Texas Public Policy Foundation

June 10, 2022

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F St., NE
Washington, D.C. 20549

RE: The Enhancement and Standardization of Climate-Related Disclosures for Investors, RIN 3235—AM87, File Number S7-10-22

Dear Ms. Countryman:

The Texas Public Policy Foundation is a non-profit, non-partisan research institute with a mission to promote and defend liberty, personal responsibility, and free enterprise in Texas and across the nation by educating policymakers with academically rigorous research, analysis, and outreach. We write to draw the attention of the Commission to several legal defects in the above-captioned proposal that would render the proposal unlawful if finalized, as well as to apprise the Commission of the devastating effect the proposal would have on the communities that for decades have fueled the many miracles of modern American life.

INTRODUCTION

America is a community of communities—a nation made up of groups who differ radically in their beliefs, ways of life, political views, and economic interests. Our Founders understood the American people's great diversity and counted on it as one of the principal bulwarks in the defense of freedom. They wove it into the Constitution, providing that federal legislation could be enacted only with the consent of members of Congress representing a wide cross-section of the people. Their hope was that, if a broad swath of America's diverse citizens could see the value of a particular measure, then that measure must serve the interests that all Americans have in common. Only such measures would become law for the entire American people.

The proposal utterly disregards that principle. Advocates for climate disclosures have tried—and failed—to persuade the people's representatives to adopt measures just like those the proposal demands. Stymied by the legislative process, these activists have now turned to rulemaking. But agencies are creatures of Congress, bound to execute the judgments of that body, and the Constitution prohibits agencies from making the transformative shifts the proposal contemplates without the sanction of Congress. Congress has never come close to authorizing the Commission to alter the fundamentals of American economic and social life.

It is not hard to see why Congress rejected climate disclosures of the sort of the proposal advances, for they lack the nationwide appeal that the Founders intended would mark federal legislation. They would benefit some Americans at the heavy expense of others. In particular, they would impose the burden of compliance on American workers in sectors that produce or consume large amounts of energy, and on the families and communities that those workers sustain. Stunningly, the Commission acknowledges the proposal's potentially transformative effects *but declines to inquire* about its effects on American energy and industrial workers and their communities. That is the paradigm of arbitrary decision-making under the Administrative Procedure Act ("APA").

Not only would the disclosures unlawfully transform America's economy by inflicting disproportionate burdens on some Americans to benefit others; they would obstruct the free and honest speech on which America's businesses and investors depend. Businesses have an utterly compelling interest in the freedom to explain their business to investors in a way that paints an accurate picture of the enterprise as a whole and of its risks and challenges. The securities laws exist to promote and enforce this honest communication. And businesses have an equally compelling interest in free internal communication about these matters. But the proposal, by forcing public representations that offer a distorted image of registrants' business and financial future and by demanding unprecedented disclosures about registrants' internal communications, would impede honest communication about business affairs. That is contrary to the federal securities laws and arbitrary and capricious under the APA. It also violates the First Amendment, which guarantees to America's businessmen and -women the freedom to communicate honestly about their businesses—especially on matters of grave public controversy like climate policy—in the way see fit.

DISCUSSION

I. The Securities Laws, the APA, and the Constitution Prohibit Sacrificing America's Energy-Providing Communities.

A. The Proposal Exemplifies the Factionalism That the Constitution Exists to Prevent.

One of the Framers' most far-reaching discoveries was a means of controlling the effects of *faction*. A government must do justice to all the citizens who live under it; it may not subordinate the well-being of some to others. But one of the gravest risks of democratic government, Framers such as James Madison observed, is that popular control of the government enables citizens to form factions to exploit other citizens. These factions may form around economic, geographic, or social interests, loyalties to competing political leaders, or divergent views on public policy. They may enact measures that unjustly privilege their own economic interests, their own leaders or social groups, or their own political projects. Factionalism violates the dictates of justice, for it subordinates the interests of some citizens to those of others. It also

leads to political instability, as groups compete to control the levers of government that would allow them to protect themselves and prevail over their adversaries.[1]

Departing from traditional political wisdom which emphasized the need for a unity of outlook among citizens, the Founders' great insight was that the very diversity of America's citizenry might serve to guard against the peril of faction. Americans represent a vast array of industries, geographic, social, and personal loyalties, and political viewpoints. There are not many interests that a broad swath of Americans shares—mostly just those that *all* Americans have in common: interests in things like safety from foreign aggression, a prosperous economy, an efficient national transportation system, and so forth. It follows that measures that garner the assent of a wide spectrum of Americans are more likely than not to serve the interests of all Americans.

