GAO GOVERNMENT ACCOUNTABILITY & OVERSIGHT

June 17, 2022

Gary Gensler
Securities and Exchange Commission
100 F Street NW
Washington, DC 20549

Via email — rule-comments@sec.gov

Dear Chairman Gensler,

Government Accountability & Oversight, a 501c3 non-profit public policy group, appreciates the opportunity to provide comments in response to your Proposed Rule "The Enhancement and Standardization of Climate-Related Disclosures for Investors" ("Proposed Rule," 87 Fed. Reg. 21334). We therefore write in response to "The Enhancement and Standardization of Climate-Related Disclosures for Investors," CFR sec. 229.1505, https://www.sec.gov/rules/proposed/2022/33-11042.pdf, in which you encouraged interested parties to submit detailed comments.

GAO is a non-profit public policy group dedicated to assessing governmental policy and operations particularly in and effecting the areas of energy and environmental policy.

GAO writes to ensure the record reflects problems with the Proposed Rule, including specifically how it violates covered parties' constitutionally protected First Amendment rights. These constitutional problems are not subject to any remedial re-drafting; rather, these problems are inherent in any such proposal requiring "climate risk disclosure" which, as other commenters have noted, appear to be redundant of extant obligations of regulated parties to report material risks. GAO strongly encourages the SEC to reconsider promulgation of this proposed rule.

GAO is aware of public records showing this Proposed Rule is the product of a long-running lobbying campaign led by an activist law enforcement office joined by a select few activist institutional investors including BlackRock, two public employee pension funds, and the pressure group Ceres (the latter referenced in the Proposed Rule 23 times). GAO therefore also incorporates into the record emails and other records obtained from the New York Office of the Attorney General reflecting this concerted and coordinated effort.[1]

[1] https://govoversight.org/wp-content/uploads/2022/05/NY-OAG-Ceres-et-al-records-re-SEC-Climate-Risk-Disclosure.pdf

Further, and as detailed *infra*, other parties currently invested in "ESG[2]-complaint" companies have committed scores of millions of dollars toward attaining the prize represented by the SEC's Proposed Rule, which the published literature (including that cited in the Proposed Rule) (see, *infra*) strongly suggests are the most likely financial beneficiaries of the Proposed Rule should it go into effect (and survive inevitable judicial challenge).

That is, the Proposed Rule is old rent-seeking in a new bottle, if a particularly dangerous version of this unsavory practice.

As covered more fulsomely by other commenting parties, the Commission lacks the statutory authority to enact this Proposed Rule for reasons including the absence in SEC's authorizing statutes of any indicia that the SEC has competence for or an obligation to enact such a rule, the arbitrary and capricious problems (re: science and cost-benefit) inherent in the proposed rule, and also the constitutional infirmity of the proposed rule, as detailed in these comments. Reasons behind the latter include that estimates of *climate change* risks (rather than risks from policies in the name of climate change, such as this Proposed Rule), both physical and political in nature, are wildly exaggerated, making any "climate disclosures" impermissibly speculative.

This exaggeration is committed by those sources that the Commission embraces and endorses, effectively, in its Proposed Rule as suggested benchmarks and authorities for covered entities. Because requiring disclosures that are subjective and disparaging is unconstitutional, this Proposed Rule cannot withstand judicial scrutiny and should be withdrawn.

As one author insightfully writes (then supports), "The SEC proposal has always been more about manufacturing than reporting climate-policy risks."[3] This proposal is part of the current administration's oft-touted "whole-of-government approach" to advancing an ideological agenda, the "climate" agenda. These boasts and immediate action-steps like this Proposed Rule prove far too much, including about the Rule's legal permissibility, as regulatory agencies including SEC are not simply vehicles to advance any political wishes, let alone those never enacted by Congress and which concern, as does SEC's Proposed Rule does, "questions of vast economic or political significance."

The "climate risk disclosure" campaign seeks to coercively extract 'confessions' of financial vulnerability to the climate as projected in computer model scenarios (which themselves build in assumed sensitivity to a doubling of GHGs sharply higher than supported by the peer-reviewed literature, producing their overly (relative to the historical record) warm, often apocalyptic outcomes). As Andrew Montford, former economics professor and now Deputy Director of the Global Warming Policy Foundation in London, has written recently, "Claims of a climate crisis rely almost entirely on climate model outputs. But once you know what climate

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[2] Environmental, Social & Governance, of which "climate risk disclosure" and the Proposed Rule are a key component.

[3] https://cei.org/blog/sec-ignores-the-easiest-way-to-reduce-climate-policy-risks-oppose-the-netzero-agenda/

models get wrong, it's hard to take them seriously as any sort of guide to the future, never mind government policy."[4]

These modeled 'scenarios' drive capital toward ESG-approved investments. Remarkably enough, the pressure campaigns promoting these policies — including those expressly dedicated to attaining the Proposed Rule— are financially backed with tens of millions of dollars from "ESG" investors who are the parties also seeking and standing to financially benefit from the Proposed Rule as detailed, *infra*.

Preamble: Background to the Proposed Rule, Obscured in the Proposed Rule

The Commission's Proposed Rule comes at the least advisable time to add further governmental (political) policy interventions in the capital markets, particularly as regards energy. In the last year, people around the world have suffered huge rises in the cost of energy.

Recent experience has highlighted the vital importance of affordable, reliable, and abundant energy and other resources. Yet the Proposed Rule threatens this.

Gasoline, diesel, and domestic electricity and natural gas prices are now past the point that many people can afford. The problem affects businesses too, including manufacturing and agriculture, with consequences for the wider economy, jobs and the cost of living. In poorer and developing economies, these problems are intensified, and are having deeper and tragic consequences.

While misguided energy and climate policies had been contributing to precisely this problem for years, the recent crisis began in earnest as the world emerged from the restrictions placed by governments on economic activity during the Covid-19 pandemic. These restrictions had reduced global energy demand. This reduced demand resulted in the reduction of the price of natural gas. As producers reduced their output and as Covid lockdowns were eased, the price began to recover.

But rather than stabilizing, natural gas prices continued to rise. The rise of the price of gas has increased the cost of fertilizer, and key crops on which the entire world depends. And the rising cost of energy has increased the cost of construction materials, transport and everyday goods and services.

This has greatly contributed to "greenflation" by badly compounding the labyrinth of energy and environmental policies in the name of "climate." The broader consequence of greenflation has pushed prices and the cost of living upwards, and destabilized manufacturing sectors in the U.S., U.K. and Europe. There is a risk developing that the progress the world has seen in dealing with poverty, famine and communicable diseases since the 1990s will be reversed.

[4] Release, "Steve Baker MP warns of risks of computer modelling," The GWPF, May 31, 2022, https://www.thegwpf.org/publications/ten-things-everyone-should-know-about-climate-models/

However, instead of discerning what is behind these problems, what caused them, what role the federal government had and what it can do to ease the problem, the Administration offers an ideological proposed rule which recklessly guarantees a compounding of the maladies that have demonstrably and greatly aggravated these conditions, and most certainly will worsen them.

The Proposed Rule guarantees a compounding of these harms further, and tragically further, by radically restricting access to the capital markets faced by hydrocarbon energy industries beyond what the (largely) private pressure campaigns have accomplished to date.

The Proposed Rule will surely compound all of this given its proponents have the desired end of further strangling investment into projects necessary to restore our system of affordable and reliable energy supplies.

Since the mid-2000s, many elected and *unelected* officials have been driven by the idea that people's wellbeing depended on eliminating carbon dioxide (CO2) emissions, rather than on the energy that powered society and the economy.

That meant that old power stations were closed, and were not replaced by equivalent capacity, but with non-comparable 'renewable' sources – wind and solar – whose output was variable and unreliable.

Policymakers believed that by setting targets for decarbonization and by offering generous subsidies for renewable energy, domestic green manufacturing and energy-producing sectors would be created. As detailed, *infra*, the SEC's Proposed Rule is being pleaded for by the very parties behind the special pleading for that agenda, which despite decades of its success being "just around the corner" requires such interventions to apply life support to certain investments while playing Russian roulette with the larger economy and social well-being.

