June 16, 2022

Comments of Mandy Gunasekara regarding

The U.S. Securities and Exchange Commission's Proposed Rule entitled

"The Enhancement and Standardization of Climate-Related Disclosures for Investors"

RIN 3235—AM87, File Number S7-10-22

The 3-part mission of the Securities and Exchange Commission (SEC) to protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation is extremely important to maintaining confidence in and stability of the U.S. economy. History has shown us that when the SEC is distracted from pursuit of this mission, it comes with grave consequences that hit American businesses, and the families and communities that support them, the most. Yet today, the SEC is in the process of abandoning its core mission and realigning itself as a new, climate-focused environmental regulator.

While protecting the environment is an equally important and noble mission, that responsibility has been expressly assigned to the U.S. Environmental Protection Agency. As the former Chief of Staff to U.S. EPA, I am intimately familiar with the work that has been done and is currently underway aimed at improving the environment and in particular, accounting for and reducing all manner of emissions.

The proposed climate rule is being marketed as a means to provide "investors with consistent, comparable, and decision-useful" information. [1] If this truly was the driving force behind the measure, focusing on surgical fixes within the existing construct that requires disclosure of "material risk" including climate seems the more prudent, and legally viable course. Instead, the SEC has proposed an expansive, complex reporting regime premised on speculative environmental analytics overseen by securities experts. On its face, this proposal lends itself to confusion rather than clarity.

More broadly, it appears that the SEC is being pushed to adopt activist-created metrics, referred to as environmental, social, and governance (ESG), to push investors away from politically disfavored industries.[2] EPA is no stranger to these same tactics being deployed within the agency whereby imagined authority is used to achieve well-defined political ends that have failed to pass Congress. I offer a measure of warning that when EPA's mission was distracted to achieve noble means beyond its specific and legally authorized purpose at the behest of politically connected activists, the agency experienced a series of preventable environmental

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[1] Chair Gensler, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors* (March 21, 2022), available at https://www.sec.gov/news/press-release/2022-46.

[2] Sen. Warren, *The Climate Risk Disclosure Act Would Accelerate the Transition from Fossil Fuels* (April 15, 2021), available at https://www.warren.senate.gov/newsroom/press-releases/warren-casten-colleagues-reintroduce-bill-requiring-public-companies-to-disclose-climate-related-risks.

disasters that caused immediate, measurable harm to Americans, including the Flint, MI, water crisis in 2014[3] and the Gold King Mine spill in 2015[4].

Accordingly, I urge the SEC to resist ESG-themed efforts and set aside its proposed rule. In its current form it lacks a statutory basis, is duplicative to existing disclosures, will degrade the quality of financial information available to investors, undermine institutional integrity of the SEC and distract the agency from its mission potentially causing harm that extends well beyond the investor class.

I. Without a clear directive from Congress, the SEC lacks authority to mandate climate disclosures.

When Congress passes laws establishing new agencies or conferring mission-oriented authority, those grants of power come with carefully considered limitations. This is the case with the laws the SEC has cited as its legal justification for the proposed climate-disclosure rule: the Securities Act of 1933 and the Securities and Exchange Act of 1934. Its notable that during the passage of those laws, legislators made clear that they did not want disclosure authority used to "elicit any information whatsoever."[5] Congress instead was very clear in listing specific categories of information tied to a company's potential for creating value and prospect for success.

Historically, the SEC has respected these limits and in the face of mounting pressures to require climate-related disclosures openly admitted them. In 2010, in response to the interpretative guidance regarding climate change disclosures, former Commissioner Katherine Casey argued that the effort was unrelated to investor protection and therefore fell outside the agency's expertise and fundamental mission.[6] Again, in 2016 when the SEC issued a concept release on potential climate disclosures, the agency formally reiterated its relevant limits:

> The Commission, however, has determined in the past that disclosure relating to environmental and other matters of social concern should not be required of all registrants unless appropriate to further a specific congressional mandate or unless, under the particular facts and circumstances, such matters are material.[7]