The Founders therefore adopted a rule that federal legislation may be enacted only upon a consensus of representatives and senators accountable to a wide cross-section of American citizens. This rule reduces the likelihood of legislative schemes that unjustly benefit particular regions, industries, social groups, or political viewpoints at the expense of others, because representatives whose constituents would not share in these benefits would have no reason to go along with the scheme.

The keystone of the Founders' remedy to factionalism is the federal legislative process. That process is challenging, and it was meant to be. It is hard to assemble a majority consensus of representatives and senators around any policy proposal. Often it requires years of national debate that takes seriously the objections and concerns of the proposal's opponents. Often it requires compromise to ensure that the proposal is acceptable to Americans in diverse circumstances holding a variety of political views. The difficulty of passing legislation often frustrates partisans of particular proposals, who are certain of their vision of what is best for America or who are unconcerned about their proposal's effects on those whose views, lifestyles, and communities differ from their own. But the difficulty of the federal legislative process is a feature, not a bug, for it ensures that federal laws enjoy support across a wide spectrum of American society and therefore are likely to benefit all Americans rather than just a favored few. And that, in turn, promotes stability in our national political life, as American citizens come to see that the political process takes everyone's interests into account.

Contrast the Founders' approach with the rulemaking process. All too often, that process is the opposite of the legislative process the Founders established. For the regulatory process depends on the will of one person: the President, acting through his appointees and their staffs.[2] Because the rulemaking process does not depend on assembling a broadly-based coalition of Americans, it offers no guarantees against faction. Indeed, it would be more accurate to say the

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[1] *Federalist* 10.

[2] Of course, some of the President's appointees, such as the Commissioners of the SEC, enjoy certain protections from removal. But that fact, while perhaps diminishing presidential influence over certain rulemakings, does not abolish it, among other reasons because the President is able to select appointees who agree with his policy priorities.

rulemaking process often *promotes* faction, for it creates an instrument by which the President can advance the interests of his adherents at the expense of Americans who support his political opponents.

The instant rulemaking is a case in point. There are few issues on which Americans differ more than climate policy. Some Americans believe that additional climate disclosures, by shifting billions or trillions of dollars toward green businesses, would help to avert global disaster. Others believe that such a shift would do little or nothing for the environment but would have catastrophic impacts on thousands or millions of jobs. This issue is complicated by the fact that the proposed resource shift would affect different people differently: so-called “green” industries and those who have invested in them would profit handsomely while others would face devastating increases in the cost of capital. Different communities would likewise experience different effects, with the towns and regions that for decades have fueled the many miracles of modern American life paying the price for additional climate disclosures. And those communities have divergent political allegiances: the fuels-producing communities in places like Texas and Appalachia, which would bear the brunt of the rule’s harms, voted against President Biden, whereas the financial industry, which according to the Commission favors its proposal, is predominantly headquartered in regions that voted for him.

That Americans see the question of climate disclosures differently, then, should come as no surprise. Our Founders provided for situations like this by requiring that any solutions must come from Congress, where the need to assemble a majority of representatives and senators ensures that any federal action would respect the diverse views and interests of all Americans.

In fact, Congress is no stranger to the question of climate disclosures. Just last Congress, legislation was introduced that would have instructed the Commission to issue regulations remarkably like those described in the proposal.[3] But this legislation garnered no consensus, as signified by the fact that all 35 of the bill’s co-sponsors were members of a single party. This divisive legislation did not pass because it failed to command the widespread support indicative of a measure that advances the interests of *all* Americans, rather than of a select few. Similar legislation was introduced again during the current Congress, with no sign of a different outcome.[4]

Congress’s refusal to legislate additional climate disclosures should have been enough for the Commission, which after all is a creature of statute and exists only to execute the direction of the people’s representatives. But the Commission has decided to press forward anyway. That decision does not reflect a widespread consensus among Americans that additional climate disclosures are in the interests of all. To speak bluntly, it is the decision of a faction pursuing its ideological commitments and political loyalties (and, in the case of some, financial interests as well) at the expense of others.

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[3] *See* H.R. 3623, *Climate Risk Disclosure Act of 2019*.
[4] *See* H.R. 2570, *Climate Risk Disclosure Act of 2021*.

B. The Constitution Forbids the Proposal's Factionalism.

Fortunately, our Founders did not leave protection against factionalism to the self-restraint of public officials. Rather, they enshrined it in the Constitution by vesting the entire federal legislative power in Congress. Over the decades, Congress has created agencies to execute the laws it enacts. That executive task, the courts have held, includes the power to fill in details that Congress omits. Agencies have frequently taken an expansive view of what constitutes "filling in," but one thing remains clear: agencies have no freestanding authority to create legal obligations; their power derives entirely from their role in carrying out missions entrusted to them by Congress.