Rather than creating new industries based in Western countries imposing this agenda, green policies merely created a market for technologies that were largely manufactured in the East, where prices were much cheaper, thanks to the continued use of coal and the lower cost of labor. Rather than creating domestic energy production, European countries increased their dependence on fossil fuels from foreign countries and the U.S. has increased its dependence on foreign countries, particularly China, for manufacturing and materials for renewable energy equipment.[5] This has undermined the West's geopolitical position and global security, strongly contrary to America's interests. It has also furthered the interests of other nations.[6]

[5] See, e.g., "China has also publicly indicated that it would use its industrial capabilities, such as rare-earth mineral processing, for strategic purposes against adversaries. Beijing recently levied large tariffs on imported Australian goods in retaliation for Canberra's attempts to investigate the origin of the Covid-19 pandemic." Steve Milloy, "Companies Should Come Clean on Their Ties to China: Investors have a right to know how an invasion of Taiwan would affect business," *Wall Street Journal*, May 10, 2022, https://www.wsj.com/articles/companies-ties-to-china-disclose-invest-sec-securities-and-exchange-commission-taiwan-ukraine-russia-costs-lost-earnings-public-11652125591

[6] See, e.g., https://www.cfact.org/2022/05/06/china-and-russia-rejoice-at-americas-quest-to-go-green/.

As American Enterprise Institute scholar James Coleman pithily put matters, "[The Biden administration:] Yesterday: we're critically short of solar panels, so we have to waive our laws to get them from the Chinese government. Today: let's 'become more dependent on the wind and the sun that are not subject to geopolitical influences."

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The public is told, with staggering disingenuousness by federal policymakers and other officials, that all it takes to correct these problems in the immediate crisis is for natural gas and oil producers to simply increase production.

In addition to the federal government restricting access to resources on federal lands and slow-walking, denying and reversing permits, there is one problem that the Proposed Rule will disastrously compound: capital.

In order to increase production, large industrial operations must first find the capital required to invest in the labor, hardware and other costs that are created by ramping up production. But since the middle of the last decade, energy companies have been spending less on their operations. The Proposed Rule will most assuredly compound this problem, as indeed it is intended to if its proponents are to be believed.

In late 2021, some U.S. traditional energy producers, particularly coal and related industries were unable to affordably access capital markets to facilitate ramping up production and transport in the face of a looming energy crisis (which continues today[7]), leading to serious energy security concerns. They were informed by lenders that loaning money to, *e.g.*, coal, gave the banks an "ESG problem." This resulted not from *de jure* regulation but *de facto* as a result of pressure campaigns — including from a Biden Administration that made clear that it has targeted hydrocarbon energy interests for extinction and that assisting them would not be well-received in Washington. This threatens U.S. national security.[8]

Yet, as the cost of finance has increased, when it is available at all to hydrocarbon energy interests, SEC now proposes a massive and massively disruptive rule to deeply compound the above-described crisis unfolding.

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In the 2010s, the green lobby became frustrated with the slow pace of global and national climate policymaking. Democratic politics was taking a different direction to the agenda that they had planned. In the U.S., "climate" legislation not only repeatedly failed but its failure — and the risk its proponents took — helped its proponents lose control of Congress in 2010. The lesson was learned: avoid acknowledging agreements are treaties, do not put legislators to such

[7] Katherine Blunt, "Electricity Shortage Warnings Grow Across U.S.," Wall Street Journal, May 8, 2022, https://www.wsj.com/articles/electricity-shortage-warnings-grow-across-u-s-11652002380?mod=djem_EnergyJournal.

[8] See, e.g., Rupert Darwall, "Woke Investors Threaten the West's Security," Real Clear Politics, April 18, 2022, https://www.realclearenergy.org/articles/2022/04/18/woke_investors_threaten_the_wests_security_827666.html

tough votes,[9] and rely on efforts to stretch claims of existing executive authority while hoping for the best from the courts. The Proposed Rule is the epitome of this strategy.

This new approach of daring the courts with expansive claims to exercise existing authority, and the new campaigning agenda described in these comments, seeks to bypass democratic institutions. The new approach attacks fossil fuel production without democratic accountability or creating the need for governments to create unpopular policies to ban it. The Proposed Rule reflects the effort to formalize the *de facto* prohibitions. Hundreds of millions of dollars were pumped into campaigning organizations which in addition to aiming their scaremongering at the public, specifically targeted investors, and financial institutions.

These campaigns frightened investors by telling them that their money was at risk. They claimed that the world was reducing its demand for oil and gas, and that fossil fuel companies would be found guilty of causing catastrophic climate change in lawsuits. Angry publics across the world would rise up to demand that governments take action against energy companies, and switch to renewables. These risks were growing, and the assets investors had bought, campaigners told them, would become stranded, and worthless.

This new movement of terrified shareholder activists in turn demanded that companies be rated not just according to their creditworthiness or economic performance, but on alleged climate risks, and metrics that measured their Environmental, Social and corporate Governance policies, or ESG for short.

As analyst Rupert Darwall wrote recently in The Spectator (UK):

> There is huge momentum behind net zero investing – encouraged by central banks and financial regulators – that has nothing to do with financial returns. The willingness of institutional investors to deepen the current economic crisis and undermine the strategic interests of the West is a new problem brought about by the rise of Environmental, Social and Governance (ESG)-investing that has swept the world of finance.[10]

This encouraged investors to divest from fossil fuel companies, and to invest in companies with higher ESG scores, such as high tech and social media companies.

And the pressure put on financial institutions by shareholders forced them to withdraw financial services and loans from fossil fuel companies.

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[9] See, e.g., Mike DeBonis and Robert Costa, "Sixteen dissident Democrats vow to oppose Pelosi as next Speaker," Washington Post, November 19, 2018, https://www.washingtonpost.com/powerpost/rep-degette-drops-bid-for-no-3-job-in-house-leadership/2018/11/19/50462ebc-ec16-11e8-96d4-0d23f2aaad09_story.html. Pelosi "was pressed on the need to shield centrist members from politically perilous votes. Rep. Jim Himes (D-Conn.), the chairman of the coalition, cited the cap-and-trade climate bill that House Democrats passed in 2009, only to see it languish in the Senate. Many Republican challengers used the bill in their campaign to oust Democratic incumbents the next year."
[10] Rupert Darwall, "Rishi Sunak's net zero u-turn," The Spectator (UK), May 12. 2022, https://www.spectator.co.uk/article/rishi-sunak-s-cop-speech-is-coming-back-to-haunt-him

This is why the cost of capital for fossil fuel companies rose, a key reason that investment in infrastructure fell, and the price of energy increased.[11]

Jeff Currie of Goldman Sachs in April, criticizing ESG, said "It's (ESG) a blunt instrument that is reducing capital flows into a very critical sector … one is that the banks, you know, all of them are, are very much behind the ESG push. And I want to emphasize, I am very, very much pro-climate change and really believe it's a problem that needs to be solved. What I'm arguing is ESG is probably not the best way to go at it."[12]

Recently, "[s]peaking at the Future Investment Initiative conference in Saudi Arabia, [Blackstone's Steve Schwarzman] warned that an energy shortage could lead to "real unrest" across the world — and put forward a provocative culprit. A focus on E.S.G. is driving a credit crunch for oil and gas companies, Schwarzman and others say. So-called environmental, social and corporate governance investing principles have spurred investment giants to divest their holdings in oil and gas companies. That, according to Schwarzman, has made it hard for the industry to invest in new wells and other sources of capacity. "If you try and raise money to drill holes, it's almost impossible to get that money," he said. (Blackstone has invested in both fossil-fuel and renewable energy companies.) Some think the energy shortfall could be huge. JPMorgan analysts wrote this year that as much as $600 billion must be invested in oil by 2030 to meet continued demand."[13]

It is now also documented that self-interested "ESG" money managers heavily invested in "ESG" were plowing tens of millions of dollars into these advocacy campaigns that, in turn, improved the money managers' portfolios and businesses. ESG appears to have become yet one more, if terribly reckless, rent-seeking scheme. The Proposed Rule cannot be excluded from the list of results these activists have obtained. See, *infra*.

The Proposed Rule Represents an Historic Economic and Financial Risk

Pumping capital into politically favored sectors, which the Proposed Rule would accelerate, is a formula for stoking an unsustainable financial bubble, such as in housing finance, which was the root cause of the subprime mortgage implosion and the 2008 financial crisis. This

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[11] See, e.g., Reuters, "Saudi energy minister blames lack of investment for surge in fuel prices," May 9, 2022, https://www.reuters.com/world/middle-east/saudi-energy-minister-says-gap-between-crude-prices-fuel-mobility-prices-around-2022-05-09/?mc_cid=1530a308dd&mc_eid=546d7a34dc. See also, "ESG considerations account for much of the decline in capital expenditure by international oil companies in recent years and the investor exodus out of oil and gas markets," Amrita Sen, "Embrace high fossil fuel prices because they are here to stay," Financial Times, October 26, 2021, https://www.ft.com/content/a15e7ade-dad0-4ed3-a172-1974ac9d5b23.
[12] Joe Weisenthal and Tracy Alloway, "Transcript: Goldman's Jeff Currie On the 'Vol Trap" In Commodities," Bloomberg.com, April 14, 2022, https://www.bloomberg.com/news/articles/2022-04-14/transcript-goldman-s-jeff-currie-on-the-vol-trap-in-commodities?srnd=oddlots&sref=Hpp1MmFS.
[13] Andrew Ross Sorkin, et al. "Why This Billionaire Is Worried About Green Investing," New York Times, October 27, 2021, https://www.nytimes.com/2021/10/27/business/dealbook/schwarzman-energy-crunch.html.

is increasingly recognized even in corners that helped stoke (and greatly profited, for a while, from) the current troubles.[14]

Analyses including, e.g., in Bloomberg in September 2021[15] and the Financial Times the following month[16] strongly support the idea of an ESG-stoked bubble. Peer-reviewed literature also suggests this is simply more Bootlegger-and-Baptist rent-seeking, in new bottles, a dangerous play pleaded for and enriching those who placed "ESG" bets in anticipation of such regulatory interventions adding value to their bets placed not on the basis of creditworthiness or proper investment considerations.[17]

The Commission's Proposed Rule even cites one of these papers in its fn. 848 (p. 336), only to caution in fn. 967 (p. 393) that these unhelpful findings should be taken "with caution," an impulse so badly lacking in SEC's proposed rule.

