and report greenhouse gas emissions from their suppliers, customers, and logistics operators. Scope 2 and 3 emission reporting requirements are indirect emissions (beyond a registrant’s control) that are associated with activities both upstream and downstream from a company’s value or supply chain. Scope 2 emissions reporting would be required regardless of materiality, while Scope 3 emissions reporting would be required only if those emissions are material or if the registrant has set a GHG emission target or goal that includes Scope 3 emissions.<sup>74</sup> Thus, this requirement would not only be difficult to assess but would also create a great deal of uncertainty for private and international companies that may be in the supply chain of a public company. We do not believe the SEC has the statutory authority to mandate environmental disclosures and Scope 2 and 3 requirements go beyond what many public companies provide voluntarily. Moreover, the Commission makes no attempt to reconcile the redundant reporting stemming from these requirements. For example, one registrant’s Scope 1 reporting would be of another registrant’s Scope 2 emissions, all of which might be Scope 3 emissions for yet another registrant. The Commission has failed to consider more cost-effective rules that are more accurate and more in line with the public interest.

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<sup>69</sup> <https://www.sec.gov/comments/climate-disclosure/cl12-8914461-244714.pdf>.

<sup>70</sup> <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>.

<sup>71</sup> *Id.*

<sup>72</sup> 87 FR 21345.

<sup>73</sup> <https://www.sec.gov/comments/climate-disclosure/cl12-8914466-244728.pdf>.

<sup>74</sup> 87 FR 21377.

This proposed requirement would touch every industry and have significant impact on how and who registrants do business with. Scope 3 upstream emissions activities include: a registrant's purchased goods and services; transportation and distribution of purchased goods, raw materials, and other inputs; business travel by employees; employee commuting; and more.<sup>75</sup> The downstream activities include transportation and distribution of a registrant's sold products and goods; processing by a third-party of a registrant's sold products; end-of-life treatment of sold products; and more.<sup>76</sup> Currently only 22.1% of public companies voluntarily submit this information,<sup>77</sup> as compared to 52% of public companies that voluntarily publish environmental social governance (ESG) reports that include climate and emissions information.<sup>78</sup> The Commission has provided a safe harbor for Scope 3 emission requirements due to the difficult nature of measuring the reports for accuracy.

The Commission has suggested more significant Scope 3 emissions may lead registrants “to shift their activities to capitalize on these changes and thus may need to allocate capital to invest in lower emissions equipment or to create new types of products.”<sup>79</sup> Through this suggestion the SEC is asserting they know how you should operate your business and who you should do business with. As Commissioner Pierce states, “[a]dmitedly, a company’s choices about things like what products to produce and which suppliers and distributors to use affect its Scope 3 numbers, but Scope 3 data is really about what other people do. The reporting company’s long-term financial value is only tenuously at best connected to such third-party emissions.”<sup>80</sup> This has nothing to do with investment or financial risk which are in the SEC’s regulatory purview. This information is not directly relevant to investors and the Commission not only lacks the regulatory authority to mandate environmental disclosures, it does not have the expertise to make suggestions regarding how a company conducts its business.

The requirement of Scope 3 emissions would entangle private companies and foreign companies, including small businesses, into the SEC climate disclosure reporting. This would likely require private companies and foreign companies to provide their GHG emissions data that may be considered material and relevant to evaluating public companies’ risk. As partners at Kirkland and Ellis law firm stated, “many are suppliers or customers to, or have received loans or investments from, public companies subject to the proposed rule. These non-subject companies would face pressure to disclose their emissions in order to enable reporting of Scope 3 emissions by public companies that are subject to the rule.”<sup>81</sup> This issue is not effectively discussed in the proposed rule and leaves a great deal of uncertainty to registrants and third parties who may be impacted. It is unclear the SEC has the authority to effectively require private companies to disclose such information.

## **V. The Commission’s Proposal Would Have Adverse Impacts on Businesses and Investors**

The SEC recognizes that the Proposal would impose significant costs on companies, however, those costs are likely understated. In fact, the Commission admits in the Proposal’s “Benefits and Costs” section they are “unable to reliably quantify these potential benefits and

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<sup>75</sup> 87 FR 21380.

<sup>76</sup> 87 FR 21380.

<sup>77</sup> 87 FR 21422.

<sup>78</sup> 87 FR 21422.

<sup>79</sup> 87 FR 21435.