Because agencies' regulatory power exists only to pursue the objectives of Congress, agencies may not take advantage of broad or indefinite statutory text to make rules about subjects far from Congress's attention in enacting the relevant statute. The principle forbidding them to do so, known as the "major questions" doctrine, presumes that Congress does not casually confer power to decide the most important questions in American economic and social life; it does not, so to speak, "hide elephants in mouseholes."[5] That presumption finds its roots in the Constitution's assignment of the legislative power to Congress: by barring agencies from taking advantage of ambiguity to pursue their own priorities rather than Congress's, the major questions doctrine "ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives."[6]

The major questions doctrine bars the Commission's proposal. The intended effect of the proposal's additional climate disclosures is clear: it seeks to channel immense quantities of capital toward greener enterprises and sectors,[7] thus transforming both U.S. climate policy and the American economy. Whether to fundamentally realign American capital and consequently business operations across every sector toward green goals is surely a graver question than whether to eliminate a rate-filing requirement,[8] whether to allow FDA to regulate tobacco products,[9] and other questions to which courts have applied the major questions doctrine.

The Commission's decision to realign the American economy demands pellucidly clear statutory text authorizing that choice.[10] But the Securities and Exchange Acts have nothing to say about climate policy, any more than they pronounce on questions of public health, education policy, or national defense. Indeed, these acts generally have nothing to say about what companies should do; rather, they set standards for how companies must disclose what they are doing. To pursue this goal, the Acts give the Commission both the power and the duty to ensure that issuers truthfully tell investors about their operations—but not to privilege some kinds of operations over others. It beggars belief that Congress would give the Commission authority to set substantive

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

[6] *See, e.g.*, *Nat'l Fed. of Indep. Bus. v. Occupational Safety and Health Admin.*, 142 S. Ct. 661 (Gorsuch, J., concurring).

[7] *See, e.g.*, Executive Order 14030, 86 Fed. Reg. 27967 (May 20, 2021).

[8] *MCI Telecommunications Corp. v. Am. Tel. & Telegraph Co.*, 512 U.S. 218, 231 (1994).

[9] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

[10] *Whitman*, 531 U.S. at 468.

standards of conduct under the guise of authority to demand disclosure of conduct. For this reason, any final rule resembling the Commission's proposal would run afoul of the major questions doctrine.

Indeed, any argument that Congress intended to give the Commission the authority to set substantive standards of conduct that fundamentally realign the entire American economy would raise very serious questions under the non-delegation doctrine.[11] Under longstanding interpretive canons, such a reading of the Securities and Exchange Acts must be avoided.[12]

The Commission will doubtless defend its proposal on the basis that it merely requires issuers to disclose what they are already doing about climate-related issues and that any pressure on issuers to change their conduct would come from investors rather than the Commission. But this defense does not hold up. Courts have recognized that mandating disclosures can be an "effective way for the government to … shape behavior."[13] That is especially true here, where the disclosures the Commission demands are *tailor-made* to force changes to registrant behavior. If investors pressure issuers to make changes, it is because the Commission's proposal is designed to encourage and enable them to do just that.

Nowhere is this more evident than in the proposal's singling out of climate-related issues for much more robust disclosure mandates than apply to other subjects. The proposal would demand that issuers disclose a vast amount of climate-related information:

- A registrant's GHG emissions, the emissions from the power companies from which it buys electricity, and emissions of its suppliers and customers;[14]

- How climate-related risk will impact the registrant's own operations and those of its suppliers and customers, as well as the registrant's R&D budget, all in the short-, medium-, and long-term;[15]

- The registrant's own internal processes for evaluating climate-related risk and the registrant's internal climate-related goals;[16]

- The carbon price and other tools the registrant uses in its internal deliberations about climate-related issues and the registrant's climate "transition plan";[17]

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[11] *See, e.g.*, *Nat'l Fed. of Indep. Bus.*, 142 S. Ct. 661 (Gorsuch, J., concurring).
[12] *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 381 (2005).
[13] *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (internal quotation marks omitted).
[14] 87 Fed. Reg. at 21374.
[15] *Id.* at 21353-54.
[16] *Id.* at 21356, 21361.
[17] *Id.* at 21355-56.

- How often the registrant's board discusses climate issues, how the board considers climate risk as part of its business strategy, how the board sets climate-related goals, and how often management reports to the board on climate-related issues;[18]

- The climate-related qualifications of board members and management and whether the registrant handles climate-related matters in-house or through outside service providers;[19]

This degree of mandatory detail far exceeds anything the Commission has ever required for any other topic. The proposal would force registrants to devote an outsized portion of their disclosures to climate-related issues, far in excess of the degree of detail they must provide about topics with known massive impacts on every economy in the world such as the COVID-19 pandemic. The Commission has offered no reasonable basis for singling out climate issues for this special treatment. This failure of reasoned decision-making is itself arbitrary and capricious under the APA.

