June 17, 2022

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

Re: The Enhancement and Standardization of Climate-Related Disclosures for Investors
[File No. S7-10-2; Release No. 33-11042; RIN 3235-AM87]

Dear Ms. Countryman:

I am pleased to provide these comments in response to the proposed rule entitled "The Enhancement and Standardization of Climate-Related Disclosures for Investors."[1] This comment letter consists of four parts: (1) An introduction, (2) a summary of the analysis of the proposed rule, (3) detailed analysis of the proposed rule under 25 specific headings and (4) answers to specific questions posed by Commission in the proposing release.

Introduction

If the Commission adopts this rule in anything close to its current form, then this Commission will become the most economically destructive Commission since the Commission's creation in 1934. That may sound intemperate or hyperbolic. It is not. This is a rule unlike any other ever considered by the Commission.

Adoption of this proposed rule would constitute a stark break with the Commission's nearly nine-decade history of requiring material, scaled disclosure by issuers to aid investors when making investment decisions. The reality is that this rule, standing alone and using the SEC's own low-ball estimates, would nearly triple the costs imposed on issuers. The costs imposed by this rule alone are at least double the aggregate of every other rule promulgated by the Commission since 1934.[2] *That* is extreme, intemperate, and unadvisable. As the analysis below demonstrates, the proposed rule would have countless substantial adverse effects throughout our economy and yet do somewhere between nothing and vanishing little to reduce greenhouse gas emissions. The economic analysis in the proposing release does not even begin to establish otherwise.

The voluminous proposing release is virtually devoid of environmental or climate analysis. In one respect, this is unsurprising. The Commission has no expertise regarding climate science. In another respect, it is disturbing since the entire basis for this extraordinarily costly proposed rule is the proposition that climate change represents an enormous, extraordinary and special kind of risk that justifies tripling the cost of being a public company, launching an assault on traditional conceptions of

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[1] "The Enhancement and Standardization of Climate-Related Disclosures for Investors," Securities and Exchange Commission, Proposed Rule, *Federal Register*, Vol. 87, No. 69, April 11, 2022, pp. 21334-21473 https://www.govinfo.gov/content/pkg/FR-2022-04-11/pdf/2022-06342.pdf. See also the SEC version of the proposing release, March 21, 2022 https://www.sec.gov/rules/proposed/2022/33-11042.pdf (506 pages). All citations throughout this comment letter are to the *Federal Register* version. See also Release Nos. 33-11061 extending the comment period to June 17, 2022.
[2] See PRA Table 4 at p. 21461 of the proposing release estimating external costs to increase by 165 percent (2.65 times current costs) and internal costs to increase by 131 percent. For the reasons discussed below, these are underestimates.

materiality and endangering the integrity of financial statements. The proposing release does not even attempt to defend this proposition with serious analysis or facts.

Securities laws are an ineffective means of addressing externalities.[3] But the United States does have an Environmental Protection Agency. It already requires GHG emissions reporting.[4] The EPA estimates that the required reporting under their rule covers 85–90% of all GHG emissions from over 8,000 facilities in the United States.[5] That is good enough[6] and does not require upending our securities markets and imposing many billions of dollars in costs to duplicate what the EPA is already doing. The Initial Regulatory Flexibility Act Analysis in the proposing release falsely asserts "The proposed rules do not duplicate or conflict with other existing federal rules."[7] It also cavalierly dismisses the EPA program and does not even consider allowing issuers to use this information in their SEC filings.[8]

Neither the proposing release nor the proposed rule provide any meaningful guidance with respect to which climate models issuers should rely upon or provide any intelligible standard by which climate models should be judged. The entirety of the climate analysis is some dropped footnotes referencing models by five entities that have a financial or political interest in climate change alarmism. The Commission entirely ignores independent voices that are not alarmist and that have no financial or political interest in being alarmist. In short, the proposing release entirely skips the analytical or factual predicate for the rulemaking and entirely ignores the modeling and factual questions that will underly *any* climate-related disclosure required by the proposed rule.

Neither the proposing release nor the proposed rule provide any meaningful guidance with respect to which economic models issuers should rely upon to estimate the economic effects caused by the climate effects predicted by various climate models. Neither the proposing release nor the proposed rule provide any intelligible standard by which economic models should be judged. Neither the proposing release nor the proposed rule provide any meaningful guidance about how the interaction between climate models and economic models should be handled. This matters a great deal since *any* economic model must be predicated on some climate model predictions with respect to the degree and timing of climate change.

Neither the proposing release nor the proposed rule provide any meaningful guidance with respect to how issuers should assess and predict responses and policies in the future by a myriad of federal, state and foreign governments,[9] future technological developments or market responses to these government policies or technological developments. Issuers will have to simply guess (i.e. make it up) in order to make issuer specific assessments.

Because neither the proposing release nor the proposed rule provide any meaningful guidance with respect to these issues, it will not contribute to any meaningful degree to the "standardization of climate-

[3] See the discussion below under the heading "Securities Laws are a Poor Mechanism to Address Externalities."
[4] Greenhouse Gas Reporting Program (GHGRP) https://www.epa.gov/ghgreporting/ghgrp-reported-data.
[5] Proposing release at p. 21414.
[6] Of course, if policymakers wanted to expand the EPA rule, they could do so and impose vastly fewer costs than the SEC proposed rule would impose. Moreover, the SEC could allow issuers to use their EPA reporting for purposes of SEC filings.
[7] Proposing release at p. 21463 (section VI.E).
[8] Proposing release at p. 21463 (sections VI.E and VI.F).
[9] To get a sense of how daunting a task it is to keep track of the many government policy responses, see "Climate Change Laws of the World," Grantham Research Institute on Climate Change and the Environment at LSE https://climate-laws.org/. Merely keeping track of these many rules is one thing. Accurately *predicting* how they will change introduces an entirely new level of complexity and uncertainty.

related disclosures" which the Commission claims to be the proposed rule's primary *raison d'être*. Each issuer will inevitably make substantially different assessments about how to comply with the rule.

To adopt this rule, the Commission must adopt a willing blindness, a reckless disregard for both the facts and its statutory mission, in pursuit of a woke, transparently political agenda. Furthermore, because of its scope 3 requirements relating to the upstream and downstream activities in a registrant's value chain, the proposed rule would also impose costs on millions of non-issuers, including many millions of small businesses that must deal with issuers.[10] These vast costs imposed on non-issuers are not even considered by the Commission in its proposing release. And, as discussed below,[11] they are likely to be of similar magnitude to the costs imposed directly on issuers.

The Commission and the proper discharge of its mission are important to the health and vibrancy of our capital markets. Our capital markets, in turn, are critical to a dynamic, innovative, growing economy that delivers prosperity, a high standard of living to the American people and the tax base and resources for everything that local, state and federal governments do. The mission of the Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.[12] The proposed rule is utterly inconsistent with the SEC's statutory mission.[13] It imposes requirements that are beyond its statutory authority.

The proposed rule would substantially harm, not protect investors in at least four ways:[14]

- By radically increasing compliance costs and litigation risk and costs, shareholder returns would decline;
- By substantially reducing the number of public companies, investor choice and diversification potential would shrink;
- By forcing companies to go public much later in their life cycle, most of the gains associated with successful entrepreneurial ventures would accrue to affluent accredited investors rather than the broader investing public;
- By burying investors in a blizzard of immaterial information, investors would find it more difficult to determine relevant information material to the financial outcome of the firms in which they invest.

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[10] See the discussion below under the heading "The Impact of the Proposed Rule on Small Businesses." Moreover, the Small Business Regulatory Enforcement Fairness Act analysis (Section VII of the proposing release) is preposterous. ("We request comment on whether our proposal would be a ''major rule'' for purposes of SBREFA.") A major rule has 'an annual effect on the U.S. economy of $100 million or more." The Commission's own Paperwork Reduction Act analysis (PRA Table 4) indicates that it will have an impact of at least sixty four times that amount (just looking at the increase in external costs).
[11] See the discussion below under the heading "The Impact of the Proposed Rule on Small Businesses."
[12] "The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation," http://www.sec.gov/about/whatwedo.shtml#intro. The statutory charge is "Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." See §3(f) of the Securities Exchange Act of 1934 and §2(b) of the Securities Act of 1933. See also Securities Exchange Act sec. 23(a)(2) (requiring the Commission to consider the impact that any rule or regulation would have on competition).
[13] See the discussion below under the heading "The Proposed Rule is Inconsistent with the Mission of the Commission." See also Andrew Vollmer, Mercatus Center at George Mason University, April 12, 2022 https://www.sec.gov/comments/s7-10-22/s71022-20123525-279742.pdf.
[14] See the discussion below under the heading "The Impact of the Proposed Rule on Investors."

The proposed rule would constitute an unprecedented impediment to capital formation rather than facilitating it.[15] It would make capital markets less, not more, efficient.[16] Moreover, there is strong reason to believe that well over half of the costs imposed by the rule will in the long run be borne by workers, not investors, because capital is much more mobile than labor.[17]

The rule also represents a frontal assault on the fundamental purposes of federal securities laws, to wit, to deter and punish fraud and to foster or require disclosure by issuers of material and accurate financial and non-financial information about issuers to investors that is needed to make informed investment decisions.[18] The proposed rule represents a deep politicization of securities law.[19] If this rule is adopted, then the integrity of financial statements will be endangered.[20] It will require companies to bury investors in a blizzard of immaterial, politically motivated and fundamentally unreliable, make believe "information."[21] Generalized and voluminous reporting on the upstream and downstream emissions of an issuers value chain (i.e. scope 3 reporting), for example, has nothing to do with the financial outcome of the firm and requires the collection and reporting of vast amounts of immaterial information.

Disclosure requirements have already become so voluminous that they obfuscate rather than inform, making it more difficult for investors to find relevant, material information. The proposed rule will exacerbate this problem dramatically but add still another. As discussed below, the required GHG emission financial statement "disclosures" will require the creation of "information" built on such a factual and theoretical house of cards that they will be deeply and necessarily misleading, unreliable or false.[22] The Commission should not require make believe, fictional disclosures in financial statements reporting "information" that would raise fraud issues in any other context. The "information" that the rule would require issuers to collect and create, not disclose, will be based on highly uncertain and often dubious models of the economic impact of climate change that are in turn based on highly variable and radically uncertain climate models, and guesses about future government policies world-wide,

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[15] See the discussion below under the headings "The Impact of the Proposed Rule on Issuers" and "The Impact of the Proposed Rule on the Capital Markets."

[16] See the discussion below under the heading "The Impact of the Proposed Rule on the Capital Markets."

[17] See the discussion below under the subheading "The Social Costs of ESG" under heading "The Commission's Economic Analysis is Seriously Deficient."

[18] See the discussion below under the headings "Immaterial Climate Change 'Disclosure' Would Obfuscate Rather than Inform," "The Impact of the Proposed Rule on the Integrity of Financial Statements and Regulators," and "Efforts to Redefine Materiality and the Purpose of Securities Laws are Counterproductive."

[19] Undoubtedly in response to political pressure from the White House. See especially, "Executive Order on Climate-Related Financial Risk," section 3, May 20, 2021 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/. The Executive Order is almost entirely unsullied by citations to facts. And, if the SEC filing with Office of Management and Budget, Office of Information and Regulatory Affairs (OIRA) is any indication, more is to follow. See "Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions, Active Regulatory Actions Listed by Agency," [Human Capital Management Disclosure, RIN 3235-AM88 and Corporate Board Diversity, RIN 3235-AL91] https://www.reginfo.gov/public/do/eAgendaMain. See also "Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," January 20, 2021 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.

[20] See the discussion below under the heading "The Impact of the Proposed Rule on the Integrity of Financial Statements and Regulators."

[21] See the discussion below under the heading "Immaterial Climate Change 'Disclosure' Would Obfuscate Rather than Inform."

[22] See the discussion below under the headings "Climate Models and Climate Science are Highly Uncertain," "Economic Modeling of Climate Change Effects is Even More Uncertain," "Efforts to Redefine Materiality and the Purpose of Securities Laws are Counterproductive," "Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform," and "The Impact of the Proposed Rule on the Integrity of Financial Statements and Regulators."

technological developments and market reaction decades into the future. It will require the collection of information from countless third parties. Then, piled on top of this, issuers must guess about issuer specific effects based on this house of cards years into the future.

Moreover, the proposed rule would have somewhere between either a vanishingly small or no effect on actual greenhouse gas emissions.[23] Lengthy footnotes full of amorphous, legally scrubbed language based on highly doubtful climate and economics models presented in financial statements or in SEC forms are not going to have a significant impact on emissions. The proposed rule may, however, shift some capital away from conventional fuel[24] companies depending on how the Commission administers and enforces the rule and what climate activists, investment advisers, politicians, and federal agencies do with the information that the rule requires issuers to manufacture. As discussed below in detail, the proposing release is notably deficient in explaining how the rule will have a significant impact on the climate or the environment. Part of the reason for this, of course, is the Commission is maintaining the fiction that the purpose of the rule is to protect investors rather than achieve environmental objectives. The economic analysis is also deficient in many ways. It ignores many major analytical and cost issues. The proposed rule undoubtedly does not even begin to meet any cost-benefit test. The proposing release does not really even try to demonstrate that it does.

The proposed rule will have a number of other powerful and important effects. For example, it will enrich, by many billions of dollars, large accounting and law firms and create an affluent class of economists, climate modelers and climate consultants who will live off the rule. It creates an entirely new profession, a "GHG emissions attestation provider." This group, in turn, will become a powerful lobby for its continued existence and expansion. They will spend vast amounts lobbying to finalize and then retain the rule. The proposed rule will also enhance the power of the SEC and its ability to use the Corporation Finance and Enforcement Divisions to pressure issuers to achieve progressive political ends. It will result in a dramatically lower number of initial public offerings (IPOs), result in IPOs occurring much later in a firm's life-cycle and result in many smaller public companies going private. This, in turn, will (1) reduce the number of public companies that ordinary unaccredited investors may invest in, (2) ensure that most of the rapid growth and share appreciation in a successful entrepreneurial venture occurs before the firm goes public, (3) substantially harm the returns achieved by ordinary investors who are mostly investing for their retirement.

The many gross failures in the analysis of the proposed rule in the proposing release render the proposed rule arbitrary and capricious.

Lastly, certain aspects of the rule constitute unconstitutional compelled speech.[25]

The Commission should withdraw the rule in its entirety. Absent that, it should drop the damaging, costly, senseless and cascading scope 3 emissions reporting. Absent that, the Commission should make it clear that issuers need not demand scope 3 emissions information from their millions of small business customers and suppliers in order to comply. The Commission should substantially change the rule so that reporting done to the EPA can be used in lieu of complying with the SEC methodology. Other changes, described below, should also be made.

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[23] See the discussion below under the heading "Climate Change Disclosure Requirements Would Have No Meaningful Impact on the Climate."
[24] By conventional fuels, I mean primarily oil, gas and coal.
[25] See the discussion below under the heading "The Rule Constitutes Unconstitutional Compelled Speech."

Summary of Major Criticisms of the Proposed Rule

1. <u>The Proposed Rule is Inconsistent with the Mission of the Commission and Beyond the Scope of it Lawful Authority</u>. The important mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation. Mandatory climate change disclosure of the nature that would be imposed by the proposed rule would impede rather than further that mission. It would affirmatively harm investors, impede capital formation and do nothing to improve the efficiency of capital markets. Moreover, the securities laws do not give the Commission the authority to impose regulations that have as their objective environmental regulation and the mitigation of climate change. The Commission simply does not have the authority to issue this rule.

2. <u>The Near Total Absence of Environmental or Climate Analysis in the Proposing Release</u>. The proposing release is virtually devoid of environmental or climate analysis. In one respect, this is unsurprising. The Commission has no expertise regarding climate science. In another respect, it is it is disturbing since the entire basis for this extraordinarily costly proposed rule is the proposition that climate change represents a huge, extraordinary and special kind of risk that justifies tripling the cost of being a public company and launching an assault on traditional conceptions of materiality. The proposing release entirely skips the analytical or factual predicate for the rulemaking and entirely ignores the modeling and factual questions that will underly any climate-related disclosure required of issuers by the proposed rule.

3. <u>The Commission's Economic Analysis is Seriously Deficient</u>. Generic qualitative remarks about the benefits of disclosure do not justify this massively expensive rule since material risks must be disclosed under current rules and immaterial disclosure is of dubious value. The analysis is inadequate in its discussion of (1) lower returns to investors, (2) reduced employment and lower wages, (3) reduced entrepreneurship and innovation, (4) the impact of fewer initial public offerings, (5) the impact of an increase in the number of going private transactions, (6) an increase in the user cost of capital, (7) a reduction in the efficiency of capital markets, (8) reduced investor choice and reduced diversification possibilities, and (9) the distributional effect of favoring affluent accredited investors over retail investors. The economic analysis contains no discussion of the impact on non-issuers, mostly small businesses. Because of the scope 3 requirements, the proposed rule can be expected to impose around $14 billion of costs on non-issuers. Nowhere does the Commission acknowledge that its scope 3 emissions reporting requirement would result in double counting or cascading with respect to emissions, potentially resulting in the same emissions being counted and reported seven to ten times. The analysis fails to monetize internal costs, understating the true cost of the rule by $2.5 to $3.0 billion. The analysis does not seriously consider litigation costs and risks. The economic analysis shows no explicit or implicit understanding of the insights of public choice economics about how special interests work against the public interest. In summary, the proposed rule probably would impose costs that are likely to be at least $17 billion higher than indicated in the Commission's Paperwork Reduction Act table ($6.4 billion). These deficiencies, and many others, in the analysis of the proposed rule in the proposing release render the proposed rule arbitrary and capricious.

4. <u>The Impact of the Proposed Rule on Issuers</u>. Issuers would go public much later in their life cycle due to the higher costs and risk of being a public company. Many small and medium sized issuers

would go private. The number of IPOs would decline. The positive impact of the JOBS Act on IPOs would be overwhelmed. It would reduce the access by entrepreneurs to public capital markets.

5. The Impact of the Proposed Rule on the Capital Markets. The rule would undermine the integrity of financial statements, make markets less efficient and have a very adverse impact on public capital markets.

6. The Impact of the Proposed Rule on Investors. By radically increasing compliance costs and litigation risk and costs, shareholder returns would decline. By substantially reducing the number of public companies, investor choice and diversification potential would shrink. By forcing companies to go public much later in their life cycle, most of the gains associated with successful entrepreneurial ventures would accrue to affluent accredited investors rather than the investing public. By burying investors in a blizzard of immaterial information, investors would find it more difficult to determine relevant information material to the financial outcome of the firms in which they invest.

7. The Impact of the Proposed Rule on Small Businesses. Because of Scope 3 upstream and downstream value chain emissions reporting, the aggregate cost imposed on non-issuer small businesses may well exceed the cost imposed on issuers. Issuers are going to have to demand that non-issuers, mostly small businesses, provide them with emissions information as a condition of doing business with the issuer. Making reasonable assumptions, the costs imposed on small business would be around $14 billion annually unless the scope 3 requirement is removed from the rule. In addition, the Commission adopts a preposterous agnostic view on whether the proposed rule is a major rule for purposes of the Small Business Regulatory Enforcement Fairness Act. Its own data shows that the proposed rule is a major rule. It exceeds the threshold by nearly two orders of magnitude.

8. Immaterial Climate Change "Disclosure" Would Impede the Commission's Important Mission. Incorporating climate change disclosure mandates beyond those already required under the traditional materiality standard does nothing to protect investors and, in actuality, would harm investors by obfuscating material information in a blizzard of politically motivated immaterial information, by reducing returns and by reducing investor choice as the number of public companies decline. The Commission would be required to expend very substantial resources to police emissions disclosures by thousands of issuers notwithstanding the fact that it would do nothing to further the Commission mission and would harm investors, capital formation and market efficiency.

9. Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform. Disclosure requirements have already become so voluminous that they obfuscate rather than inform, making it more difficult for investors to find relevant information. The proposed rule would exacerbate this problem dramatically.

10. Climate Models and Climate Science are Highly Uncertain. Climate models show massive variations in projections and show wide divergence in the ability of models to account for past warming and the degree of warming that is anthropogenic. Any issuer is going to have to address climate modeling issues and the Commission provides no guidance about how to do so.

11. Economic Modeling of Climate Change Effects is Even More Uncertain. Any estimate of the economic impact of climate change will have to rely on the highly uncertain and divergent climate model results in order for economic modeling to be undertaken. In addition to this high degree of uncertainty would be added an entirely new family of economic ambiguity and uncertainty. A choice of discount rate would need to be made. Estimates would need to be made of the cost of various aspects of climate change (sea level rises, the impact on agriculture, etc). Estimates would need to be made of the cost of various remediation techniques. Guesses would need to be made about the rate of technological change. Guesses would need to be made about the regulatory, tax and other responses of a myriad of governments. Estimates would need to be made using conventional economic techniques regarding the economic impact of those changes which, in turn, will reflect a wide variety of techniques and in many cases a thin or non-existent empirical literature. Guesses would need to be made of market responses to all of these changes since market participants will not stand idly by and do nothing as markets, technology and the regulatory environment change. The Commission provides no guidance about how to address these issues.

12. The Commission Does Not Possess the Expertise to Competently Assess Climate Models or the Economic Impact of Climate Change. The Commission does not have the expertise or administrative ability to assess the veracity, or lack thereof, of issuer "disclosures" based on firm-specific speculation regarding the impact of climate change which will be based on firm-specific choices regarding highly divergent and uncertain economic models projecting the economic impact of climate changes based on firm-specific choices regarding highly divergent and uncertain climate models.

13. The Commission Has Neither the Expertise nor the Administrative Ability to Assess the Veracity of Issuer Climate Change Disclosures. After making decisions regarding the extraordinarily complex, ambiguous and uncertain issues relating to climate models, economic models, future government policies, likely technological developments, market responses and so on, issuers will then need to assess, on some undetermined basis, the likely impact of climate change on their specific business years into the future – a business that may by then bear little resemblance to the issuer's existing business. The Commission does not have the resources or expertise to assess the veracity of these issuer climate change disclosures.