<sup>80</sup> <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>.

<sup>81</sup> <https://www.kirkland.com/publications/kirkland-alert/2022/03/sec-proposes-new-climate-disclosure-requirements>.

costs” and that “we qualitatively describe the factors that may affect disclosure costs but we are unable to accurately quantify these costs.”<sup>82</sup> Comments submitted by a cohort of professors of law and finance note that even with the high costs of the Proposal “the SEC recognizes that it cannot be sure of what benefits, if any, the Proposal will produce. The Proposal refers repeatedly to benefits that “could,” “may” or “might” arise.”<sup>83</sup> The Commission is willing to impose high costs on companies (and their consumers) for seemingly little benefit.

According to SEC estimates, the change in external cost burden stemming from the Proposal would increase from \$3.9 billion to \$10.2 billion.<sup>84</sup> While a significant increase, it likely underestimates the Proposal’s total cost. Commissioner Peirce astutely recognizes that basing the rule in part on the Task Force on Climate-Related Financial Disclosures Framework and estimating costs based on its use is flawed, as some companies have only engaged with pieces and parts of the framework.<sup>85</sup> Uncertainties like these should raise a red flag for the SEC’s cost analysis.

The breadth of information the Proposal requires specifically regarding Scope 3 emissions will add unnecessary costs for companies, both public and private. As discussed earlier, there is immense difficulty in assessing Scope 3 emissions which include “all indirect GHG emissions not otherwise included in a registrant’s Scope 2 emissions, which occur in the upstream and downstream activities of a registrant’s value chain.”<sup>86</sup> This will necessarily include information from a qualifying registrant, but also from any public or private company in the registrant’s value chain. In comments regarding a potential upcoming SEC rulemaking, Commissioner Lee contended: “I’m not interested in forcing medium- and small-sized companies into the reporting regime.”<sup>87</sup> However, the Proposal under consideration would do just that. Additionally, large companies would be subject to an attestation requirement for Scope 1 and Scope 2 emissions, requiring those companies to pay a third-party to comply. These realities will result in increased costs for registrants and the companies operating up and down their value chain.

The Proposal would spur the demand for climate specialists, auditors, attorneys, and other consultants that will be needed for public and private companies to comply with the new requirements. It would also allow class action lawyers a flurry of opportunities to file frivolous securities law claims. While the disclosure regime imposed on companies would create major costs, it would benefit certain lines of business whose purpose would be to help companies stay in compliance with the new burdensome mandates and regulations. The Commission acknowledges that registrants would not be able to comply without the assistance of outside firms, stating that “We recognize that determining the likely future impacts on a registrant’s business may be difficult for some registrants. Commenters have noted that the science of climate modeling has progressed in recent years and enabled the development of various software tools and that climate consulting firms are available to assist registrants in making this determination.”<sup>88</sup> The Proposal would provide a new niche for lobbyists and stakeholder groups to influence the process. That’s a contorted way of “helping” American businesses and investors.

Employers, shareholders, and investors would be worse off under the Proposal. As Members of the U.S. Senate explained, “This proposal comes with enormous costs for employers. As described in the SEC’s proposal, public companies would face billions in new compliance costs to meet the new requirements, which will likely reduce the amount of capital that could otherwise

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<sup>82</sup> 87 CR 21428.

<sup>83</sup> <https://www.sec.gov/comments/s7-10-22/s71022-20126528-287180.pdf>.

<sup>84</sup> 87 FR 21461.

<sup>85</sup> <https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>.

<sup>86</sup> 87 FR 21374

<sup>87</sup> <https://www.wsj.com/articles/sec-pushes-for-more-transparency-from-private-companies-11641752489>.

<sup>88</sup> 87 FR 21352.

be deployed in the U.S. economy. Investors will face harm, too, in the form of reduced shareholder returns.”<sup>89</sup> It is difficult to see how the economy, capital markets, businesses, and investors would be better off under the SEC’s proposed “enhanced” disclosure regime. Not only would the Proposal reduce capital formation and shareholder returns, but the swath of burdensome regulations would ultimately lead to fewer companies going and staying public.

AFP appreciates the opportunity to comment, and our activists look forward to consideration of this feedback.

Sincerely,  
Gary Haglund  
Senior Policy Analyst, Economic Policy

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<sup>89</sup> <https://www.sec.gov/comments/s7-10-22/s71022-20122544-278541.pdf>.