These aggressive disclosure mandates would, in turn, nudge investors toward evaluating registrants on the basis of climate-related issues. Setting the terms of a decision is, of course, one of the most potent ways of influencing its outcome: by flooding investors with disclosures about climate—and only about climate—the Commission would encourage investment decisions on the basis of those disclosures. That is all the more likely because investors reasonably view disclosures as indicating that the disclosed information is financially significant.[20] The proposal, if finalized, would therefore encourage investors to accept the newly-disclosed information as important for their investment decisions. In other words, pressure from investors would originate with the Commission as the predictable effect of the proposal's disclosure requirements. The major questions doctrine prevents the Commission from bringing about such effects to realign the American economy around green goals.

The Commission will also likely defend its proposal on the grounds that it simply requires registrants to disclose information that investors need; any effect on climate policy is incidental. But many of the proposal's requirements apply even when the disclosed information is *not* material to investment decisions. For instance, the proposal demands that registrants disclose their own GHG emissions and those of their electricity suppliers even when this information is not material.[21] And much of the information to which we refer above, such as how often the board discusses climate-related issues, will be immaterial with respect to many of the registrants that must disclose it.

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[18] *Id.* at 21359-60.

[19] *Id.* at 21359-60.

[20] *See, e.g.*, *Basic, Inc. v. Levinson*, 485 U.S. 224, 230 (1988) (purpose of disclosures under the Exchange Act of 1934 is to enable investors to make accurate judgments about the value of securities).

[21] 87 Fed. Reg. at 21345 (requiring disclosure of scopes 1 and 2 emissions whether or not material, and of scope 3 emissions only if material).

C. The Proposal Arbitrarily Sacrifices American Communities, Especially Energy-Producing Communities.

America's Founders took factionalism so seriously because they knew how easy it is to slight the interests of those whose views, loyalties, and ways of life differ from our own. The proposal shows just how right the Founders were, for it glibly disregards its own impact on the many communities it will harm, especially those that produce the energy on which America runs. Indeed, it fails even to inquire about its own massive impact on American companies, workers, and communities. This failure is textbook arbitrariness under the APA.

If finalized, the proposal would nudge investors toward preferring companies that emit less GHGs and that have more aggressive climate policies. Some investors would refuse to invest in companies with emissions over certain thresholds or that have not implemented certain practices. Others would cap the value of investments in such companies, while still others would rank potential investments according to their emissions and climate policies.[22] The effect of each of these approaches would be the same: the pool of available capital for companies that do not make the cut would shrink, with consequent increases in their cost of capital.

This consequence would be exacerbated by the action of publicly traded financial companies. The proposal opines that these companies would often be required to report in their own SEC filings on the emissions of companies in which they purchase equity or to which they lend.[23] To drive down the emissions they report, many financial companies would doubtless cease investing in higher-emitting companies or would offer investment only on prohibitive terms. These actions would exacerbate the growing trend toward green investing among financial companies—a trend that is already posing challenges for higher-emitting companies that need to access the capital markets.

For some companies, the increase in the cost of capital would prove too much to continue as going concerns; they would be forced to close or move overseas, and their employees would lose their jobs. Other companies would continue to operate, but higher capital costs would prevent them from hiring new employees, increasing wages, expanding operations, or creating important new goods and services, with all the economy-wide benefits that would have flowed from these actions. Indeed, higher capital costs would impede the ability of companies to develop even climate-focused innovations, undercutting the proposal's own rationale.

The burden of these harms would fall most heavily on the energy sector as well as on energy-intensive industries such as heavy manufacturing. The workers in these sectors have benefited all Americans for decades, but they and their families would bear alone the burden of job loss and lower wages—and at a time when rampant inflation is rapidly diluting the savings of American families.

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[22] *Id.* at 21376.
[23] *Id.* at 21387.

Nor would job loss and lower wages be spread evenly across the country. Energy-sector jobs tend to be in communities near the natural resources and physical infrastructure on which the industry depends; job loss would naturally be concentrated in these communities. The concentration of job losses in these communities would exacerbate their impact, as retailers and service providers would see large portions of their customer base lose spending power.

These same communities would also bear the brunt of dislocation as former energy-sector employees move their families elsewhere in search of work. Energy-sector jobs are often among the highest-paying in otherwise severely disadvantaged areas; many former energy employees would not be able to find locally-available jobs comparable to those they lose and would have no choice but to move. Neighborhoods would experience disproportionate turnover with accompanying economic effects (such as depressed real estate markets), erosion of the tax base (with associated harm to schools and other vital services), and social ailments (such as the breakup of neighborhood and charitable groups). The proposal's changes would maul communities that have already been suffering for decades, such as in coal-producing regions of Appalachia and in Rust Belt towns that have already seen substantial departures among local employers.