Indeed, the Proposed Rule repeatedly references how these self-interested investors are the ones noisily clamoring for the SEC's proposed intervention.

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[14] Although as recently as February 2022 media outlets were promoting a "narrative" that climate change was behind skyrocketing price increases and inflation, Bloomberg and Blackrock correctly saw climate-change *policy* as the inflationary threat. See, e.g., Rachel Morison, "The Climate-Change Fight Is Adding to the Global Inflation Scare: BlackRock's Fink and others see price risk in green revolution," Bloomberg.com, June 18, 2021, https://www.bloomberg.com/news/articles/2021-06-18/the-climate-change-fight-is-adding-to-the-global-inflation-scare. See also, e.g., Simon Foy, "BlackRock ditches green activism over Russia energy fears: Fund titan says investing in traditional energy sources is now required to boost security," The Telegraph, May 11, 2022, https://www.telegraph.co.uk/business/2022/05/11/blackrock-ditches-green-activism-russia-energy-fears/. See also, https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf. More recently, BlackRock CEO "Larry Fink said too narrow a focus on the climate policies of public companies risks undermining the green agenda and is potentially creating "the largest capital-market arbitrage in our lifetimes," as hydrocarbon assets move from public to private hands."[14] As mildly realistic as it is, this represents a major pivot in Fink's rhetoric. Apparently seeing not only the societal and security consequences but the almost-certain bubble nature of "ESG," one of the principals at Oxford University responsible for developing the Stranded Assets campaign at the Smith School began linking to Bloomberg articles acknowledging ESG's "tarnished halo." https://twitter.com/bencaldecott/status/1536966769604284419?s=20&t=ZfWGaxdEMtzuD1xBlDNDTA

[15] See, e.g., Catherine Bosley, "Green Investment Frenzy Runs Risk of Becoming a Bubble, BIS Says," Bloomberg.com, September 20, 2021, https://www.bloomberg.com/news/articles/2021-09-20/green-investment-frenzy-runs-risk-of-becoming-a-bubble-bis-says, reporting on a Bank of International Settlements paper by Sirio Aramonte and Anna Zabai, "Sustainable finance: trends, valuations and exposures," BIS Quarterly Review, 20 September 2021, https://www.bis.org/publ/qtrpdf/r_qt2109v.htm.

[16] See, e.g., Dambisa Moyo, "Lack of investment rigour risks creating ESG bubble," Financial Times, October 19, 2021, https://www.ft.com/content/c6346a90-6c3c-48f9-bec3-5ae5057e1ed7.

[17] See, e.g., Aramonte and Zabai, "Sustainable finance: trends, valuations and exposures," BIS Quarterly Review, 20 September 2021, https://www.bis.org/publ/qtrpdf/r_qt2109v.htm, *supra*, and J. Grewal, E. J. Riedl, and G. Serafeim, Market Reaction to Mandatory Nonfinancial Disclosure, 65 (7) Management Science 3061-3084 (2019) https://www.hbs.edu/faculty/Pages/item.aspx?num=54302; See supra note 849 (Bolton and Kacperczyk, 2020).

Fortunately, if far too late, some of the first-movers in bringing about this voluntary (coercive) regime now proposed as formal law by the SEC have recognized what is transpiring. Consider how Germany soon shelved its ESG rules when the reality of its agenda hit home very early in the Ukraine war.[18] Not long thereafter, erstwhile cheerleader Goldman Sachs began openly admitting ESG doesn't match the sales pitch (in the face of fleeing investors),[19] and even aggressive "ESG" promoter BlackRock "ditche[d] green activism over Russia energy fears [because] Fund titan says investing in traditional energy sources is now required to boost security."[20]

The Proposed Rule Represents an Historic, Dangerous Rent-Seeking Achievement

As the SEC seeks to formalize ESG and the demands of institutional investors it is important to establish the record of how the Commission got here. As noted, *supra*, public records detail a campaign that first got off its feet a decade ago with the assistance of law enforcement — the senior staff of one now-disgraced state attorney general lobbying SEC staff and Commissioners along with representatives of BlackRock, two pension funds, a "social investor" and an activist group called Ceres.

The roster of that core group which began lobbying this regime into place is a reminder that the main force driving organizations that campaign to scare investors and financial institutions away from fossil fuel companies include a number of philanthropic foundations. These foundations are often, including in this matter, driven by the donor's priorities.

Operated as 'charities' and 'civil society organizations', these foundations' direct beneficiaries (pressure groups) are able to assert their influence in the public and political sphere without appearing to be serving the business interests of their funders. Yet they clearly are doing so.

For example, more recently, other interested parties have taken the driving role in steering SEC on this matter. For these purposes we focus on the role of a single investor, using his own foundation, having seemingly taken the helm of the campaign.

British billionaire hedge fund manager, Sir Christopher Hohn is one of the biggest funders of ESG lobbying organizations and specifically those behind the SEC's Proposed Rule, ***which organizations the Commission repeatedly references in said proposal***. Hohn, whose

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[18] Nicholas Comfort and Steven Arons, "German Regulator Shelves ESG Rules After Russia Energy Fears," Bloomberg.com, May 3, 2022, https://www.bloomberg.com/news/articles/2022-05-03/german-watchdog-shelves-esg-investing-rules-on-energy-price-jump?mc_cid=6bd8a7fda1&mc_eid=546d7a34dc.

[19] Natasha White and Frances Schwartzkopff, "Goldman Investigation Tarnishes ESG Halo as Investors Bail," https://www.bloomberg.com/news/articles/2022-06-15/investors-are-increasingly-skeptical-of-esg-this-is-why.

[20] Simon Foy, "BlackRock ditches green activism over Russia energy fears: Fund titan says investing in traditional energy sources is now required to boost security," The Telegraph, May 11, 2022, https://www.telegraph.co.uk/business/2022/05/11/blackrock-ditches-green-activism-russia-energy-fears/. See also, https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf.

entities bankrolled the ‘Carbon Disclosure Project’ (CDP) with tens of millions of dollars, called the March 2022 U.S. Securities and Exchange Commission proposal to compel many more companies into this regime “an important moment” for him.[21] This is because, “‘[a]ctivism is now more opportunistic rather than fundamental for us,’ he says.” “Although [Hohn] is often described as an activist investor… these days, he describes activism as a tool to protect his investments.”[22]

Hohn’s $23 million investment in CDP from 2014 through 2020 (the last year for which figures are available) paid off: the SEC Proposed Rule cites to CDP at least 73 times (referring to it both as Climate Disclosure Project and Carbon Disclosure Project).

We refer SEC to research GAO has published, entitled *Disclosing The Real “Climate Risk: Case Study: UK “Esg” Billionaire Behind U.S. Climate Regulatory, Litigation Campaigns*, which is available online at https://govoversight.org/wp-content/uploads/2022/06/Hohn-TCI-CIFF-Paper.pdf.

GAO’s research can be summarized as stating that Hohn’s investment firm, The Children’s Investment Fund (TCI), grants a percentage of profits it makes from investing Hohn’s and other people’s wealth into the philanthropic foundation he also operates, called The Children’s Investment Fund Foundation, or CIFF.

CIFF in turn pressures governmental institutions[23] and makes large grants to organizations, whose work it then closely helps manage. In very sort, CIFF underwrites a campaign instilling in investors a fear that adverse regulatory outcomes could erase the value of their investments, as well as simultaneously underwriting litigation campaigns to instill in investors the fear that inevitable climate liability will be imposed through litigation, as well or alternatively. These campaigns drive more money into the “ESG” sector, benefitting the campaign’s ultimate funders.

