June 17, 2022

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

Submitted via http://www.sec.gov/rules/submitcomments.htm,
and rule-comments@sec.gov (File Number S7-10-22)

Re: The Enhancement and Standardization of Climate-Related Disclosures for Investors (File Number S7-10-22)

Dear Vanessa A. Countryman:

The undersigned financial officers hereby respectfully submit the following comments in response to the Securities and Exchange Commission ("Commission")'s proposed rule entitled The Enhancement and Standardization of Climate-Related Disclosures for Investors (File Number S7-10-22) ("Proposed Rule").[1] We have watched with dismay as the Commission and other federal commissions and boards have proposed rules and policies that promote political causes that will adversely affect public finance and retirement income. The Proposed Rule is another such rule. The Commission should not adopt the Proposed Rules for the following reasons.

First, the Commission is not a climate regulator. By adopting the Proposed Rule, the Commission would make itself a climate regulator. This would violate the Securities and Exchange Act and usurp Congress' authority. The Proposed Rule will also fail the Administrative Procedures Act (APA) arbitrariness test and likewise the Securities and Exchange Act's requirement to assess rulemakings for their effect on efficiency, competition, and capital formation.

Second, the Proposed Rule would violate the First Amendment because it would require issuers to represent that they regard alleged climate risks as material.

Third, the Proposed Rule carries the potential for effects well beyond affected issuers, reaching into the broader economy and society. The Proposed Rule is likely to cause massive shifts to the American economy, driving investment away from sectors that support millions of jobs and thousands of fragile communities—all at a time when historic levels of inflation,

[1] The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed April 11, 2022) (to be codified at 17 C.F.R. pt. 210, 229, 232, 239, and 249).

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including especially hikes in food and energy prices, making such changes most painful to lower-income Americans. The Commission has also issued the Proposed Rules at a time when domestic energy production is a matter of national security. These changes will likely drive-up energy prices at the precise moment that surging gas prices are causing grave concerns for millions of American households. Yet the Commission fails even to inquire about the nature of these effects, let alone compare them against the benefits the Proposed Rule is asserted to achieve.

Fourth, the increased costs of compliance to be borne by issuers, with no clear benefit to the issuers or investors.

Fifth, the Proposed Rule indulges in irrational climate exceptionalism, elevating climate issues to a place of prominence in disclosures that they do not deserve—above even issues such as the COVID-19 pandemic with its proven massive effects on every economy of the globe. This irrational elevation will mislead investors, contrary to the purpose of the securities laws.

Sixth, the Proposed Rule fails to consider an obvious and facially far superior alternative: relying on an existing greenhouse gas ("GHG") emissions registry operated by the agency entrusted by Congress with environmental issues, the EPA. The reasons the Commission offers for disregarding this option could easily be addressed at a far lower cost than the Proposed Rule's potentially massive price tag.

Seventh, the Proposed Rule will fail to enable comparison across issuers, which is one of its principal aims of the Proposed Rule. And even if companies could agree on these predictions, the diversity of issuers' circumstances and the data reporting of their value chains will frustrate any attempt to compare reports across companies.

Eighth and finally, the Proposed Rule continues to show what has been evident since Acting Chair Lee's initiation of this rulemaking: the core decision to require additional disclosures has already been made by the Commission and the broader Administration. As a result, any final rule will bear the taint of prejudgment.

It is important to be clear about what is at stake in this rulemaking. The Proposed Rule (despite its rhetoric) is not about *removing* an impediment to investors or about providing more material information to investors. Today an investor may use existing data and choose to invest only in companies that have climate policies of which the investor approves or that disclose climate-related data the investor requires. Rather, the Proposed Rule is about *imposing* an impediment: issuers will be barred from offering to Americans opportunities to invest unless the issuers make certain immaterial climate-related statements. The Proposed Rule is also about forcing issuers to act or take actions in compliance with a political agenda and giving activists and regulators ways to force issuers to act. Such policies are contrary to state economies and citizens.

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1. The Commission Is Not a Climate Regulator

In an extraordinary break with its own authorizing statutes and Congress's clear direction, the Commission in this rulemaking attempts to transform itself into a climate regulator, proposing provisions intended—as a matter of public record—to foist new "green" policies on America's issuers. To paraphrase the title of Commissioner Hester M. Peirce's statement about the Proposed Rule, the Commission is "not the Securities and Environment Commission." Setting environmental policy for the nation lies far beyond the limited mission entrusted to the Commission and deep in the heart of territory reserved to the deliberations of the people's representatives in Congress. The tool the Commission selects—compelled speech on matters of grave public controversy—is just as unlawful as the purposes it serves. And the reasoning advanced to support this power grab is just as shaky.

By claiming to set environmental policy for the nation, the Commission trespasses into Congress's domain, namely the resolution of divisive national policy questions. In fact, Congress *has* spoken to just the question at issue in the Proposed Rule, rejecting legislation that would have instructed the Commission to do what it now seeks to do anyway. But not even Congress could adopt the means the Commission has chosen, for the Proposed Rule does nothing but compel speech based on its subject matter. While the Supreme Court has sometimes permitted compelled disclosures of uncontroversial information needed to protect consumers from potential deception, the disclosures here are both highly controversial and unneeded to prevent fraud. Nor has the Commission advanced the connection to a strong government interest needed to justify the disclosures.