14. The Impact of the Proposed Rule on the Integrity of Financial Statements and Regulators. The proposed rule would require issuers to make a presentation in their financial statements based on highly uncertain issuer specific guestimates based on highly uncertain economics models based on highly uncertain climate models making assumptions about future government policies around the world, rates of technological change and market responses and their auditors must express an opinion regarding the accuracy of this morass. Many auditors are going to express qualified opinions or demand radically higher fees to compensate for litigation risk. Financial statements should present factual information that describes as accurately as possible the financial condition of a firm. Only material information should be presented. The Commission should not require financial statements to include guesses and known fictions in pursuit of a political agenda.

15. Commission Resources Are Better Spent Furthering Its Mission. A reasonable estimate is that 18 to 39 percent of the Division of Corporation Finance's staff would have to be devoted to

administering this rule. A large number of the Enforcement Division's staff would also be devoted to enforcing the rule. Finally, resources would have to be expended by the Commission to regulate and presumably register "GHG emissions attestation providers," a new profession created by the rule. These very substantial resources would be much better spent furthering the Commission's actual mission.

16. Climate Change Disclosure Requirements Would Create a New Compliance Eco-System and a New Lobby to Retain the Requirements. The proposed rule would result in the creation of a new compliance eco-system composed of the economists, accountants, attorneys, compliance officers, consultants, "GHG emissions attestation providers" and NGOs that will live off of the proposed rule. The SEC estimates that $6.4 billion annually will flow to this group. They will fight to implement the rule and then to preserve their multi-billion dollar business by spending many tens or even hundreds of millions of dollars lobbying for the rule, writing in support of the rule, and holding conferences for the rule. They will become a potent pro-complexity lobby, seeking to make the rule even more complex and expensive.

17. The Proposed Climate Change Disclosure Requirements Would Result in Much Litigation. The imposition of the proposed rule's requirements would result in much higher litigation risk and expense as private lawsuits are filed challenging the veracity of climate disclosures. The proposed rule explicitly contemplates liability under Securities Exchange Act Sections 11 and 18. Large numbers of these lawsuits are virtually assured under the proposed rule since virtually no climate models have accurately predicated future climate developments and the economic and financial projections based on these climate models are even more uncertain. In fact, this kind of litigation is already on the rise around the world.

18. Securities Laws are a Poor Mechanism to Address Externalities. The economic justification for climate change disclosure mandates is that they are designed to address a negative externality. There are many ways to address negative externalities including improved property rights, tort law, and regulation (by the EPA, for example). The EPA already requires GHG emissions reporting. The EPA estimates that the required reporting under its rule covers 85–90% of all GHG emissions from over 8,000 facilities in the United States. Trying to achieve environmental results through mandated disclosures by issuers is comparable to trying to score in basketball by bouncing the ball off the floor and then the backboard. It is theoretically possible, but there is a vanishingly small chance that it will achieve the desired result.

19. Efforts to Redefine Materiality and the Purpose of Securities Laws are Counterproductive. The concept of materiality has been described as "the cornerstone" of the disclosure system established by the federal securities laws. There is now a major effort to effectively redefine what is material to include information that is really directed at achieving various social or political objectives. The effort to redefine materiality usually takes the form of saying that investors are "demanding" information relating to environmental or social matters. A closer look, however, shows that ordinary investors are demanding no such thing. It is usually politically motivated actors such as government-run pension funds or a few increasingly "woke" proxy advisory firms or investment advisors that support such disclosures. The proposed rule represents a giant step down the road of redefining materiality as anything that politically motivated investment managers might want. The focus of the materiality standard should remain on what investors need to know to meet their financial, economic or pecuniary objectives, not a regulator's

preferred political or social objectives or those of politically motivated fund managers or proxy advisors.

20. The Rule Constitutes Unconstitutional Compelled Speech. The Supreme Court has applied strict scrutiny to content-based laws. The SEC climate change proposed rule is content-based. The proposed rule is also "controversial" within the meaning of the case law. The proposed rule, as written, is likely to be ruled unconstitutional compelled speech.

21. Material Actions by Management in Furtherance of Social and Political Objectives that Reduce Returns must be Disclosed. To the extent management takes material actions in furtherance of social and political objectives (including ESG objectives) that reduce shareholder returns, they should be required to disclose that information.

22. Climate Change Disclosure Requirements Would Have No Meaningful Impact on the Climate. The information elicited by the rule, especially scope 3 reporting, will be extraordinarily unreliable and built on a speculative house of cards that would raise fraud issues in any other context. It strains credibility to believe that including this unreliable, immaterial information in financial statement footnotes and other disclosure documents is going to have a significant impact on the climate. The only way that this disclosure will have even the slightest impact is if the disclosure is weaponized by a highly politicized SEC that launches enforcement action after enforcement action against disfavored industries seeking billions of dollars in fines (nominally for disclosure violations) in an effort to drive them from conventional fuel use.

23. The Proposed Rule, to the Extent it is Effective in Its True Objective, will Harm U.S. Energy Independence. The Biden administration has taken a series of steps to impede conventional fuel production in the United States. We should be removing regulatory impediments to energy independence not creating them.

24. ESG Requirements will Make Management Even Less Accountable. In large, modern corporations there is a separation of ownership and control. There is a major agent-principal problem because management and the board of directors often, to varying degrees, pursue their own interest rather than the interests of shareholders. The proposed rule will make management dramatically less accountable since climate change and other ESG requirement (diversity, human capital management, etc.) will come at the expense of profitability (otherwise it would be done in the absence of a regulatory requirement) and the metrics relating to success or failure of achieving ESG or CSR requirements will be largely unquantifiable.

25. Fund Managers Attempts to Profit from Socially Responsible Investing (SRI) at the Expense of Investors Should be Policed. To the extent fund managers (Registered Investment Advisers or RIAs) take material actions in furtherance of social and political objectives (including ESG or SRI objectives) that reduce shareholder returns, they should be required to disclose that information.

The Proposed Rule is Inconsistent with the Mission of the Commission and Beyond the Scope of Its Lawful Authority

"The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[26] The statutory charge is "[w]henever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."[27] These are important functions. As described below, the rule hinders and does not further these objectives.

There is, moreover, nothing in the Securities Act, the Securities Exchange Act or the Commission's statutory charge about climate change, curing cancer or a hundred other worthy objectives. The Commission only has the power it has been provided by Congress. It does not have plenary power to do anything that three Commissioners believe may be a good idea.

Section 13(a) of the Securities Exchange Act does not save the proposed rule. It reads:

> Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security …

As Andrew Volmer of the Mercatus Center has explained in detail,[28] neither the legislative history nor over eight decades of practice by the Commission nor the case law justifies such an expansive reading of section 13(a) or any other provision in the securities laws as to turn the Commission into a climate change enforcement agency. As explained below, neither can the concept of materiality be warped to justify the proposed rule.[29]

In *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court, granting *Chevron* deference to the agency, found that the Food and Drug Administration did not have authority to regulate tobacco.

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning - or ambiguity - of certain words or phrases may only become evident when placed in context. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into an harmonious whole." Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand. In

[26] U.S. Securities and Exchange Commission, "What We Do: Introduction," http://www.sec.gov/about/whatwedo.shtml#intro.
[27] See §3(f) of the Securities Exchange Act of 1934 and §2(b) of the Securities Act of 1933.
[28] Andrew N. Vollmer, "Does the SEC Have Legal Authority to Adopt Climate-Change Disclosure Rules?," Policy Brief, Mercatus Center, George Mason University, August 2021 https://www mercatus.org/system/files/vollmer_-_policy_brief_-_does_the_sec_have_legal_authority_to_adopt_corporate_disclosure_rules_on_climate_change_-_v1.pdf.
[29] See discussion below under the heading "Efforts to Redefine Materiality and the Purpose of Securities Laws are Counterproductive."

> addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.[30] (citations omitted)

Certainly, the proposed rule is of great "economic and political magnitude." It nearly triples the cost of being a public company. It imposes more costs than all other Commission rules combined. Congress clearly did not grant authority to the Commission to pursue environmental objectives that are not material to investment outcomes. It bears repeating that *material* climate-related risk must already be disclosed under current rules.

The *FDA v. Brown & Williamson Tobacco Corp.*, the court also wrote that:

> By no means do we question the seriousness of the problem that the FDA has sought to address. The agency has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States. Nonetheless, no matter how "important, conspicuous, and controversial" the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."[31] (citations omitted)

Thus, a court can accept the importance of climate change and even accept the much more questionable proposition that the proposed rule would have climate change mitigation or "investor protection" benefits that exceed its costs and yet it still must find that the securities laws do not authorize the Commission to regulate in the proposed manner.

Similarly, in *NAACP v. FPC*, 425 U.S. 662 (1976) the Supreme Court held that the Federal Power Commission did not have the authority to prohibit discriminatory employment practices.

> The parties point to nothing in the Acts or their legislative histories to indicate that the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted this legislation. The use of the words "public interest" in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates. … The Federal Power Commission is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees only insofar as such consequences are directly related to the Commission's establishment of just and reasonable rates in the public interest."[32]

Thus, the various provisions in the securities laws directing the Commission to regulate in the "public interest" do not confer authority it does not otherwise have.

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[30] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000).
[31] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).
[32] *NAACP v. FPC*, 425 U.S. 662, 670-671 (1976).

In *NFIB v. OSHA*,[33] the Supreme Court granted a stay enjoining OSHA from imposing vaccine mandates on employees because OSHA does not have the authority to do so under its authorizing statute.

> Why does the major questions doctrine matter? It 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. If administrative agencies seek to regulate the daily lives and liberties of millions of Americans, the doctrine says, they must at least be able to trace that power to a clear grant of authority from Congress.[34]

Similarly, the Securities and Exchange Commission does not have the authority to impose regulations that have as their objective environmental regulation and the mitigation of climate change. Furthermore, because of the scope 3 requirements, the proposed rule *will* affect millions of Americans and not "merely" thousands of issuers. The generalized instruction in the Commission's statutory charge to act in the "public interest" does not give it authority to do whatever it wants. The Commission simply does not have the authority to issue this rule.[35] Only Congress may give it the authority to do so.

The Near Total Absence of Environmental or Climate Analysis in the Proposing Release

The proposing release is virtually devoid of environmental or climate analysis. In one respect, this is unsurprising. The Commission has no expertise regarding climate science. In another respect, it is it is disturbing since the entire basis for this extraordinarily costly proposed rule is the proposition that climate change represents a huge, extraordinary and special kind of risk that justifies tripling the cost of being a public company and launching an assault on traditional conceptions of materiality. The proposing release does not even attempt to defend this proposition with serious analysis or facts. It simply asserts that it is so.

Neither the proposing release nor the proposed rule provide any meaningful guidance with respect to which climate models issuers should rely upon or provide any intelligible standard by which climate models should be judged. The entirety of the climate analysis is some dropped footnotes referencing models created by the Intergovernmental Panel on Climate Change (IPCC), the Task Force on Climate-related Financial Disclosures (TCFD), the International Energy Agency (IEA), the Network of Central Banks and Supervisors for Greening the Financial System (NGFS) and the International Sustainability Standards Board (ISSB). Moreover, the Commission entirely ignores models that are not alarmist and models created by organizations that do not have a financial or political interest in climate change alarmism.[36]

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[33] *NFIB v. OSHA*, 595 U. S. ____ (2022) https://www.supremecourt.gov/opinions/21pdf/21a244_hgci.pdf.
[34] Op. Cit., p. 4.
[35] See also Commissioner Hester M. Peirce, "We are Not the Securities and Environment Commission - At Least Not Yet," March 21, 2022, section IV ("The Commission Lacks Authority to Propose this Rule") https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321
[36] See Steven E. Koonin, *Unsettled: What Climate Science Tells Us, What It Doesn't, and Why It Matters*, Chapter 4, "Many Muddled Models," (Dallas, TX: BenBella Books, 2021); Bjorn Lomborg, *False Alarm: How Climate Change Panic Costs Us Trillions, Hurts the Poor, and Fails to Fix the Planet*, (New York: Basic Books, 2020); Pat Michaels and Chip Knappenberger, *Lukewarming: The New Climate Science that Changes Everything*, (Washington: Cato Institute, 2016); Benjamin Zycher, Resident Scholar, American Enterprise Institute, Statement before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Hearing on the "21st Century Economy: Protecting the Financial System from Risks Associated with Climate Change" March 18, 2021 https://www.banking.senate.gov/imo/media/doc/Zycher%20Testimony%203-18-21.pdf; Kevin Dayaratna, Ross McKitrick and David Kreutzer, "Empirically Constrained Climate Sensitivity and the Social Cost of Carbon," *Climate Change*

In other words, this massive document skips the analytical or factual predicate for the rulemaking and entirely ignores the modeling and factual questions that will underly *any* climate-related disclosure required by the proposed rule.

The Commission's Economic Analysis is Seriously Deficient

The Commission asserts that "[t]he primary benefit is that investors would have access to more consistent, comparable, and reliable disclosures with respect to registrants' climate-related risks, which is expected to enable investors to make more informed investment or voting decisions."[37] *The problem with this proposition is that it is not true.* It will simply create the appearance of "more consistent, comparable, and reliable disclosures" but the underlying inconsistency, incomparability and, most importantly, unreliability will remain because the entire SEC mandated disclosure regime is built on issuer specific guesses built on fictional economic models built on highly uncertain climate models. The rule will not result in standardization or comparability because each issuer will make different choices regarding climate and economics models, projections of future government policies, projections regarding rates of technological change, market response to all of these factors and other matters. Moreover, it is also entirely unestablished that consistency and comparability in reporting among issuers has a substantial positive effect. The more relevant question is whether the information is material to the financial outcome of the reporting issuer and whether it is reliable. The former (material information) must be reported currently and as discussed throughout this letter, the proposed rule actually does almost nothing to improve the reliability of the information being reported.

Generic qualitative remarks about the benefits of disclosure do not justify this massively expensive rule. There is, of course, an extensive literature on the benefits of disclosure.[38] But this entire literature assumes that the disclosure is *material* to the financial outcome of the issuer making the disclosure – material in the traditional since of being material to the financial outcome of the firm. First, the proposed rule requires the collection, creation and "disclosure" of massive amounts of immaterial information. Second, to the extent that climate related information is material to the financial outcome of a firm, current rules require its disclosure. The added, new information elicited by the rule will be almost exclusively immaterial since material information must already be disclosed. The SEC economic analysis simply ignores this glaring problem.

Agents and agents of agents who have a vested financial interest in this rule, NOT investors, are demanding this rule. SEC appears to be oblivious to conflicts and the willingness of RIAs and pension

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Economics, Vol. 8, No. 2, 2017, pp. 1-12 https://econpapers.repec.org/article/wsiccexxx/v_3a08_3ay_3a2017_3ai_3a02_3an_3as2010007817500063.htm; Ross McKitrick and John Christy, "A Test of the Tropical 200- to 300-hPa Warming Rate in Climate Models," *Earth and Space Science*, September 2018, https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2018EA000401; Roger Pielke and Justin Ritchie, "How Climate Scenarios Lost Touch With Reality," *Issues in Science and Technology*, Summer 2021, https://issues.org/climate-change-scenarios-lost-touch-reality-pielke-ritchie/; Zeke Hausfather , Kate Marvel , Gavin A. Schmidt , John W. Nielsen-Gammon and Mark Zelinka, "Climate Simulations: Recognize the 'Hot Model' Problem," *Nature* https://www nature.com/articles/d41586-022-01192-2.

[37] Proposing release at p. 21413 citing in turn Section IV.C.1 in support of that assertion.

[38] For a discussion, see David R. Burton, "Securities Disclosure Reform," Chapter 5, *Prosperity Unleashed: Smarter Financial Regulation*, Norbert J. Michel, Editor (The Heritage Foundation: 2017) http://thf-reports.s3.amazonaws.com/2017/ProsperityUnleashed.pdf or David R. Burton, "Securities Disclosure Reform," Heritage Foundation Backgrounder No. 3178, February 13, 2017 https://www heritage.org/sites/default/files/2017-02/BG3178.pdf.

fiduciaries to throw investors under the bus to achieve profits for themselves and to achieve political objectives at others' expense.

The economic analysis shows no explicit or implicit understanding of the insights of public choice economics. As discussed below under the heading "Climate Change Disclosure Requirements Would Create a New Compliance Eco-System and a New Lobby to Retain the Requirements," large law firms, accounting firms, climate consultants, compliance officers and non-governmental organizations have a massive interest in supporting this rule, ensuring that it is retained after it is finalized and making it more complex and expensive over time. The rule even creates a new profession -- a "GHG emissions attestation provider." The SEC estimates, in PRA Table 4, that external compliance costs will increase by $6.4 billion. This is the money that these firms will receive. It is a massive gift to them by the SEC. It is no wonder that they are investing so heavily in a lobbying effort in support of this rule.

The economic analysis contains an extraordinarily limited discussion of the adverse effects that this rule would have. It contains literally no effort to quantify these adverse effects or, for that matter, the benefits. The adverse effects will be massive.

> Lower Returns to Investors: Investor returns will decline because of the large costs imposed on issuers, because of increased litigation risks and expense, because of the broader adverse economic effects of the rule on issuers and because of the reduced number of economic opportunities that investors will have (particularly the reduced ability to invest in early-stage growth companies).[39]
>
> Reduced Employment and Lower Wages: As the public finance literature demonstrates, costs imposed on corporations (which, after all, are legal fictions) are borne by natural persons. Because capital is much more mobile than labor, costs imposed on corporations are disproportionately borne by workers. In addition, the general adverse economic effects of the rule will reduce employment and wages.[40]
>
> Reduced Entrepreneurship and Innovation: The proposed rule will force companies to go public much later in their life cycle because of the dramatically higher cost and risk of being a public company and the proposed rule will substantially impede entrepreneurs' access to the public capital markets. This, in turn, will harm innovation, technological advancement, productivity growth and real wages.[41]
>
> Fewer IPOS: The proposed rule will result in a much lower number of initial public offerings (IPOs) because of the dramatically higher cost and risk of being a public company. It will overwhelm the positive impact of the Emerging Growth Company provisions in the JOBS Act.[42]

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[39] See the discussion under the heading "The Impact of the Proposed Rule on Investors."

[40] See the discussion under the subheading "The Social Costs of ESG" immediately below.

[41] See the discussion under the heading "The Impact of the Proposed Rule on Issuers." See also David R. Burton, Testimony before The Committee on Banking, Housing and Urban Affairs, United States Senate, on "Entrepreneurial Capital Formation," April 5, 2022 https://www.banking.senate.gov/imo/media/doc/Burton%20Testimony%204-5-22.pdf for a discussion of the importance of entrepreneurship.

[42] See the discussion under the heading "The Impact of the Proposed Rule on Issuers." See also David R. Burton, Testimony before The Committee on Banking, Housing and Urban Affairs, United States Senate, on "Entrepreneurial Capital Formation," April 5, 2022 https://www.banking.senate.gov/imo/media/doc/Burton%20Testimony%204-5-22.pdf for a discussion of the recent history of and data regarding IPOs.

A Large Number of Going Private Transactions: A large number of small and medium sized public companies will engage in going private transaction to avoid the dramatically higher cost and risk of being a public company. This will result in a substantial decline in the number of investment opportunities for ordinary, unaccredited investors.[43]

A Higher User Cost of Capital: The higher costs and reduced access to public markets will raise the costs of capital for all firms, but disproportionately for small firms.[44]

Less Efficient Capital Markets: The blizzard of immaterial information, reduced integrity of financial statements and reduced access to public capital markets, will make the capital markets less efficient.[45]

Reduced Investor Choice and Reduced Diversification: A smaller number of IPOs and a higher number of going private transactions will substantially reduce the universe of potential investments by ordinary, unaccredited investors over time. This will reduce diversification potential and limit the ability of ordinary investors to invest in dynamic, early-stage companies.[46]

Favoring Accredited Investors Over Retail Investors: Most of the returns from successful entrepreneurial ventures will accrue to affluent accredited investors because firms will go public much later in their life cycle, if at all, due to the dramatically higher costs and risks of being a public company[47]

The economic analysis is also seriously deficient because it contains no discussion of impact on non-issuers, most of whom are small business, and will be seriously affected by scope 3 emissions reporting.[48]

Scope 3 Emission Reporting: Cascading and Double Counting

Nowhere does the Commission acknowledge that its scope 3 emissions reporting requirement will result in double counting or cascading with respect to emissions. A retailer will report on emissions by its suppliers and customers. Those suppliers and customers will report on emissions by the retailer. And so on *ad infinitum*.

If there are 5 transactions between the original raw material and the final sale to a consumer, this will result in an overstatement of emissions by a factor five. Take, for example, a loaf of bread. Assuming that they are all issuers, the corporate farmer, the trucker, the baker, the trucker, the wholesaler, the trucker, and the retailer will all have to report the same upstream and downstream emissions data. The same scope 3 emissions will be reported 7 times. The issuers will need to collect and report information with respect to the same emissions seven times. This is both wasteful and will likely lead to seriously

[43] See the discussion under the heading "The Impact of the Proposed Rule on the Capital Markets."
[44] Ibid.
[45] Ibid.
[46] See the discussion under the heading "The Impact of the Proposed Rule on Investors."
[47] Ibid.
[48] See the discussion below under the heading "The Impact of the Proposed Rule on Small Businesses."

misleading the public about aggregate emissions. It is one more reason why the scope 3 emissions part of the proposed rule should be eliminated.

Costs

In its PRA Table 4, the Commission's economic analysis does not monetize internal costs. It thus understates by about one-third the true cost of the proposed rule. The table below presents external costs (as estimated by the Commission) and then monetizes the internal hour estimates using various plausible fully burdened labor rates. Since the people that will have to deal with rule compliance are generally going to be skilled and relatively expensive, the higher rates are probably the most appropriate.

The failure by the Commission to monetize the internal compliance burden hours is a serious failure and results in a seriously misleading PRA table. Using the lower intermediate fully burdened labor rate, the cost imposed by the rule becomes $8.8 billion instead of $6.4 billion (38 percent higher). Using the plausible higher rate, the increase cost would be $10.1 billion instead of $6.4 billion (58 percent higher).