These communities would not be the only ones to experience loss. If the proposal were finalized, companies would (as the proposal contemplates[24]) abandon regions that they deem at high risk for damage from climate change-induced weather, including especially coastal regions and regions prone to severe weather such as wildfires. These regions would likewise experience concentrated job loss with all the adverse impacts that accompany it. Further, they would lose access to vital goods and services, as retailers and service providers join the flight for regions deemed less climate-exposed. The plight of these communities may be the worst of all, for while towns and counties that traditionally have focused on energy production may be able to attract new industry in other sectors, regions that investors deem to present excessive climate risk will have difficulty attracting employers wary of the increase in their cost of capital from siting new facilities there.

To curry favor with activist investors and thus avoid higher capital costs, many companies would adopt new green practices. For instance, some companies would shift their energy purchases to solar plants and wind farms—decisions that would amplify the harms from the higher cost of capital to many fossil fuel-based energy companies. Others would lower their emissions by installing expensive new equipment, diverting cash from job creation or wage increases. Still others would change their suppliers or cut off disfavored customers. All of these changes would create still further adverse effects for the companies themselves, for the people and communities that depend on them, and across the American economy.

While the proposal's adverse impacts would be concentrated in certain communities, they would not be confined there, for raising the cost of capital for America's energy sector would affect all Americans. Erecting barriers to the affordable production of fossil fuels would drive up

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[24] *Id.* at 21447-48.

the cost of gas at the worst possible time, when gas prices already stand at all-time record highs.[25] This increase in gas price would be highly regressive, hitting the neediest Americans worst. Electricity would also become pricier as energy companies are driven out of business and others labor under additional costs, some of which they would pass on to consumers. Electricity would become less reliable as generation is shifted to solar and wind resources, which are subject to weather-induced variability.[26] And impeding America's energy-production capabilities would also negatively impact national security: as the Foundation has long argued and as recent events amply confirm, robust domestic energy production capacity is essential if America is to protect itself against threats from other major fuel producers like Russia.

The proposal acknowledges, as it must, its potential to affect the broader American economy.[27] It acknowledges that "registrants may change their behavior in response to the proposed disclosure requirements by reducing exposures to certain physical or transition risks,"[28] including by "mov[ing] assets or operations away from geographic areas with higher physical risk exposures or … decreas[ing] GHG emissions,"[29] and by "search[ing] for alternative energy sources or find[ing] different suppliers."[30] It likewise admits that financial institutions in particular may "disengage with" clients in an effort to drive down emissions reported from their equity and lending portfolios.[31] The proposal thus leaves no doubt about its potential to prompt transformative change in communities across the country.

Yet despite these admissions, the Commission astonishingly *failed to consider these changes* in advancing its proposal. The proposal does not seek to understand these changes. It does not examine the magnitude of the increase in capital costs, or the extent of operational changes companies would make to avoid them. It does not spell out whether affected jobs will be in the hundreds, thousands, or millions, or tally up the wages that workers in the energy, manufacturing, and other sectors would lose. It does not even identify the sectors and communities that it would adversely affect—notwithstanding a presidential memorandum, issued in the first few hours of President Biden's term, signaling the new administration's commitment to understanding the distributional impacts of its regulations.[32]

Because the Commission does not understand, or even attempt to understand, the changes its proposal would cause across America, it is in no position to assert that the benefits it claims for the proposal are worth the price of these changes. And in fact, it does not assert as much. Instead, it ignores the question: it advances its proposal *without regard to its baleful effects on American*

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25 Aimee Picchi, "U.S. gas prices surge to all-time high as oil costs soar," CBS News (Mar. 8, 2022), https://www.cbsnews.com/news/gas-prices-record-high-oil/.

26 Jason Isaac, "Yes, Green Energy Failures Helped Cause Texas Blackout Disaster," *The Federalist* (Feb. 18, 2021), https://thefederalist.com/2021/02/18/texass-blackouts-are-the-result-of-unreliable-green-energy/.

27 87 Fed. Reg. at 21447-48.

28 *Id.* at 21447.

29 *Id.* at 21448.

30 *Id.*

31 *Id.*

32 *See Modernizing Regulatory Review*, 86 Fed. Reg. 7223 (Jan. 20, 2021).

businesses, workers, and communities. As far as the Commission is concerned, these harms simply do not matter.