The Proposed Rule would unlawfully transform the Commission into a climate regulator and violates the Securities and Exchange Act and APA. The Proposed Rule also usurps Congress's role in resolving our Nation's political disagreements and trenches upon vital First Amendment freedoms.

a. The Proposed Rule Violates the Securities and Exchange Act

The Proposed Rule would violate the Securities and Exchange Acts and transgress the clear decree of Congress by making the Commission a climate regulator. There can be no doubt that the Proposed Rule is about setting climate policy for the United States. The Proposed Rule aims to push issuers toward "greener" policies and operations. Its purpose is to change what issuers *do*, not just what they *say*. In the first place, the Executive Order from which this rulemaking springs states that the President's and Administration's policy is to "advance … disclosure of climate-related financial risk" and to "*act to mitigate that risk* and its drivers."[2] Further, the Financial Stability Council's report under the foregoing Executive Order explains that the "[e]conomic and financial decisions that account for climate-related financial risks,"

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[2] Executive Office of the President, *Climate-Related Financial Risk*, Executive Order 14030, 86 FR 27967 (May 20, 2021), https://www.federalregister.gov/documents/2021/05/25/2021-11168/climate-related-financial-risk.

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which the Proposed Rule aims to advance, "help promote alignment of financing and capital toward a future with lower greenhouse gas emissions."[3]

At the commencement of this rulemaking, Acting Chair Lee explained that additional disclosures were needed because "investors want to and can help drive sustainable solutions" on climate issues.[4] Many of the comments in response to the Acting Chair's request for information—from which the Proposed Rule, in Chair Gensler's words, "benefited greatly"[5]—urged that the Commission proceed with the Proposed Rule for the same reason. For example, one comment urged disclosure requirements because they help to "accelerate and scale up private capital flows towards the net-zero transition" by enabling "investors [to] use capital allocation and stewardship to … transition away from carbon-intensive activities."[6] Another commenter explained that issuers who report operations and policies that green investment managers do not like can expect to be "removed from [their] investable universe,"[7] with associated increases in the cost of capital that many companies cannot afford. For this reason, mandatory disclosures will "driv[e] the large-scale behavior and systems change needed to achieve a … net zero emissions economy"[8] that one commenter sought. Another commenter sought disclosures to help it to "engage[] with … company management and boards" on needed changes as well as to exercise voting rights.[9] This "engagement" in turn "facilitates the emergence of best practices across industries"—i.e., helps investors urge companies to change

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[3] *Report on Climate-Related Financial Risk* 2, https://home.treasury.gov/system/files/261/FSOC-Climate-Report.pdf; *see also id.* at 4 (by promoting climate disclosures, "financial regulators can … help [the financial system] support an orderly, economy-wide transition toward the goal of net-zero emissions").

[4] "A Climate for Change" (Mar. 15, 2021), https://www.sec.gov/news/speech/lee-climate-change.

[5] "Statement on Proposed Mandatory Climate Risk Disclosures" (Mar. 21, 2022), https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321.

[6] Attachment to Comment by Ceres (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8911852-244660.pdf, cited by the Proposed Rule at 87 Fed. Reg. 21334, 21341.

[7] Comment from Calvert Research and Management 4 (June 1, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8856988-239822.pdf, cited by the Proposed Rule at 87 Fed. Reg. 21334, 21338.

[8] Comment from Ceres (June 10, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-245664.pdf, cited by the Proposed Rule at 87 Fed. Reg. 21334, 21339.

[9] Comment from State Street Global Advisors (June 14, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8914407-244702.pdf, cited by the Proposed Rule at 87 Fed. Reg. 21334, 21338.

their operations to reduce GHG emissions and implement other green policies.[10] It is clear that the proposed new disclosures are aimed at forcing issuers to comply with the Administration's climate policies, not at proving more material information to investors.

If finalized, the Proposed Rule would have the effect that the President and commenters sought: it would push companies toward "green" policies and operations. The Commission admits, with considerable understatement, that in response to the finalized proposal "registrants may move assets or operations away from geographic areas with higher physical risk exposures or may seek to decrease GHG emissions," and that they may also "change some suppliers or disengage with certain clients."[11] The Proposed Rule would achieve this result in several ways, including:

- By requiring issuers to disclose their GHG emissions (and in many cases emissions of those up and down their "value chains"), the rule would give activists tools to pressure issuers to drive down GHG emissions and would prioritize capitalization and hence growth at lower-emitting issuers. Indeed, because the emissions disclosure requirements cannot promote investment decisions reasonably designed to account for transition risk, see infra, the creation of tools for activists is the principal effect of the emission disclosure provisions.

- By requiring issuers to disclose how their boards and management deal with climate issues, the rule would precipitate an arms race for green governance.

- By creating potential liability for failure—despite best efforts—to adequately disclose both climate-related risk and GHG emissions, the rule would push issuers away from activities involving such risk and emissions.

But Congress has been very clear: the Commission's role is to ensure that issuers accurately represent their activities rather than to decide what those activities should be. The Commission's authority extends to disclosures needed "for the protection of investors"[12]—that is, protection of people *as investors*. In general, as investors, people seek a reasonable return on investment in exchange for a commensurate degree of risk. And that, as the Supreme Court has made clear, is what Congress set out to protect in the federal securities laws.[13] As investors, Americans primarily expect capital markets that are orderly, efficient, and free from fraud. To

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[10] Comment from Vanguard (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8906800-244148.pdf, cited by the Proposed Rule at 87 Fed. Reg. 21334, 21338.