External and Internal Direct Cost on Issuers of Proposed Rule

	Internal Cost (Current)	Internal Cost (Change)	Total Internal Cost (Post Rule)	Percentage Increase	Post Rule Cost as a Multiple of Current Cost
Hours	18,849,934	24,689,099	43,539,033	131%	2.31
Fully Burdened Labor Rate					
$75	$1,413,745,050	$1,851,682,425	$3,265,427,475	131%	2.31
$100	$1,884,993,400	$2,468,909,900	$4,353,903,300	131%	2.31
$125	$2,356,241,750	$3,086,137,375	$5,442,379,125	131%	2.31
$150	$2,827,490,100	$3,703,364,850	$6,530,854,950	131%	2.31
	External Cost (Current)	External Cost (Change)	Total External Cost		
	$3,856,958,756	$6,378,073,242	$10,235,031,998	165%	2.65
Fully Burdened Labor Rate	External and Internal Cost (Current)	External and Internal Cost (Change)	Total and Internal External Cost		
$75	$5,270,703,806	$8,229,755,667	$13,500,459,473	156%	2.56
$100	$5,741,952,156	$8,846,983,142	$14,588,935,298	154%	2.54
$125	$6,213,200,506	$9,464,210,617	$15,677,411,123	152%	2.52
$150	$6,684,448,856	$10,081,438,092	$16,765,886,948	151%	2.51

Data Source: Proposing Release PRA Table 4

The SEC (in PRA Table 4) estimates that issuer external costs will increase by $6.4 billion (165 percent) and internal costs by 131 percent (probably about $3 billion more). Although jaw dropping, this is a substantial underestimate. It ignores litigation costs, and litigation surrounding these disclosures will almost certainly become a mainstay of the securities bar. It presumably ignores or underestimates costs that are not easily and directly allocable to filling out the forms listed in PRA Table 4 (e.g. Chief Sustainability Officer staff). It ignores the adverse economic effects caused by the impact of a smaller public market and a reduced access to capital by entrepreneurs. It ignores entirely the costs imposes on non-issuers. This could easily be in the neighborhood of $14 billion.[49] The compliance costs and litigation risk and costs associated with generating this verbiage will reduce shareholder returns, reduce investor choice (since the public market will shrink) and ensure that most of the gains associated with successful entrepreneurial ventures accrue to affluent accredited investors (since companies will go public much later in their life cycle). Furthermore, there is strong reason to believe that well over half of the costs imposed by the rule will in the long-run be borne by workers, not investors, because capital is much more mobile than labor.[50]

In summary, besides failing to monetize the internal compliance burden hours, the PRA Table ignores:

1. litigation costs;
2. cost not easily and directly allocable to filling out the forms listed in PRA Table 4;
3. costs imposed on non-issuers; and
4. The cost to investors, issuers and workers caused by adverse economic effects of the rule.

That may be fine in a Paperwork Reduction Act table. It is not fine for the Commission to ignore these costs altogether in its economic analysis. In summary, the proposed rule probably will impose costs that are *at least* $17 billion higher than indicated in the Commission's Paperwork Reduction Act table. $14 billion because of the impact on non-issuers, $2.5-3.0 billion reflecting the monetization of internal compliance costs plus litigation costs and the potentially huge adverse economic effects.

The Social Costs of ESG

The broader social costs associated with ESG requirements (including climate change disclosure requirements) can, in principle, be quantified. This section provides an analytical framework that may be useful in analyzing the social welfare costs of ESG requirements.

To the extent ESG objectives are not pursued by businesses for the purpose of making a profit, $R > R_{ESG/CSR}$, where R is the rate of return on investment in the absence of ESG, CSR, sustainability requirements, diversity requirements, or stakeholder theory implementation, and $R_{ESG/CSR}$ is the rate of return after implementation of those requirements. The difference, $R - R_{ESG/CSR}$, is economically analogous to a tax. It is a reduction in return due to the pursuit of ESG objectives. Thus, $R - R_{ESG/CSR} = Tax_{ESG/CSR}$. This means that various techniques used in public finance to analyze the social welfare impact of taxes may be used to quantitatively analyze the social welfare cost of these provisions (i.e., $Tax_{ESG/CSR}$).

[49] See the discussion below under the heading "The Impact of the Proposed Rule on Small Businesses."
[50] See the discussion below under the subheading "The Social Costs of ESG."

A tax has an excess burden or deadweight loss that can be calculated.[51] By introducing a wedge ($Tax_{ESG/CSR}$) between, in this case, the gross return and the net return, ESG/CSR reduces the size of the capital market and therefore output and employment. In a well-functioning market, the price of a capital asset should be equal to the present value of the expected future income stream generated by the asset net of taxes and depreciation.[52] Introducing a new tax (in this case $Tax_{ESG/CSR}$) would reduce the expected future income stream, and therefore, the price of the asset. It would also cause investment to flow out of the affected sector or jurisdiction.

Who bears the actual economic burden of the corporate income tax is an open question.[53] The analysis of who bears the burden of $Tax_{ESG/CSR}$ would be the same. One thing is certain: It cannot be corporations. A corporation is a legal fiction, and legal fictions do not pay taxes—people pay taxes. The corporate tax could be borne by corporate shareholders in the form of lower returns;[54] owners of all capital (again in the form of lower returns);[55] corporate customers in the form of higher prices;[56] or employees (in the form of lower wages).[57] It is, almost certainly, some combination of these.[58] The economics profession

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[51]Arnold C. Harberger, "The Incidence of the Corporation Income Tax," *Journal of Political Economy* (June 1962), pp. 215–240; Alan J. Auerbach and James R. Hines, "Taxation and Economic Efficiency," in Martin Feldstein and A. J. Auerbach, eds., *Handbook of Public Economics* (Amsterdam: North Holland, 2002); and John Creedy, "The Excess Burden of Taxation and Why It (Approximately) Quadruples When the Tax Rate Doubles," New Zealand Treasury *Working Paper* No. 03/29, December 2003, https://treasury.govt.nz/sites/default/files/2007-10/twp03-29.pdf. See also, for example, N. Gregory Mankiw, *Principles of Economics*, 4th ed. (Boston: Cengage Learning, 2006), chapter 8 (or many other textbooks on price theory, microeconomics, or principles of economics).

[52]See Robert E. Hall and Dale Jorgenson, "Tax Policy and Investment Behavior," *American Economic Review*, Vol. 57, No. 3 (June 1967), pp. 391–414. This section covers the basic user cost of capital analysis with taxes. See also Dale W. Jorgenson, *Investment: Capital Theory and Investment Behavior* (Cambridge, MA: MIT Press, 1996), and John Creedy and Norman Gemmell, "Taxation and the User Cost of Capital: An Introduction," New Zealand Treasury *Working Paper* No. 04/2015, March 2015, https://www.wgtn.ac.nz/cpf/publications/pdfs/2015-pubs/WP04_2015_Taxation-and-User-Cost.pdf.

[53]In the economics literature, this question is usually phrased as, "What is the incidence of the corporate income tax?"

[54]Government estimators are among the few who cling to the view that shareholders bear most of the burden. Joint Committee on Taxation, "Modeling the Distribution of Taxes on Business Income," JCX–14–13, October 16, 2013, https://www.jct.gov/publications.html?func=download&id=4528&chk=4528&no_html=1 (25 percent labor), and Julie Anne Cronin et al., "Distributing the Corporate Income Tax: Revised U.S. Treasury Methodology," *National Tax Journal*, March 2013, https://www.ntanet.org/NTJ/66/1/ntj-v66n01p239-62-distributing-corporate-income-tax.pdf (18 percent labor).

[55]The non-corporate sector can be affected because competition will eventually cause wages, prices, and after-tax returns in the corporate *and* non-corporate sectors to be the same. For a more detailed explanation, see Arnold C. Harberger, "The Incidence of the Corporation Income Tax," *Journal of Political Economy*, Vol. 70, No. 3 (June 1962), pp. 215–240.

[56]The focus of the economics profession to date has been almost exclusively the impact on capital and labor rather than customers.

[57]Arnold C. Harberger, "The ABCs of Corporation Tax Incidence: Insights into the Open-Economy Case," in *Tax Policy and Economic Growth* (Washington, DC: American Council for Capital Formation, 1995); Arnold C. Harberger, "The Incidence of the Corporation Income Tax Revisited," *National Tax Journal*, Vol. 61, No. 2 (June 2008), pp. 303–312, http://www.ntanet.org/NTJ/61/2/ntj-v61n02p303-12-incidence-corporation-income-tax.pdf; Matthew H. Jensen and Aparna Mathur, "Corporate Tax Burden on Labor: Theory and Empirical Evidence," *Tax Notes*, June 6, 2011, https://www.aei.org/wp-content/uploads/2011/06/Tax-Notes-Mathur-Jensen-June-2011.pdf; Kevin A. Hassett and Aparna Mathur, "A Spatial Model of Corporate Tax Incidence," American Enterprise Institute, December 1, 2010, https://www.aei.org/wp-content/uploads/2011/10/-a-spatial-model-of-corporate-tax-incidence_105326418078.pdf; Robert Carroll, "The Corporate Income Tax and Workers' Wages: New Evidence from the 50 States," Tax Foundation *Special Report* No. 169, August 3, 2009, https://taxfoundation.org/corporate-income-tax-and-workers-wages-new-evidence-50-states/; Desai Mihir, Fritz Foley, and James Hines, "Labor and Capital Shares of the Corporate Tax Burden: International Evidence," December 2007, http://piketty.pse.ens.fr/files/Desaietal2007.pdf; and "Why Do Workers Bear a Significant Share of the Corporate Income Tax?" in Jason J. Fichtner and Jacob M. Feldman, "The Hidden Cost of Federal Tax Policy," 2015, https://www.mercatus.org/system/files/Fichtner-Hidden-Cost-ch4-web.pdf. For a contrary view, see Kimberly A. Clausing, "In Search of Corporate Tax Incidence," *Tax Law Review*, Vol. 65, No. 3 (2012), pp. 433–472, http://ssrn.com/abstract=1974217.

has changed its thinking on this issue several times over the past four decades, but the latest —and highly plausible —consensus is that workers probably bear *more than half* of the burden of the corporate income tax because capital is highly mobile.[59] Labor's share of the corporate tax burden is potentially as high as three-quarters.[60] Shareholders (investors) probably bear most of the remainder.[61] Initially (i.e., in the short run), the impact on shareholder returns would be greater. Adjustments take time. In the long run, ESG requirements ($Tax_{ESG/CSR}$) would have a disproportionately negative impact on labor due to capital factor mobility.

The Impact of the Proposed Rule on Issuers

Requiring all public companies to develop climate modeling expertise, the ability to make macroeconomic projections based on these models and then to make firm-specific economic assessments based on these climate and economic models will be expensive. As discussed below, they will probably resort to hiring outside consultants (even over and above the attestation requirements in the proposed rule). There is tremendous uncertainty regarding climate models and economic models projecting of the impact of climate change. There is still further uncertainty regarding issuer specific effects. The issues to be addressed are numerous and complex and have no facile answers. The climate change components of Form 10-Ks, Form 10-Qs, Form 8-Ks and other disclosure documents (including annual reports) are likely to be both voluminous and virtually useless.

The SEC (in PRA Table 4) estimates that issuer external costs will increase by $6.4 billion (165 percent). Internal costs will increase another $2.5-$3.0 billion. Although jaw dropping, this is a substantial underestimate. It ignores litigation costs, and litigation surrounding these "disclosures" will almost certainly become a mainstay of the securities bar. Given the massive uncertainty associated with climate modeling, economic modeling of climate change, and issuer specific projections in light of changing government policy, technological change and market response, issuers will almost inevitably get it wrong. Enter the lawyers.

PRA Table 4 is an estimate of the cost of filing out SEC forms – not an estimate of all costs associated with the rule. It presumably ignores or underestimates costs that are not easily and directly allocable to filling out the forms listed in PRA Table 4. It ignores the adverse economic effects caused by the impact of a smaller public market and a reduced access to capital by entrepreneurs. It ignore entirely the costs imposed on non-issuers. The compliance costs and litigation risk and costs associated with generating

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[58]It requires extreme, implausible assumptions about elasticities of demand for, or supply of, factors for this not to be the case. Alan J. Auerbach, "Who Bears the Corporate Tax? A Review of What We Know," National Bureau of Economic Research *Working Paper* No. 11686, October 2005, http://www nber.org/papers/w11686.pdf; William M. Gentry, "A Review of the Evidence on the Incidence of the Corporate Income Tax," Department of the Treasury, Office of Tax Analysis, *OTA Paper* No. 101, December 2007, https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-101.pdf; and Stephen J. Entin, "Tax Incidence, Tax Burden, and Tax Shifting: Who Really Pays The Tax?" Heritage Foundation *Center for Data Analysis Report* No. 04–12, November 5, 2004, http://s3.amazonaws.com/thf_media/2004/pdf/cda04-12.pdf.

[59]In a competitive market, capital will flow from jurisdictions with a relatively low expected after-tax return to jurisdictions with a relatively high expected after-tax return until the expected after-tax returns are equal. Social and legal barriers reduce labor mobility relative to capital mobility. Gentry, "A Review of the Evidence on the Incidence of the Corporate Income Tax"; William C. Randolph, "International Burdens of the Corporate Income Tax," Congressional Budget Office *Working Paper* 2006–09, August 2006, https://cbo.gov/sites/default/files/cbofiles/ftpdocs/75xx/doc7503/2006-09.pdf; and R. Alison Felix, "Passing the Burden: Corporate Tax Incidence in Open Economies," Federal Reserve Bank of Kansas City, October 2007, https://www kansascityfed.org/Publicat/RegionalRWP/RRWP07-01.pdf.

[60]Ibid.

[61]As opposed to non-corporate capital and customers.

this verbiage will reduce shareholder returns, reduce investor choice (since the public market will shrink) and ensure that most of the gains associated with successful entrepreneurial ventures accrue to affluent accredited investors (since companies will go public much later in their life cycle).

The Impact of the Proposed Rule on the Capital Markets

The proposed rule will further reduce the attractiveness of being a registered, public company and will exacerbate the decline in the number of public companies and the trend of companies going public later in their life cycle. This, in turn, will deny to ordinary (unaccredited) investors the opportunity to invest in dynamic, high-growth, profitable companies until most of the money has already been made by affluent accredited investors.[62] It will further impede entrepreneurial access to public capital markets.

Although there may be some others, I am aware of only two instances in the past quarter century where the Commission has discussed *quantitatively* the costs associated with an IPO. The SEC certainly does not make a habit of it and the information available to policymakers is extraordinarily limited. This should be remedied.[63]

In 2013, in a proposing release for Regulation CF, the SEC referenced survey data[64] that indicated "the average cost of achieving initial regulatory compliance for an initial public offering is $2.5 million, followed by an ongoing compliance cost, once public, of $1.5 million per year."[65] In 1996, the *Report of the Advisory Committee on the Capital Formation and Regulatory Process* found that the costs associated with an initial public offering during the period 1993-1995 for those filing an S-1 was 16.4 percent of the amount raised and for those filing an SB-2[66] it was 28.9 percent of the amount raised.[67] Costs are almost certainly higher now, although the costs as a percentage of the amount of capital raised may not be because firms are going public much later in their life-cycle after they have achieved much larger size and, therefore, the offerings are larger.

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[62] David R. Burton, "Reducing the Burden on Small Public Companies Would Promote Innovation, Job Creation, and Economic Growth," Heritage Foundation Backgrounder No. 2924, June 20, 2014 https://thf_media.s3.amazonaws.com/2014/pdf/BG2924.pdf; David R. Burton, "Broadening Regulation D: Congress Should Let More People Invest in Private, High-Growth Companies," Heritage Foundation Backgrounder No. 3137. August 15, 2016 http://thf-reports.s3.amazonaws.com/2016/BG3137.pdf; David R. Burton, "Improving Entrepreneurs' Access to Capital: Vital for Economic Growth," Heritage Foundation Backgrounder No. 3182, February 14, 2017 https://www.heritage.org/sites/default/files/2017-02/BG3182.pdf.

[63] See David R. Burton and Norbert J. Michel, "Proposals to Foster Economic Growth and Capital Formation," March 18th, 2021, Recommendation 44, p. 119 https://www.banking.senate.gov/imo/media/doc/David%20Burton%20and%20Norbert%20Michel%20-%202021-3-18.pdf.

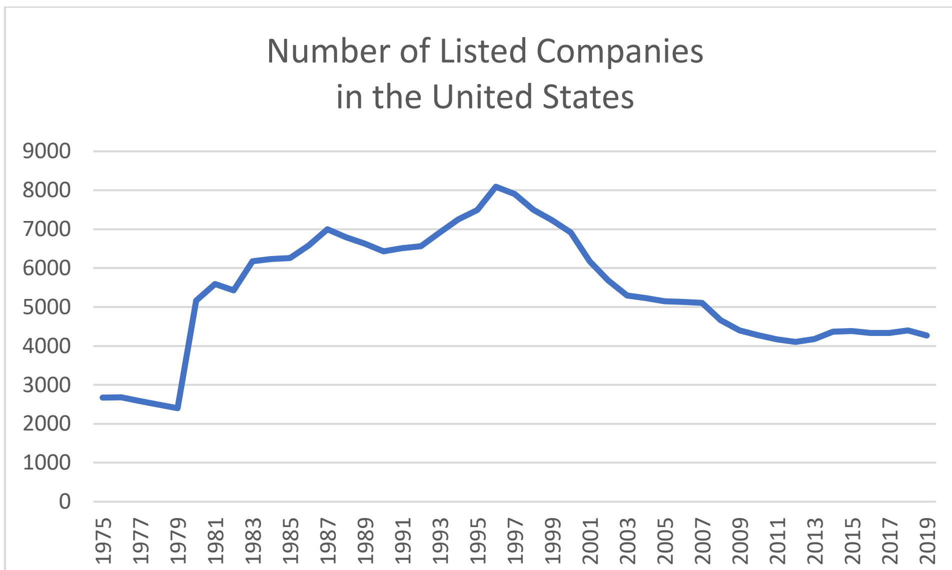
[64] "Rebuilding the IPO On-Ramp Putting Emerging Companies and the Job Market Back on the Road to Growth," IPO Task Force, Chart H, p. 10, October 20, 2011 https://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf.

[65] "Crowdfunding," Proposed Rules, *Federal Register*, Vol. 78, No. 214 (November 5, 2013), p. 66509 (col. 2), http://www.gpo.gov/fdsys/pkg/FR-2013-11-05/pdf/2013-25355.pdf.

[66] In 2008, the Form SB-2 was retired in connection with the adoption of the smaller reporting company rules. See "Changeover to the SEC's New Smaller Reporting Company System by Small Business Issuers and Non-Accelerated Filer Companies: A Small Entity Compliance Guide," January 25, 2008 https://www.sec.gov/info/smallbus/secg/smrepcosysguid.pdf.

[67] *Report of the Advisory Committee on the Capital Formation and Regulatory Process*, Securities and Exchange Commission, July 24, 1996, Table 1 https://www.sec.gov/news/studies/capform/capffull.txt.

Prior to the 2012 JOBS Act, the number of public companies was in steady decline. The number of listed companies declined from 8,090 in 1996 to 4,266 at the end of 2019, a decline of 47 percent.[68] The number of listed companies per million people declined from 30 in 1996 to 13 in 2019, a decline of 57 percent.[69] The number of listed companies per trillion dollars of real (inflation-adjusted) Gross Domestic Product declined from 733 to 224 or by 69 percent.[70] The precipitous decline stopped in 2012, the year that the JOBS Act was enacted.[71] However, the number of listed companies has increased only four percent in the nine years since the JOBS Act was enacted. Thus, while there has not been a significant increase in the number of public companies in the U.S. since the JOBS Act, the decline has stopped.



Source: World Bank[72]

The regulatory costs of initial public offerings and of continued regulatory compliance, once public, are a major reason for the decline in the number of public companies.[73] The heightened litigation costs and risks of being a public company are another.

The proposed rule would radically increase the cost and litigation risk of being a public company and can be expected to utterly overwhelm the positive impact of the JOBS Act. The Commission's own estimate is that the proposed rule will nearly triple the costs of filing the forms associated with being a

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[68] Listed Domestic Companies, Total - United States, World Bank https://data.worldbank.org/indicator/CM.MKT.LDOM.NO?locations=US.

[69] "Number of Listed Companies per Million People," Federal Reserve Board of Saint Louis https://fred.stlouisfed.org/series/DDOM01USA644NWDB.

[70] Author's calculations using World Bank and Bureau of Economic Analysis, National Income and Product Accounts data. 8,090 / $11,038.3 = 733; 4,266 / $19,032.7 = 224, a decline of 69 percent. See National Income and Product Accounts Table 1.1.6. Real Gross Domestic Product, Chained Dollars [Billions of chained (2012) dollars] for NIPA data.

[71] Title I of the JOBS Act which exempted "Emerging Growth Companies" or EGCs from some of the most onerous reporting requirements was the primary reason. For more information on this, see David R. Burton, Testimony before The Committee on Banking, Housing and Urban Affairs, United States Senate, on "Entrepreneurial Capital Formation," April 5, 2022 https://www.banking.senate.gov/imo/media/doc/Burton%20Testimony%204-5-22.pdf.

[72] The data used to generate the graph is available here: https://api.worldbank.org/v2/en/indicator/CM.MKT.LDOM.NO?downloadformat=excel

[73] David R. Burton, "Reducing the Burden on Small Public Companies Would Promote Innovation, Job Creation, and Economic Growth," Heritage Foundation Backgrounder No. 2924, June 20, 2014 https://thf_media.s3.amazonaws.com/2014/pdf/BG2924.pdf.

public company.[74] This is unprecedented and can be expected to have unprecedented effects. The proposed rule would lead to a resumption in the decline in the number of public companies and a shrinkage in the size and scope of public capital markets. Because of the massive costs imposed by the rule, if the rule is finalized in anything close to its current form, firms will go public much later in their life-cycle and many small and medium-sized companies will engage in "going private" transactions. This occurred after the Sarbanes-Oxley internal controls reporting requirements were implemented. And those costs were relatively small compared to the costs that the proposed rule would impose.

As discussed below, the diversion of vast resources from the Commission's actual mission will harm capital markets and investors.