That is the very definition of arbitrariness under the APA. Long ago the Supreme Court explained that "an agency rule would be arbitrary and capricious if the agency has … entirely failed to consider an important aspect of the problem" before it.[33] In particular, an agency's failure to understand the costs of its rule and to assess whether those costs are worth the rule's benefits is irrational.[34] It is hard to imagine an "aspect of the problem" more important than the cost of new climate disclosures to thousands or millions of workers across the country and to their families and communities. Yet the Commission and the faction it represents do not seem interested in these costs or the Americans who would bear them.

II. The Proposal Would Interfere with the Honest Speech at the Heart of America's Free Society, in Violation of the Securities Laws, the APA, and the First Amendment.

At times the Commission makes it sound like socially-conscious business activity is a new phenomenon, but of course it is not. American businessmen and -women have always recognized the importance of laboring for the good of our neighbors and hence for our broader society—including especially through the work of business itself. For business is essentially the provision of goods and services that our neighbors need to live and live well. Doing business requires creating financial returns for the business owners, but no business can be profitable in the long run unless it provides its products and services in a way that is beneficial to society as a whole.

A business is first and foremost a group of people who together offer a needed good or service and, for doing so, receive compensation that allows them to support their families and others they care about. Those who most evidently make up such a group are the business's workers, but the group also includes those who sell to it or provide it with services—and, of course, those who finance its activities. Investing with a purpose is nothing new; it is as old as investment itself, for investing is participation in the good done by those to whom the investment is entrusted.

The indispensable instrument by which business groups are formed and carry out their work is speech. That is both how the workers coordinate with each other and how they communicate to the outside world—to potential co-workers, suppliers, customers, and investors—that their enterprise is important, effective, and hence worth supporting.

If the business is to succeed in its mission and respect the dignity, as free agents, of those on whom it depends for support, this speech must be honest. Part of what it means to be honest is for workers to communicate truthfully with each other about the opportunities and obstacles that their business faces—including, of course, the comparative magnitude of such opportunities and obstacles. Honesty likewise demands the communication of a true picture of the good a business

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33 *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).
34 *See Michigan v. EPA*, 576 U.S. 743 (2015).

does, its incidental harms, and the possible compensation or loss that may attend a person's choice to support the business and its mission.

The proposal would invade the most sensitive internal communications of businesses by policing how and how much workers talk among themselves about climate risk. And it would force business groups to offer a distorted picture of themselves to investors. By doing so, it would impede the honest communication that is so necessary for business groups and the good they do. This impedance is at odds with the securities laws, the APA, and the First Amendment.

A. The Securities Laws Exist to Demand Honest Communication, but the Proposal Would Suppress It.

The "fundamental purpose" of federal securities regulation is "implementing a philosophy of full disclosure"[35] that aids the honest communication we discussed above. The securities laws focus on a particular subset of topics for honest communication: just those that are relevant to investment performance,[36] which is of concern to all investors because it determines how an investor's investing activity relates to his other goals (providing for a family, etc.).[37] Investors also reasonably care about other sorts of information, but here interests diverge, for different investors care about advancing different projects and values and therefore need different kinds of information from potential investees. The securities laws, which must serve all investors equally in facilitating access to the national capital markets, rightly require full disclosure of information that is material to investment performance—a topic of relevance to every investor—with the expectation that investors will seek out on their own the other sorts of information they need. A company wishing to attract investors sympathetic to the company's mission has every incentive to make available the additional information investors need to understand that mission and the company's effectiveness in pursuing it.

The Commission, then, acts outside the bounds of its authorities when it demands the disclosure of information that does not bear on investment performance. And it doubly transgresses its bounds when, as in the proposal, it demands "disclosures" that would actively *undermine* the ability of companies to communicate about themselves and their missions honestly to investors, for doing so would compel the painting of a partial picture of companies and their activities.

There can be little doubt that this would be the proposal's effect. In the first place, the proposal would require companies to disclose their GHG emissions and other climate-related information in a format tailor-made for comparison across companies; indeed, the proposal insists again and again that its goal is to create just such opportunities for comparison.[38] But GHG

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[35] *Basic*, 485 U.S. at 230.

[36] *See id.* at 231-32.

[37] Because information relevant to risks and returns often serves as a kind of gateway, informing investors how their other responsibilities will be benefited or burdened by investing in one enterprise versus another, this information can often sensibly be presented separately from other sorts of information for comparison.

[38] *See, e.g.*, 87 Fed. Reg. at 21335.

emissions are necessary for companies to achieve their missions. If a hospital chain has significant GHG emissions, that is because it consumes electricity in running life-saving medical equipment and optimizing the climate of its surgical theaters and because it fuels a fleet of ambulances; any account of the hospitals' GHG emissions that omits the *reason* for those emissions would give a woefully inaccurate picture of the business, and evaluating the emissions apart from the good they achieve would be a particularly mindless exercise. Yet the proposal would demand that companies present investors with emission (and other climate) information abstracted from the broader narratives of which it is part and structured to promote comparison of companies on this partial basis. It is rather like making doctors disclose how much anesthetic they use so patients can rank them accordingly—without regard to the kinds of practice the doctors engage in or the outcomes of their procedures.