[11] Proposed Rule, 87 Fed. Reg. 21334, 21448.

[12] 15 U.S.C. 77g(a)(1) (emphasis added).

[13] *See, e.g.*, *Basic v. Levinson*, 485 U.S. 224, 230 (1988) ("The 1934 Act was designed to protect investors against manipulation of stock prices.").

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achieve this objective Congress adopted a "fundamental purpose" of "full disclosure."[14] Pursuing this fundamental purpose requires the Commission to ensure that issuers do not use "manipulative or deceptive device[s] or contrivance[s],"[15] and that in turn means preventing issuers from "omit[ting] to state a material fact necessary in order make" other statements "not misleading."[16]

Therefore, the Commission rightly demands that issuers disclose information about their conduct insofar as this could make other statements about earnings, profitability, etc., inaccurate by omission—that is, insofar as the information is *material*.[17] But while the Commission rightly requires that issuers disclose their material conduct, it lacks authority to set substantive standards for what that conduct must be. Nothing in the Securities or Exchange Acts remotely suggests that the Commission has authority to set substantive environmental (or any other kind of) policy for issuer conduct, and of course the Commission has "only those authorities conferred upon it by Congress."[18] Congress has limited the Commission's authorities for good reason, for the Commission lacks the political accountability, experience, and expertise to set substantive standards of conduct for issuers.

The Commission cannot justify new climate disclosures by claiming that investors demand them. The question is not whether investors *want* new disclosures. Other investors do not want new disclosures, and on each side the motives for these desires are various. The question the Commission must ask, however, is whether the disclosures are objectively material to investors *as investors*, that is, to investment risk and return. Because, as the Supreme Court has held, the "question of materiality … is an objective one,"[19] the Commission got it exactly wrong when it "consider[ed] … investor demand [for additional disclosures] in exercising [its] authority and responsibility to design an effective and efficient disclosure regime,"[20] and any final rule similarly based on investor demand would be arbitrary and capricious.

The Commission asserts that the information its Proposed Rule demands is material. This will not be true in practice. In fact, the Proposed Rule is guaranteed to force disclosure of vast quantities of immaterial information for at least these three reasons.

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[14] *Id.* (internal quotations omitted).

[15] 15 U.S.C. 78j(b).

[16] 17 C.F.R. 240.10b-5(b).

[17] *See, e.g.*, *TSC Indus., Inc. v. Northway*, 426 U.S. 438 (1976).

[18] *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

[19] *TSC Indus.*, 426 U.S. at 445.

[20] Proposed Rule, 87 Fed. Reg. 21334, 21337.

First, the Proposed Rule would demand extensive new climate disclosures from *all issuers*, regardless of whether the information generated by those disclosures is material for particular issuers considering the overall mix of their operations and assets. The Commission nowhere finds that all the disclosures it demands are material for all issuers, and for good reason. It is difficult to believe that the risks and returns of, e.g., software development or construction companies are affected by the research and development budget they devote to climate issues[21] or how often the board discusses climate change.[22] Indeed, the Commission nowhere finds even that *most* of its disclosures are material for *most* issuers.

Second, the Proposed Rule would require disclosure of scopes 1 and 2 information even when that information is not material—a feature highlighted by the limitation of disclosure of information falling within scope 3, but *not* scopes 1 and 2, to situations in which the information is material.[23]

Third, scopes 1, 2, and 3 information is highly unlikely to be material. The Commission justifies disclosure of this information by claiming it would help investors manage transition risk,[24] defined as "risks related to a potential transition to a lower carbon economy."[25] But economies do not become "lower carbon" in the abstract; any such transition is accomplished only by means of concrete legal, regulatory, and public opinion changes. And as our extensive political debates on climate over the last decades show, America has reached no decision about any of these changes.

Impeding an American's access to the capital markets is a grave step. Congress carefully limited the Commission's authority to do so: the Commission may establish only those requirements necessary to ensure that investors are not misled. That means that the Commission may require issuers to explain what they are doing but not tell them what to do. But here, the public record and the Administration's own statements leave no doubt that one principal purpose of the Proposed Rule is to force issuers to change what they do. The Proposed Rule, if finalized, would create incentives and leverage that push issuers toward green policies and operations. The Commission tries to justify the Proposed Rule by claiming that many investors *want* this information.[26] The Commission overlooks the many investors who do not want additional disclosures, but in any event, the meaning of the federal securities laws does not turn on plebiscites. The relevant question is whether the disclosures would result in information that is

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[21] Proposed Rule, 87 Fed. Reg. 21334, 21354.

[22] Proposed Rule, 87 Fed. Reg. 21334, 21359.

[23] Proposed Rule, 87 Fed. Reg. 21334, 21374.

[24] Proposed Rule, 87 Fed. Reg. 21334, 21361.

[25] Proposed Rule, 87 Fed. Reg. 21334, 21349.