Lastly, by requiring issuers to put highly speculative, radically uncertain "information" in *financial statements*, the rule will undermine the integrity of financial statements and make markets less efficient, not more.[75]

The Impact of the Proposed Rule on Investors

"Investor protection" is a central part of the SEC's tripartite mission. However, it is quite clear that many existing regulations, usually imposed in the name of investor protection, actually harm investors by increasing costs and by reducing investor returns and freedom.[76] They certainly go beyond those necessary to deter fraud and achieve reasonable, limited, scaled disclosure.

The term "investor protection" is a very ambiguous term that can cover, at least, four basic ideas. The first is protecting investors from fraud or misrepresentation. This is a fundamental function of government. The second is providing investors with adequate information to make informed investment decisions. Although a legitimate function of the securities laws,[77] this requires policymakers to carefully balance the costs (which are typically underestimated by regulators and policymakers) and benefits (which are typically overestimated by regulators and policymakers) of mandatory disclosure.[78] Moreover, more disclosure is not always better because it enables issuers to obfuscate by drowning investors in barely relevant and immaterial information. The third is protecting investors from

[74] See PRA Table 4 at p. 21461 of the proposing release.
[75] See discussion below under the heading "The Impact of the Proposed Rule on the Integrity of Financial Statements and Regulators".
[76] See, for example, David R. Burton, "Improving Entrepreneurs' Access to Capital: Vital for Economic Growth," Heritage Foundation Backgrounder No. 3182, February 14, 2017 https://www.heritage.org/sites/default/files/2017-02/BG3182.pdf; *Prosperity Unleashed: Smarter Financial Regulation* (Washington, DC: Heritage Foundation, 2017), edited by Norbert J. Michel http://thf-reports.s3.amazonaws.com/2017/ProsperityUnleashed.pdf; *The Case Against Dodd–Frank: How the "Consumer Protection" Law Endangers Americans* (Washington, DC: Heritage Foundation 2016), edited by Norbert J. Michel http://thf-reports.s3.amazonaws.com/2016/The%20Case%20Against%20Dodd-Frank.pdf; *Reframing Financial Regulation: Enhancing Stability and Protecting Consumers* (Arlington, VA: Mercatus Center at George Mason University, 2016), edited By Hester Peirce And Benjamin Klutsey https://www.mercatus.org/system/files/peirce_reframing_web_v1.pdf; David R. Burton, "Securities Disclosure Reform," Heritage Foundation *Backgrounder* No. 3178, February 13, 2017 https://www heritage.org/sites/default/files/2017-02/BG3178.pdf.
[77] For a full discussion, see David R. Burton, "Securities Disclosure Reform," Heritage Foundation *Backgrounder* No. 3178, February 13, 2017, https://www heritage.org/sites/default/files/2017-02/BG3178.pdf.
[78] "Some Limits and Drawbacks of MD," section in Luca Enriques and Sergio Gilotta, "Disclosure and Financial Market Regulation," in *The Oxford Handbook on Financial Regulation*, edited by Eilís Ferran, Niamh Moloney, and Jennifer Payne (Oxford: Oxford University Press, 2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2423768; Omri Ben- Shahar and Carl E. Schneider, "The Failure of Mandated Discourse," *University of Pennsylvania Law Review*, Vol. 159 (2011), pp. 647–749, http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2066&context=journal_articles.

investments or business risks that regulators deem imprudent or ill-advised. This is commonplace is so-called "merit review" states but various federal policy initiatives have moved in this direction over the past decade. This is not an appropriate function of government and can be highly counter-productive. The fourth is protecting investor freedom of choice or investor liberty and, thereby, allowing investors to achieve higher returns and greater liquidity. This primarily requires regulators to exercise restraint, or eliminate existing regulatory barriers, both in the regulation of primary offerings by issuers and of secondary market sales by investors to other investors. In practice, this aspect of investor protection is almost entirely ignored by state and federal regulators. The proposed rule is a stellar example.

The problem with the proposed rule is that it does not further any of these four objectives. It purports to further the second objective but, in reality, no additional rules are necessary to require issuers to report climate related risks that are *material* to the financial outcome of the issuer. The real purpose or objective of the proposed rule is to achieve political and social objectives unrelated to protecting investors. As discussed below in the materiality section, satisfying the political "demands" of a few dozen large and highly politicized fund advisors and state government pension funds does not "protect" investors.[79]

In summary, the proposed rule affirmative harms, rather than protects, investors in at least four ways:

- By radically increasing compliance costs and litigation risk and costs, shareholder returns will decline;
- By substantially reducing the number of public companies, investor choice and diversification potential will shrink;
- By forcing companies to go public much later in their life cycle, most of the gains associated with successful entrepreneurial ventures accrue to affluent accredited investors rather than the investing public;
- By burying investors in a blizzard of immaterial information, investors will find it more difficult to determine relevant information material to the financial outcome of the firms in which they invest.

Moreover, as discussed below, the diversion of vast resources from the Commission's actual mission will harm capital markets and investors.

The Impact of the Proposed Rule on Small Businesses

The Commission estimates "that there are 1,004 registrants that are small entities that would be affected by the proposed rules."[80] These are typically businesses with total assets of $5 million or less. A large number of these companies will go private and leave the public capital markets.

[79] See, for example, the discussion in Paul G. Mahoney and Julia D. Mahoney, "The New Separation of Ownership and Control: Institutional Investors and ESG," Columbia Business Law Review Symposium: The Future of Securities Regulation, Spring 2021 https://www.sec.gov/comments/climate-disclosure/cll12-8855236-238441.pdf.
[80] Proposing release at p. 21462.

The Proposed Rule is a Major Rule

The Commission adopts a preposterous agnostic view on whether the proposed rule is a major rule for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''):

> We request comment on whether our proposal would be a "major rule" for purposes of SBREFA.[81]

Under 5 U.S. Code §804(2), a rule is considered ''major'' where, if adopted, it results in or is likely to result in:

> • An annual effect on the U.S. economy of $100 million or more;
> • A major increase in costs or prices for consumers or individual industries;
> or
> • Significant adverse effects on competition, investment, or innovation.

The Commission's own PRA Table 4 shows that this is a major rule. $6.4 billion (the reported external cost increase) is greater than $100 million. If nearly tripling the costs imposed on public companies is not "a major increase in costs," then nothing is. *Quod erat demonstrandum*.

The Impact on Non-Issuers

What the Commission entirely ignores is the impact on non-issuers, mostly small businesses. This will be substantial.[82]

Proposed § 229.1500(r) reads as follows:

> (r) Scope 3 emissions are all indirect GHG emissions not otherwise included in a registrant's Scope 2 emissions, which occur in the upstream and downstream activities of a registrant's value chain.
> (1) Upstream activities in which Scope 3 emissions might occur include:
> (i) A registrant's purchased goods and services;
> (ii) A registrant's capital goods;
> (iii) A registrant's fuel and energy related activities not included in Scope 1 or Scope 2 emissions;
> (iv) Transportation and distribution of purchased goods, raw materials, and other inputs;
> (v) Waste generated in a registrant's operations;
> (vi) Business travel by a registrant's employees;
> (vii) Employee commuting by a registrant's employees; and
> (viii) A registrant's leased assets related principally to purchased or acquired goods or services.
> (2) Downstream activities in which Scope 3 emissions might occur include:

[81] Proposing release at p. 21463.
[82] I am not the only person to raise this concern. See Comment Letter of the National Federation of Independent Businesses, May 11, 2022 https://www.sec.gov/comments/s7-10-22/s71022-20128567-292655.pdf.

(i) Transportation and distribution of a registrant's sold products, goods or other outputs;
(ii) Processing by a third party of a registrant's sold products;
(iii) Use by a third party of a registrant's sold products;
(iv) End-of-life treatment by a third party of a registrant's sold products;
(v) A registrant's leased assets related principally to the sale or disposition of goods or services;
(vi) A registrant's franchises; and
(vii) Investments by a registrant.

Scope 3 emissions reporting basically requires reporting GHG emissions with respect to almost all customers ("use by a third party of a registrant's sold products") or suppliers ("a registrant's purchased goods and services") of issuers.

Assuming, for the sake of argument, that issuers are not going to simply fabricate (i.e. make up) this information, where does the Commission suppose this information is going to come from? Issuers are going to have to demand that non-issuers, mostly small businesses, provide them with this information as a condition of doing business with the issuer.[83] So every small business that sells on Amazon, Ebay or Etsy, every trucking firm that moves good for an issuer, every plumbing, electrical, HVAC or cleaning firm that does business with an issuer, every business that has a phone or internet, etc., etc. will have to provide the issuer with information on its greenhouse gas emissions. This will affect about 14 million small businesses.[84]

Even assuming that the small businesses can provide this information to all of the issuers it deals with for an annual aggregate of $1,000 (which is likely to be low since the information would have to be provided to many issuers – utilities, phone companies, internet service providers, trucking and delivery companies, retailers, etc.), then this would amount to an added cost for small businesses of **$14 billion**.[85] And, of course, the SEC has failed to account for how much it will cost issuers to collect and report this information.

The scope 3 requirements pose a bit of conundrum for the Commission. Either it must impose devastating costs on non-issuer small businesses (which, once realized by the public and the small business community, will be seriously problematic for the Commission) or it must permit issuers to fabricate this information out of whole cloth. "Information" fabricated out of whole cloth is, shall we say, of limited utility when making investment decisions or even policy decisions. More importantly, putting such information in financial statements is deeply problematic.[86] We really don't want to require issuers to put fabricated, politicized information in financial statements. Establishing such a precedent is likely to have incalculable adverse effects.

[83] As any subcontractor on a federal contract knows, various certifications and information is routinely required to comply with Federal Acquisition Regulations (FAR).
[84] About 5.5 million C corporations with assets under $5 million, about 4 million partnerships and LLCs and 4.7 million S corporations. SOI Tax Stats - Business Tax Statistics https://www.irs.gov/statistics/soi-tax-stats-business-tax-statistics SOI Tax Stats - Business Tax Statistics https://www.irs.gov/statistics/soi-tax-stats-business-tax-statistics.
[85] 14 millions small businesses time $1,000 annually.
[86] See discussion under the heading "The Impact of the Proposed Rule on the Integrity of Financial Statements and Regulators."

Immaterial Climate Change "Disclosure" Would Impede the Commission's Important Mission

Incorporating climate change disclosure mandates beyond those already required under the traditional materiality standard does nothing to protect investors and, in actuality, would harm investors by obfuscating material information in a blizzard of politically motivated immaterial information, by reducing returns and by reducing investor choice as the number of public companies decline. Furthermore, non-material climate change disclosures would impede other aspects of the tripartite SEC mission. It would harm capital formation by imposing a needless and substantial burden on public companies and, to the extent that immaterial and erroneous information based on speculation and guesses are included in disclosure documents and financial statements, it can be expected to make markets less efficient. Requiring issuers to include guesses and speculation built on a modeling house of cards into financial statements will undermine the integrity of financial statements. Enforcement by the SEC will be almost of necessity either arbitrary or non-existent and is likely to become highly politicized furthering politicized environmental objectives rather than acutal investor protection. Finally, going down this path will require the Commission to expend very substantial resources to police such disclosures by thousands of issuers notwithstanding the fact that it would do nothing to further the Commission's actual mission and would harm investors, capital formation and market efficiency. These resources would be much better spent furthering the Commission's important mission. To the extent the resources are drawn away from traditional securities enforcement functions, it would harm the Commission's mission and investors.[87]

Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform

The proposing release is extraordinarily complex and seeks comment on about 300 specific issues.[88] Disclosure requirements have already become so voluminous that they obfuscate rather than inform, making it more difficult for investors to find relevant information.[89] The average number of pages in annual reports devoted to footnotes and "Management's Discussion and Analysis" has quadrupled.[90] The number of words in corporate annual 10-Ks increased from 29,996 in 1997 to 41,911 in 2014.[91] This has undoubtedly become an even bigger problem over the past seven years. The proposed rule will exacerbate this problem quite dramatically.

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[87] See discussion under the heading "Commission Resources Are Better Spent Furthering Its Mission."

[88] Only 201 are numbered. Of these, many are multipart questions and many requests for comment are not numbered (e.g. requests for comment regarding the economic analysis, collection of information, the Regulatory Flexibility Act analysis, SBREFA, etc.).

[89] Troy A. Paredes, "Blinded by the Light: Information Overload and Its Consequences for Securities Regulation," *Washington University Law Quarterly*, Vol. 81 (2003), pp. 417–485, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1287&context=law_lawreview and Troy A. Paredes, "Remarks at The SEC Speaks in 2013," U.S. Securities and Exchange Commission, February 22, 2013, http://www.sec.gov/News/Speech/Detail/Speech/1365171492408#.Ut2WJbROmM8. See also Keith F. Higgins, "Disclosure Effectiveness: Remarks Before the American Bar Association Business Law Section Spring Meeting," U.S. Securities and Exchange Commission, April 11, 2014, http://www.sec.gov/News/Speech/Detail/Speech/1370541479332#.VItSmXt4zYg.

[90] Ernst & Young, "Now is the Time to Address Disclosure Overload," *To the Point*, No. 2012-18, June 21, 2012, https://www.lexissecuritiesmosaic.com/gateway/sec/speech/%24FILE_TothePoint_BB2367_DisclosureOverload_21June2012.pdf.

[91] Vipal Monga and Emily Chasan, "The 109,894-Word Annual Report: As Regulators Require More Disclosures, 10-Ks Reach Epic Lengths: How Much Is Too Much?" *The Wall Street Journal*, June 1, 2015 https://www.wsj.com/articles/BL-CFOB-8071.

Climate Models and Climate Science are Highly Uncertain

I am no climate science expert. Nor, I suspect, is anyone at the Commission since climate science is way outside of the Commission's lane and the proposing release shows little evidence of climate science expertise. I do know a thing or two about modeling in an economics context. Models are typically highly dependent on a few relationships specified in their equations and parameters. A small number of assumptions about relationships and parameters drive results. For example, a model examining the impact of proposed tax policy might adopt a neoclassical view where the impact of the proposed tax changes on the user cost of capital and labor response are central (as specified in the equations) and the empirical parameters (as specified in the elasticities) governing investment and labor are key.[92] Seemingly small adjustments to elasticities (even though within the bounds established in the empirical literature) result is significantly different results. A Keynesian "macroeconomic" approach focusing on aggregate demand would yield dramatically different results, operate on different principles and lead to different policy recommendations. And so on.

Climate modeling is, in principle, no different. A small number of equations and empirical parameters drive results. Even the conventional governmental source -- the Intergovernmental Panel on Climate Change – shows massive variations in projections and shows the wide divergence in the ability of models to account for past warming[93] and the degree of warming that is anthropogenic.[94] The worst-case concentration pathway, for example, assumes highly unlikely projections of coal use, high population growth, low economic growth and slow technological progress.[95] Using the worst-case scenario of these emissions concentration pathways as the business-as-usual scenario will mislead the private sector, policymakers, regulators and the public on the estimated climate impacts and costs.[96]

Once you broaden your reading to include those that do not have a financial or political interest in climate change alarmism, it becomes clear that the variance and uncertainty in climate modeling is even higher than the IPCC report indicates.[97] It is clear that various models yield dramatically different

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[92] Parker Sheppard and David Burton, "How the GOP Tax Bill Will Affect the Economy," *Daily Signal*, November 17, 2017 https://www.dailysignal.com/2017/11/17/gop-tax-bill-will-affect-economy/. In this case, we used the Hall-Jorgenson user cost of capital equation, the Cobb-Douglas production function and conventional price theoretic labor market modeling.

[93] See, for instance, Byron A. Steinman, Michael E. Mann and Sonya K. Miller, "Atlantic and Pacific Multidecadal Oscillations and Northern Hemisphere Temperatures," *Science*, February 27, 2015, Vol. 347, Issue 6225, pp 988-991, https://science.sciencemag.org/content/347/6225/988#aff-1 and Joseph Majkut, "Climbing the Staircase of Global Warming," Niskanen Center, July 27, 2016, https://www niskanencenter.org/climbing-staircase-global-warming/ .

[94] *Climate Change 2014 Synthesis Report*, Intergovernmental Panel on Climate Change https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf See, for example, "The Representative Concentration Pathways," (p. 57); "Box 2.3, Models and Methods for Estimating Climate Change Risks, Vulnerability and Impacts," (pp. 58-59); "Table 2.1, Projected Change in Global Mean Surface Temperature and Global Mean Sea Level Rise for the Mid- and Late 21st Century, Relative to the 1986–2005 Period," (p. 60); "Cumulative Total Anthropogenic CO2 Emissions from 1870 (GtCO2)," (p. 63); "Table 2.2, "Cumulative Carbon Dioxide (CO2) Emission Consistent with Limiting Warming to Less than Stated Temperature Limits at Different Levels of Probability, Based on Different Lines of Evidence," (p. 64). The updated sixth version of the Synthesis Report is due for release in the Fall of 2022.

[95] Justin Ritchie and Hadi Dowlatabadi, "Why Do Climate Change Scenarios Return to Coal?" *Energy*, December 2017, Vol. 140, Part 1, pp 1276-1291, https://www.sciencedirect.com/science/article/abs/pii/S0360544217314597.

[96] Pielke, Roger and Ritchie, Justin, "Systemic Misuse of Scenarios in Climate Research and Assessment," April 21, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3581777.

[97] Steven E. Koonin, *Unsettled: What Climate Science Tells Us, What It Doesn't, and Why It Matters*, Chapter 4, "Many Muddled Models," (Dallas, TX: BenBella Books, 2021); Bjorn Lomborg, *False Alarm: How Climate Change Panic Costs Us Trillions, Hurts the Poor, and Fails to Fix the Planet*, (New York: Basic Books, 2020); Pat Michaels and Chip Knappenberger, *Lukewarming: The New Climate Science that Changes Everything*, (Washington: Cato Institute, 2016);

results. Explaining the details is beyond the scope of this letter and my current competence. It is also beyond the ability of DERA and others at the SEC.

Economic Modeling of Climate Change Effects is Even More Uncertain

Any estimate of the economic impact of climate change will have to rely on the highly uncertain and divergent climate model results discussed above. In other word, the economics models are more uncertain because of necessity they are built on top of the climate models. So if the climate models have a band of results plus or minus X percent, the economics models will have a band of results that is greater than plus or minus X percent.

In addition to the high degree of uncertainty in the climate models will be added an entirely new family of economic ambiguity and uncertainty. Any economic estimate of the impact of climate change will also have to choose a discount rate to arrive at the present discounted value of future costs and benefits[98] of climate change and to estimate the future costs and benefits of various regulatory or private initiatives. The choice of discount rate is controversial and important.[99] Estimates will need to be made of the cost of various aspects of climate change (sea level rises, the impact on agriculture, etc). Estimates will need to be made of the cost of various remediation techniques. Guesses will need to be made about the rate of technological change. Guesses will need to be made about the regulatory, tax and other responses of a myriad of governments.[100] Estimates will need to be made using conventional economic techniques regarding the economic impact of those changes which, in turn, will reflect a wide variety of techniques and in many cases a thin or non-existent empirical literature. Guesses will need to be made of market responses to all of these changes since market participants will not stand idly by and do nothing as markets, technology and the regulatory environment change.

The results of any given model will depend on what assumptions or guesses the modeler makes regarding these many highly uncertain issues. The SEC provides no guidance on these issues.

Benjamin Zycher, Resident Scholar, American Enterprise Institute, Statement before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate, Hearing on the "21st Century Economy: Protecting the Financial System from Risks Associated with Climate Change" March 18, 2021 https://www.banking.senate.gov/imo/media/doc/Zycher%20Testimony%203-18-21.pdf; Kevin Dayaratna, Ross McKitrick and David Kreutzer, "Empirically Constrained Climate Sensitivity and the Social Cost of Carbon," *Climate Change Economics*, Vol. 8, No. 2, 2017, pp. 1-12 https://econpapers.repec.org/article/wsiccexxx/v_3a08_3ay_3a2017_3ai_3a02_3an_3as2010007817500063.htm; Ross McKitrick and John Christy, "A Test of the Tropical 200- to 300-hPa Warming Rate in Climate Models," *Earth and Space Science*, September 2018, https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2018EA000401; Roger Pielke and Justin Ritchie, "How Climate Scenarios Lost Touch With Reality," *Issues in Science and Technology*, Summer 2021, https://issues.org/climate-change-scenarios-lost-touch-reality-pielke-ritchie/; Zeke Hausfather , Kate Marvel , Gavin A. Schmidt , John W. Nielsen-Gammon and Mark Zelinka, "Climate Simulations: Recognize the 'Hot Model' Problem," *Nature* https://www nature.com/articles/d41586-022-01192-2.

[98] There are some benefits. For example, large portions of Northern areas such as Canada, Russia and Scandinavia would presumably become suitable for agriculture.

[99] See, for example, David Kreutzer, "Discounting Climate Costs," Heritage Foundation Issue Brief No. 4575, June 16, 2016 http://thf-reports.s3.amazonaws.com/2016/IB4575.pdf; Kevin Dayaratna, "An Analysis of the Obama Administration's Social Cost of Carbon," Testimony before Committee on Natural Resources, United States House of Representatives on July 23, 2015 https://www.heritage.org/testimony/analysis-the-obama-administrations-social-cost-carbon.

[100] To get a sense of how daunting a task it is to keep track of the many government policy responses, see "Climate Change Laws of the World," Grantham Research Institute on Climate Change and the Environment at LSE https://climate-laws.org/. Merely keeping track of these many rules is one thing. Accurately predicting how they will change introduces an entirely new level of complexity and uncertainty.

The Commission Does Not Possess the Expertise to Competently Assess Climate Models or the Economic Impact of Climate Change

The Commission does not have the expertise or administrative ability to assess the veracity, or lack thereof, of issuer "disclosures" based on firm-specific speculation regarding the impact of climate change which will be based on firm-specific choices regarding highly divergent and uncertain economic models projecting the economic impact of climate changes based on firm-specific choices regarding highly divergent and uncertain climate models. See the discussion above under the headings "Climate Models and Climate Science are Highly Uncertain," "Economic Modeling of Climate Change Effects is Even More Uncertain" and "Commission Resources Are Better Spent Furthering Its Mission" for a more detailed discussion of the many issues that the Commission would be required to address.