CIFF is a major funder of organizations that attempt to use the agencies such as the SEC and also the courts to force governments to implement and enforce green policies, and to sue energy companies for damages caused by climate change, creating the fear that drives ESG campaigning as well as ESG financial gain.

In this way, CIFF’s funding has aligned nearly all of US and UK civil society’s stance on climate policy, completely displacing the public from policymaking. The Proposed Rule, with its repeated allusions to the “institutional investors” demanding this, prove far too much on this count.

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[21] Stephen Taub, “Chris Hohn Is a Hedge Fund Manager Like No Other,” Institutional Investor, April 26, 2022, https://www.institutionalinvestor.com/article/b1xs7nyw3yprmh/Chris-Hohn-Is-a-Hedge-Fund-Manager-Like-No-Other. “Although TCI is still perceived by many Wall Streeters as an activist firm, Hohn plays down this part of the firm’s strategy. ‘Activism is now more opportunistic rather than fundamental for us,’ he says.” “Although [Hohn] is often described as an activist investor… these days, he describes activism as a tool to protect his investments.”

[22] Id.

[23] See, e.g., https://ciff.org/news/ciff-calls-on-leading-central-banks-to-take-climate-action/.

Such special pleaders are illustrative of who Grewal, *et al*. and Aramonte, *et al*., *infra*, indicate are also the certain beneficiaries of the Proposed Rule and which the Proposed Rule serially acknowledges also are, not surprisingly, the voices to whom SEC listened in proposing the rule.

That is, this is simply silk-stocking rent-seeking, if among the most dangerous examples of the practice we have seen in many, many years if not ever.

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But Hohn is not the only underwriter of the lobbying and pressure campaign whose demands the Proposed Rule reflects. Through lobbying, much of it behind the scenes, central banks also have become leading advocates of "socially responsible" investment (including very specifically the SEC's "climate risk disclosure" Proposed Rule), without no democratic mandate.

Specifically, this Proposed Rule reflects guidelines established by the (non-governmental) 2017 Task Force on Climate-Related Financial Disclosures (TCFD) led by interested, activist investors and their employees.

The TCFD itself was founded by another obscure intergovernmental agency housed within the Bank of International Settlements (BIS), the Financial Stability Board, or FSB – an organization established by members of the G20 and the European Union, their financial ministries and central banks. BIS even published Aramonte, et al. in September 2021 giving reason to believe ESG was already creating a dangerous bubble.[24]

TCFD is run by the senior staff of the world's most powerful financial firms. Its officers are drawn from BlackRock, the Industrial and Commercial Bank of China, Swiss Re, Aviva, JP Morgan Chase, BNP, and Unilever. And its chairman is the billionaire media tycoon, investor, anti-fossil fuel campaigner, and failed Democrat presidential candidate and persistent "climate" campaigner (and, one can safely presume, investor), Michael Bloomberg (since the start of the pandemic, Bloomberg's wealth has increased from $55 billion to $82 billion).

As both governor of the Bank of England and then chair of the FSB, Mark Carney founded the TCFD and appointed Bloomberg as its chairman. Bloomberg then hired former SEC Chair Mary Schapiro to Bloomberg LP in 2018 where she serves as Vice Chair of Global Public Policy and Special Advisor to the Founder and Chairman.[25] Public records show that, in that role,

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[24] Sirio Aramonte and Anna Zabai, "Sustainable finance: trends, valuations and exposures," BIS Quarterly Review, 20 September 2021, https://www.bis.org/publ/qtrpdf/r_qt2109v.htm. See also, "I show that the performance of ESG investments is strongly driven by price-pressure arising from flows towards sustainable funds, causing high realized returns that do not reflect high expected returns….Under the absence of flow-driven price pressure, the aggregate ESG industry would have strongly underperformed the market from 2016 to 2021. Furthermore, the positive alpha of a long-short ESG taste portfolio becomes significantly negative." van der Beck, Philippe, Flow-Driven ESG Returns (September 23, 2021). Swiss Finance Institute Research Paper No. 21-71, Available at SSRN: http://dx.doi.org/10.2139/ssrn.3929359.

[25] https://www.bloomberg.com/company/press/bloomberg-l-p-names-mary-schapiro-vice-chair-public-policy-special-advisor-founder-chairman/

Schapiro has been lobbying the current administration to adopt "climate disclosure." Schapiro is listed as one of five other Task Force Members, with Bloomberg, in a 2021 Power Point slide show she gave to U.S. Treasury Secretary Janet Yellen lobbying for CRD and ESG,[26] obtained under the federal U.S. Freedom of Information Act (FOIA), but is merely on the "Secretariat" on the public-facing website[27].

According to her power point slide deck presented to Treasury Secretary Janet Yellen on April 19, 2021, and obtained by the government-transparency group Energy Policy Advocates in Freedom of Information Act litigation, TCFD/Bloomberg/Schapiro "recommend[] organizations disclose information related to Governance and Risk Management recommendations" — "how the organization identified, assesses, and manages climate-related risks" — "regardless of materiality".[28] This recommendation, like most all of TCFD's agenda items, is of course found in the Proposed Rule.

TCFD coordinated central banks' and financial institutions' designs for the ESG and disclosure principles required by Hohn's outfit TCI, campaigned for by CIFF grantees, and now proposed by SEC to be imposed as mandatory by the federal government as requested by these lobbies.

Though TCFD lacks actual regulatory teeth, and despite being a private organization staffed by outspoken activists and interested parties, the SEC defers to it in promoting "climate risk disclosure" with at least 117 references in a 490-page proposal.[29]

This proposal is not about climate, it is about "ESG" investing or, more specifically, *extant investors*. This proposal also raises interesting concerns about potential abuse of "market power." The existing, large holders of "climate-friendly" investments appear to have a pecuniary interest in pressing for a new disclosure regime that will help inflate the value of those assets at the expense of the actual returns of the "ordinary investor" the SEC claims to be most concerned about. And that's who the SEC repeatedly indicates is calling for this information, not retail investors.

That is to say, those who have already put their money in "ESG," large investors who made a bet and have a pecuniary interest in the outcome, are the same ones pressing for a new disclosure regime that will help inflate the value of those assets, at the expense of the actual returns of the "ordinary investor" the SEC claims to be most concerned about.

Failing the "Purely Factual" Standard: All Speculative 'Confessions' Required by the Proposed Rule are Grounded in Climate Models Not Fit for Purpose

This Proposed Rule also reflects the product of, and refers (and defers) as an authority to, general circulation models (GCMs) generally and the Intergovernmental Panel on Climate

[26] https://govoversight.org/wp-content/uploads/2022/04/Schapiro-Bloomberg-TCFD-Deck-314-335.pdf
[27] https://www.fsb-tcfd.org/members/
[28] https://govoversight.org/wp-content/uploads/2022/04/Schapiro-Bloomberg-TCFD-Deck-314-335.pdf
[29] https://www.sec.gov/rules/proposed/2022/33-11042.pdf

Change (IPCC) specifically. It also defers to other entities which nonetheless are not independent of each other as they all rely on "scenarios" generated by a suite of models.[30]

In adopting uncritically these outside assessments, the Proposed Rule reveals fatal flaws of arbitrariness and capriciousness in its use of science, and creates Due Process problems regarding compelled speech extending far beyond any accepted bounds of the applicable standard clearly set forth by the courts of "purely factual and noncontroversial" disclosures.

That the climate models SEC refers to do not portray purely factual and noncontroversial information is widely recognized if little discussed. These models have their uses, unfortunately those are not the uses to which they are put, particularly in this specific context.

As with TCFD's recommendations and all CRD demands, IPCC reports and the Proposed Rule are grounded in projections derived from GCMs. This is a very complex subject that fortunately can be made very simple particularly for these purposes:

Demand for climate policy rests largely on climate models
Climate models are very complex
Climate models are not complex enough
Climate models are tuned, climate models are fudged
Climate models get the temperature of the Earth wrong
Climate models get many other things wrong too
Climate models breach a fundamental principle of physics[31]

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[30] See, e.g., "Estimates of physical risks are based on a variety of assumptions, scenarios, and Representative Concentration Pathways (RCPs). RCPs are widely used, consensus-based models that estimate how climate systems may respond to specific concentrations of greenhouse gas in the atmosphere. Currently, no standardization exists within or across sectors on which parameters to use for evaluating physical risk, and so these estimates remain first-order approximations. For instance, there is an ongoing debate concerning the assumptions in RCP 8.5 (the most severe of the RCPs) and whether it underestimates business as usual (Christensen, Gillingham, and Nordhaus, 2018) or overestimates physical and economic impacts by disregarding gradual shifts in the global energy economy (Ritchie and Dowlatabadi, 2017). However, these pathways and associated estimates nevertheless importantly help shape awareness among policymakers and the private sector on the magnitude and nature of the risk." "Managing Climate Risk In The U.S. Financial System," Report of the Climate-Related Market Risk Subcommittee, Market Risk Advisory Committee of the U.S. Commodity Futures Trading Commission, https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf.