[26] Chair Gary Gensler, Statement on Proposed Mandatory Climate Risk Disclosures, March 21, 2022, https://www.sec.gov/news/statement/gensler-climate-disclosure-20220321.

objectively material to the risks and returns available from investments—and the proposed disclosures clearly would not.

b. The Proposed Rule Usurps Congress' Role

The Proposed Rule usurps Congress's role by attempting to resolve one of the most controversial political topics of our day, namely climate change. Our Constitution vests in Congress exclusive legislative authority and with it the authority to decide divisive questions of national policy within the purview of the Constitution.[27] The American people elect their representatives to deliberate about what is best for our country and, where serious differences exist, to resolve them by discussion and compromise. Many Americans hold strong views about national climate policy. Congress is the only legitimate forum in which to debate these views and come to resolution. Yet Congress has declined to adopt anything approaching the sweeping measures the Commission here advances. Indeed, the last Congress specifically *rejected* proposed legislation remarkably like the Proposed Rule.[28] And similar legislation proposed this Congress shows no likelihood of passage.[29]

The Commission may not now put itself in Congress's place by reshaping America's economy in ways that Congress itself has rejected. The Commission has only those powers that Congress has given it. It is nonsensical to imagine that Congress, in granting the Commission authority to maintain capital markets that are orderly, efficient, and free from fraud, silently intended to give the Commission authority to set U.S. climate policy. Congress, after all, "does not … hide elephants in mouseholes."[30] Further, Congress has created programs specifically tasked with addressing air pollution, and the Supreme Court has held that these programs regulate GHG emissions.[31] Where Congress "has created a distinct regulatory scheme for"[32] GHG emissions, it is unreasonable for the Commission to attempt to substitute or add its own regulatory apparatus. Moreover, it is manifestly unreasonable for the Commission to adopt a regulatory scheme that Congress itself has rejected.

c. The Proposed Rule Would Violate the APA and the Commission's Rulemaking Authority

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[27] U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

[28] *See* H.R. 3623, *Climate Risk Disclosure Act of 2019*.

[29] *See* H.R. 2570, *Climate Risk Disclosure Act of 2021*.

[30] *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001).

[31] *See Massachusetts v. EPA*, 549 U.S. 497 (2007).

[32] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000).

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If finalized, the Proposed Rule would violate the APA and the Commission's rulemaking authority because it blithely abandons the principles of reasoned decision-making. The Proposed Rule fails to inquire whether even the costs it acknowledges are worth the benefits it claims, thus failing the APA arbitrariness test and likewise the Securities and Exchange Acts' demand to assess rulemakings for their effect on efficiency, competition, and capital formation Because it justifies itself by claiming to offer investors material information but in fact fails to do so, the Proposed Rule fails under its own terms and is therefore arbitrary and capricious under the APA.

2. **The Proposed Rule Would Violate the First Amendment**

The Proposed Rule would violate vital First Amendment freedoms. The Proposed Rule specifies the content about which issuers must extensively speak, including the asserted impacts of climate change on their business, their internal processes for addressing climate issues, and—through the GHG emission disclosures—their asserted contribution to climate change. The Proposed Rule even requires issuers to speak about their speech.[33] Ordinarily, "[c]ontent-based laws … are presumptively unconstitutional" and may be upheld only if they survive strict scrutiny.[34] The Court has applied a lesser, but still demanding, form of scrutiny to commercial speech.[35]

The Court has applied a relatively permissive standard of review to restrictions compelling certain kinds of disclosures to prevent consumer fraud, but this standard does not apply here, for many reasons. *Zauderer* review applies only to compelled disclosures that are "purely factual and uncontroversial,"[36] but the Proposed Rule's disclosures are anything but that. The Proposed Rule would require issuers to disclose the degree of their asserted contribution to what critics claim is "the ultimate crime against humanity."[37] A regulation "compelling an issuer to confess blood on its hands" does not qualify as "factual and uncontroversial."[38] Further, the Proposed Rule would require issuers to take the Commission's side in a hotly contested public debate.

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[33] *See* Proposed Rule, 87 Fed. Reg. 21334, 21359 (requiring disclosure of frequency of board discussions of climate issues).

[34] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

[35] *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

[36] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985).

[37] Tom Engelhardt, "Is Climate Change a Crime against Humanity?", https://www.thenation.com/article/archive/climate-change-crime-against-humanity/.

[38] *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015).

Not all Americans agree with the Commission that the climate is about to inflict increasingly severe losses on issuers and to force changes to their business operations. But the Proposed Rule, by compelling extensive discussion of climate-related risks and of issuers' strategies for dealing with them. The Proposed Rule demands that issuers send the message that they regard these alleged climate risks as material—indeed, as warranting greater attention than the vast number of other issues (e.g., a global public health crises) that are not afforded such treatment. *Zauderer* does not apply to "attempt[s] to prescribe what shall be orthodox in politics … or other matters of opinion or [to] force citizens to confess by word or act their faith therein."[39] *Zauderer* by its terms applies to measures designed to prevent consumer deception.[40] But for the reasons given *supra*, the Proposed Rule would demand much information that is not material and hence not relevant to preventing any statements from becoming misleading.

The Commission has not offered a basis for its Proposed Rule to survive scrutiny under *Central Hudson*[41]—let alone under stricter standards of scrutiny—and no such basis exists. The Commission has failed to offer a "substantial interest to be achieved by restrictions on commercial speech,"[42] for the Proposed Rule would result in disclosure of much information that is not material and hence not related to the purposes of the Securities and Exchange Acts. And the Commission has failed to show that its interest, such as it is, could not be "served as well by a more limited restriction,"[43] such as a very modest filing amendment that would assist investors in using EPA's existing Greenhouse Gas Reporting Program to track issuer emissions. *See infra*.

The Proposed Rule's violations of the First Amendment are especially egregious because speech about the climate—from all perspectives and all speakers, including from groups of Americans who have joined together to create valuable goods or offer important services for the public—is just what is needed for our society to resolve its deep-seated disagreements about climate policy.