The Commission Has Neither the Expertise nor the Administrative Ability to Assess the Veracity of Issuer Climate Change Disclosures

After making decisions regarding the extraordinarily complex, ambiguous and uncertain issues relating to climate models, economic models, future government policies, likely technological developments, market responses and so on, issuers will then need to assess, on some undetermined basis, the likely impact of climate change on their specific business years into the future – a business that may by then bear little resemblance to the issuer's existing business. Then, the Commission will need to assess the veracity of the issuer's "disclosure" based on this speculative house of cards. The idea that all of this can be done in a way that will meaningfully improve investors' decision-making compared to what is currently available to them is not credible. People, including investors, are going to disagree about the future because the future is highly uncertain. To deny this evident fact is folly.

It is important to note at this point that every securities transaction reflects a disagreement about the future. The buyer of a security believes that the security in question represents the best addition to the investor's portfolio possible out of all of the other vast number of options available. Otherwise, they would not buy the security but would buy something else. The seller disagrees. The seller wants to deploy his capital elsewhere.[101] This is unavoidable. The objective of the Commission should be to improve the information available to investors so that markets become more efficient and allocate capital better. Building a house of cards built on one guess, estimate or speculation after another after another ad infinitum is not going to improve our capital markets.

The Impact of the Proposed Rule on the Integrity of Financial Statements and Regulators

U.S. financial statements presented in accordance with Generally Accepted Accounting Principles (GAAP), as regulated by the Financial Accounting Standards Board (FASB) and SEC Regulation S-X, are among the most reliable and trusted in the world. They enable our capital markets to function efficiently. The proposed "Article 14—Climate-Related Disclosure" is an important step toward making U.S. financial statement less reliable and endangering the integrity of our financial statements.

Some of the proposed provisions are relatively benign (although potentially or even probably immaterial). For example, proposed §210.14–01(c) relating to financial impacts of severe weather events

[101] Obviously, in limited circumstances the seller will be liquidating the securities for consumption purposes rather than reinvestment. In that case, the seller still regards the security being sold as the least favorable investment in the seller's portfolio (either because of the expected rate of return or portfolio diversification requirements).

and other natural conditions would require line by line disclosure with respect to certain events but the information required is based on actual events and calculable. Others, however, require issuers in their audited financial statements to go down the speculative rabbit hole discussed above. For example,

- proposed §210.14(g) Financial estimates and assumptions impacted by severe weather events and other natural conditions.
- proposed §210.14(h) Financial estimates and assumptions impacted by transition activities
- proposed §210.14(i) Impact of identified climate-related risks.
- proposed §210.14(j) Impact of climate-related opportunities

will all require issuers and their auditors to make a presentation in their financial statements based on highly uncertain issuer specific guestimates based on highly uncertain economics models based on highly uncertain climate models making assumptions about future government policies around the world, rates of technological change and market responses to all of the above.

Yes, financial statements currently require some judgment calls. But those judgment calls are made in the context of well-developed rules, historical experience and best practices overseen by independent accountants. Some of the provisions required by the proposed Article 14 will require issuers and their auditors to become fiction writers, telling a story that they think regulators want to hear. Occasionally, life imitates art. But we really do not want to mandate, in pursuit of a political agenda, that U.S. financial statements include provisions that are known to be fiction.

How are auditors going to audit the financial statements that now must be filled with fictional or, at best, highly speculative statements. Generally Accepted Auditing Standards require that:

(a) The auditor must obtain sufficient appropriate audit evidence by performing audit procedures to afford a reasonable basis for an opinion regarding the financial statements under audit.
(b) The auditor must state in the auditor's report whether the financial statements are presented in accordance with generally accepted accounting principles
(c) When the auditor determines that informative disclosures are not reasonably adequate, the auditor must so state in the auditor's report.
(d) The auditor must either express an opinion regarding the financial statements taken as a whole, or state that an opinion cannot be expressed, in the auditor's report.[102]

What kind of audit evidence will be required with respect to climate or economic modeling or issuer speculation regarding future government policies, rates of technological change or market responses? How is an auditor supposed to state, in good conscience, “the financial statements are presented in accordance with generally accepted accounting principles” when GAAP does not require the information that must now be reported under the proposed rule and most of that information is not material and deeply speculative? One potential solution, I suppose, is for accounting firms to give qualified opinions on all issuers disclaiming an opinion on the climate change disclosures. Issuers and investors will not relish the though of qualified opinions for most companies. But the accounting firms must give an opinion. Another response, I suppose, is for accounting firms to radically increase their fees to compensate them for the lawsuits they will be required to defend and the judgments they will be forced

[102] Generally Accepted Auditing Standards, American Institute of Certified Public Accountants https://us.aicpa.org/content/dam/aicpa/research/standards/auditattest/downloadabledocuments/au-00150.pdf.

to pay because the disclosures required by the rule will inevitably be wrong and the lawsuits will inevitably follow.

This is a very dangerous road to go down. Financial statements should present factual information that describes as accurately as possible the financial condition of a firm. Only material information should be presented. If we start requiring financial statements to include guesses and known fictions in pursuit of a political agenda, then the reliability of those financial statements will come into question. Politicized and unreliable financial statements would have a highly adverse impact on U.S. capital markets.

Commission Resources Are Better Spent Furthering Its Mission

Imposing these requirements and developing the expertise to police climate disclosure by thousands of issuers will involve the expenditure of very substantial resources. The Division of Corporation Finance currently has about 400 employees.[103] Based on World Bank data, that there are about 4,400 domestic public companies listed in the U.S. (about half of the number in 1995).[104] Assuming (heroically) that a CorpFin employee could competently evaluate the climate modeling choices, economic modeling choices and issuer specific determinations of one issuer per week, they would still mean that CorpFin would need an additional 85 employees – a more than 20 percent increase.[105] Assuming, more realistically, that it would take two or three weeks to evaluate the climate model choices, the economics model choices, the issuer specific analysis and so on of each issuer, then 170 to 255 new employees would be needed to enforce this rule. Thus, 18 to 39 percent of CorpFin's staff is going to be devoted to administering this rule.[106] Foreign issuers subject to the rule would increase these figures. Similar, large increases in the enforcement staff would be required. Finally, resources would have to be expended by the Commission to regulate and presumably register "GHG emissions attestation providers," a new profession created by the rule.[107]

These very substantial resources would be much better spent furthering the Commission's actual mission.

Climate Change Disclosure Requirements Would Create a New Compliance Eco-System and a New Lobby to Retain the Requirements

The proposed rule would result in the creation of a new compliance eco-system composed of the economists, accountants, attorneys, compliance officers, consultants and NGOs that will live off of the proposed rule. In PRA Table 4, the SEC estimates that external costs will increase by $6.4 billion. That is the pot of money that these accountants, attorneys, compliance officers, consultants and NGOs very much want a piece of. They are fighting for this rule. Then, they will fight to preserve their multi-billion dollar business by spending many tens or even hundreds of millions of dollars lobbying for the rule, writing in support of the rule, and holding conferences for the rule. They will become a potent pro-complexity lobby.

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[103] Fiscal Year 2023 Congressional Budget Justification and Annual Performance Plan, SEC, p. 16 https://www.sec.gov/files/FY%202023%20Congressional%20Budget%20Justification%20Annual%20Performance%20Plan_FINAL.pdf#page=19.
[104] Listed Domestic Companies https://api.worldbank.org/v2/en/indicator/CM.MKT.LDOM.NO?downloadformat=excel.
[105] 4,400 issuers / 52 weeks = 85.
[106] 85/485 = 18; 255/655 = 39.
[107] See proposed §229.1505(b).

As public choice economics demonstrates, it will be very difficult to overcome this lobby. They have a concentrated and large incentive to fight for the rule and to invest in keeping the rule in place. Opponents of the rule will have a relatively diffuse interest in stopping or later reversing the rule. Ergo, the concentrated special interest typically is likely to prevail contrary to the public interest. The Commission should not be a party to acting contrary to the public interest to aid this compliance eco-system.

Proposed §229.1505 requires a registrant that is required to provide Scope 1 and Scope 2 emissions disclosure and that is an accelerated filer or a large accelerated filer to include an attestation report in the relevant filing. The required GHG emissions attestation report must be prepared and signed by a "GHG emissions attestation provider." Thus, the proposed rule will create an entirely new profession – a GHG emissions attestation provider. This new profession will fight to preserve itself and expand its business. It will create trade associations and professional societies dedicated to lobbying for retention of the rule and ever more complex versions of it. It will seek to establish standards or "best practices" that will require issuers to spend ever increasing amounts of money engaging GHG emissions attestation providers. It will seek to expand the requirements to use them to include non-accelerated filers and for the requirement to use them to include scope 3 emissions reporting. Even if it promulgates some version of a climate change rule, the Commission should not be a party to creating this new cartel.

The Proposed Climate Change Disclosure Requirements Would Result in Much Litigation

The imposition of such requirements will result in much higher litigation risk and expense as private lawsuits are filed challenging the veracity of climate disclosures. The proposed rule explicitly contemplates liability under Securities Exchange Act Section 18 (15 U.S. Code § 78r - Liability for misleading statements) and Securities Exchange Act Section 11 (15 U.S. Code § 77k - Civil liabilities on account of false registration statement).[108] Large numbers of these lawsuits are virtually assured under the proposed rule since virtually no climate models have accurately predicated future climate and the economic and financial projections based on these climate models are even more uncertain. In fact, this kind of litigation is already on the rise around the world.[109] Litigation outcomes will be as uncertain as the underlying climate science, economics and the associated financial projections. This kind of litigation involves potentially large liability. It will make becoming a public company even less attractive. This will harm investors and entrepreneurial capital formation.

Securities Laws are a Poor Mechanism to Address Externalities

The economic justification for climate change disclosure mandates is that they are designed to address a negative externality. An externality is (1) a cost that is imposed on (negative externality) or (2) a benefit accorded to (positive externality) someone that is not a party to a transaction or not engaged in an action. There are countless positive and negative externalities all around us. Air pollution is a typical example of a negative externality.

[108] See proposing release section II.L at p. 21411.

[109] Joana Setzer and Catherine Higham, "Global Trends in Climate Change Litigation: 2021," Policy Report, The Grantham Research Institute on Climate Change and the Environment, July 2021, Figure 1.1. Total Cases Over Time, US and Non-US, to 31 May 2021
https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf.

There are many ways to address negative externalities. Improved property rights,[110] tort law,[111] regulation,[112] or a tax equal to the cost involuntarily imposed by the economic actor creating the externality on those "external" to the transaction.[113] A tax subsidy for politically favored interests with strong lobbies would be fairly far down the list of efficacious means of addressing the problem of negative externalities but there are many provisions in the Internal Revenue Code with this purpose. To achieve the desired effect, the policy designed to address the externality must be calibrated to accurately internalize the actual cost of the externality. This requires estimating the costs imposed by the externality and imposing costs in an equal and off-setting amount on the economic actor in question. Detailed scientific, cost and market information must be obtained to get this even close to right.[114]

Trying to achieve this result through mandated disclosures by issuers is comparable to trying to score in basketball by bouncing the ball off the floor and then the backboard. It is theoretically possible, but there is a vanishingly small chance that it will achieve the desired result. And any team that tried that on a regular basis would lose. Similarly, securities laws are not the place to do environmental regulation.

It is clear that mandated climate change disclosure will have significant costs and adverse effects. Proponents of such disclosure should be required to explain how, exactly, it will have a meaningful positive impact AND why securities regulation is a more efficacious means of addressing the problem than traditional means of addressing environmental problems, some of which have been highly successful. The proposing release does not do so. It simply states that some large investors want this information (some do, but for political reasons not for investment purposes) and then citing generalized research showing that mandated disclosure can have positive effects ignoring (a) that this body of research relates to disclosures that are material to investment outcomes, (b) that the vast majority of information elicited by this rule will be immaterial, (c) that current rules already require disclosure of material climate related information and (d) that the massive costs that would be imposed by the proposed rule will have major adverse economic effects.

The United States does have an Environmental Protection Agency. Its mission is to police externalities. It already requires GHG emissions reporting.[115] The EPA estimates that the required reporting under their rule covers 85–90% of all GHG emissions from over 8,000 facilities in the United States.[116] Policing externalities directly using an agency that has actual expertise on the subject matter is much more efficacious than the securities disclosure bank shot approach.

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[110] In the case of air and water that are usually unowned resources, this is problematic. In other cases, this can be the solution, although transactions costs can impede a private solution. See Ronald H.Coase, "The Problem of Social Cost," *Journal of Law and Economics*, Vol. 3, October, 1960, pp. 1–44.
[111] The common law of nuisance and various more modern environmental torts.
[112] Most notably by the Environmental Protection Agency and state analogs.
[113] This is commonly known as a Pigouvian tax. See Arthur Cecil Pigou, *The Economics of Welfare* (1920 and various later editions); "Pigouvian Taxes," *The Economist*, August 19, 2017 https://www.economist.com/news/economics-brief/21726709-what-do-when-interests-individuals-and-society-do-not-coincide-fourth.
[114] See David R. Burton, "Post Tax Reform Evaluation of Recently Expired Tax Provisions," Testimony before The Committee on Ways and Means, Subcommittee on Tax Policy, United States House of Representatives, March 14, 2018 https://www heritage.org/testimony/post-tax-reform-evaluation-recently-expired-tax-provisions.
[115] Greenhouse Gas Reporting Program (GHGRP) https://www.epa.gov/ghgreporting/ghgrp-reported-data.
[116] Proposing release at p. 21414.

Efforts to Redefine Materiality and the Purpose of Securities Laws are Counterproductive

Proposed § 229.1504 (c) Scope 3 emissions reads:

(1) Disclose the registrant's total Scope 3 emissions **if material**. A registrant must also disclose its Scope 3 emissions if it has set a GHG emissions reduction target or goal that includes its Scope 3 emissions. (emphasis added)

Ergo, the concept of materiality is central to how much information must be disclosed pursuant to the proposed rule.[117]

The concept of materiality has been described as "the cornerstone" of the disclosure system established by the federal securities laws.[118] The Supreme Court has held that information or facts (or omitted information or facts) are material if there is a substantial likelihood that a reasonable investor would consider the information important in deciding how to vote or make an investment decision.[119] The Court has also indicated that information is material if there is a substantial likelihood that disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information available.[120]

There is no definition of material or materiality in the Securities Act or the Securities Exchange Act although the term "material" is used in both many times. The Commission has defined the term "material" in its regulations and changed its definition over years, often to conform to Supreme Court holdings. The current definition found in 17 CFR § 240.12b-2 is:

> Material. The term "material," when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered.

The Supreme Court and regulatory definitions are fine as far as they go but they are quite general and provide little practical guidance to issuers. There is a spirited debate about whether "principles-based" or more "prescriptive," bright-line rules should govern disclosure by issuers of material information.

There is now, however, a major effort to effectively redefine what is material to include information that is really directed at achieving various social or political objectives.[121] The effort to redefine materiality usually takes the form of saying that investors are "demanding" information relating to environmental or

[117] See also proposed §229.1502(a), §229.1501(d), §229.1504(d)(4)-(5), and §229.1504(f).
[118] SEC Concept Release on Business and Financial Disclosure Required by Regulation S-K, April 13, 2016 at p. 33 https://www.sec.gov/rules/concept/2016/33-10064.pdf; "Report of the Advisory Committee on Corporate Disclosure to the Securities and Exchange Commission," Committee Print 95-29, House Committee on Interstate and Foreign Commerce, 95th Congress, 1st Session, November 3, 1977 http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45 r81.cf1 rackcdn.com/collection/papers/1970/1977_1103_AdvisoryDisclosure.pdf.
[119] *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976); *Basic Inc. vs. Levinson*, 485 U.S. 224 (1988)
[120] *Matrixx Initiatives, Inc. v. Siracusano*, 131 U.S. 1309 (2011).
[121] See, for example, Commissioner Allison Herren Lee, "Living in a Material World: Myths and Misconceptions about "Materiality," May 24, 2021 https://www.sec.gov/news/speech/lee-living-material-world-052421?utm_medium=email&utm_source=govdelivery#_ftnref37.

social matters. The proposing release adopts this posture.[122] A closer look, however, shows that ordinary investors are demanding no such thing. It is usually politically motivated actors such as government-run pension funds or a few increasingly "woke" proxy advisory firms or investment advisors that support such disclosures. The proposed rule represents a giant step down the road of redefining materiality as anything that politically motivated investment managers might want. Unless the proposed rule adopts a traditional definition of material, to wit, material to the financial outcome of a firm, assertions that traditional notions of materiality will apply should simply not be believed because the proposing release adopts the redefined, politicized version of what material means.

The effective duopoly[123] in the proxy advisory business, largely a regulatory creation, means that two advisory firms can change the votes of potentially as many as 38 percent of corporate shares of public companies in the United States.[124] This raises serious concerns, particularly when paired with the high degree of concentration in the fund advisory business. For example, the top ten mutual fund advisors control approximately two-thirds of all net assets under management.[125] Mutual funds, in turn, account for about 82 percent of assets managed by registered investment companies.[126] The top 15 mutual fund advisors have assets under management (all types, foreign and U.S.) roughly equal to the total U.S. stock market capitalization.[127] Some of these assets under management, of course, are invested abroad. It is not

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[122] See section I.C. The Growing Investor Demand for Climate-Related Risk Disclosure and Related Information of the proposing release at pp. 21340-21341.

[123] Institutional Shareholder Services, Inc. (ISS) [located in Rockville, MD a suburb of Washington, DC] and Glass, Lewis & Co., LLC (Glass Lewis) [located in San Francisco, CA] control about 97 percent of the proxy advisory business (61 percent for ISS and 36 percent for Glass Lewis). Egan-Jones Proxy Service, Segal Marco Advisors and ProxyVote Plus are much smaller competitors. See James K. Glassman and J. W. Verret, "How To Fix Our Broken Proxy Advisory System," Mercatus Center, George Mason University, April 16, 2013 https://www mercatus.org/system/files/Glassman_ProxyAdvisorySystem_04152013.pdf ("Between them, ISS and Glass Lewis clients control 25 percent to 50 percent of the typical mid-cap or large-cap company's shares, according to a study by a proxy solicitation firm." (p. 20) "The proxy advisory industry was principally created by regulation. Without regulatory mandates requiring active participation in proxy votes, and without interpretative releases giving preferential treatment to investment managers who use proxy advisors, a profitable proxy advisory industry might not exist." (p. 26)); James K. Glassman and Hester Peirce, "How Proxy Advisory Services Became So Powerful," Mercatus Center, George Mason University, Policy Brief, June 18, 2014 https://www.mercatus.org/system/files/Peirce-Proxy-Advisory-Services-MOP.pdf ("But regulation is the main impetus to vote proxies — and to rely on proxy advisory firms. In the absence of regulatory encouragement to use PAs, institutional investors might rationally choose not to vote, to vote consistently with management, or to vote only on key matters." (p. 1)); David F. Larcker, Brian Tayan and James R. Copland, "The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry," *Harvard Law School Forum on Corporate Governance*, June 14, 2018 https://corpgov.law harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry/. See also "Corporate Shareholder Meetings: Issues Relating to Firms That Advise Institutional Investors on Proxy Voting," Government Accountability Office, June 2007 [GAO-07-765] https://www.gao.gov/assets/gao-07-765.pdf; "Corporate Shareholder Meetings Proxy Advisory Firms' Role in Voting and Corporate Governance Practices," Government Accountability Office, November 2016 [GAO-17-47] https://www.gao.gov/assets/gao-17-47.pdf.

[124] Yonca Ertimur, Fabrizio Ferri, and David Oesch, "Shareholder Votes and Proxy Advisors: Evidence from Say on Pay," p. 3, pp. 22-23 and Table 6 of the SSRN version, *Journal of Accounting Research*, Vol. 51, No. 5, December 2013, pp. 951-996 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2019239; Testimony of Thomas Quaadman, "Legislative Proposals to Examine Corporate Governance," United States Senate Committee on Banking, Housing, and Urban Affairs, June 28, 2018 https://www.banking.senate.gov/imo/media/doc/Quaadman%20Testimony%206-28-18.pdf.

[125] See data available at "All Fund Companies," https://mutualfunddirectory.org/latest-directory-ranking-here/.

[126] "Facts at a Glance," *Investment Company Factbook*, 60th Edition, Investment Company Institute (2020), p. ii https://www.ici.org/system/files/attachments/pdf/2020_factbook.pdf.

[127] The top fifteen mutual fund managers (ranked by net assets under management) were BlackRock, Vanguard Group, Charles Scwab, Fidelity Investments, State Street Global Advisors, PIMCO/Allianz, J.P. Morgan, Capital Group, BNY Mellon (Dreyfus), Amundi Asset Management, Prudential Investments, T. Rowe Price, Legal & General Investments, Franklin Templeton, and BofA Merrill Lynch. These 15 firms had $50.6 trillion under management (invested in all securities

clear how much. Overall, institutional investors control about 71 percent of the shares held in the United States.[128] This concentration means that an extremely small group, perhaps as few as 20 proxy advisory firms and investment fund managers can exercise effective control over most public corporations in the United States.

The focus of the materiality standard should remain on what investors need to know to meet their financial, economic or pecuniary objectives, not a regulator's preferred political or social objectives or those of politically motivated fund managers or proxy advisors. Congress should statutorily define materiality in terms generally consonant with Supreme Court holdings on the issue but should specifically exclude social and political objectives unrelated to investors' financial, economic or pecuniary objectives.[129] The Commission could either support such action or take similar action via rulemaking.[130]

Traditionally, the purpose of a business has been to earn a return for its owners by cost-effectively combining the capital and entrepreneurial spirit of its founders and owners with the labor and talent of its employees in a competitive environment to satisfy the wants and needs of its customers. The relationship between owners, management, workers, suppliers, and customers are (subject to certain broad constraints imposed by law) privately decided and voluntary.

The effort to redefine materiality in the securities laws is part of an increasingly strident effort to redefine the purpose of businesses more generally to achieve various social or political objectives unrelated to earning a return, satisfying customers, or treating workers or suppliers fairly. This is being done under the banner of social justice; corporate social responsibility (CSR); stakeholder theory; environmental, social and governance (ESG) criteria; socially responsible investing (SRI); sustainability; diversity; business ethics; common-good capitalism; or corporate actual responsibility.