In the context of the current proposal, dissenting Commissioner Peirce also reiterated the agency's limits:

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[3] Grist, *The EPA failed Flint. Now we know exactly how*. (July 19, 2018), available at https://grist.org/article/the-epa-failed-flint-now-we-know-exactly-how/.
[4] US News & World Report, *EPA to Blame for 'Preventable' Gold King Mine Spill* (October 22, 2015), available at https://www.usnews.com/news/articles/2015/10/22/epa-to-blame-for-preventable-gold-king-mine-spill-interior-dept-finds.
[5] H.R. Rep. No. 73-1383, at 23 (1934).
[6] SEC Commissioner Kathleen L. Casey, *Statement at Open Meeting on Interpretive Release Regarding Disclosure of Climate Change Matters* (January 27, 2010), available at https://www.sec.gov/news/speech/2010/spch012710klc-climate.htm.
[7] Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,916, 23,970 (Apr. 22, 2016); referencing Environmental and Social Disclosure, 40 Fed. Reg. 51,656 (Nov. 6, 1975), available at https://www.govinfo.gov/content/pkg/FR-2016-04-22/pdf/2016-09056.pdf.

> Congress, however, did not give us plenary authority over the economy and did not authorize us to adopt rules that are not consistent with applicable constitutional limitations. This proposal steps outside our statutory limits by using the disclosure framework to achieve objectives that are not ours to pursue …[8]

To date, Congress has not granted the SEC a specific directive that would support its current climate disclosure proposal nor granted the agency an expanded role over the U.S. economy. Some on capitol hill have attempted to grant the SEC specific authority related to climate-change disclosures, but that legislation has yet to gain necessary traction.[9] Instead, Congress has authorized mandatory disclosures in other topic areas, such as executive pay[10] and conflict minerals[11] reinforcing that they will act clearly when they want the SEC to take disclosure actions beyond existing statutory limits.

Additionally, Congress has spoken specifically to the matter of making company-specific emissions information available to the public. In 2008, Congress directed the U.S. Environmental Protection Agency (EPA) to "to require mandatory reporting of greenhouse gas emissions above appropriate thresholds in all sectors of the economy of the United States."[12] The agency now oversees the U.S. Greenhouse Gas Reporting Program (GHGRP) covering over 8,000 facilities across 41 different categories, which provides publicly available insight into a company's environmental footprint.[13]

As a result, U.S. EPA is home to a highly specialized workforce that has built, defined and maintained the U.S. GHGRP. The SEC's proposal not only encroaches on EPA's congressionally directed reporting responsibilities fulfilled by specialized, environmental experts but proposes to replicate it with a new, expansive reporting regime premised on speculative analytics overseen by securities experts. If finalized, this rule lends itself to wasteful duplication and confusion requiring the Commission to perform duties of which its experts are not equipped.

Mismatched expertise is not the only technical shortcoming of the climate disclosure rule. There is a high likelihood of double counting emissions in that one company's Scope 3 emissions is another company's Scope 1 emissions. This results in less accurate accountings and opens the door for manipulation, which are significant flaws of the GHG reporting program. Researchers have recently proposed a novel method aimed at addressing these flaws.[14] The U.S. EPA has considered recognizing lifecycle analysis as another emissions quantification tool, which is

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[8] SEC Commissioner Hester Peirce, *We are Not the Securities and Environment Commission - At Least Not Yet* (March 21, 2022), available at https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.

[9] Congress.gov, *Related Bills: H.R. 2570 – Climate Risk Disclosure Act of 2021* (April 15, 2021), available at https://www.congress.gov/bill/117th-congress/house-bill/2570/related-bills.

[10] Congress.gov, *H.R. 3763 – Sarbanes-Oxley Act of 2002* (February 14, 2002), available at: https://www.congress.gov/bill/107th-congress/house-bill/3763/text.

[11] Congress.gov, *H.R. 4173 – Dodd-Frank Wall Street Reform and Consumer Protection Act (December 12, 2009), available at: https://www.congress.gov/bill/111th-congress/house-bill/4173*.