3. <u>The Commission Fails to Consider the Effects on The Economy and Americans</u>

The Commission inexcusably fails to consider the Proposed Rule's effects on the economy and on American workers, families, and communities. As noted above, the Proposed Rule's purpose is to bring about vast changes in the American economy, and that will be its effect if finalized. Such a seismic shift would create enormous economic dislocation. As many of today's industries wither, they would shed jobs and upend the families and communities—especially in manufacturing- and extraction-dependent regions—that depend on them. The same would be true as companies abandon regions they have deemed at heightened physical risk.

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[39] *Zauderer*, 471 U.S. at 651.

[40] *Id.*

[41] *Central Hudson*, 447 U.S. 557.

[42] *Id.* at 564.

[43] *Id.*

Financial Stability Oversight Council's report on climate-related financial risk acknowledged that "actions to address climate-related financial risks could disproportionately impact financially vulnerable communities" and therefore urged "thoughtful and balanced policy responses" that take the interests of these communities into account.[44] But the Proposed Rule fails to follow this approach. Instead, while admitting that its provisions may drive companies to abandon communities, clients, and suppliers, it simply declines to forecast these effects or take them into account.

The Proposed Rule does not prognosticate how extensive its changes to the American economy and American society will be. For all the Proposed Rule can say, those changes could result in hundreds of thousands or even millions of lost jobs, the death of major industries, and the break-up of communities across the country. Because the Proposed Rule does not inquire as to the extent of its economic and social dislocation, it cannot compare that dislocation against the benefits that it claims it will achieve. Its failure to make that comparison would render any final rule arbitrary and capricious, for it is irrational to pursue benefits at the cost of unknown—and hence potentially vastly greater—harms. Likewise, a Proposed Rule that fails to inquire about acknowledged—and potentially vast—dislocation "entirely fail[s] to consider an important aspect of the problem," in violation of the APA.

Were a study completed or disclosures required regarding the costs of eliminating traditional energy sources from the U.S. economy, we expect that the Commission would abandon the Proposed Rules. While the Administration and Commission focus on the alleged costs and harm, the Administration and Commission ignore the costs and harm that will result if we eliminate traditional energy sources. U.S. businesses and citizens would be irreparably harmed. In addition, U.S. national security would be weakened.

The Commission's failure to understand the broader effects of its Proposed Rule is even more startling because on its face those effects would be both immense and inequitable. The Proposed Rule would cause massive shifts to the American economy, driving investment away from sectors that support millions of jobs and thousands of fragile communities—all at a time when historic levels of inflation, including especially hikes in food and energy prices, make such changes most painful to lower-income Americans. These changes would also drive-up energy prices at the precise moment that surging gas prices are causing grave concerns for millions of American households. By artificially elevating the prominence of climate-related factors in investment decisions, the Proposed Rule would interfere with the ability of working Americans to plan for and achieve a secure and dignified retirement. And by flooding disclosures with useless climate-related information, the Proposed Rule would make it harder for investors to find and evaluate the information they care about and for businesses to access the capital they need to grow and create jobs.

4. **The Commission Fails to Consider the Effects on Issuers**

The Proposed Rule fails to consider whether its acknowledged costs are justified by its benefits. The Commission acknowledges that the Proposed Rule, if finalized, will be enormously

[44] See Footnote 3.

costly[45], maybe one of the costliest in American history. Individual issuers may incur compliance costs of $640,000 initially and $530,000 annually thereafter for compliance cost.[46] And these figures exclude the costs of operational changes businesses will make or of changes to the broader economy and society. Yet the Commission does not tell us the value of the disclosures it believes the Proposed Rule would achieve over and above the disclosures issuers already make under the Commission's 2010 guidance. The Proposed Rule does not attempt to quantify the value of its claimed benefits or even to estimate their order of magnitude.[47] Most fatally, it simply fails to ask whether the Proposed Rule's benefits are worth its massive costs. This indifference, the Supreme Court has made clear, falls below the level of rational decision-making.[48]

This failure would be unacceptable from any agency, but it is especially so from the Commission, which operates under a congressional directive to consider whether its actions "will promote efficiency, competition, and capital formation."[49] The Commission has not adequately considered whether its Proposed Rule would promote efficiency, because it cannot tell us whether its imposition of massive operating costs on America's public companies would be counterbalanced by its claimed efficiency gains, the magnitude of which it fails to estimate.[50] Further, the Commission has not considered the fact—evident from the comments submitted in response to Acting Chair Lee's RFI[51]—that many investors and investment advisors would use the information filed in response to the proposed rule to make *inefficient* allocations of capital, that is, allocations driven by the desire to achieve social rather than financial goals.

The Commission has not adequately considered whether its Proposed Rule would promote competition because it fails to consider the effects of suppression of non-green business

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[45] Proposed Rule, 87 Fed. Reg. 21334, 21439-21445.

[46] *See id. See also* Mark Segal, "Study Reveals Cost of Climate Disclosure for Issuers and Investors," (ESG Today (May 18, 2022), https://www.esgtoday.com/study-reveals-cost-of-climate-disclosure-for-issuers-and-investors/ (citing Costs and Benefits of Climate-Related Disclosure Activities by Corporate Issuers and Institutional Investors, by The SustainAbility Institute by ERM, https://www.sustainability.com/globalassets/sustainability.com/thinking/pdfs/2022/costs-and-benefits-of-climate-related-disclosure-activities-by-corporate-issuers-and-institutional-investors-17-may-22.pdf.

