November 1, 2022

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: File No. S7-06-22; Modernization of Beneficial Ownership Reporting; Release Nos. 33-11030; 34-94211

Dear Ms. Countryman,

Please find attached a recent article[1] I wrote examining the potential impact of the U.S. Supreme Court's opinion in *West Virginia v. Environmental Protection Agency* on the Commission's current rulemaking efforts, including on the proposed rules relating to the Modernization of Beneficial Ownership Reporting presented in Release Nos. 33-11030; 34-94211.

Thank you for your consideration.

Respectfully,

Kent Greenfield
Dean's Distinguished Scholar
Boston College Law School

[1] Kent Greenfield, *The Coming Clash Between the SEC and the Supreme Court*, Barron's (Oct. 26, 2022). Staff of the International Institute of Law and Finance, a non-profit, non-partisan corporation, provided assistance on the article.

Attachment 1

The Coming Clash Between the SEC and the Supreme Court

About the author: ***Kent Greenfield****, an expert in constitutional and corporate law, is dean's distinguished scholar at Boston College Law School.*

As the midterms near, federal regulators are dashing to finalize proposed rules before a likely divided Congress, or Republican-controlled one, dampens political support for their agendas. In their rush, however, these regulators must now be mindful of another key constituency: The Supreme Court's conservatives—a group not so easily replaced every two years.

The U.S. Securities and Exchange Commission is high on the list of agencies that a conservative-dominated court could affect. The SEC has been on a recent tear, proposing or finalizing dozens of regulations. Some are minor tweaks to existing rules, but many are quite significant. And their significance alone may pose problems, beyond the threat of unfriendly faces on Capitol Hill.

In June, the U.S Supreme Court decided *West Virginia v. Environmental Protection Agency,* striking down an EPA regulation fighting climate change on the grounds that it violated the "major questions doctrine." The Court had never used that term before, and the criteria the Court used to define it were vague and manipulable. The doctrine's lack of pedigree gives reason for increasingly cynical Court watchers like myself to see it as a way for the Court's conservative super-majority to operationalize its skepticism of broader regulation. Its ambiguity may be a feature, rather than a bug, to the Court's conservatives.

Going forward, the Court has a tool to strike down any regulation that offends its anti-regulatory sensibilities, with wide-scope rationales. As such, the case is likely to be one of history's most important rulings on bureaucratic authority.

In the EPA case, the agency had proposed a regulation that would allow it to force utilities to switch some coal-fired power plants to cleaner technologies. What seemed to bother Chief Justice John Roberts, who wrote the majority opinion, was that the rule was the kind of "major" decision that should be left to Congress. He did not define how major was "major," but instead focused on how the EPA's action was unprecedented, that it would implicate a significant portion of the national economy, and that the agency was using old statutory language to regulate risks in new ways. Also relevant was whether Congress had declined to legislate in the way that the agency chose to regulate. Justice Neil Gorsuch added additional criterion in a concurrence: whether the agency was "intruding" in a traditional area of state law.

Under these criteria, vague as they are, several SEC efforts may now be at risk, in addition to the historic jeopardy of regulators' agendas steamrolled by an incoming political party.

The highest-profile initiative from the SEC also involves climate change. Environmental activists have rightly lauded the SEC's proposal to require companies to increase their disclosure of climate risks. But an attempt such as this by a federal agency to address climate change now faces a new challenge: It is unprecedented, will be costly to implement, and takes action on new

risks based on statutory language from the 1930s. And as a practical matter, one need not struggle to imagine how conservative justices feel about climate-change regulation.

Also newly vulnerable are dozens of significant rules proposed by the SEC during the past year—on proxy voting advice, insider trading, special purpose acquisition companies, and other matters.

Consider the SEC's proposed rules for swaps, the financial instruments that some investors use to bet on stocks. The SEC's suggested rule would require disclosure of such swaps within a day, and to the public. Before the Court's decision in EPA, the proposal was already under broad attack. But now, the rule's skeptics have an additional argument: that this rule is an unprecedented intervention in a multi-trillion dollar market, regulating new risks based on old statutory language. The argument is bolstered by the fact that Congress could have authorized such broad disclosure in the 2010 Dodd-Frank Act, but did not.

Also at risk is the proposed rule on "beneficial" ownership. Such a definition is important for a host of reporting obligations, and the SEC is considering expanding what counts as ownership. But questions of ownership have long been a matter of state concern. Gorsuch may have something to say about the SEC effort to expand the definition.

The SEC and other regulatory agencies face uncharted territory as they contend with uncertainty at both the political and judicial levels. Should they continue to push for aggressive new regulations, tempting conservative courts to strike them down with the vague and malleable criteria now available to them? Or should they tap the brakes, recast safer proposals, and wait for courts to change politically or define the doctrine more precisely? It's a Hobson's choice; there may be no meaningful decision to make. But regulators ignore it at their peril.