[12] Consolidated Appropriations Act, 2008, Public Law 110-161, 121 Stat. 1844, 2128 (2008) available at https://www.govinfo.gov/content/pkg/PLAW-110publ161/pdf/PLAW-110publ161.pdf.

[13] US EPA, *Learn about the Greenhouse Gas Reporting Program*, available at https://www.epa.gov/ghgreporting/learn-about-greenhouse-gas-reporting-program-ghgrp.

[14] Harvard Business Review, *Accounting for Climate* Change (2021), available at https://hbr.org/2021/11/accounting-for-climate-change.

already used to assess the overall GHG impacts of fuels, including each stage of its production and use.[15] Transporting these responsibilities over to the SEC won't fix the technical shortcomings, but stands to make them worse.

II. Investors already have access to decision-useful information related to climate under existing disclosures that were clarified in 2010.

Existing SEC rules already require companies to disclose material risks, which for some includes the potential impacts of the changing climate as well as the impact of applicable legal, administrative, and legislative landscapes. In 2010, the SEC issued guidance clarifying how companies can incorporate climate risks into their existing disclosure responsibilities.[16] For example, if a company is subject to environmental regulation, they must provide a description of how compliance could impact its capital expenditures under requirements laid out in Regulation S-K.

> Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries. The registrant shall disclose any material estimated capital expenditures for environmental control facilities for the remainder of its current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem material.[17]

Another provision, Item 103 of Regulations S-K, requires companies to describe pending legal matters of which it is a party and specifically clarifies how this disclosure requirement applies to certain environmental litigation.[18] Of particular note, when the SEC integrated these requirements into Item 103 during the 1980s, the Commission modified the disclosure standard to omit disclosure of a legal proceeding that was expected to produce a monetary sanction below $100,000. The reason was "to address the problem that disclosure documents were being filled with descriptions of minor infractions that distracted from other material disclosures."[19] Early on the SEC realized the problem of expansive, open-ended disclosure requirements especially in the context of environmental litigation and how the sheer volume of information affiliated with this type of disclosure could degrade the quality of investor reports.

More broadly, current disclosure rules require companies to describe any material factors that could make investment in the company or related offering "speculative or risky."[20] Additionally,

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[15] U.S. EPA, *Lifecycle Analysis of Greenhouse Gas under the Renewable Fuel Standard* (January 5, 2022), available at https://www.epa.gov/renewable-fuel-standard-program/lifecycle-analysis-greenhouse-gas-emissions-under-renewable-fuel#:~:text=Lifecycle%20analysis%2C%20sometimes%20referred%20to,by%20the%20Clean%20Air%20Act.
[16] SEC, available at https://www.sec.gov/rules/interp/2010/33-9106.pdf.
[17] 17 CFR 229.101
[18] 17 CFR 229.103
[19] SEC, *Commission Guidance Regarding Disclosure Related to Climate Change*, 75 Fed. Reg. 6290 (Feb. 8, 2010), available at https://www.sec.gov/rules/interp/2010/33-9106.pdf. *See* footnote 45.
[20] 17 CFR 229.503(c).

the existing disclosures pertaining to Management's Discussion and Analytics (MD&A) laid out in Item 303 requires companies to disclose known trends, events, demands, commitments and uncertainties that are reasonably likely to have a material effect on financial condition or operating performance.[21] The 2010 climate guidance specifically clarified this requirement's application to pending climate change laws and regulations even laying out a two-step process whereby managers could determine whether to disclose a known uncertainty within the "rapidly developing area" of climate change policy.[22]

There are additional catch-all provisions under Securities Act Rule 408 and Exchange Act Rule 12b-20 whereby companies disclose risks that are not expressly required by the Commission but could provide important environmental context.[23] As SEC Commissioner Peirce recently noted, in application companies have used this section "to disclose risks of wildfires to property, risk of rising sea levels, temperatures and risk of climate-change legislation or regulation when proven material to a company's financial situation."[24]