[47] Proposed Rule, 87 Fed. Reg. 21334, 21432-21433.

[48] *See Michigan*, 576 U.S. 743.

[49] 15 U.S.C. 77b(b); 15 U.S.C. 78c(f); *see also* 15 U.S.C. 78w(a)(2).

[50] *See* Proposed Rule, 87 Fed. Reg. 21334, 21449-21451.

[51] *See, e.g.,* Comment from Investment Advisors Association (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8906799-244130.pdf.

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strategies. Some firms claim to see significant business opportunities in strategies such as "increased use of renewable energy, increased resource efficiency, the development of new products, services, and methods, access to new markets caused by the transition to a lower carbon economy," etc.[52] Others are doubtful. At present, firms compete for investment based on these divergent strategies. But the Proposed Rule would dampen this competition by tilting the scales in favor of green strategies. The Commission displays no awareness of this competition-suppressive effect. It therefore does not even inquire whether it would be outweighed by the Proposed Rule's asserted pro-competitive effects, let alone determine that this burden on competition is "necessary and appropriate," as Congress has demanded.[53]

The Commission has not adequately considered whether its Proposed Rule would promote capital formation because it has not determined that the massive costs it would impose for the privilege of accessing the public capital markets are justified by *all* asserted benefits taken together, let alone benefits to capital formation.

5. The Proposed Rule Indulges in Irrational Climate Exceptionalism

The Proposed Rule indulges in irrational climate exceptionalism. War, foreign policy, presidential elections, inflation, public health crises—these and many other events have immense effects throughout the economy. Yet the Commission does not require that every issuer report on the impact of these events, the qualifications of its management to evaluate them, or the amount of time its board spends discussing them. That treatment is reserved for climate alone.

The Commission does not explain why, or even ask whether, the climate is more likely than—or even as likely as—these and other factors to prove material to most issuers. But absent a reason to believe that this is so, it is arbitrary to treat climate differently than such other factors. Indeed, the Commission does not even propose to require reporting on the impacts of the continuing COVID-19 pandemic, notwithstanding its proven widespread impact throughout every economy in the world. If the Commission mistakenly finalizes the Proposed Rule, then to avoid arbitrariness it must require the same kind of reporting about every factor that is at least as likely as the climate to prove material to issuers.

The unexplained primacy which the Commission affords to climate factors is not merely irrational but also misleading. Readers of disclosures will naturally conclude from every issuer's reporting on climate factors that 1) such factors are material to every issuer and 2) such factors are more likely to affect an issuer's financials than all the other factors that issuers omit or do not give similar prominence. But there is no reason to believe that either of these propositions is true. The Commission's Proposed Rule, then, would leave investors with a misleading picture of the role of climate issues in the financial health of the companies in which they consider investing. A rule that actively promotes precisely the sort of misinformation the Securities and Exchange Acts were enacted to prevent violates those acts and is arbitrary and capricious.

[52] Proposed Rule, 87 Fed. Reg. 21334, 21351.

[53] 15 U.S.C. 78w(a)(2).

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6. The Proposed Rule Fails to Consider an Obvious and Superior Alternative

To understate the obvious, the Commission lacks experience in, and a congressional mandate for, environmental issues. But there *is* a federal agency with both—and it already maintains a disclosure system. The EPA's Greenhouse Gas Reporting Program identifies and makes publicly available GHG emissions data from thousands of sources, resulting in public reporting of some 85-90% of U.S. anthropogenic emissions.[54] Each reporting facility must also report its U.S. parent company.[55] The Proposed Rule explains that EPA's program is not an adequate substitute for the framework it proposes because "each facility is matched to its parent company[and] this company may not be the entity registered with the SEC and thus of interest to investors."[56] The obvious solution to this asserted difficulty, of course, would be to require a very modest amendment to issuers' filings identifying the facilities listed in EPA's database that they own.

Astonishingly, however, the Commission *does not even list this alternative* among the fourteen it claims to have considered.[57] This failure is even more glaring because the minor clerical amendment we have described would eliminate the Commission's sole disclosed objection to using EPA's Reporting Program in lieu of the Proposed Rule. And the alternative approach is clearly superior to the Commission's own, for it would 1) take advantage of a program run by an agency with a congressional mandate for and experience in environmental policy, and 2) save many billions of dollars. The Proposed Rule summarily asserts that "the EPA emissions data does not allow a clean disaggregation across the different scopes of emissions for a given registrant," *id.*, but neither explains the significance of that fact for investors nor appears to rest on that fact as a basis to reject use of EPA's program. In any event, the enormous advantages of using EPA's program made it incumbent on the Commission to consider whether a filing amendment to facilitate use of that program was the most effective solution notwithstanding the asserted disadvantage from some lack of clarity as to which emissions belong to which scopes. To be clear, an alternative rulemaking of the sort we describe would suffer from grave defects, for many of the reasons we have outlined above. But it would clearly be superior to the Commission's approach which, in addition to all its other flaws, is both pointlessly costly and an intrusion into a subject matter entirely foreign to its mission. The failure to consider an alternative that is not just viable but facially superior is a hallmark of unreasoned decision-making in violation of the APA.[58]

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[54] EPA, GHGRP Reported Data, https://www.epa.gov/ghgreporting/ghgrp-reported-data.