If successful, these attempts to redefine the purpose of business would have marked adverse social consequences. To wit:

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worldwide). The total market capitalization of the U.S. stock market on March 31, 2021 was approximately $49 trillion. See "Total Market Capitalization of Public U.S. Companies (USD, Millions)," Siblis Research https://siblisresearch.com/data/us-stock-market-value/. The Wilshire 5000 appreciated 5.5 percent between March 31 and April 27, 2021 implying a total U.S. stock market capitalization as of April 27th of about $52 trillion.

[128] "ProxyPulse: 2020 Proxy Season Review," Broadridge Investor Communication Solutions and PricewaterhouseCoopers (2020), p. 4 https://www.broadridge.com/_assets/pdf/broadridge-proxypulse-2020-review.pdf.

[129] In section 2 of the Securities Act Congress could define "material" as follows:

> "(20) The term "material" means, when used to qualify a requirement for the furnishing of information as to any subject, information limited to those matters regarding which there is a substantial likelihood that a reasonable investor would attach importance when –
>
> (i) evaluating the potential financial return and financial risks of an existing or prospective investment, or
>
> (ii) exercising, or declining to exercise, any rights appurtenant to securities.
>
> The term "material" does not include, when used to qualify a requirement for the furnishing of information as to any subject, information that –
>
> (i) primarily furthers non-pecuniary, non-economic or non-financial social or political goals or objectives, or
>
> (ii) primarily relates to events that –
>
> (A) involve a high degree of uncertainty regarding what may or may not occur in the distant future, and
>
> (B) are systemic, general or not issuer specific in nature.

[130] The Commission could, of course, revise 17 CFR § 240.12b-2.

- Management would be even less accountable to anyone since the metrics of success will become highly amorphous and constantly changing.
- Businesses would become less productive and less competitive. Jobs would be lost, and wages would grow more slowly.
- The return to investors can be expected to decline.
- By creating large inefficiencies in the economy and allocating resources politically, the social welfare cost of going down this road would be considerable.

The Rule Constitutes Unconstitutional Compelled Speech

The proposed rule compels speech. The question is whether it is, in context and as written, unconstitutional compelled speech. Compelled speech is generally unconstitutional.[131] While businesses, thankfully,[132] have First Amendment rights,[133] they are more limited than those of natural persons.

The Supreme Court noted in *National Institute of Family and Life Advocates v. Becerra* (2018)[134] that it

> … has afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that require professionals to disclose ***factual, noncontroversial information*** in their "commercial speech. Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech. (emphasis added) (citations omitted) [135]

The court continued:

> Outside of the two contexts discussed above — disclosures under Zauderer and professional conduct — this Court's precedents have long protected the First Amendment rights of professionals. … Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields.[136]

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[131] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us. We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power, and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.") 319 U. S. 624, 642 (1943).
[132] Since most of media are corporately owned, holding otherwise would eviscerate the First Amendment.
[133] See, e.g., *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) ("The Court has recognized that First Amendment protection extends to corporations."). See also the many cases cited therein.
[134] *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___ (2018), 138 S. Ct. 2361; 201 L. Ed. 2d 835. See slip opinion at pp. 8-9 https://www.supremecourt.gov/opinions/17pdf/16-1140_5368.pdf.
[135] Citations omitted to *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626, 651 (1985); *Milavetz, Gallop & Milavetz, P. A. v. United States*, 559 U. S. 229, 250 (2010); *Ohralik v. Ohio State Bar Assn*., 436 U. S. 447, 455–456 (1978), *id*., at 456; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 884 (1992) (opinion of O'Connor, KENNEDY, and Souter, JJ.)."
[136] *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___ (2018). See slip opinion at pp. 11-12, 13 https://www.supremecourt.gov/opinions/17pdf/16-1140_5368.pdf.

For example, the DC Court of Appeals recently explicated what the term “controversial” means in the context of ruling the SEC conflict minerals rule unconstitutional. That analysis is on point and, in fact, directly mentions the question of global warming disclosures.

> One clue is that "uncontroversial," as a legal test, must mean something different than "purely factual." Hence, the statement in AMI we just quoted, describing "controversial in the sense that [the compelled speech] communicates a message that is controversial for some reason other than [a] dispute about simple factual accuracy." AMI, 760 F.3d at 27. Perhaps the distinction is between fact and opinion. But that line is often blurred, and it is far from clear that all opinions are controversial. Is Einstein's General Theory of Relativity fact or opinion, and should it be regarded as controversial? If the government required labels on all internal combustion engines stating that "USE OF THIS PRODUCT CONTRIBUTES TO GLOBAL WARMING" would that be fact or opinion? It is easy to convert many statements of opinion into assertions of fact simply by removing the words "in my opinion" or removing "in the opinion of many scientists" or removing "in the opinion of many experts."[137] (Capital letter emphasis in original)
>
> It [the conflict minerals rule] requires an issuer to tell consumers that its products are ethically tainted, even if they only indirectly finance armed groups. An issuer, including an issuer who condemns the atrocities of the Congo war in the strongest terms, may disagree with that assessment of its moral responsibility. And it may convey that `message' through `silence.' See Hurley, 515 U.S. at 573, 115 S.Ct. 2338. By compelling an issuer to confess blood on its hands, the statute interferes with that exercise of the freedom of speech under the First Amendment.[138]

The primary objective of the proposed rule is not to protect investors by providing them with information relevant to the financial outcomes of issuers but to force issuers to provide information, including information about GHG emissions and about board deliberations, that can then be used against them politically.

The Supreme Court has applied strict scrutiny to content-based laws.[139] The SEC climate change proposed rule is content-based. The proposed rule is also “controversial” within the meaning of the case law. Thus, the proposed rule, as written, is likely to be ruled unconstitutional compelled speech.[140]

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137 *National Association of Manufacturers v. S.E.C.*, 800 F.3d 518, 528 (D.C. Cir., 2015).
138 Ibid. at p. 529.
139 Ibid., slip opinion at p. 13. See also *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015).
140 For a more detailed discussion of these issues, see Sean J. Griffith, What’s “Controversial” About ESG? A Theory of Compelled Commercial Speech under the First Amendment, May 24, 2022 https://ssrn.com/abstract=4118755 (“The SEC’s recently proposed climate disclosure rules fail to satisfy these requirements. Instead, the proposed climate rules create controversy by imposing a political viewpoint, by advancing an interest group agenda at the expense of investors generally, and by redefining concepts at the core of securities regulation. Having created controversy, the proposed rules are ineligible for deferential judicial review. Instead, a form of heightened scrutiny applies, under which they will likely be invalidated.”). See also Comment Letter of Christopher A. Iacovella, Chief Executive Officer, American Securities Association June 13, 2022 https://www.sec.gov/comments/s7-10-22/s71022-20131037-300856.pdf; Letter of Patrick Morrisey, Attorney General, State of West Virginia to Allison Herren Lee, March 25, 2021 https://ago.wv.gov/Documents/Letter%20to%20Acting%20Chair%20Lee.pdf.

Material Actions by Management in Furtherance of Social and Political Objectives that Reduce Returns must be Disclosed

Many environmentally constructive corporate actions will occur in the absence of any government mandate or required disclosure. For example, energy conservation measures may reduce costs as well as emissions. No new laws or regulations are necessary to induce firms to take these actions. Assuming they are not utterly pointless, climate change disclosure laws presumably are designed to induce management to take action that they would not otherwise take. To the extent management takes material actions in furtherance of social and political objectives (including ESG objectives) that reduce shareholder returns, whether induced by climate change disclosure requirements or taken for other reasons, they should be required to disclose that information. The Commission should ensure that they do so. I have not yet had a chance to evaluate the recently proposed rule on the subject with respect to investment advisers,[141] but the Commission is right that there are problems that need to be addressed.

Investors, of course, are free to invest in benefit corporations that explicitly have a dual purpose (both social or philanthropic and profit). Few do so. They may invest in funds that have a social as well as investment purpose. A small proportion do so. When afforded the opportunity to vote on shareholder resolutions that would instruct management to pursue social goals, very few do so. That is especially true of ordinary investors.

Climate Change Disclosure Requirements Would Have No Meaningful Impact on the Climate

The SEC's proposing release largely justifies the proposed rule on the grounds that investors want and will benefit from the mandated climate change disclosure. As discussed about, the "investors" that are "demanding" this information are not actual investors but politically motivated pension fund fiduciaries, mutual fund and ETF RIAs and proxy advisors that have either political motivations or are trying to market ESG funds. There is also strong support for the rule from those that will make billions of dollars from the rule – the accounting firms, law firms, economists, climate consultants and compliance officers that will live off the rule.

But among people who do not have a financial interest in the proposed rule, the true reason that most people support the rule is simply that they believe it will have an impact on the climate by reducing GHG emissions. The EPA already requires GHG emissions reporting.[142] It estimates that the required reporting under their rule covers 85–90% of all GHG emissions from over 8,000 facilities in the United States.[143] The very limited increase in actual information that will be achieved by the proposed rule will make virtually no difference. And, if it is thought that it will, by far the most efficient and effective means of increasing the information available would be to amend the EPA rules.

As discussed in detail above, the information elicited by the rule, especially scope 3 reporting, will be extraordinarily unreliable built on a speculative house of cards that would raise fraud issues in any other context. Unreliable information – fiction really – is not going to be the basis for changing the climate.

[141] "Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices," Proposed Rule, May 25, 2022 https://www.sec.gov/rules/proposed/2022/33-11068.pdf.
[142] Greenhouse Gas Reporting Program (GHGRP) https://www.epa.gov/ghgreporting/ghgrp-reported-data.
[143] Proposing release at p. 21414.

It also strains credibility to believe that including this unreliable, immaterial information in financial statement footnotes and other disclosure documents is going having such a meaningful impact on investors and capital flows that it will have a significant impact on the climate. It will take massive changes in investment and behavior to have even a measurable if trivial impact on the climate.

That massive behavior change will not occur. Markets tend to equate risk-adjusted returns across securities. To the extent that the disclosure succeeds in reorienting some capital away from disfavored companies, their stock price will temporarily decline and the expected return from purchasing that stock will increase.[144] Non-woke investors - those seeking a return rather than social objectives - will step in to bid the stock price back up so that the present discounted value of expected future returns are equal. In other words, they will arbitrage away the differential returns. This is likely to happen very quickly. For so long as a substantial proportion of global investing public is seeking returns rather than political results, this will be the case. This analysis is similar to the arbitrage analysis when only some countries impose sanctions and why sanctions that are not nearly universal are ineffective.[145]

I fear that the only way that this disclosure will have even the slightest impact is if the disclosure is weaponized by a highly politicized SEC that launches enforcement action after enforcement action against disfavored industries seeking billions of dollars in fines (nominally for disclosure violations) in an effort to drive them from conventional fuel use. If the SEC does this and coordinates with the banking regulators to cut off credit, then the approach may have some small effect on the climate. Such an approach, however, would have a devastating impact on investors, retirement funds, workers and consumers.

The Proposed Rule, to the Extent it is Effective in Its True Objective, will Harm U.S. Energy Independence

The Biden administration has taken a series of steps to impede conventional fuel production in the United States.[146] To the extent that the proposed rule is effective in achieving its true objective of reorienting capital away from conventional fuels, it is part of this policy agenda. To the extent it is effective in achieving its rue objective, it will make the United States more dependent on foreign producers, more susceptible to supply shocks caused by war or supply constraints induced by hostile foreign actors and more dependent on unreliable alternative energy sources that source many of their components in countries that are geopolitical rivals like China. For the reasons outlined in the previous section, it is unlikely to be effective in achieving this result unless a highly politicized SEC launches enforcement action after enforcement action against disfavored industries seeking billions of dollars in fines. We should be removing regulatory impediments to energy independence not creating them.

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[144] In principle, a stock's value is the present discounted value of its expected future returns. If the expected future returns have not changed, then the stock would be undervalued. Changes in the discount rate can also affect price but that effect would be the same for all securities.

[145] The transactions costs associated with evading trade or financial sanctions will typically be substantially higher than with publicly traded securities.

[146] Katie Tubb, "Biden's Many Anti-Energy Policies Are Hurting Producers, Consumers Alike," December 17, 2021 https://www heritage.org/energy-economics/commentary/bidens-many-anti-energy-policies-are-hurting-producers-consumers-alike; David A. Ditch, Katie Tubb, and Preston Brashers, "Gas Prices: Policy Gimmicks Are No Solution," Heritage Foundation Backgrounder No. 3699, April 6, 2022 https://www.heritage.org/sites/default/files/2022-04/BG3699.pdf; Drew Bond and James Jay Carafano, "An Action Plan for America's Energy Security," April 7. 2022 https://www heritage.org/energy-economics/commentary/action-plan-americas-energy-security.

ESG Requirements will Make Management Even Less Accountable

In large, modern corporations there is a separation of ownership and control. There is a major agent-principal problem because management and the board of directors often, to varying degrees, pursue their own interest rather than the interests of shareholders. Profitability is, however, a fairly clear measure of the success or failure of management and the board. If a firm become unprofitable or lags considerably in profitability, the board may well replace management, shareholders may replace the board or another firm may attempt a takeover.

The proposed rule will make management dramatically less accountable since climate change and other ESG requirement (diversity, human capital management, etc.) will come at the expense of profitability (otherwise it would be done in the absence of a regulatory requirement) and the metrics relating to success or failure of achieving ESG or CSR requirements will be largely unquantifiable. For that matter, ESG or CSR requirements themselves tend to be amorphous and ever changing.

Fund Managers Attempts to Profit from SRI at the Expense of Investors Should be Policed

To the extent fund managers (RIAs) take material actions in furtherance of social and political objectives (including ESG objectives) that reduce fund shareholder returns, they should be required to disclose that information. The Commission should ensure that they do so. Absent some drastic change in the underlying law by Congress, this principle would apply to a reduction in returns induced by ESG disclosures or taken by management on its own initiative to achieve social and political objectives. I have not yet had a chance to evaluate the recently proposed rule on the subject,[147] but the Commission is right that there are problems that need to be addressed.

Fund management firms are generally compensated from either sales commissions (often called loads) or investment management fees that are typically based on assets under management. Their compensation is not closely tied to performance. Thus, these firms will often see a financial advantage in selling "socially responsible" products that perform no better and often worse than conventional investments. It is doubtful that this is consistent with Regulation BI. In any event, they can both court political favor from progressive politicians and organizations and enhance profitability from moving customers into different funds. Their new-found interest in socially responsible investing should be taken with the proverbial grain of salt.

Congress, the Commission and other regulatory agencies[148] need to be make it clear that investment advisers managing investment funds or those managing retirement funds or accounts have a duty to manage those funds and vote the shares held by the funds in the financial, economic or pecuniary interest of millions[149] of small investors and not in furtherance of managers' preferred political objectives.[150]

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[147] "Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices," Proposed Rule, May 25, 2022 https://www.sec.gov/rules/proposed/2022/33-11068.pdf.

[148] Most importantly, the Department of Labor, Employee Benefits Security Administration (regarding those retirement accounts and plans regulated under the Employee Retirement Income Security Act of 1974 (ERISA)).

[149] 15 percent of all families directly hold stock and 53 percent hold stock in some form (including retirement accounts and mutual funds). See *Survey of Consumer Finances*, 2019, Federal Reserve Board at https://www federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Directly_Held_Stocks;demographic:all;population:1;units:have and https://www federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Stock_Holdings;demographic:all;population:1;units:have.

Responses to Specific Requests for Comment

Question 2. If adopted, how will investors utilize the disclosures contemplated in this release to assess climate-related risks? How will investors use the information to assess the physical effects and related financial impacts from climate-related events? How will investors use the information to assess risks associated with a transition to a lower carbon economy?

Response 2. The proposed rule will require the production and reporting of massive amounts of immaterial information. This will not be used by investors for investment purposes. It will be used by political actors and potentially by politicized government agencies to pressure and attack issuers. It may be used by certain registered investment advisers, proxy advisers or pension fund managers seeking to achieve a political, not an investment, result. Furthering these political objectives is inconsistent with the Commission's mission and beyond its statutory authority.

Question 4. Do our current reporting requirements yield adequate and sufficient information regarding climate-related risks to allow investors to make informed decisions? In lieu of, or in addition to the proposed amendments, should we provide updated guidance on how our existing rules may elicit better disclosure about climate-related risks?

Response 4. Yes, current reporting requirements yield adequate and sufficient information regarding climate-related risks to allow investors to make informed decisions. Current rules require the disclosure of material climate-related risk. They are sufficient and to the extent that they may not be adequate, modest changes would do the job. Climate-related risks are just one of a myriad of risks that issuers face. They do not deserve special treatment and do not warrant the imposition of the draconian costs on issuers that the proposed rule would impose. The massive costs imposed by this rule are unprecedented and will have unprecedented adverse effects on investors, issuers and capital markets.

Question 5. Should we require a registrant to present the climate-related disclosure in an appropriately captioned, separate part of the registration statement or annual report, as proposed? Should this disclosure instead be presented as part of the registrant's MD&A?

Response 5. Climate related risk is not special as an investment matter. Politically, of course, it is. If climate related risk is material, it should be reported. But it is one among many, many risk factors and typically will be far from the most important risk that an issuer faces.

Question 6. Should we permit a registrant to incorporate by reference some of the climate-related disclosure from other parts of the registration statement or annual report, as proposed? Should we permit

[150] The Trump Administration took steps in this regard. See Financial Factors in Selecting Plan Investments," Final Rule, Employee Benefits Security Administration, Department of Labor, *Federal Register*, Vol. 85, No. 220, November 13, 2020 https://www.govinfo.gov/content/pkg/FR-2020-11-13/pdf/2020-24515.pdf; Fiduciary Duties Regarding Proxy Voting and Shareholder Rights," Final Rule, Employee Benefits Security Administration, Department of Labor, *Federal Register*, Vol. 85, No. 242, December 16, 2020 https://www.govinfo.gov/content/pkg/FR-2020-12-16/pdf/2020-27465.pdf. The Biden administration appears to be poised to reverse these steps. "U.S. Department of Labor Statement Regarding Enforcement of its Final Rules On ESG Investments and Proxy Voting by Employee Benefit Plans," March 10, 2021 https://aboutblaw.com/WaM ("Until it publishes further guidance, the Department will not enforce either final rule or otherwise pursue enforcement actions against any plan fiduciary based on a failure to comply with those final rules with respect to an investment …").

a registrant to incorporate by reference climate-related disclosure that appears in a sustainability report if the registrant includes the incorporated by referenced disclosure as an exhibit to the registration statement or annual report? Are there some climate-related disclosure items, such as GHG emissions data, that we should not permit a registrant to incorporate by reference? Would requiring a registrant to include all of the proposed climate-related disclosures in a separate, appropriately captioned section, while precluding a registrant from incorporating by reference some or all of the climate-related disclosures, promote comparability and ease of use of the climate-related information for investors?

Response 6. You should permit registrants to satisfy the Commission reporting requirements by either incorporating by reference their EPA GHG emissions report or slightly modifying it.

Question 8. Should we require a registrant to disclose any climate-related risks that are reasonably likely to have a material impact on the registrant, including on its business or consolidated financial statements, which may manifest over the short, medium, and long term, as proposed? If so, should we specify a particular time period, or minimum or maximum range of years, for "short," "medium," and "long term?" For example, should we define short term as 1 year, 1-3 years, or 1-5 years? Should we define medium term as 5-10 years, 5-15 years, or 5-20 years? Should we define long-term as 10-20 years, 20-30 years, or 30-50 years? Are there other possible years or ranges of years that we should consider as the definitions of short, medium, and long term? What, if any, are the benefits to leaving those terms undefined? What, if any, are the concerns to leaving those terms undefined? Would the proposed provision requiring a registrant to specify what it means by the short, medium, and long term mitigate any such concerns?

Response 8. The best means of addressing this issue is to require any analysis of material climate related risks to discount future costs. This is the only means, and the almost universal means in economics and finance, of making costs that occur at different times comparable. Arbitrary temporal divisions are not helpful and usually misleading. There is a serious debate regarding what discount rate should be employed. Typically, businesses use discount rates that reflect their cost of capital and implicitly use an entirely appropriate opportunity cost analysis. Others may argue for lower "social" discount rates. The absolute floor discount rate would be the "risk free rate of return," usually taken to mean U.S. Treasury securities. The Commission should provide guidance on these matters.

Question 9. Should we define "climate-related risks" to mean the actual or potential negative impacts of climate-related conditions and events on a registrant's consolidated financial statements, business operations, or value chains, as proposed? Should we define climate-related risks to include both physical and transition risks, as proposed? Should we define physical risks to include both acute and chronic risks and define each of those risks, as proposed? Should we define transition risks, as proposed? Are there any aspects of the definitions of climate-related risks, physical risks, acute risks, chronic risks, and transition risks that we should revise? Are there other distinctions among types of climate-related risks that we should use in our definitions? Are there any risks that we should add to the definition of transition risk? How should we address risks that may involve both physical and transition risks?

Response 9. See the discussion above under the heading "Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform."

Question 10. We define transition risks to include legal liability, litigation, or reputational risks. Should we provide more examples about these types of risks? Should we require more specific disclosures about how a registrant assesses and manages material legal liability, litigation, or reputational risks that may arise from a registrant's business operations, climate mitigation efforts, or transition activities?

Response 10. See the discussion above under the heading "Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform."

Question 11. Some chronic risks might give rise to acute risks, *e.g.*, drought (a chronic risk) that increases acute risks, such as wildfires, or increased temperatures (a chronic risk) that increases acute risks, such as severe storms. Should we require a registrant to discuss how the acute and chronic risks they face may affect one another?

Response 11. See the discussion above under the heading "Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform."

Question 12. For the location of its business operations, properties or processes subject to an identified material physical risk, should we require a registrant to provide the ZIP code of the location or, if located in a jurisdiction that does not use ZIP codes, a similar subnational postal zone or geographic location, as proposed? Is there another location identifier that we should use for all registrants, such as the county, province, municipality or other subnational jurisdiction? Would requiring granular location information, such as ZIP codes, present concerns about competitive harm or the physical security of assets? If so, how can we mitigate those concerns? Are there exceptions or exemptions to a granular location disclosure requirement that we should consider?

Response 12. There is simply no possible scenario in which the zip code or similarly granular location information is *material* to investment outcomes. This is clearly a part of somebody's political objective to place pressure on issuers, probably so they can demonstrate at issuer's locations.