In September of 2021, the SEC's Division of Corporate Finance issued a *Sample Letter* to numerous companies to further clarify the Commission's related disclosures expectations and to inform the proposal.[25] Of note, 25 out of 26 companies subject to these inquiries responded that climate risk was important but not material and that the additional information the SEC sought was either already disclosed or to abstract and general.[26]

Not only are there multiple existing avenues whereby companies already provide comprehensive information regarding potential impacts of the climate to investors, more recent efforts to expand these disclosures through SEC enforcement initiatives have made clear the potential for immaterial information making its way into investor reports. It appears that this new information is not geared towards informing the investor community but rather a specific strand of environmental advocates.

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[21] 17 CFR 229.303.

[22] Item 303 requires registrants to assess whether any enacted climate change legislation or regulation is reasonably likely to have a material effect on the registrant's financial condition or results of operation. In the case of a known uncertainty, such as pending legislation or regulation, the analysis of whether disclosure is required in MD&A consists of two steps. First, management must evaluate whether the pending legislation or regulation is reasonably likely to be enacted. Unless management determines that it is not reasonably likely to be enacted, it must proceed on the assumption that the legislation or regulation will be enacted. Second, management must determine whether the legislation or regulation, if enacted, is reasonably likely to have a material effect on the registrant, its financial condition or results of operations. Unless management determines that a material effect is not reasonably likely MD&A disclosure is required. SEC, *Commission Guidance Regarding Disclosure Related to Climate Change*, 75 Fed. Reg. 6290 (Feb. 8, 2010), available at https://www.sec.gov/rules/interp/2010/33-9106.pdf

[23] 17 CFR 230.408 and 17 CFR 240.12b-20.

[24] SEC Commissioner Hester Peirce, *We are Not the Securities and Environment Commission - At Least Not Yet* (March 21, 2022), available at https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.

[25] U.S. SEC, *Sample Letter to Companies Regarding Climate Change Disclosures* (September 22, 2021), available at https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures.

[26] Bloomberg Law, *SEC Drops Hints About ESG Rule in Retorts to Vague Disclosures* (March 18, 2021), available at https://news.bloomberglaw.com/financial-accounting/sec-scrutiny-of-big-companies-sheds-light-on-climate-priorities.

III. Prioritizing the wants of environmental activists over the needs of the investor community will degrade the quality of decision-useful information and undermine the SEC's standards of efficiency.

Advocates behind the climate disclosure rule and broader integration of ESG standards present the issue of climate change as an immediate crisis that threatens the entire human race unless certain government sponsored policies are adopted. These advocates further claim that the scientific work and discourse that underlies this truth is settled.

While our knowledge in the realm of climate change has greatly improved, the body of scientific work and our affiliated understanding is better described as incomplete and evolving. Our understanding regarding the changing climate's impact on present and future generations and the policies we should embrace to either mitigate or adapt are complex, nuanced and far from settled.

Admission of speculative assumptions, referred to as "uncertainties" is a regular part of earnest climate discourse, the SEC's proposal largely ignores this fact. It purports to create comparable, consistent, and decision-useful information surrounding the complex world of climate change into a single investor report. Even the United Nation's Intergovernmental Panel on Climate Change has found the task of producing precise, conclusive outcomes to be fleeting throughout its multi-decadal existence. In attempts to set some standard of comparison within climate science, the IPCC has produced four possible future scenarios called Representative Concentration Pathways (RPC). To date, the existence and use of these four possible scenarios has failed to produce reliably useful information for the general public.[27]

Yet the SEC proposal would set this aside and place the burden of accurately disclosing "physical risk" tied to climate at the feet of the financial community. Beyond sifting through well-founded criticisms with the leading pathways' analyses, companies would have to contend with the consistently unreliable nature of climate models, the unknown impact of climate sensitivities and many other highly variable aspects of the climate that can change the degree of any purported risk.