This report has 65 TCFD references. It has every appearance of being an effort to create a shadow carbon price tax in commodities/options/insurance markets. One of the authors, Litterman, very oddly was not at the time a government employee but now is chairman of the Office of the Comptroller of the Currency; at the time he was a board member of activist non-governmental organizations, someone who with his friends helped spearhead TCFD (e.g., Mark Carney at Brookfield Asset Management) while standing to earn vast sums of money if this is put in place. Relying on IPCC and TCFD is inappropriate for any regulation such as SEC's Proposed Rule.

[31] Climate models' virtual worlds 'lose' heat. Mauritzen T et al. (2012) 'Tuning the climate of a global model'. Journal of Advances in Modeling Earth Systems; 4: M00A01.

Climate models incorporate too much heat and too little natural variability, and thus in fact *cannot* predict the future
It is well-understood (and established) that climate models are failing for any policy-relevant purpose including particularly the Proposed Rule, which is taboo to say, and because of all of this
Climate models are causing harm.[32]
The Proposed Rule, if it goes into effect, will be greatest manifestation so far of this harm

Unfortunately, proponents of using models for policy and other decision-making couch their language "with the contents expressed in terms that allow for 'plausible deniability'."[33] Using models as the Commission does here is not only legally unsupportable but deeply reckless.

Model outputs are a direct function of their inputs (assumptions). The assumptions are demonstrably improper (inflated and disproved, by observations) for any policymaking purpose, including most demonstrably in the models' climate sensitivity (to a doubling of atmospheric CO2).

As German climate scientist and Professor at the Meteorological Institute of the University of Hamburg Hans van Storch has acknowledged about the basis for all such projections, climate models: "Other climate researchers might have a different instinct [than his, about future scenarios]. Our models certainly include a number of highly subjective assumptions. Natural science is also a social process, and one far more influenced by the spirit of the times than non-scientists can imagine. You can expect many more surprises."[34]

Fatally flawed assumptions rife throughout GCMs include projected fossil fuel use and climate sensitivity. Regarding the latter, all GCMs use an assumption of climate sensitivity that is higher than observations allow for any scenario to be credible, or, as the federal government puts it in its own Information Quality Act (IQA)(Section 515 of Public Law 106-554), "highly influential" as the SEC treats IPCC scenarios.

Each and every model suffers from these problems. This, too, affirms that the models, their scenarios, and any compelled speech that is to be grounded therein all are "hardly 'factual and non-ideological'."

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[32] This distillation is taken from and can be explored in detail with supportive information at Andrew Montford, "Ten Things Everyone Should Know About Climate Models," Note 32, The Global Warming Policy Foundation, May 31, 2022, https://www.thegwpf.org/content/uploads/2022/05/Montford-Climate-Models-1.pdf?mc_cid=dc5725d4f5&mc_eid=546d7a34dc.
[33] "Information we are supplying which is not 'adequate for purpose' is being interpreted as if it was. 'Plausibile Deniability' [sic] seems a poor aim to me.'" Montford at 6, citing a talk by Leonard Smith, available at Smith L, 'The user made me do it: Seamless forecasts, higher hemlines and credible computation'. http://www.eas.gatech.edu/sites/default/files/SmithTalkGT.pdf.
[34] "Climate Expert von Storch: Why is Global Warming Stagnating?", Der Spiegel, June 20, 2013, https://www.spiegel.de/international/world/interview-hans-von-storch-on-problems-with-climate-change-models-a-906721.html

The flawed methodology and uncertain outputs of the modelling SEC refers to is important and in our opinion fatal to SEC's proposed rule. Also critical to note is that the models uniformly assume — again, as an assumption all simply adopt — a climate sensitivity that is higher than is supported by decades of observations. Explanations surely include elements of groupthink, the reward system of governmental (and private) financing of alarmist climate projections over more realistic ones (again, in terms of what observations tell us), and the clubby nature of science shown time and again including (in)famously in the case of Barry Marshall and Robin Warren, researchers who discovered the bacterium Helicobacter pylori and deciphered its role in causing ulcers, ultimately breaking through establishment insistence that stress caused ulcers to win the Nobel Prize for Physiology in 2005. See, e.g., "Nobel came after years of battling the system," *New York Times*, October 11, 2005.[35]

The bias toward various over sensitivities abounds. So many years of observations at odd with model projections on which SEC wants to compel "climate disclosures" by covered companies are revealing cracks, however ploddingly. For example, it was just in April 2022 that we read how "Most simulations of our climate's future may be overly sensitive to Arctic ice melt as a cause of abrupt changes in ocean circulation, according to new research led by scientists at the University of Wisconsin–Madison." [36]

As discussed below in more detail, these model projections run too hot[37] compared to reality[38], as a result of this *continuing use of inflated climate sensitivity assumptions*.

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[35] "When two Australian scientists set out in the early 1980's to prove that a bacterium, Helicobacter pylori, caused stomach inflammation and ulcers, they met opposition from a medical-industrial complex entrenched in the belief that psychological stress was the cause. Opposition to their radical thesis came from doctors with vested interests in treating ulcers and other stomach disorders as well as from drug companies that had come up with Tagamet, which blocked production of gastric acid and was becoming the first drug with $1 billion annual sales. Ulcer surgery was lucrative for surgeons who removed large portions of the stomach from patients with life-threatening bleeding and chronic symptoms. Psychiatrists and psychologists treated ulcer patients for stress. The concept of curing ulcers with antibiotics seemed preposterous to doctors who had long been taught that the stomach was sterile and that no microbes could grow in the corrosive gastric juices…. 'because the makers of H2 blockers funded much of the ulcer research at the time, all they had to do was ignore the Helicobacter discovery.'…Dr. Marshall said…. All the factors created a type of rigidity that many doctors say still exists for better or worse…. It can be hard for doctors, like others, to admit error. Sometimes the caution is excessive and it, too, can cost lives." https://www.nytimes.com/2005/10/11/health/nobel-came-after-years-of-battling-the-system.html

[36] "Melting ice caps may not shut down ocean current," April 9, 2022, https://phys.org/news/2022-04-ice-caps-ocean-current.html. Referencing

[37] The model results are not uniform; some of the models get the historical record much worse than others, some less bad (e.g., INM-CM4/4.8). The mean of the CMIP (Coupled Model Intercomparison Project) model projections is simply not fit for policymaking purpose.

[38] The latest, and 'mainstream' publication to acknowledge this, despite the enormous climate-industry pressures to avoid saying this too publicly too often, is Science Magazine, Paul Voosen, "Use of 'too hot' climate models exaggerates impacts of global warming: U.N. report authors say researchers should avoid suspect models," Science, May 4, 2022, https://govoversight.org/wp-content/uploads/2022/05/CH_Holdings-version-1-scaled.jpg, reporting (in sometimes clumsily effusive prose to defend the IPCC) on a paper published in Nature, Hausfather, et al., "Climate simulations: recognize the 'hot model' problem," May 4, 2022, https://www.nature.com/articles/d41586-022-01192-2. This has been known for years although the articles seek to portray this as a new development, limited to

Models are a type of scientific theory. The scientific validity of models is determined by applying scientific method and comparing their predictions directly with observations to see if they work. If they don't "work," they are "wrong" and invalid as science.[39]

IPCC CMIP Models. The International Panel for Climate Change ("IPCC"), the dominant source of models, explained that its "Assessments of climate risks … [are] based on climate model simulations [predictions] that are part of the fifth and sixth Coupled Model Intercomparison Project phase (CMIP5, CMIP6)." IPCC. *Climate Change 2022: Impacts, Adaptation and Vulnerability, Summary For Policymakers* (2022), p. SPM-6.

CMIP5. John Christy, PhD, Professor of Atmospheric Science at the University of Alabama, applied the scientific method to CMIP5 102 predictions of temperatures 1979-2016 by models from 32 institutions. He explained he used "the traditional scientific method in which a claim (hypothesis) is made and is tested against independent information to see if the claim can be sustained," and produced char showing.[40]

Dr. Christy's graph clearly shows 101 of the models' 102 predictions and their consensus average fail miserably to predict reality.[41] Focusing on the consensus red line, he concluded:

> "When the 'scientific method' is applied to the output from climate models of the IPCC AR5, specifically the bulk atmospheric temperature trends since 1979 (a key variable with a strong and obvious theoretical response to increasing GHGs in this period), I demonstrate that the consensus of the models [red line] fails the test to match the real-world observations by a significant margin. As such, the average of the models is considered to be untruthful in representing the recent decades of climate variation and change, and thus would be inappropriate for use in predicting future changes in the climate or related policy decisions." Id., p. 13 (emphasis added).