Moreover, by demanding that businesses devote an outsized portion of their disclosures to climate-related issues, the proposal would interfere with businesses' ability to communicate honestly with investors about the magnitude of the opportunities and obstacles they face. The goal of the securities laws is that businesses communicate honestly to investors about financial opportunities and obstacles as the businesses see them; for that reason, as we explained above,[39] investors reasonably view a business's disclosure of information as indicating the business's judgment that that information is material for investment. But the Commission's proposal would require businesses to disclose climate-related information that is irrelevant to the business's future financial performance. Investors will infer that businesses judge this information relevant to their financial performance—indeed, due to the immense amount of climate-related information required to be disclosed, that climate-related risks are among the most important that each business faces. But of course, that is not true for the vast majority of businesses. The proposal will therefore force businesses to give investors a distorted picture of the most important factors affecting their future financial performance.

Demanding the presentation of partial and misleading pictures of businesses and their financial performance in this way is the opposite of the honest communication that the securities laws were intended to further. It thus obstructs the ability of America's businessmen and -women to pursue their missions and of investors to participate in those missions by making intelligent choices that take into account the mission and operations, the opportunities and obstacles, of each business as a whole.

The proposal explains the need for emissions information by asserting that investors need it to gauge transition risk, which is the risk to companies from future legal and regulatory changes. But if future lawmakers regulate emissions, presumably they, like reasonable investors, will act with a view to the entire context within which those emissions occur. There simply is no reason to believe that future Congresses and administrations would be so unreasonable as to regulate on the basis of GHG emissions alone. Investors today cannot reliably predict how future lawmakers will treat a business based on its emissions taken in the abstract, and therefore they cannot use GHG emission disclosures as a reliable basis to predict transition risk. To do that, they would

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[39] *Id.*

need to know how tomorrow's regulators will treat emitters *similar in all other respects to the businesses in which they are considering investing*, and no one can know that. For this reason, requiring the disclosure of emissions to ward off transition risk would be arbitrary and capricious under the APA.

B. The Proposal Irrationally Fails to Grapple with Its Deleterious Effects on Private Speech.

The proposal would not just interfere with businesses' communication with investors but even with their *internal* communications, by demanding that each registrant disclose how and how often its board deliberates about climate issues as well as how often management reports to the board on such issues.[40] This demand is unprecedented; as far as we can tell, never has the Commission required that registrants disclose the private deliberations of their boards and management about a particular kind of risk.

The deleterious effects of this disclosure are inevitable and easy to see. Activist investment managers will rank registrants based on the portion of their deliberations they devote to climate-related issues, offering the best rates and access to capital to registrants that discuss climate issues the most. Registrants will be pushed into a bidding war, each competing to give climate issues greatest pride of place in their internal deliberations so as to court access to capital.

As a result, the internal conversations of a registrant's board and management would no longer be candid deliberation about the opportunities and obstacles confronting the business; they would be performative, the more so as businesses compete aggressively for favorable funding terms. The time of board members and managers is not unlimited; as the discussion of climate-related issues increases, the discussion of other issues—those that reflect the board's and management's actual assessment of a registrant's goals and circumstances—would diminish, and with it the registrant's ability to pursue the business's goals, including returns for investors.

The proposal does not acknowledge the invasive and distorting effect of its demand to disclose internal communications. Its failure to do so and its consequent failure to evaluate whether this high price is worth whatever benefit such disclosure could achieve is arbitrary and capricious.

C. The Proposal's Compulsion to Speak, If Adopted, Would Violate the First Amendment.

The proposal's demand that businessmen and -women speak what they neither wish to say nor believe to be true would, if finalized, fly in the face of the First Amendment to the U.S. Constitution, for it would compel speech both vital to private enterprises and inextricably bound up with important public controversies, all in the absence of a compelling or even cognizable state objective.

[40] 87 Fed. Reg. at 21359-60.

"Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."[41] Such content-based speech restrictions "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests,"[42] that is, if the restrictions survive strict scrutiny.