The proposed SEC disclosures regarding "transition risk" are equally problematic. The standard of predicting markets, technology law, and policy across a company's entire value chain is a recipe for endless, irrelevant disclosures. Investors may not find this information decision-useful but environmental activists with litigation-based business models will. Building off recent activist campaigns, they will now be able to use SEC-mandated information to build their cases against the companies and technologies they disfavor.

Filling reports with massive amounts of irrelevant information while increasing legal exposure, also comes with a high compliance cost. As the Commission has previously noted, these costs will ultimately be borne by the shareholders, which is why they have historically held back from

[27] "The climate scenarios that underlie much of climate research are badly outdated and no longer offer insight to plausible futures." Dr. Roger Pielke, Jr., Statement to the U.S. Senate Committee on Banking, Housing and Urban Affairs (July 20, 2021), available at: https://www.banking.senate.gov/imo/media/doc/Pielke%20Testimony%207-20-21.pdf.

mandating disclosures "to serve the needs of limited segments of the investing public, even if otherwise desirable."[28] As one article highlighted, the SEC reports that many smaller companies with greater than $700 million market capitalizations will have to pay an estimated $640,000 a year in compliance fees, with costs dropping to about $530,000 annually thereafter.[29] Yet some, including Commissioner Peirce have made clear these costs are likely under estimated.

There is also the matter of efficiency. The Commission is statutorily required to consider whether an action will promote efficiency, competition, and capital formation.[30] Requiring companies to disclose massive amounts of irrelevant information adds needless inefficiencies into a process where relevant climate related disclosures are already made. With added compliance costs and liabilities to consider, companies are more likely to curb engagement in public capital markets.

IV. This is a backdoor attempt to push expansive climate policies that have been rejected on capitol hill and limited by courts in other areas of the law.

In 2013, Democrat politicians initiated a massive shift in approach to implementing their climate related policies. After a series of legislative losses including a refusal by the Democrat-controlled Senate to take up House-passed climate legislation that had the backing of the Obama White House, they started looking to administrative agencies and existing authorities to achieve their policy objectives. As one Obama-era official explained:

> [W]hile the president continued to call for Congressional action, political reality left no choice but to rely on existing law in order to show progress in addressing climate change. Otherwise, the president faced the prospect that the U.S. would fail to deliver on his Copenhagen commitment to a seventeen percent emission reduction by 2020, which would represent not only a personal embarrassment but a significant setback in rallying world leaders to the cause of deeper emission reductions in the years to come.[31]

This mentality alongside the start of the second term that allowed then President Obama "more maneuvering room to address an urgent but politically divisive issue"[32] spurred democrat politicians and aligned environmental activists to push unpopular climate policies focused on making the price of traditional energy more expensive and less accessible through expanded interpretations of existing laws, regulations and agency missions. This template of unauthorized expansion started under the Clean Air Act within the U.S. EPA but has since ballooned into a "whole of the government" approach to climate whereby activists are finding imagined authority in all manner of statutes and agencies.

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[28] SEC News Digest, *Conclusions and Proposals RE Environmental and Social Disclosure* (October 16, 1975) available at https://www.sec.gov/news/digest/1975/dig101575.pdf.
[29] The Deal, *ESG Disclosure Rule Could Drive Activism, M&A* (March 24, 2022), available at https://pipeline.thedeal.com/.
[30] 15 U.S.C. 77b(b).
[31] Robert Sussman, *Power Plant Regulation Under the Clean Air Act: A Breakthrough Moment for U.S. Climate Policy,* 32 Va. Envtl. L.J. 97, 109 (2014).
[32] *Id*.

But sidestepping Congress and pushing expansive, new policies even at the behest of presidential directives has regularly come up against the courts. In recent years, the U.S. Supreme Court has issued a number of relevant rebukes of which the SEC should take note. In particular, the Court has made clear that "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," we typically greet its announcement with a measure of skepticism." The Court further reiterated that when agencies undertake actions of vast economic and political significance, there is an expectation that Congress will speak clearly in assigning such a role.[33]

Even EPA's "landmark" climate regulation, the Clean Power Plan, which was final in 2015 has never fully gone into effect.[34] The Supreme Court issued an unprecedented stay against the rule after the majority of states argued that the agency's expanded view of authority was defective.