"a subset of the newest generation of models." See, e.g., the claims since the 1980s that the Maldives Islands would be covered by warming-induced sea-level rise in the next 30 years, yet in 2020 Maldives opened four new airports to accommodate its booming tourist travel to islands still very much above water and likely to stay that way — indeed they like other island chains continue to grow, which poses no impediment to, e.g., National Geographic continues to report "The Maldives is being swalled by the sea." The Commission's rules cannot mimic such detachment.

Hausfather, et al., whose authors include high-profile climate 'alarmists', which does not influence the point made here that the climate advocacy community and climate industry's bias, in violation of the laws of probability, are continuously found to have made their mistakes on the side of exaggerated claims. This explains why the sky remains exactly where we left it despite decades of promises of its impending collapse, a lesson that the Commission will be inherently arbitrary and capricious to continue avoiding, in any final rule, as it does in the proposed rule.

[39] Commenters owe a debt of thanks to Drs. William Happer and Richard Lindzen for their preparation of the following.

[40] Christy, House Comm. Science, Space and Technology (March 29, 2017), pp. 3, 5.

[41] The one model that closely predicted the temperatures actually observed is a Russian model and is the only model that should be used in most widely promoted (including by the Commission) climate science applications. The IPCC did not use it but used the models that it should have rejected.

Thus, the models that produced the 101 predictions fail the Feynman test. They do not "work," therefore they are "wrong." Scientifically, they all should be abandoned. Rejecting science, the IPCC governments keep using CMIP models, including CMIP6 even though it is worse.

CMIP6. Steven Koonin, Phd., a Cal-Tech physicist, a professor at New York University and the author of *Unsettled* (2021), concluded:

> "One stunning problem is that … the later generation of [CMIP] models are actually more uncertain than the earlier one[s]."
>
> "The CMIP6 models that inform the IPCC's upcoming AR6 [Climate Change reports] don't perform any better than those of CMIP5." *Id*. pp. 87, 90 (emphasis added).
>
> He elaborated CMIP6's failure using the scientific method in detail:

- "An analysis of 267 simulations run by 29 different CMIP6 models created by 19 modeling groups around the world shows that they do a very poor job [1] describing warming since 1950 and … [2] underestimate the rate of warming in the early twentieth century**.**" *Id*. p. 90 (emphasis added).
- "Comparisons among the [29] models [show] … model results differed dramatically both from each other and from observations ... [and] disagree wildly with each other." *Id*. p. 90 (emphasis added).
- "One particularly jarring failure is that the simulated global average surface temperature … varies among models … three times greater than the observed value of the twentieth century warming they're purporting to describe and explain." *Id*. p. 87 (emphasis added).
- As to the early twentieth century warming when CO2 levels only increased from 300 to 310 ppm, "strong warming [was] observed from 1910 to 1940. On average, the models give a warming rate over that period of about half what was actually observed. That the models can't reproduce the past is the big red flag -- it erodes confidence in their projections of future climate." *Id*. pp. 88, 95 (emphasis added).

Thus, the IPCC CMIP5 & 6 models that are the basis for their scenarios and everything the IPCC and many others do (including the Commission's proposed requirements for climate risk "disclosures") fail the fundamental test of scientific method. They have no value as scientific evidence and **most importantly are not fit for the purpose to which the Commission effectively but inarguably puts them in this Proposed Rule**.

Other Models. Prof. Koonin's book devoted an entire chapter to "Many Muddled Models," not just the CMIP models.

He asked, "how good are our climate models? And how much confidence should we have in what they say about future climates?" He concluded all the models are "demonstrably unfit for the purpose," elaborating:

> "The uncertainties in modeling of both climate change and the consequences of future greenhouse gas emissions make it impossible today to provide reliable, quantitative statements about relative risks and consequences and benefits of rising greenhouse gases

to the Earth system as a whole, let alone to specific regions of the planet." *Unsettled*, pp. 24, 96.

The above establishes that agreement with observations is the measure of scientific truth, which test the CMIP and other models fail. Thus, the IPCC CMIP and other models provide no scientific support for the SEC's Proposed Rule or its required disclosures of a climate related risk caused by fossil fuels and CO2, and **are impermissibly not fit for this purpose.**

Models' output and their validity and utility are nonetheless sold to the public — including, inescapably, via the SECs Proposed Rule — as being adequate to support decision-making (policy and, in this case, compelled speech).

Professors Roger Pielke, Jr. and Justin Ritchie summarized the fatal defect of climate computer model projections, in an April 2022 article in *Issues in Science and Technology*:

> In 2021, climate research finds itself in a situation similar to breast cancer research in 2007. Our research (and that of several colleagues) indicates that the scenarios of greenhouse gas (GHG) emissions through the end of the twenty-first century are grounded in outdated portrayals of the recent past. Because climate models depend on these scenarios to project the future behavior of the climate, the outdated scenarios provide a misleading basis both for developing a scientific evidence base and for informing climate policy discussions. The continuing misuse of scenarios in climate research has become pervasive and consequential—so much so that we view it as one of the most significant failures of scientific integrity in the twenty-first century thus far. We need a course correction. …
>
> The emissions scenarios the climate community is now using as baselines for climate models depend on portrayals of the present that are no longer true. And once the scenarios lost touch with reality, so did the climate, impact, and economic models that depend on them for their projections of the future. Yet these projections are a central part of the scientific basis upon which climate policymakers are now developing, debating, and adopting policies.[42]

Emeritus professor (in physical geography, from which "climate" emerged as a subdiscipline) at the University of Oslo Ole Humlum examined *observed* patterns in temperature changes in the atmosphere and oceans together with trends in climate impact in his annual *State of the Climate* report for 2021 (April 2022).[43] Humlum, who warns of "great risk in using computer modelling and immature science to make extraordinary claims," chronicles *observed reality* in this report, noting disparities between modeling and reality. These include, *inter alia*, sudden and stark sea level rise which the IPCC 6th Assessment Report Working Group I (August

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[42] Jr., Roger Pielke, and Justin Ritchie. "How Climate Scenarios Lost Touch With Reality." *Issues in Science and Technology* 37, no. 4 (Summer 2021): 74–83. https://issues.org/climate-change-scenarios-lost-touch-reality-pielke-ritchie/.

[43] The State of the Climate 2021, Ole Humlum, Report 51, The Global Warming Policy Foundation (London), April 2022, available at https://www.thegwpf.org/content/uploads/2022/04/Humlum-State-of-Climate-2021-.pdf?mc_cid=2b0d86682b&mc_eid=546d7a34dc.

2021) persistently projects are slated to begin in 2020 — which would require a sudden reversal of long-term relative sea-level decrease over more than a century. "A few reflections might be appropriate here. The step change in relative sea level predicted for both sites (and many others) in 2020 appears implausible, and suggests that the modelled data is not capturing real-world dynamics."[44]

Viewed another way, SEC must address that its Proposed Rule grounds its compelled speech in the recommendations and assessments which treat a proved least-likely, indeed now near-impossible scenario as a reasonable and even business-as-usual case. Consider the admittedly least-likely scenario, what is known as "RCP 8.5," which is both disproved as an impossibility and yet officially treated as reasonable by authorities deferred to by the SEC. It is legally untenable for the SEC to declare such "disclosures" as "purely factual."

As brief background, the IPCC, like other recommended sources for computer-modeled climate scenarios in the Proposed Rule, sets forth different emissions pathways and scenarios. As noted, above, each uses different socioeconomic, technology and biophysical assumptions. The characteristic uniting all scenarios' assumptions is that all err on the side of producing more lurid, i.e., less realistic, scenarios than observations (the other half of this science experiment) reveal are prudent.