[55] EPA, GHG Reporting Program Data Sets, https://www.epa.gov/ghgreporting/data-sets.

[56] Proposed Rule, 87 Fed. Reg. 21334, 21434.

[57] Proposed Rule, 87 Fed. Reg. 21334, 21453 - 21456.

[58] *State Farm*, 463 U.S. at 50-51.

7. **The Proposed Rule Will Not Result in Comparable Data**

The Proposed Rule would fail to result in the release of comparable data, which is one of the Proposed Rule's central justifications. The second sentence of the Proposed Rule's introduction offers one of its main asserted justifications: the disclosures the Proposed Rule would demand "would provide consistent, comparable, and reliable—and therefore decision-useful—information to investors."[59] For example, knowing issuers' GHG emissions cannot help investors avoid transition risk unless they also know how the legal, regulatory, and public opinion regimes of the future will treat issuers with those emissions profiles and other characteristics—and no investor can know that. The Proposed Rule is littered with additional invocations of this rationale. But the Commission's Proposed Rule is guaranteed not to result in the release of consistent data that can be usefully compared across companies.

In the first place, the Proposed Rule "would require a registrant to disclose whether any climate-related risk is reasonably likely to have a material impact on a registrant … over the short, medium, and long term."[60] To make such disclosures, an issuer must predict climate-related risks far into the future. But physical climate-related risks are notoriously impossible to predict over the long term—second in difficulty only to transition risks, depending as they do on future political events. The notion that thousands of issuers will somehow coalesce around uniform predictions about what politics and the weather will be like decades from now is risible—but otherwise issuers' reports will be predicated on varying predictions about the future and therefore will not be comparable.

Second, the Proposed Rule would demand a series of disclosures about how an issuer's board and management deal with climate issues. But these disclosures are so generic, and the needs and corporate structures of issuers are so various, that the only comparable information the disclosures will yield is which issuers are most interested in impressing investors with their climate policies. For instance, issuers must disclose how often the board discusses climate issues. But length and frequency of discussion measures neither effectiveness nor wisdom. And the varying circumstances of issuers mean that what is too little discussion of a topic for one board is too much for another. For much the same reasons, investors are unlikely to be able to make useful comparisons among issuers based on the climate-related curricula vitae of board members and the extent to which an issuer relies on in-house versus outside staff for climate issues.

Third, the Proposed Rule would demand disclosure of scope 3 information when material. But to ascertain this information, issuers must rely on reports from firms up and down their value chains, each of which may calculate emissions using a different set of assumptions. The non-comparability of the reports from the up- and down-stream entities will pass on to the issuers' own disclosures.

8. **The Proposed Rule Is Infected with The Taint of Prejudgment**

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[59] Proposed Rule, 87 Fed. Reg. 21334, 21335.

[60] Proposed Rule, 87 Fed. Reg. 21334, 21352.

From its inception, this rulemaking has been premised on a decision, made before the rulemaking commenced, to require additional climate disclosures. In her remarks accompanying the release of the Request for Information that initiated the rulemaking,[61] Acting Chair Lee explained that "it's time to move from the question of 'if' to the more difficult question of 'how' we obtain disclosure on climate."[62] Consistent with those remarks, the Request did not include among its sixty questions about *how* to demand additional disclosures a single inquiry about *whether* the Commission should require them. The Acting Chair's prejudgment that additional disclosures are needed is consistent with the view of the White House which, in an October 2021 report, concluded that "the current suite of data, tools, disclosures, and mitigation strategies fail to help investors … understand and make decisions grounded in the economic realities of the climate crisis."[63] The Proposed Rule fails to dispel the taint of prejudgment that attached to this proceeding from the beginning. That is because, among the fourteen alternatives the Commission claims to have considered, it *failed to include the status quo*.[64]

The Commission failed in this way notwithstanding Executive Order 12866's longstanding instruction that "agencies should assess all costs and benefits of available regulatory alternatives, *including the alternative of not regulating*."[65] The Commission's and the broader Administration's "unalterably closed mind"[66] on whether to require additional disclosures means that comments submitted in response to the Proposed Rule will not receive the full and fair consideration to which the APA entitles them on the core and most critical question in this rulemaking.

Further, even if the Commission does intend (notwithstanding its own pronouncements) to give serious consideration to whether additional disclosures are needed, the damage has already been done.

The Request's evident lack of interest in comments debating whether new requirements are needed meant that the public was far less likely to submit such comments in response to the

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[61] There can be no doubt that the Request for Information, which sought public input for the purpose of preparing proposed changes to the Commission's disclosure rules and which resulted in public comments cited extensively in the Proposed Rule, is part of a "process for formulating … a rule," 5 U.S.C. 551(5); *see also* 15 U.S.C. 78d-1(a) (incorporating APA definition of rulemaking), and therefore initiated the rulemaking at issue here.

[62] "A Climate for Change," *supra* n.3.

[63] *A Roadmap to Build a Climate-Resilient Economy* 4, https://www.whitehouse.gov/wp-content/uploads/2021/10/Climate-Finance-Report.pdf?stream=top.

[64] Proposed Rule, 87 Fed. Reg. 21334, 21453 - 21456.

[65] Sec. 1(a).

[66] *C & W Fish Co., Inc. v. Fox*, 931 F.2d 1556, 1565 (D.C. Cir. 1991).