Seven years later, the same regulation and affiliated issues are once again before the Supreme Court. While a final opinion has yet to be published, there is an increasing expectation that the trend of skepticism towards unbridled agency actions – even those done in the name of climate change – will continue.

Without support from American voters and increased, limiting rebukes to preferred environmental statutes, activists have looked to international institutions to cultivate pressure against domestic resistance. Not surprisingly, environmentalists and their sponsored democrat allies have found enthusiastic support within the United Nations, which is populated by economically competitive countries and industries that would love nothing more than government mandates that could curb American entrepreneurialism.

It's no surprise then that the SEC proposal is built off the UN's Task Force on Climate-Related Disclosure, a derivative of the Paris Climate Accord.[35] Of note, in the lead up to the signing of the Paris Accord, lead negotiators famously stated that given the lack of political support for climate policies within the U.S. the final agreement had to be modeled in a way to avoid the U.S. Congress.[36] UN negotiators ultimately convinced the international law experts at the U.S. State Department that the Paris Accord and its derivative agreements where not legally binding to the point where it triggered Senate advise and consent. However, with the latest SEC proposal, the strategic international work around has come full circle.

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[33] *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014).

[34] The White House, *Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants* (August 3, 2015), available at https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards.

[35] Institute and Faculty of Actuaries, *The Paris Agreement and the Task Force on Climate-related Financial Disclosures*, available at https://www.actuaries.org.uk/learn-and-develop/lifelong-learning/sustainability-and-lifelong-learning/climate-change-curated-library/paris-agreement-and-task-force-climate-related-financial-disclosures.

[36] "We must find a formula which is valuable for everybody and valuable for the US without going to the Congress." French Foreign Minister Laurent Fabius, France 24, *France says climate deal must avoid US Congress vote* (June 2, 2015), available at https://www.france24.com/en/20150602-climate-change-deal-congress-fabius-bonn-usa.

Piece by piece, current political officials are attempting to codify elements of the now well-formed Paris Accord and its byproducts that do not have the force of law – by design – but will be referenced to pump new authority into existing laws to justify the progression of failed congressional objectives via administrative fiat.

V. Losing sight of the Commission's mission will cause harm that goes beyond the investor class negatively impacting the lives of everyday Americans.

When agencies become distracted by their relative missions, it comes with a series of consequences to the American people. At the U.S. Environmental Protection Agency, a long-term political distraction from its core function to work cooperatively – not coercively – with states to progress meaningful environmental improvements coupled with a disregard for the rule of law and a proliferation of redundant, wasteful processes led to a series of preventable environmental problems.

Some of these problems were acute and widely covered. They included the 2014 water crisis in Flint, Michigan, whereby local residents were exposed to high concentrations of lead. At the time, DC-based political leadership busy pursuing its all-encompassing climate agenda ignored concerns raised by regional staff that could have prevented the proliferation of this disaster.[37] There was also the 2015 Gold King Mine spill where mishaps by U.S. EPA contractors unleashed millions of gallons of toxic waste into the Animas River creating a series of harm to residents and wildlife.[38]

Other problems were prolonged and received less attention. This included a massive backlog of state plans that laid out a path for compliance with air and water quality standards. When EPA failed to make a final decision on these plans it degraded overall environmental health and curbed economic opportunity.[39] The agency's Superfund program, which is charged with cleaning up the most polluted areas of our country, had been placed on the backburner. As a result, some areas failed to be adequately cleaned up for decades, ultimately holding back the communities that had borne the consequences of legacy pollution.[40]

These outcomes were a consequence of diverting agency resources, interest and talent away from fundamental duties because they had been overtaken by political pressures to advance actions that exceeded the agency's statutory mission and authority. It not only caused tangible harm to the American public but also dealt the agency serious reputational damage that has culminated in the form of distrust among the regulated community and disappointment among stakeholders who were promised outcomes of which the agency cannot legally deliver.