RCP stands for Representative Concentration Pathways. "The number (e.g., 8.5) reflects the additional radiative forcing (in Watts per square meter) in 2100 from greenhouse gas emissions and other factors, relative to pre-industrial times. To date, radiative forcing relative to pre-industrial levels is ~2.5 Watts per square meter."[45]

The IPCC has a clear history not only of maintaining its scenario RCP 8.5 — one is tempted to conclude it is for the headline-grabbing utility that an utterly implausible scenario provides the outfit, always seeking greater budgets and influence — but of using RCP 8.5 as a baseline scenario, disproven time and again by the very passage of time.[46] Again per Pielke and Ritchie's recent assessment:

> For instance, RCP8.5 projects to 2100 a six-fold growth in global coal consumption per capita, while the International Energy Agency and other energy forecasting groups collectively agree that coal consumption has already or will soon peak. Also, RCP8.5 foresees carbon dioxide emissions growing rapidly to at least the year 2300 when Earth reaches more than 2,000 ppm of atmospheric carbon dioxide concentrations. But again, according to the IEA and other groups, fossil energy emissions have likely plateaued, and it is plausible to achieve net-zero emissions before the end of the century, if not much sooner. Today, projections that carbon dioxide emissions from fossil fuels will increase dramatically for the next 50, 100, or 300 years are simply implausible. …

[44] Id., at 37.
[45] https://judithcurry.com/2021/05/19/projecting-manmade-climate-change-scenarios-to-2050/
[46] See, e.g., relevant IPCC assertions and analysis and references at https://rogerpielkejr.com/2020/02/20/misuse-of-scenarios-in-the-fourth-u-s-national-climate-assessment/

These decisions might be justifiable if climate models were simply scientific tools aimed at exploring a variety of conditions as a way to test hypotheses and researchers' understanding of the climate system. But scientists, policymakers, the media, environmentalists, and the public now widely justify and interpret climate models as providing predictive information about plausible futures. By choosing RCP8.5 as one of only four forcing scenarios to be used by modelers, and compounding this choice by labeling it as the business-as-usual scenario, the IPCC promoted a scenario useful for scientific exploration but highly misleading when applied to projecting the future to inform decision-making. …

In our research on the plausibility of IPCC scenarios, we have discovered it is not just RCP8.5 that is implausible, but the entire set of baseline scenarios used by the IPCC. The abstract of one particular academic paper summarizes these deficiencies, as follows:

Abstract

Scenarios used by the Intergovernmental Panel on Climate Change (IPCC) are central to climate science and policy. A recent Nature commentary found observed trends and International Energy Agency (IEA) projections of global CO2 emissions substantially diverging from high-emission scenarios such as RCP8.5, which are often treated as equivalent to 'business as usual' in climate research and assessment. Here, we quantify the bases for this divergence by comparing "baseline" (or "no policy") scenario projections of key fossil-fuel CO2 emission drivers to observations from 2005-2017, and also to projections through 2040 from world energy outlooks. We find most of the baseline scenarios used in the Fifth (AR5) and designed for the forthcoming Sixth (AR6) IPCC Assessment Reports have over-projected per-capita GDP growth—severely in most developing regions, and slightly in other regions—and have slightly over-projected carbon intensity (CO2 emissions/primary energy) in most regions. These baseline scenarios will likely continue to over-project carbon intensity through 2040 and beyond, in part due to unrealistic assumptions about fossil-fuel expansion. Long-term economic growth outlooks lack consensus among economists, but we argue that most of these baseline scenarios will likely continue over-projecting per-capita GDP to at least 2040 due to inertia. Our results inform the rapidly evolving discussion on uses of scenarios in climate science and policy.[47]

These deficiencies in the models have been known for years, with no retreat by the climate authorities promoting climate regulation. Instead, by grounding governmentally compelled speech in IPCC scenarios and recommendations we see an aggressive refusal to accept the IPCC et al.'s limitations.

As Pielke, Jr., has written, "At the center of the corruption of climate science discussed here [is] a highly technical scenario of the future (called Representation Concentration Pathway

[47] Burgess, M. G., Ritchie, J., Shapland, J., & Pielke, R., Jr. (2020, February 18). IPCC baseline scenarios over-project CO2 emissions and economic growth. https://doi.org/10.31235/osf.io/ahsxw *SocArXiv*

8.5 or RCP8.5). Over the past decade this particular scenario has moved from an extreme outlier to the center of climate policy discussions."[48]

"Unlikely" has turned into "likely impossible", making IPCC reports impermissibly speculative bases for assessing climate risk disclosure.[49] Putting aside the widespread (certainly knowing) media, advocate, political and even scientific-author misrepresentations of IPCC scenario RCP 8.5 as "business as usual," since 2015 the evidence has become essentially irrefutable that RCP 8.5 no longer serves as even a realistic worst-case scenario. It is likely even an *impossible* scenario. Its inclusion in the bases for SEC mandated climate risk disclosures is fatal to the proposed rule.

Nonetheless, the SEC emphasizes IPCC scenarios as a basis for climate risk disclosure — both for requiring and reporting such claimed risks to a business — despite IPCC using RCP 8.5 as one of four scenarios to frame planning decisions. It is self-discrediting and, by SEC's effective adoption of this approach and embrace of it as a basis for requiring climate risk disclosures, it is fatal to the proposed rule.

SEC must take note that the institutions promoting these scenarios have made clear they have no inclination to change this behavior, and as such SEC must recognize this behavior, and deficiencies in the authorities' products, will persist. This factor alone makes SEC's proposed compelled climate risk disclosures unconstitutional as impermissibly compelled speech, running afoul of SEC's obligation to require only factual, non-controversial statements, and therefore makes the mandated disclosures unconstitutional compelled speech.

We note that the above assessment of the use of IPCC scenarios applies across the board, whichever scenario(s) SEC references and a regulated party might rely on, as all suffer from the same reliance on impermissible vulnerabilities, which vulnerabilities are found in assumptions that, quite remarkably, all err on the side of greater, e.g., sensitivity to CO_2, and thereby a greater problem.

In a similar vein, the proposed rule's requirement that regulated parties count supply chain emissions is, on its own, sufficiently speculative and non-factual and controversial that it should doom the rule as unconstitutional.[50]

By exaggerating the certainty and magnitude of climate change risk on its own, and with the Proposed Rule relying on, e.g., TCFD, IPCC and other such entities which were expressly

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[48] Roger Pielke, Jr., "How Billionaires Tom Steyer and Michael Bloomberg Corrupted Climate Science," Forbes, January 2, 2020, https://www.forbes.com/sites/rogerpielke/2020/01/02/how-billionaires-tom-steyer-and-michael-bloomberg-corrupted-climate-science/?sh=1bf4019c702c.

[49] See also relevant IPCC assertions and analysis and references, at https://judithcurry.com/2018/11/24/is-rcp8-5-an-impossible-scenario/, and relevant International Energy Agency assertions and analysis and references, at https://judithcurry.com/2021/05/19/projecting-manmade-climate-change-scenarios-to-2050/

[50] See, e.g., Vince Bielski, "The Green U.S. Supply-Chain Rules Set to Unspool and Rattle the Global Economy," Real Clear Investigations, April 7, 2022, https://www.realclearinvestigations.com/articles/2022/04/07/the_green_supply-chain_rules_set_to_unspool_and_rattle_the_economy_825567.html.

established to support advancement of this agenda (i.e., interested, mission-driven activists, whose recommendations are not fit for purpose here), SEC disclosure *increases* investor risk.

All of this is the tip of the iceberg of the constitutionally problematic nature of demanding parties report climate risk beyond extant required reporting. The models on which the compelled speech is to be based are "hardly 'factual and non-ideological'." Any work that the SEC might require of regulated entities in support of reporting mandates based on the current state of climate science is an unconstitutional mandate.

<u>Constitutional Problems with the Proposed Rule</u>:

SEC's Proposed Rule runs afoul of controlling First Amendment precedent. If the Commission adopts the Proposed Rule, SEC will inevitable face litigation and inevitably waste resources in an attempt to defend a doomed and indefensible regulation.

As Commissioner Hester Peirce noted in her own statement about the Proposed Rule: "All the disclosure mandates [SEC] adopts … are at bottom compelled speech, and this one in particular prescribes specific content for the speech that it mandates." This Proposed Rule is particularly pernicious in its assault upon First Amendment rights, because the rule not only compels speech, but compels certain speech with a certain politically favored viewpoint, that is hardly "purely factual" let lone also noncontroversial.

That the rule does so without any statutory authority or mandate to guide it in the enactment, interpretation, or enforcement of the Proposed Rule leaves both natural and corporate citizens facing the prospect of indefinitely chilled speech on issues of public concern.

In *Nat'l Ass'n of Mfrs. v. SEC*, 419 U.S. App. D.C. 158, 166, 800 F.3d 518, 526 (2015), the D.C. Circuit considered the issue of compelled speech and compelled disclosures, but in a posture much more favorable to SEC than in the instant posture. In that case, Congress had passed a statute (§1502) forcing various entities to make disclosures to SEC. Congress, however, made no effort to hold hearings prior to passage of the statute and there was no evidence in the record of the governmental interest in forcing the disclosures.

In *Nat'l Ass'n of Mfrs. v. SEC*, therefore, SEC was thus acting on authority expressly entrusted to it by the legislative branch. Even this express statutory language could not shield the statute and SEC's actions to enforce it from being found to be unconstitutional. In the instant matter, SEC is attempting to go even further in mandating compelled "disclosures" from individuals and entities, but is doing so on much weaker grounds and without any legislative foundation for its actions. If SEC adopts this regulation in its current form, it will almost certainly be overturned under controlling D.C. Circuit precedent.