Application of this categorical rule makes ample sense in these circumstances, for the proposal restricts speech at the core of the First Amendment. As we have outlined above, businesspeople have a vital interest in communicating truthfully to investors and potential investors and within their business about the business, its mission, and the risks and opportunities it confronts. That interest includes communicating the full story about their business, without being forced to emphasize facts that they believe present a distorted picture of their enterprise or its circumstances. This need of businesspeople to communicate truthfully (and of investors to receive truthful communication) is no less whit deserving of protection just because it has to do with private matters.[43]

But in any event, the proposal would in fact compel speech about one of the most controversial matters of our public policy debates: climate change. By requiring registrants to disclose vast quantities of information about climate factors and only those factors, the proposal would demand that registrants send the message that climate-related risk looms very large in our Nation's economic future and therefore is likely to impact each registrant's financial performance. But many Americans do not believe that that is true, which is why (as we discussed above) Congress continues to resist measures just like the proposal. The proposal demands that these Americans side with the Commission's evaluation of this controversial subject, in effect attempting to shut down the debate on climate change. But as the Supreme Court has held, "the people lose when the government is the one deciding which ideas should prevail."[44]

The general rule that content-based speech is subject to strict scrutiny would thus apply with good reason to the proposal if finalized. The Supreme Court has carved out limited exceptions to this general rule, but none apply here. In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,[45] the Court applied a lesser form of scrutiny to a disclosure requirement that "governed only commercial advertising and required the disclosure of purely factual and uncontroversial information about the terms under which [advertised] services will be available."[46] But as *Zauderer* itself suggested and as the Supreme Court has recently made clear, *Zauderer*'s less demanding standard of review does not apply to disclosures about hot-button issues such as abortion[47] or climate change.

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[41] *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988).
[42] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
[43] *See Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) ("A consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.") (internal quotation marks omitted).
[44] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018).
[45] 471 U.S. 626 (1985).
[46] *Becerra*, 138 S. Ct. at 2372 (internal quotation marks omitted).
[47] *Id.*

The Court has applied intermediate scrutiny to commercial speech, "that is, expression related solely to the economic interests of the speaker and its audience."[48] But the Court has also explained that speech does not "retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech,"[49] and as we have set forth above, the speech that the proposal would demand is not merely intertwined with, but *is*, speech about one of the most controversial political topics of our time. For that reason compelling the speech at issue here "poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information."[50] Nor would the proposal warrant intermediate scrutiny because it seeks to compel statements of asserted fact rather than opinion about these controversial matters, for the First Amendment applies equally to statements of fact and opinion.[51]

In any event, no matter the standard under which the proposal's speech compulsions are evaluated, they must fall. Every standard of review demands both a valid government interest and some reasonable relationship between the interest and the restriction at issue.[52] The proposal announces an undoubtedly valid interest: assisting investors to understand the risks of their investments.[53] Yet that cannot really be the Commission's aim, for it proposes to require the disclosure of much information regardless of its materiality,[54] and it is perfectly happy to require still more immaterial information.[55] Yet even if the Commission does indeed pursue an interest in ensuring that investors can evaluate risk, the proposal must fail because it "regulate[s] speech that poses no danger to the asserted state interest"[56] and is therefore wildly overbroad in violation of all standards of review.[57]

The Commission's real reason appears to be simply that some investors *demand* additional climate-related information, regardless of whether it is helpful for understanding the risks of their investments. But the mere usefulness of compelled speech does not constitute a valid governmental interest, let alone one that may survive intermediate or strict scrutiny; after all, every speech restriction is presumably useful to someone or it would never have been enacted. Nor is arbitrarily privileging the ability of some people to pursue their social or political goals a valid interest; indeed, it is difficult to imagine a less permissible governmental interest than creating tools for use by one faction to overpower another.

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[48] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980).

[49] *Riley*, 487 U.S. at 796.

[50] *Becerra*, 138 S. Ct. at 2374.

[51] *Riley*, 487 U.S. at 797-98.

[52] *See, e.g.*, *Becerra*, 138 S. Ct. at 2377.

[53] *See, e.g.*, 87 Fed. Reg. at 21335.

[54] *See* note and text *supra* at n.17.

[55] *See* 87 Fed. Reg. at 21381 (asking whether the Commission should "require the disclosure of Scope 3 emissions for all registrants, *regardless of materiality*") (emphasis added).

[56] *Central Hudson*, 447 U.S. at 565.

[57] *See, e.g.*, *Reed*, 135 S. Ct. at 2226 (restriction must "narrowly tailored"); *Central Hudson*, 447 U.S. at 565 (restriction must be "narrowly drawn"); *Becerra*, 138 S. Ct. at 2377 (*Zauderer* requires that restrictions "extend no broader than reasonably necessary" and may not be "unduly burdensome) (internal quotation marks omitted).

CONCLUSION

For the reasons given above, the proposal, if finalized, would violate the securities laws, the APA, and the Constitution, and the Commission must therefore withdraw the proposal and terminate this rulemaking.

Sincerely,

Robert Henneke
Executive Director

Jason Isaac
Director, Life:Powered