Question 13. If a registrant determines that the flooding of its buildings, plants, or properties is a material risk, should we require it to disclose the percentage of those assets that are in flood hazard areas in addition to their location, as proposed? Would such disclosure help investors evaluate the registrant's exposure to physical risks related to floods? Should we require this disclosure from all registrants, including those that do not currently consider exposure to flooding to be a material physical risk? Should we require this disclosure from all registrants operating in certain industrial sectors and, if so, which sectors? Should we define "flood hazard area" or provide examples of such areas? If we should define the term, should we define it similar to a related definition by the Federal Emergency Management Agency ("FEMA") as an area having flood, mudflow or flood-related erosion hazards, as depicted on a flood hazard boundary map or a flood insurance rate map? Should we require a registrant to disclose how it has defined "flood hazard area" or whether it has used particular maps or software tools when determining whether its buildings, plants, or properties are located in flood hazard areas? Should we recommend that certain maps be used to promote comparability? Should we require disclosure of whether a registrant's assets are located in zones that are subject to other physical risks, such as in locations subject to wildfire risk?

Response 13. See the discussion above under the heading "Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform."

Question 14. If a material risk concerns the location of assets in regions of high or extremely high water stress, should we require a registrant to quantify the assets (*e.g.*, book value and as a percentage of total assets) in those regions in addition to their location, as proposed? Should we also require such a registrant to disclose the percentage of its total water usage from water withdrawn in high or extremely high water stressed regions, as proposed? If so, should we include a definition of a "high water stressed region" similar to the definition provided by the World Resource Institute as a region where 40-80 percent of the water available to agricultural, domestic, and industrial users is withdrawn annually? Should we similarly define an "extremely high water stressed area" as a region where more than 80 percent of the water available to agricultural, domestic, and industrial users is withdrawn annually? Are there other definitions of high or extremely high water stressed areas we should use for purposes of this disclosure? Would these items of information help investors assess a registrant's exposure to climate-related risks impacting water availability? Should we require the disclosure of these items of information from all registrants, including those that do not currently consider having assets in high water-stressed areas a material physical risk? Should we require these disclosures from all registrants operating in certain industrial sectors and, if so, which sectors?

Response 14. See the discussion above under the heading "Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform."

Question 15. Are there other specific metrics that would provide investors with a better understanding of the physical and transition risks facing registrants? How would investors benefit from the disclosure of any additional metrics that would not necessarily be disclosed or disclosed in a consistent manner by the proposed climate risk disclosures? What, if any, additional burdens would registrants face if they were required to disclose additional climate risk metrics?

Response 15. Only disclosure of climate risks that are material to the financial outcome of the firm should be disclosed. The proposed rule would already impose more costs than all of the other Commission rules combined. Additional requirements would be ridiculous.

Question 17. Should we include the negative impacts on a registrant's value chain in the definition of climate-related risks, as proposed? Should we define "value chain" to mean the upstream and downstream activities related to a registrant's operations, as proposed? Are there any upstream or downstream activities included in the proposed definition of value chain that we should exclude or revise? Are there any upstream or downstream activities that we should add to the definition of value chain? Are there any upstream or downstream activities currently proposed that should not be included?

Response 17. As discussed above under the subheading "Scope 3 Emission Reporting: Cascading and Double Counting" under the heading "The Commission's Economic Analysis is Seriously Deficient," the scope 3 value chain upstream or downstream activities reporting will result in massive and misleading cascading and double counting, plausibly resulting in the same emissions being reported 7 to 10 times.

Question 19. Should we require a registrant to describe the actual and potential impacts of its material climate-related risks on its strategy, business model, and outlook, as proposed? Should we require a registrant to disclose impacts from climate-related risks on, or any resulting significant changes made to, its business operations, including the types and locations of its operations, as proposed?

Response 19. This is among the most burdensome and intrusive aspect of the proposed rule and will require the publication of much proprietary information.

Question 21. Should we require a registrant to specify the time horizon applied when assessing its climate-related impacts (*i.e.*, in the short, medium, or long term), as proposed?

Response 21. The best means of addressing this issue is to require any analysis of material climate related risks to discount future costs. This is the only means, and the almost universal means in economics and finance, of making costs that occur at different times comparable. Arbitrary temporal divisions are not helpful and usually misleading. There is a serious debate regarding what discount rate should be employed. Typically, businesses use discount rates that reflect their cost of capital and implicitly use an entirely appropriate opportunity cost analysis. Others may argue for lower "social" discount rates. The absolute floor discount rate would be the "risk free rate of return," usually taken to mean U.S. Treasury securities. The Commission should provide guidance on these matters.

Question 22. Should we require a registrant to discuss whether and how it considers any of the described impacts as part of its business strategy, financial planning, and capital allocation, as proposed? Should we require a registrant to provide both current and forward-looking disclosures to facilitate an understanding of whether the implications of the identified climate-related risks have been integrated into the registrant's business model or strategy, as proposed? Would any of the proposed disclosures present competitive concerns for registrants? If so, how can we mitigate such concerns?

Response 22. This is among the most burdensome and intrusive aspect of the proposed rule and will require the publication of much proprietary information.

Question 23. Should we require the disclosures to include how the registrant is using resources to mitigate climate-related risks, as proposed? Should the required discussion also include how any of the metrics or targets referenced in the proposed climate-related disclosure subpart of Regulation S-K or Article 14 of Regulation S-X relate to the registrant's business model or business strategy, as proposed? Should we require additional disclosures if a registrant leverages climate-related financing instruments, such as green bonds or other forms of "sustainable finance" such as "sustainability-linked bonds," "transition bonds," or other financial instruments linked to climate change as part of its strategy to address climate-related risks and opportunities? For example, should we require disclosure of the climate-related projects that the registrant plans to use the green bond proceeds to fund? Should we require disclosure of key performance metrics tied to such financing instruments?

Response 23. See the discussion above under the heading "Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform."

Question 25. Should we require a registrant to provide a narrative discussion of whether and how any of its identified climate-related risks have affected or are reasonably likely to affect its consolidated financial statements, as proposed? Should the discussion include any of the financial statement metrics in proposed 17 CFR 210.14-02 (14-02 of Regulation S-X) that demonstrate that the identified climate-related risks have had a material impact on reported operations, as proposed? Should the discussion include a tabular representation of such metrics? 26. Should we require registrants to disclose information about an internal carbon price if they maintain one, as proposed? If so, should we require that the registrant disclose:

- The price in units of the registrant's reporting currency per metric ton of CO_2e;
- The total price;
- The boundaries for measurement of overall CO_2e on which the total price is based if different from the GHG emission organizational boundary required pursuant to 17 CFR 210.14-03(d)(4); and
- The rationale for selecting the internal or shadow carbon price applied, as proposed?

Should we also require registrants to describe the methodology used to calculate its internal carbon price?

Response 25. If the disclosure is material necessary to prepare financial statements under generally accepted accounting principles, yes. Otherwise, no. The internal cost of carbon reporting is not required under GAAP. It is not material to the financial outcome of the firm. The Commission should not require extraneous material in financial statements.

Question 27. Should we also require a registrant to disclose how it uses the described internal carbon price to evaluate and manage climate-related risks, as proposed? Should we further require a registrant that uses more than one internal carbon price to provide the above disclosures for each internal carbon price, and disclose its reasons for using different prices, as proposed? Are there other aspects regarding the use of an internal carbon price that we should require to be disclosed? Would disclosure regarding any internal carbon price maintained by a registrant elicit important or material information for investors? Would requiring the disclosure of the registrant's use of an internal carbon price raise competitive harm concerns that would act as a disincentive from the use of an internal carbon price? If so, should the Commission provide an accommodation that would mitigate those concerns? For example, are there exceptions or exemptions to an internal carbon price disclosure requirement that we should consider?

Response 27. If the disclosure is material to reporting the financial statements under generally accepted accounting principles, yes. Otherwise, no. The internal cost of carbon reporting is not required under GAAP. It is not material to the financial outcome of the firm. The Commission should not require extraneous material in financial statements.

Question 29. Should we require all registrants to disclose an internal carbon price and prescribe a methodology for determining that price? If so, what corresponding disclosure requirements should we include in connection with such mandated carbon price? What methodology, if any, should we prescribe for calculating a mandatory internal or shadow carbon price? Would a different metric better elicit disclosure that would monetize emissions?

Response 29. Reporting and monetizing emissions information independent of the materiality of its impact on the firm's financial outcome and GAAP should not be part of the SEC's mission.

Question 30. Should we require a registrant to disclose analytical tools, such as scenario analysis, that it uses to assess the impact of climate-related risks on its business and consolidated financial statements, and to support the resilience of its strategy and business model, as proposed? What other analytical tools do registrants use for these purposes, and should we require disclosure of these other tools? Are there other situations in which some registrants should be required to conduct and provide disclosure of scenario analysis? Alternatively, should we require all registrants to provide scenario analysis disclosure? If a registrant does provide scenario analysis disclosure, should we require it to follow certain publicly available scenario models, such as those published by the IPCC, the IEA, or NGFS and, if so, which scenarios? Should we require a registrant providing scenario analysis disclosure to include the scenarios considered (*e.g.*, an increase of global temperature of no greater than 3 º, 2 º, or 1.5 ºC above pre-industrial levels), the parameters, assumptions, and analytical choices, and the projected principal financial impacts on the registrant's business strategy under each scenario, as proposed? Are there any other aspects of scenario analysis that we should require registrants to disclose? For example, should we require a registrant using scenario analysis to consider a scenario that assumes a disorderly transition? Is there a need for us to provide additional guidance regarding scenario analysis? Are there any aspects of scenario analysis in our proposed required disclosure that we should exclude? Should we also require a registrant that does not use scenario analysis to disclose that it has not used this analytical tool? Should we also require a registrant to disclose its reasons for not using scenario analysis? Will requiring disclosure of scenario analysis if and when a registrant performs scenario analysis discourage registrants from conducting scenario analysis? If so, and to the extent scenario analysis is a useful tool for building strategic resilience, how could our regulations prevent such consequences?

Response 30. See the discussion above under the heading "Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform."

Question 31. Would the PSLRA forward-looking statement safe harbors provide adequate protection for the proposed scenario analysis disclosure? Should we instead adopt a separate safe harbor for scenario analysis disclosure? If so, what disclosures should such a safe harbor cover that would not be covered by the PSLRA safe harbors and what should the conditions be for such a safe harbor?

Question 32. Should we adopt a provision similar to 17 CFR 229.305(d) that would apply the PSLRA forward-looking statement safe harbor to forward-looking statements made in response to specified climate-related disclosure items, such as proposed Item 1502 and Item 1505 (concerning targets and goals) of Regulation S-K? If so, which proposed items should we specifically include in the safe harbor?

Question 33. As proposed, a registrant may provide disclosure regarding any climate-related opportunities when responding to any of the provisions under proposed 17 CFR 229.1502 (Item 1502). Should we require disclosure of climate-related opportunities under any or all of the proposed Item 1502 provisions?

Response 31-33. Given the issues discussed above under the heading "Climate Models and Climate Science are Highly Uncertain," "Economic Modeling of Climate Change Effects is Even More Uncertain," "The Commission Has Neither the Expertise nor the Administrative Ability to Assess the Veracity of Issuer Climate Change Disclosures," "The Proposed Climate Change Disclosure Requirements Would Result in Much Litigation," and "The Commission's Economic Analysis is Seriously Deficient," broad safe harbors will be required unless the Commission wants to seriously enrich the plaintiffs' bar and impose even more devastating costs on issuers. That is quite inevitable in the absence of a robust safe harbor. Issuers and their management should only be liable for "actual knowledge by that person that the statement was false or misleading"[151] (i.e. actual fraud). That, however, is problematic because we know that the disclosures required by the proposed rule are going to be erroneous and misleading even if compliance is undertaken in total good faith. The Commission is

[151] 15 U.S. Code § 78u–5.

requiring issuers to report information that is so suspect and unreliable that it would raise fraud issues in any other context. I would recommend that no liability attach whatsoever for reporting under the proposed rule. CorpFin review should be sufficient.

Question 34. Should we require a registrant to describe, as applicable, the board's oversight of climate-related risks, as proposed? Should the required disclosure include whether any board member has expertise in climate-related risks and, if so, a description of the nature of the expertise, as proposed? Should we also require a registrant to identify the board members or board committee responsible for the oversight of climate-related risks, as proposed? Do our current rules, which require a registrant to provide the business experience of its board members, elicit adequate disclosure about a board member's or executive officer's expertise relevant to the oversight of climate-related risks?

Response 34. Climate related risk is not special as an investment or business operations matter. It is one among many, many risk factors and typically will be far from the most important risk that an issuer's board faces. The very question presumes, falsely, that it is generally among the most important risks that issuers face. The only reason for such a disclosure is politics.

Question 35. Should we require a registrant to disclose the processes and frequency by which the board or board committee discusses climate-related risks, as proposed?

Response 35. Climate related risk is not special as an investment or business operations matter. It is one among many, many risk factors and typically will be far from the most important risk that an issuer's board faces. The very question presumes, falsely, that it is generally among the most important risks that issuers face. The only reason for such a disclosure is politics. Such a requirement would also represent an unprecedented intrusion into board deliberations. Boards, for political reasons, will want to be seen as talking about climate change at every board meeting. This will result in less time being devoted to other material risks and other matters that will be more important to most issuers. It is just one more way that this proposed rule could result in the neglect of the actual mission of corporate boards and the Commission.

Question 37. Should we require a registrant to disclose whether and how the board sets climate-related targets or goals, as proposed? Should the required disclosure include how the board oversees progress against those targets or goals, including whether it establishes any interim targets or goals, as proposed? Would the proposed disclosure raise competitive harm concerns? If so, how could we address those concerns while requiring additional information for investors about how a registrant's board oversees the setting of any climate-related targets or goals?

Response 37. Whether the board has set or agreed to climate-related targets or goals, if material, is one thing. Requiring disclosure as to how those targets were agreed to is unnecessary and will hinder the ability of boards and management to have franks deliberations and discussions.

Question 38. Should we require a registrant to describe, as applicable, management's role in assessing and managing climate-related risks, as proposed? Should the required disclosure include whether certain management positions or committees are responsible for assessing and managing climate-related risks and, if so, the identity of such positions or committees, and the relevant expertise of the position holders or members in such detail as necessary to fully describe the nature of the expertise, as proposed? Should we require a registrant to identify the executive officer(s) occupying such position(s)? Or do our current rules, which require a registrant to provide the business experience of its executive officers, elicit adequate disclosure about management's expertise relevant to the oversight of climate-related risks?

Response 38. See the discussion above under the heading "Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform."

Question 39. Should we require a registrant to describe the processes by which the management positions or committees responsible for climate-related risks are informed about and monitor climate-related risks, as proposed? Should we also require a registrant to disclose whether and how frequently such positions or committees report to the board or a committee of the board on climate-related risks, as proposed?

Response 39. No. And no. It is unnecessary and will hinder the ability of boards and management to have franks deliberations and discussions.

Question 40. Should we specifically require a registrant to disclose any connection between executive remuneration and the achievement of climate-related targets and goals? Is there a need for such a requirement in addition to the executive compensation disclosure required by 17 CFR 229.402(b)?

Response 40. This strikes me as reasonable. Investors have a right to know how their management's behavior will be influenced by compensation schemes.

Question 41. As proposed, a registrant may disclose the board's oversight of, and management's role in assessing and managing, climate-related opportunities. Should we require a registrant to disclose these items?

Response 41. See the discussion above under the heading "Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform."

Question 42. Should we require a registrant to describe its processes for identifying, assessing, and managing climate-related risks, as proposed?

Response 42. See the discussion above under the heading "Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform."

Question 43. When describing the processes for identifying and assessing climate-related risks, should we require a registrant to disclose, as applicable, as proposed:

- How the registrant determines the relative significance of climate-related risks compared to other risks?
- How it considers existing or likely regulatory requirements or policies, such as emissions limits, when identifying climate-related risks?
- How it considers shifts in customer or counterparty preferences, technological changes, or changes in market prices in assessing potential transition risks?
- How the registrant determines the materiality of climate-related risks, including how it assesses the potential size and scope of an identified climate-related risk? Are there other items relevant to

a registrant's identification and assessment of climate-related risks that we should require it to disclose instead of or in addition to the proposed disclosure items?

Response 43. Disclosure of how all of these things are done will harm the deliberative process. The question is whether the disclosures are material and accurate. If disclosure of process is mandatory, then boards and management, for political reasons, will want to create a complex and expensive climate change analytical process at the expense of other, usually more important risks.

Question 44. When describing the processes for managing climate-related risks, should we require a registrant to disclose, as applicable, as proposed:

- How it decides whether to mitigate, accept, or adapt to a particular risk?
- How it prioritizes climate-related risks?
- How it determines to mitigate a high priority risk?

Are there other items relevant to a registrant's management of climate-related risks that we should require it to disclose instead of or in addition to the proposed disclosure items?

Response 44. Disclosure of how all of these things are done will harm the deliberative process. The question is whether the disclosures are material and accurate. If disclosure of process is mandatory, then boards and management, for political reasons, will want to create a complex and expensive climate change analytical process at the expense of other, usually more important risks.

Question 45. Should we require a registrant to disclose whether and how the processes described in response to proposed 17 CFR 229.1503(a) are integrated into the registrant's overall risk management system or processes, as proposed? Should we specify any particular aspect of this arrangement that a registrant should disclose, such as any interaction between, and corresponding roles of, the board or any management committee responsible for assessing climate-related risks, if there is a separate and distinct committee of the board or management, and the registrant's committee in charge, generally, of risk assessment and management?

Response 45. See the discussion above under the heading "Immaterial Climate Change "Disclosure" Would Obfuscate Rather than Inform."

Question 53. The proposed rules would specify the basis of calculation for the climate-related financial statement metrics. Is it clear how to apply these accounting principles when calculating the proposed climate-related financial statement metrics, or should we provide additional guidance? Should we require a registrant to report these metrics with reference to its consolidated financial statements, as proposed? If not, how should registrants report these metrics? If we were to establish accounting principles (*e.g.*, the basis for reporting these metrics) in a manner that differs from the principles applicable to the rest of the consolidated financial statements, would the application of those principles to the proposed metrics make climate-related disclosures less clear, helpful, or comparable for investors? 54. Should we also require such metrics to be calculated at a reportable segment level when a registrant has more than one reportable segment (as defined by the FASB ASC Topic 280 *Segment Reporting*)? In addition, should we require such metrics to be presented by geographic areas that are consistent with the registrant's reporting pursuant to FASB ASC Topic 280-10-50-41? How would investors use such information?

Response 53. See discussion above under the heading “The Impact of the Proposed Rule on the Integrity of Financial Statements and Regulators.” Generally Accepted Accounting Principles and FASB should be focused on rules that provide accurate income statements, balance sheets and statements of cash flows. Not GHG emissions reporting. The Commission should not require that extraneous materials be included in financial statements.

Question 61. Alternatively, should we not require disclosure of the impacts of identified climate-related risks and only require disclosure of impacts from severe weather events and other natural conditions? Should we require a registrant to disclose the impact on its consolidated financial statements of only certain examples of severe weather events and other natural conditions? If so, should we specify which severe weather events and other natural conditions the registrant must include? Would requiring disclosure of the impact of a smaller subset of climate-related risks be easier for a registrant to quantify without sacrificing information that would be material to investors?

Response 61. The question should be whether the “severe weather events and other natural conditions” are material to the financial condition of the firm. If so, they should be reported. Otherwise, they should not be. Current rules are sufficient.

Question 68. Instead of including a quantitative threshold, as proposed, should we require disaggregated disclosure of *any* impact of climate-related risks on a particular line item of the registrant’s consolidated financial statements? Alternatively, should we just use a materiality standard?

Response 68. You should just use a materiality standard.

Question 87. We are proposing to require the financial statement metrics to be disclosed in a note to the registrant’s audited financial statements. Should we require or permit the proposed financial statement metrics to be disclosed in a schedule to the financial statements? If so, should the metrics be disclosed in a schedule to the financial statements, similar to the schedules required under Article 12 of Regulation S-X, which would subject the disclosure to audit and ICFR requirements? Should we instead require the metrics to be disclosed as supplemental financial information, similar to the disclosure requirements under FASB ASC Topic 932-235-50-2 for registrants that have significant oil- and gas-producing activities? If so, should such supplemental schedule be subject to assurance or ICFR requirements?

Response 87. Putting these requirements in Regulation S-X and requiring the accounting profession to express opinions regarding the disclosure in financial statement is a serious mistake. See discussion above under the heading “The Impact of the Proposed Rule on the Integrity of Financial Statements and Regulators.” If it is going to be done, it should be done via Regulation S-K.

Question 88. Instead of requiring the financial statement metrics to be disclosed in a note to the registrant’s audited financial statements, should we require a new financial statement for such metrics? For example, should a “consolidated climate statement” be created in addition to the consolidated balance sheets, statements of comprehensive income, cash flows, and other traditional financial statements? Would including the proposed metrics in a new financial statement provide more clarity to investors given that the metrics are intended to follow the structure of the existing financial statements (including the line items)? What complications or unintended consequences may arise in practice if such a climate statement is created?

Response 88. Having a consolidated climate statement would be preferably to introducing all of this speculation to actual financial statements. See discussion above under the heading “The Impact of the Proposed Rule on the Integrity of Financial Statements and Regulators.”

Question 89. Should we require the disclosure to be provided outside of the financial statements? Should we require all of the disclosure to be provided in the proposed separately captioned item in the specified forms?

Response 89. Using Regulation S-K and providing the information outside of financial statements would be vastly preferable. See discussion above under the heading “The Impact of the Proposed Rule on the Integrity of Financial Statements and Regulators.”

Question 91. Under the proposed rules, PCAOB auditing standards would be applicable to the financial statement metrics that are included in the audited financial statements, consistent with the rest of the audited financial statements. What, if any, additional guidance or revisions to such standards would be needed in order to apply PCAOB auditing standards to the proposed financial statement metrics? For example, would guidance on how to apply existing requirements, such as materiality, risk assessment, or reporting, be needed? Would revisions to the auditing standards be necessary? What additional guidance or revisions would be helpful to auditors, preparers, audit committee members, investors, and other relevant participants in the audit and financial reporting process?