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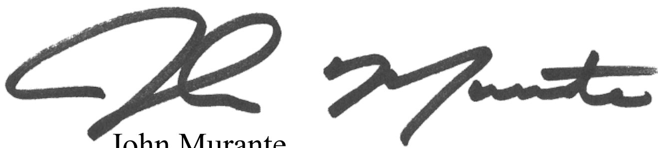
Request.[67] This lack of engagement by the public was only worsened by the unlawful way in which this rulemaking was begun: by Acting Chair Lee's unilateral exercise of the rulemaking function that, per statute, can be exercised only by the full Commission.[68]

Because the Proposed Rule was heavily informed by the comments submitted in response to the Request, the Proposed Rule incorporates a skewed perspective on the need for additional disclosures. If the Commission stands by the earlier decision that a Request for Information was needed to formulate a useful proposal, then it must agree that the current proposal, shaped as it is by a skewed set of comments, is not useful and must therefore be abandoned. Similarly, quite apart from whether the Commission in fact has already reached a decision to require additional disclosures, the foregoing facts mean that the public will inevitably *believe* the Commission has reached such a decision and therefore will be much less likely to offer helpful comments on this core question in response to the Proposed Rule. If the Commission continues to believe (mistakenly) that rulemaking in this space is needed, it should begin again with a new Request for Information that solicits views on *all* relevant questions, including especially whether new disclosures are needed.

Thank you for the opportunity to provide comments.

Respectfully submitted,



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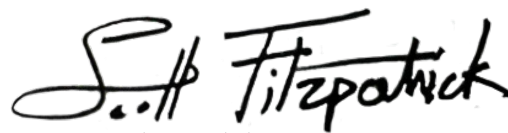

Scott Fitzpatrick
Missouri Treasurer
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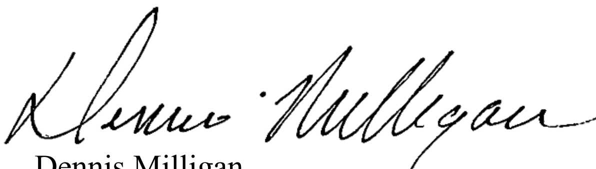

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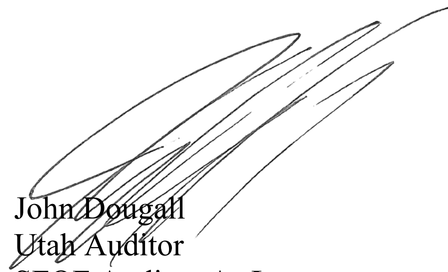

John Dougall
Utah Auditor
SFOF Auditor-At-Large

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[67] *See, e.g.*, *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 902 (D.C. Cir. 1978) ("We doubt that persons would bother to submit their views … after the regulations are a *fait accompli*.") (internal quotation marks omitted).

[68] *See* 15 U.S.C. 78d-1(a).

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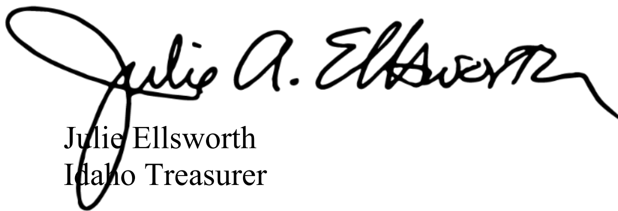

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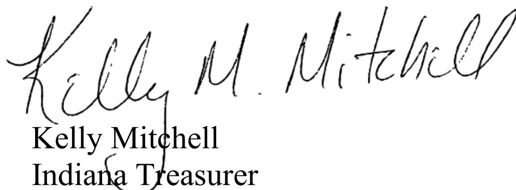

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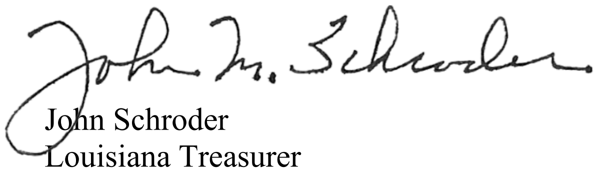

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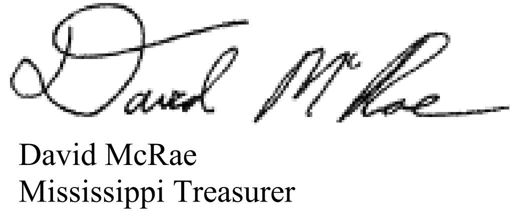

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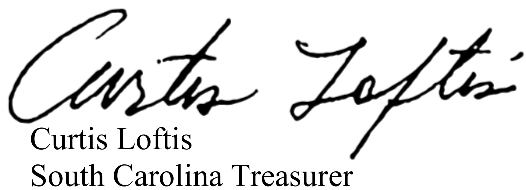

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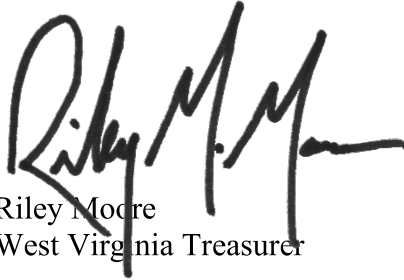
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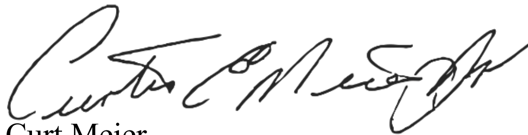
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