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[37] Grist, *The EPA failed Flint. Now we know exactly how*. (July 19, 2018), available at https://grist.org/article/the-epa-failed-flint-now-we-know-exactly-how/.

[38] US News & World Report, *EPA to Blame for 'Preventable' Gold King Mine Spill* (October 22, 2015), available at https://www.usnews.com/news/articles/2015/10/22/epa-to-blame-for-preventable-gold-king-mine-spill-interior-dept-finds.

[39] US EPA, Memorandum: Back-to-Basics Process for Reviewing National Ambient Air Quality Standard (May 9, 2018) available at https://www.epa.gov/sites/default/files/2018-05/documents/image2018-05-09-173219.pdf.

[40] US EPA, Superfund Task Force Recommendations (May 22, 2017), available at https://www.epa.gov/sites/default/files/2017-07/documents/superfund_task_force_report.pdf.

These same efforts and political pressures are now being deployed at the SEC. The climate disclosure rule stands to be a massive distraction with the potential to produce serious consequences far beyond the investor class. It stands to make it harder and more complex for good ideas and technologies to gain access to public capital. It will deter investment away from traditional energy sources, which will further drive up the costs of gas, electricity, and consumer goods.

A recent report from the International Energy Forum quantified the harm that ESG investment has already caused with regard to gas prices.[41] It estimates that in 2021 oil and gas production remained 23 percent below the pre-pandemic level of $525 billion, while investment slumped by 30 percent in 2020. The report identified ESG investing and changing regulatory signals to the capital markets on fossil fuel production as one of the primary contributors to investment remaining below what's needed to meet demand.[42]A codification and signal sending endorsement of these same policies within the federal government will only exacerbate this damaging trend.

Additionally, reshaping investment strategy and capital allocation to favor perceived social good over financial returns, the Commission's rule stands to jeopardize the performance of pension retirement funds and the millions of retired Americans depending on them. Research has already confirmed this to be the case, finding that "social investing of any form does not appear to improve returns and has the potential to reduce [public pension funds]; hence, it is not appropriate for public pension funds."[43] This reality is likely why the U.S. Department of Labor changed its ERISA guidelines in 2020 to limit fiduciaries' ability to consider ESG factors when selecting plan investments.[44]

VI. Conclusion

I believe it's important for Commissioners to understand where embracing this climate disclosure path ultimately leads. The SEC will be transformed into a political tool whereby its purpose and authorities are weaponized to disrupt and ultimately destroy politically disfavored industries. Such an act will initiate protracted litigation that will create years-long uncertainty for regulated entities. In the process, they will sacrifice its institutional purpose and integrity to achieve the ends of a well-funded and well connected few.

Accordingly, I urge the SEC to set aside its proposed rule and shift its focus to developing more surgical improvements to existing disclosure standards rather than creating an entirely new, legally dubious regime. During a time of record-breaking inflation, rising energy prices and a potential recession, Commissioners adhering to the traditional intent, purpose and affiliated authorities of the SEC is increasingly important. To the extent additional climate related

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[41] International Energy Forum, *Deepening Underinvestment in Hydrocarbons Raises Spectre of Continued Price Shocks and Volatility* (2021), available at https://www.ief.org/news/deepening-underinvestment-in-hydrocarbons-raises-spectre-of-continued-price-shocks-and-volatility.
[42] *Id.*
[43] CRR, *ESG Investing and Public Pensions: An* Update (October 2020), available at https://crr.bc.edu/wp-content/uploads/2020/10/SLP74.pdf.
[44] U.S. DOL, DOL Announces Final Rule to Protect Americans' Retirement Investments (October 30, 2020), available at https://www.dol.gov/newsroom/releases/ebsa/ebsa20201030.

measures should be deployed, these actions are better housed at the U.S. EPA consistent with their relative authority and applicable limits. They are not within the purview of the SEC.

Thank you for the opportunity to submit comments.

Sincerely,

Mandy Gunasekara