Response 91. Getting FASB and PCAOB involved in policing climate-related disclosure and distracting them from their core missions could have dramatic negative effects. Using Regulation S-K and providing the information outside of financial statements would be vastly preferable.

Question 93. How would investors use GHG emissions disclosures to inform their investment and voting decisions? How would such disclosures provide insight into a registrant’s financial condition, changes in financial condition, and results of operations? How would such disclosures help investors evaluate an issuer’s climate risk-related exposure? Would such disclosures enable investors to better assess physical risks associated with climate-related events, transition risks, or both types of risks?

Response 93. Even though there is extensive GHG emission reporting to the EPA, there is no evidence of which I am aware that investors have used it. That strongly implies it is immaterial. To the extent that such information is material to the financial performance of a firm, it must be disclosed currently. Virtually all of this information relating to emissions will be immaterial to investors. It is being sought by activists and politicians. Climate-related risks or exposure is different. That is potentially material. It could have a large impact on a firm’s business. But again, to the extent that is true, it must be disclosed currently.

Question 98. Should we require a registrant to disclose its Scope 3 emissions for the fiscal year if material, as proposed? Should we instead require the disclosure of Scope 3 emissions for all registrants, regardless of materiality? Should we use a quantitative threshold, such as a percentage of total GHG emissions (*e.g.*, 25%, 40%, 50%) to require the disclosure of Scope 3 emissions? If so, is there any data supporting the use of a particular percentage threshold? Should we require registrants in particular industries, for which Scope 3 emissions are a high percentage of total GHG emissions, to disclose Scope 3 emissions?

Response 98. As discussed in detail above under the headings “Scope 3 Emission Reporting: Cascading and Double Counting,” “The Commission’s Economic Analysis is Seriously Deficient,” “The Impact of the Proposed Rule on Small Businesses” and elsewhere, the scope 3 reporting requirements will do virtually nothing to provide even relevant, let alone material, information to investors, will be duplicative, result in cascading and multiple counting of the same emissions many times, be massively expensive and have a serious adverse impact on investors, capital markets, issuers and small business non-issuers. It should be dropped. At the very least, the Commission should make it clear that issuers should not require non-issuers, usually small businesses, to provide them with information about their emissions for purposes of issuer compliance with the SEC rule.

Question 107. Should we require a registrant to provide location data for its disclosed sources of Scope 1, Scope 2, and Scope 3 emissions if feasible? If so, should the feasibility of providing location data depend on whether it is known or reasonably available pursuant to the Commission’s existing rules (Securities Act Rule 409 and Exchange Act Rule 12b-21)? Would requiring location data, to the extent feasible, assist investors in understanding climate-related risks, and in particular, likely physical risks, associated with a registrant’s emissions’ sources? Would a requirement to disclose such location data be duplicative of any of the other disclosure requirements that we are proposing?

Response 107. It is difficult to see how this could possibly be material in virtually any circumstance.

Question 108. If we require a registrant to provide location data for its GHG emissions, how should that data be presented? Should the emissions data be grouped by zip code separately for each scope? Should the disclosure be presented in a cartographic data display, such as what is commonly known as a “heat map”? If we require a registrant to provide location data for its GHG emissions, should we also require additional disclosure about the source of the emissions?

Response 108. It is difficult to see how this could possibly be material in virtually any circumstance. It may, of course, have political utility to activists, lobbyists and politicians. But helping activists, lobbyists and politicians is not part of the Commission’s mission.

Question 125. Should we permit a registrant to use reasonable estimates when disclosing its GHG emissions as long as it also describes the assumptions underlying, and its reasons for using, the estimates, as proposed? Should we permit the use of estimates for only certain GHG emissions, such as Scope 3 emissions? Should we permit a registrant to use a reasonable estimate of its GHG emissions for its fourth fiscal quarter if no actual reported data is reasonably available, together with actual, determined GHG emissions data for its first three fiscal quarters when disclosing its GHG emissions for its most recently completed fiscal year, as long as the registrant promptly discloses in a subsequent filing any material difference between the estimate used and the actual, determined GHG emissions data for the fourth fiscal quarter, as proposed? If so, should we require a registrant to report any such material difference in its next Form 10-Q if domestic, or in a Form 6-K, if a foreign private issuer? Should we permit a domestic registrant to report any such material difference in a Form 8-K if such form is filed (rather than furnished) with the Commission? Should any such reasonable estimate be subject to conditions to help ensure accuracy and comparability? If so, what conditions should apply?

Response 125. For purposes of scope 3 emissions, there is no alternative to allowing “reasonable estimates.” The Commission is going to be lucky if the estimates are even close to accurate. See discussions above.

Question 131. Should we permit a registrant to present its Scope 3 emissions in terms of a range as long as it discloses its reasons for using the range and the underlying assumptions, as proposed? Should we place limits or other parameters regarding the use of a range and, if so, what should those limits or parameters be? For example, should we require a range to be no larger than a certain size? What other conditions or guidance should we provide to help ensure that a range, if used, is not overly broad and is otherwise reasonable?

Response 131. A range would be desirable in that it would dispense with the fiction that these estimates are going to be close to accurate.

Question 134. Should we provide an exemption from Scope 3 emissions disclosure for SRCs, as proposed? Should the exemption not apply to a SRC that has set a target or goal or otherwise made a commitment to reduce its Scope 3 emissions? Are there other classes of registrants we should exempt from the Scope 3 emissions disclosure requirement? For example, should we exempt EGCs, foreign private issuers, or a registrant that is filing or has filed a registration statement for its initial public offering during its most recently completed fiscal year from the Scope 3 disclosure requirement? Instead of an exemption, should we provide a longer phase in for the Scope 3 disclosure requirements for SRCs than for other registrants?

Response 134. SRCs should absolutely be exempt from scope 3 requirements. A scaled disclosure regime is critical. Scope 3 emission reporting will be expensive. And if SRCs are not exempt, the number of SRCs that will go private will be large. EGCs and BDCs should also be exempt as part of a scaled disclosure regime and to limit the adverse impact on IPOs, capital markets and investors.

Question 135. Should we require accelerated filers and large accelerated filers to obtain an attestation report covering their Scope 1 and Scope 2 emissions disclosure, as proposed? Should we require accelerated filers and large accelerated filers to obtain an attestation report covering other aspects of their climate-related disclosures beyond Scope 1 and 2 emissions? For example, should we also require the attestation of GHG intensity metrics, or of Scope 3 emissions, if disclosed? Conversely, should we require accelerated filers and large accelerated filers to obtain assurance covering only Scope 1 emissions disclosure? Should any voluntary assurance obtained by these filers after limited assurance is required be required to follow the same attestation requirements of Item 1505(b)–(d), as proposed?

Response 135. The creation of the entire “GHG emissions attestation provider” cartel should be dispensed with for the reasons described in the discussion under the heading “Climate Change Disclosure Requirements Would Create a New Compliance Eco-System and a New Lobby to Retain the Requirements.”

Question 143. We considered whether to require registrants to include the GHG emissions metrics in the notes or a separate schedule to their financial statements, by amending Regulation S-X instead of Regulation S-K.

> (i) Would there be benefits to including this information in a registrant’s financial statements? For example, would requiring the GHG emissions disclosure to be included in the financial statements improve the consistency, comparability, reliability, and decision-usefulness of the information for investors? Would it facilitate the integration of GHG metrics and targets into the registrant’s financial analysis? Would such placement cause registrants to incur significantly

more expense in obtaining an audit of the disclosure? If so, please quantify those additional expenses where possible.

(ii) Should we require a registrant to include the GHG emissions disclosure in its audited financial statements so that the disclosure would be subject to the existing requirements for an independent audit and ICFR? If so, we seek comment on the following aspects of this alternative:

(a) If GHG emissions disclosure is subject to ICFR, or an internal control framework similar to ICFR, would GHG emissions disclosure be more reliable compared to what is currently proposed? What are the benefits or costs?

(b) Should the GHG emissions disclosure be included in a note to the registrant's financial statements (*e.g.,* in the note where the proposed financial statement metrics as discussed above in Section II.F would be included) or in a schedule, or somewhere else? If the GHG emissions disclosure was required in the financial statements, should it be subject to a reasonable assurance audit like the other information in the financial statements? If in a schedule, should the GHG emissions disclosure be disclosed in a schedule similar to those required under Article 12 of Regulation S-X, which would subject the disclosure to audit and ICFR requirements? Should we instead require the metrics to be disclosed as supplemental financial information, similar to the disclosure requirements under FASB ASC Topic 932-235-50-2 for registrants that have significant oil- and gas-producing activities? If so, should such supplemental schedule be subject to ICFR requirements? Instead of requiring the GHG emissions disclosure to be included in a note to the registrant's audited financial statements, should we require a new financial statement for such metrics?

(c) PCAOB auditing standards apply to the audit of a registrant's financial statements. If GHG emissions disclosure is included in a supplemental schedule to the financial statements, should we allow other auditing standards to be applied? If so, which ones? What, if any, additional guidance or revisions to such standards would be needed in order to apply them to the audit of GHG emissions disclosure?

(d) What are the costs and benefits of employing registered public accounting firms to perform audits of GHG emissions disclosure and related attestation of internal controls? Are there potential cost savings in employing registered public accountants that currently perform audits of financial statements and attestation of ICFR to review GHG emissions disclosure and any related internal controls? If we require GHG emissions disclosure to be presented in the financial statements, should we permit entities other than registered public accounting firms to provide assurance of this information, as proposed for the current attestation requirements under Regulation S-K? If not limited to registered public accounting firms, who should be permitted to provide assurance of GHG emissions disclosure? Should we permit environmental consultants, engineering firms, or other types of specialists to provide assurance? What are the costs and benefits of such approach? Would the reliability of the audits and therefore the information disclosed be affected if assurance providers other than registered public accounting firms are permitted to conduct these audits? Please provide supporting data where possible. If we should allow for assurance providers that are not registered public accounting firms, what qualifications and oversight should they have, and what requirements should we impose on them? Should we direct the PCAOB to develop a separate registration process for service providers that are not otherwise registered? What expertise, independence and quality control standards should apply?

(e) What would be the other potential benefits and costs of such an approach?

Response 143. As described above in detail, these requirements should be in Regulation S-K and not Regulation S-X. They should be kept out of financial statements and provide by some other means separately. FASB, PCAOB and the accounting profession should remain out of this and focus on their core mission of providing accurate income statements, balance sheets and statements of cash flows. The Commission should not require extraneous material to be in financial statements.

Question 175. Should the proposed climate-related disclosures be required in Exchange Act reports and registration statements, as proposed? Should we exempt SRCs from all of the proposed climate-related disclosure rules instead of exempting them solely from Scope 3 emissions disclosure requirements, as proposed? Should we exempt SRCs from certain other proposed climate-related disclosure requirements and, if so, which requirements? For example, in addition to the proposed exemption from Scope 3 emissions disclosure, should we exempt SRCs from the proposed requirement to disclose Scopes 1 and 2 emissions? Are there certain types of other registrants, such as EGCs or business development companies ("BDCs"), that should be excluded from all or some of the proposed climate-related disclosure rules?

Response 175: Yes, SRCs, EGCs and BDCs should be exempt from all emissions reporting requirements except to the extent that they are material and reportable under current rules. This is appropriate under a scaled disclosure regime and would substantially mitigate the adverse impact on entrepreneurial capital formation and investor choice.

Question 194. Should we treat the climate-related disclosures required by proposed subpart 1500 of Regulation S-K and proposed Article 14 of Regulation S-X as filed for purposes of potential liability under the Securities Act and Exchange Act, except for the climate disclosures on Form 6-K, as proposed? Should we instead treat the climate-related disclosures required by both proposed subpart 1500 of Regulation S-K and proposed Article 14 of Regulation S-X as furnished? Are there reasons why the proposed climate-related disclosures should not be subject to Section 18 liability?

Response 194. Given the massive uncertainty associated with these disclosures, and the fact that only material (defined conventionally) would be required in the absence of the proposed rule, liability should not attach. We know that these disclosures are going to be erroneous no matter how hard an issuer tries to get it right. CorpFin review should be sufficient. See the discussion above under the headings "The Proposed Climate Change Disclosure Requirements Would Result in Much Litigation," "Climate Models and Climate Science are Highly Uncertain," "Economic Modeling of Climate Change Effects is Even More Uncertain" and elsewhere.

Other Requests for Comment

Question: We request comment on all aspects of our economic analysis, including the potential costs and benefits of the proposed rules and alternatives thereto, and whether the proposed rules, if adopted, would promote efficiency, competition, and capital formation or have an impact on investor protection. In addition, we also seek comment on alternative approaches to the proposed rules and the associated costs and benefits of these approaches. Commenters are requested to provide empirical data, estimation methodologies, and other factual support for their views, in particular, on costs and benefits estimates. Specifically, we seek comment with respect to the following questions:

Response: The Commissions economic analysis is very seriously deficient. Generic qualitative remarks about the benefits of disclosure do not justify this massively expensive rule since material risks must be disclosed under current rules and immaterial disclosure is of dubious value. The analysis is inadequate in its discussion of (1) lower returns to investors, (2) reduced employment and lower wages, (3) reduced entrepreneurship and innovation, (4) the impact of fewer initial public offerings, (5) the impact of an increase in the number of going private transactions, (6) an increase in the user cost of capital, (7) a reduction in the efficiency of capital markets, (8) reduced investor choice and reduced diversification possibilities, and (9) the distributional effect of favoring affluent accredited investors over retail investors. The economic analysis contains no discussion of the impact on non-issuers, mostly small businesses. Because of the scope 3 requirements, the proposed rule can be expected to impose around $14 billion of costs on non-issuers. Nowhere does the Commission acknowledge that its scope 3 emissions reporting requirement would result in double counting or cascading with respect to emissions, potentially resulting in the same emissions being counted and reported seven to ten times. The analysis fails to monetize internal costs, understating the true cost of the rule by $2.5 to $3.0 billion. The analysis does not seriously consider litigation costs and risks. The economic analysis shows no explicit or implicit understanding of the insights of public choice economics about how special interests work against the public interest. In summary, the proposed rule probably would impose costs that are likely to be at least $17 billion higher than indicated in the Commission's Paperwork Reduction Act table ($6.4 billion). These deficiencies, and many others, in the analysis of the proposed rule in the proposing release render the proposed rule arbitrary and capricious.

For detailed analysis of the deficiencies, see the discussions above under the headings "The Commission's Economic Analysis is Seriously Deficient." "The Impact of the Proposed Rule on Issuers," "The Impact of the Proposed Rule on the Capital Markets," "The Impact of the Proposed Rule on Investors," "The Impact of the Proposed Rule on Small Businesses," "Securities Laws are a Poor Mechanism to Address Externalities," and "Climate Change Disclosure Requirements Would Have No Meaningful Impact on the Climate."

Question: Are there any costs and benefits to any entity that are not identified or misidentified in the above analysis?

Response: Many costs and adverse economic effects are not identified. The most egregious is the failure to examine the impact on non-issuers. But there are many more of substantial magnitude. See the discussions above under the headings "The Commission's Economic Analysis is Seriously Deficient." "The Impact of the Proposed Rule on Issuers," "The Impact of the Proposed Rule on the Capital Markets," "The Impact of the Proposed Rule on Investors," "The Impact of the Proposed Rule on Small Businesses," "Securities Laws are a Poor Mechanism to Address Externalities," and "Climate Change Disclosure Requirements Would Have No Meaningful Impact on the Climate."

Question: Are there any effects on efficiency, competition, and capital formation that are not identified or misidentified in the above analysis?

Response: Many. See the discussions above under the headings "The Commission's Economic Analysis is Seriously Deficient." "The Impact of the Proposed Rule on Issuers," "The Impact of the Proposed Rule on the Capital Markets," "The Impact of the Proposed Rule on Investors," "The Impact of the Proposed Rule on Small Businesses," "Securities Laws are a Poor Mechanism to Address Externalities," and "Climate Change Disclosure Requirements Would Have No Meaningful Impact on the Climate."

Question: Are there any other alternative approaches to improving climate-related disclosure that we should consider? If so, what are they and what would be the associated costs or benefits of these alternative approaches? For example, what would be the costs and benefits of implementing a new, comprehensive system, for reporting and transferring GHG emissions across corporate supply and distribution chains, as described by Kaplan and Ramanna (2021)?

Response: There are four things that the Commission should consider. First, the Commission should prevent regulatory duplication by allowing issuers to use reporting of GHG emission information provided to the Environmental Protection Agency. Second, the Commission should eliminate scope 3 GHG emission reporting entirely except for material climate change risks. Third, the Commission should make it clear that issuers need not demand scope 3 emissions reporting information from non-issuers in order to be in compliance with the scope 3 reporting requirements. Fourth, the Commission should exempt SRCs, EGCs and BDCs from scope 3 reporting requirements.

The EPA already requires GHG emissions reporting.[152] The EPA estimates that the required reporting under their rule covers 85–90% of all GHG emissions from over 8,000 facilities in the United States.[153] That is good enough[154] and does not require upending our securities markets and imposing many billions of dollars in costs to duplicate what the EPA is already doing. The Initial Regulatory Flexibility Act Analysis in the proposing release falsely asserts "The proposed rules do not duplicate or conflict with other existing federal rules."[155] It also cavalierly dismisses the EPA program and does not even consider allowing issuers to use this information in their SEC filings.[156] It is also virtually self-evident that the EPA knows more about GHG emissions than the SEC. Issuers should be able to provide this information in lieu of complying with the duplicative and byzantine SEC methodology.

Upstream and downstream GHG emissions are simply not material to assessing an investment in an issuer. Climate-related risks that are material should be reported. Assuming, *arguendo*, that the Commission actually means what it says that the proposed rule is about protecting investors and providing them with material information and not about a progressive environmental agenda and rewarding the climate-industrial complex, then the Commission should eliminate scope 3 GHG emission reporting entirely except for material climate change risks.

The Commission should make it clear that issuers need not demand scope 3 emissions reporting information from non-issuers in order to be in compliance with the scope 3 reporting requirements. Modifying the proposing rule with this clarification could save small businesses billions of dollars. See the discussion above under the heading "The Impact of the Proposed Rule on Small Businesses."

As part of a scaled disclosure regime, the Commission should exempt SRCs, EGCs and BDCs from scope 3 reporting requirements. Under the proposed rule, as drafted, only SRCs are exempt. Extending the exemption would substantially mitigate the adverse impact of the rule on IPOs, capital markets and investors. See the discussions above under the headings "The Impact of the Proposed Rule on Issuers,"

[152] Greenhouse Gas Reporting Program (GHGRP) https://www.epa.gov/ghgreporting/ghgrp-reported-data.
[153] Proposing release at p. 21414.
[154] Of course, if policymakers wanted to expand the EPA rule, they could do so and impose vastly fewer costs than the SEC proposed rule would impose. Moreover, the SEC could allow issuers to use their EPA reporting for purposes of SEC filings.
[155] Proposing release at p. 21463 (section VI.E).
[156] Proposing release at p. 21463 (sections VI.E and VI.F).

“The Impact of the Proposed Rule on the Capital Markets,” and “The Impact of the Proposed Rule on Investors.”

Question: Are there any sources of data that could provide a more precise estimation of the potential compliance costs that registrants may incur if the proposed rules are adopted?

Response: See, for example, the table above monetizing the cost of internal compliance burden hours.

Question: How the proposed rule and form amendments can achieve their objective while lowering the burden on small entities.

Response: Quantitatively, the most important thing that the Commission can do for small entities is to make it clear that issuers need not demand scope 3 emissions reporting information from non-issuers in order to be in compliance with the scope 3 reporting requirements. Modifying the proposing rule with this clarification could save small businesses billions of dollars. See the discussion above under the heading “The Impact of the Proposed Rule on Small Businesses.”

As part of a scaled disclosure regime, the Commission should exempt SRCs, EGCs and BDCs from scope 3 reporting requirements. Under the proposed rule, as drafed, only SRCs are exempt. Extending the exemption would substantially mitigate the adverse impact of the rule on IPOs, capital markets and investors. See the discussions above under the headings “The Impact of the Proposed Rule on Issuers,” “The Impact of the Proposed Rule on the Capital Markets,” and “The Impact of the Proposed Rule on Investors.”

Question: The number of small entity companies that may be affected by the proposed rule and form amendments;

Response: The scope 3 emissions reporting requirement, unless amended, is likely to affect approximately **14 million** small businesses. The Commission entirely ignores this. See the discussion above under the heading “The Impact of the Proposed Rule on Small Businesses.”

Question: The existence or nature of the potential effects of the proposed amendments on small entity companies discussed in the analysis.

Response: See the discussion above under the heading “The Impact of the Proposed Rule on Small Businesses.”

Question: Whether there are any federal rules that duplicate, overlap, or conflict with the proposed amendments.

Response: The EPA, which has vastly better subject matter expertise than the Commission, already requires GHG emissions reporting.[157] The EPA estimates that the required reporting under their rule covers 85–90% of all GHG emissions from over 8,000 facilities in the United States.[158] The SEC proposed rule, especially its poorly conceived scope 3 emissions reporting, is inferior to and duplicative of this requirement.

[157] Greenhouse Gas Reporting Program (GHGRP) https://www.epa.gov/ghgreporting/ghgrp-reported-data.
[158] Proposing release at p. 21414.

Question: We request comment on whether our proposal would be a "major rule" for purposes of SBREFA. In particular, we request comment and empirical data on:

The potential effect on the U.S. economy on an annual basis.
Any potential increase in costs or prices for consumers or individual industries.
Any potential adverse effect on competition, investment, or innovation.

Response: The Commission adopts a preposterous agnostic view on whether the proposed rule is a major rule for purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA'').

The Commission's own PRA Table 4 shows that this is a major rule. $6.4 billion (the reported external cost increase) is greater than $100 million. *Quod erat demonstrandum.*

Monetizing the internal costs makes it closer to $10 billion. Considering other costs (litigation costs, the costs imposed on non-issuers (potentially in the neighborhood of another $14 billion), and issuer costs not reflected in PRA Table 4) makes it even higher If roughly tripling the costs imposed on public companies and imposing billions of dollars of costs on non-issuers is not "a major increase in costs," then nothing is.

Sincerely,

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[redacted]