Under that precedent, the proposed regulation is constitutionally infirm for at least three reasons: First, the proposed regulation is unlawful because SEC is presently acting without a grant of legislative authority that was present in earlier cases such as *Nat'l Ass'n of Mfrs. v. SEC.* Second, the proposed regulation is unlawful because SEC is proposing to require the disclosure of controversial information which is inherently grounded in moral judgment rather than purporting to require disclosure of purely factual and noncontroversial information. Third, the regulation is unlawful because even assuming arguendo that the SEC had authority to compel the instant disclosures and that the disclosures were not uncertain and controversial in nature, the SEC has made no effort to tailor the compelled speech to any legitimate governmental goals under *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 564, 100 S. Ct. 2343, 2350 (1980).

We reiterate, as set forth above, that the basis for this compelled speech depends upon the validity of general circulation models. Yet these models are deeply problematic and reliance upon them is a fatal flaw of the proposed "climate risk disclosure" rule.

As the D.C. Circuit has held, "To the extent that the government's interest is in assuring that consumers receive particular information.. the government [may lawfully] act[] only through a reasonably crafted mandate to disclose 'purely factual and uncontroversial information' about attributes of the product or service being offered." *Am. Meat Inst. v. United States Dep't of Agric.*, 411 U.S. App. D.C. 318, 326, 760 F.3d 18, 26 (2014). The instant regulation does not compel disclosure of such factual and uncontroversial information, but instead requires disclosure of uncertain and controversial information, in the form of subjective analyses of what a suite of GCMs materially mean for a particular business's present or future, as pertains to. As the D.C. Circuit has held, "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." *Nat'l Ass'n of Mfrs. v. SEC,* 419 U.S. App. D.C. 158, 170, 800 F.3d 518, 530 (2015), citing *Nat'l Ass'n of Mfrs. v. SEC*, 409 U.S. App. D.C. 210, 222, 748 F.3d 359, 371 (2014).

Even leaving aside that the proposed regulation requires "disclosures" of speculative claims grounded in controversial and disputed information, tantamount to the confessions of guilt that the D.C. Circuit has already held to be unconstitutional, the SEC makes no attempt in this proposed regulation to meet the standard to justify a compelled disclosure requirement at all (regardless of the content of such compelled disclosures).

As the D.C. Circuit has explained, to compel disclosures, "the government must show (1) a substantial government interest that is; (2) directly and materially advanced by the restriction; and (3) that the restriction is narrowly tailored." *Nat'l Ass'n of Mfrs. v. SEC*, 409 U.S. App. D.C. 210, 223, 748 F.3d 359, 372 (2014).

With respect to the instant regulation, SEC easily fails this three-part test.

I. SEC is not Advancing a Substantial Government Interest.

First, SEC's purported substantial government interest is that "Investors need information about climate-related risks." SEC further asserts that "enhanced climate disclosure requirements could increase confidence in the capital markets and help promote efficient valuation of securities." SEC is wrong to characterize such general concerns as a "substantial government interest" which suffices to trump First Amendment rights under the well-established *Central Hudson* test.

"When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664, 114 S. Ct. 2445, 2470 (1994) (internal citations and quotations omitted).

SEC in this case is merely positing the existence of a disease. It has offered no hard data about the impact the proposed disclosures will have on the market, much less data that shows any cost or burden upon the market as a result of purported failures to disclose the information at issue. SEC has failed to establish that any of the purported harms which the regulation is designed to address are "real" as opposed to "conjectural." Instead, SEC's introduction to its proposed regulation cavalierly assumes that investors must want and rely upon the information because a host of institutional investors in the "ESG" business wish to ground their decisions in "climate risk disclosure" but feel they cannot.

II. SEC's Proposed Regulation does not Directly or Materially Advance the Government's Interest.

Second, SEC attempts to address this purported "substantial government interest" by requiring the registrant to disclose, inter alia, "[t]he impact of climate-related events (severe weather events and other natural conditions as well as physical risks identified by the registrant) and transition activities (including transition risks identified by the registrant) on the line items of a registrant's consolidated financial statements and related expenditures." SEC further requires the registrant to disclose "GHG Emissions Metrics" related to their operations.

SEC's proposed regulation is entirely unmoored from the supposed government interest. SEC makes no attempt to explain how requiring a registrant to disclose *its own* GHG emissions metrics relates to the need of any investor or class of investors to assess the value of a particular security or how the disclosure of any company's emissions metrics might impact the costs of "climate-related events." To the extent that SEC asserts global climate change is ongoing and results in severe weather events (which is a controversial assertion debated in the scientific community), such severe weather events impact all companies regardless of the individual metrics for any particular issuer of a security. And SEC has made no connection at all between the emissions of any particular entity and the accurate valuation of that entity's securities.

Even if a court were ultimately to agree with SEC that it has a legitimate interest in ensuring the accurate pricing of securities in the market, and that climate change broadly speaking may impact the value of certain securities, SEC's compelled disclosure requirements would nevertheless be stricken because SEC fails to tie its proposed regulations to its purported interests.

III. SEC's Proposed Regulation is not Narrowly Tailored.

Third, SEC's Proposed Regulation is not narrowly tailored.

The U.S. Supreme Court has made clear that "Content-based speech restrictions are generally unconstitutional unless they are narrowly tailored to a compelling state interest." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 680, 114 S. Ct. 2445, 2478 (1994). The Court has further made clear that "This is an exacting test. It is not enough that the goals of the law be legitimate, or reasonable, or even praiseworthy." *Id*. Instead, "[t]here must be some pressing public necessity, some essential value that has to be preserved; and even then the law must restrict as little speech as possible to serve the goal." *Id*.

Although the regulation here goes beyond restricting speech to compelling it, the Proposed Rule nevertheless mandates and controls the content of speech in "disclosures." The Proposed Rule, therefore, must be held to "exacting" scrutiny. Just as in *Turner Broadcasting*, the government has the option to incentivize its desired climate disclosure outcome in other ways. It could offer tax incentives, or offer grants or subsidies to issuers of securities who comply with various disclosure standards. The government could similarly incentivize the purchase of various securities that are sold accompanied by various disclosures. Because the government has many options to obtain its desired result without requiring compelled speech on the part of entities and individuals who disagree with the government's position on climate, however, the SEC has not narrowly tailored its proposed regulation.

<u>Conclusion</u>

The world is already struggling with what a theoretically "voluntary" ESG agenda has imposed on the market and its investors. The heretofore "voluntary" ESG agenda has in practice become coercive, and the Proposed Rule would exacerbate existing problems rather than solve them.

ESG campaigning has substantially contributed to and now compounded the rising cost of energy, fanning a financial crisis with no end in sight, creating or exacerbating harms for people around the world which are immediate, have no short-term remedy, and are far worse than any reasonably projected effects of climate change.

In fact, the absence of affordable and reliable energy has caused the very same problems that climate change activists said would be caused by global warming and climate change: the loss of agricultural productivity, the return of hunger and poverty, and exposure to temperature extremes.

This reckless pursuit has deliberately caused an economic crisis that will harm many millions, perhaps billions of people. Governmental institutions and agencies that are seemingly established to protect the public's interest seem able only to compound the problem. Captured by private interests, specifically large investors already sunk into "ESG" investing and those investors' advocacy organizations, instead of admitting that the climate agenda has been a harmful failure these institutions have instead used the crisis cynically to advance their desired policies.

These self-interested ESG investors have generated and encouraged fear in investors, driving finance away from vital infrastructure and resources, and made no attempt to replace the capacity that was lost with secure sources of energy that were affordable.

The Proposed Rule does not help or address the problems. It compounds them.

GAO opposes promulgation of the Proposed Rule, for the above-cited reasons among others detailed at length by other commenters, including the obvious deficiencies given the SEC's "materiality" requirement and the inherent arbitrariness and capriciousness issues pertaining to cost/benefit and the use of "science", and Due Process issues.

If this Proposed Rule is enacted, SEC will be in the position of compelling and mandating the content and viewpoint of speech by those who issue securities. It will do so without authority conferred in statute or any limiting principle to guide its enforcement, without even considering alternative constitutionally compliant means to achieve its desired ends. If the Proposed Rule is enacted, speech will inevitably be chilled until the rule is inexorably struck down. SEC should go back to the drawing board.

The Proposed Rule's constitutional vulnerabilities are so manifest that it is improper for the SEC to propose any such requirement hoping for interim, if very costly and pointless, reporting requirements on regulated parties until the courts ultimately void the final rule.

We request SEC withdraw the rule, in full, and avoid any related or similar proposal that continues to carry the deficiencies described, above.

Sincerely,

Government Accountability & Oversight