State of West Virginia
Office of the Attorney General

Patrick Morrisey
Attorney General

Fax (304) 558-0140

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

Submitted Electronically via SEC Internet Comment Form

Re: Comments on Proposed Rule titled "Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices" by the Attorneys General of the States of West Virginia, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, Virginia, and Wyoming (SEC File No. S7-17-22)

Dear Secretary Countryman:

The Attorneys General of the States of West Virginia, Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, Virginia, and Wyoming submit these comments on the Securities and Exchange Commission's proposed rule, "Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices." 87 Fed. Reg. 36,654 (June 17, 2022) ("Proposed Rule").

Many of us recently explained how another SEC proposed rule imposing new carbon-related disclosure requirements on public companies exceeds the agency's authority, violates the First Amendment, and is arbitrary and capricious. *See* Letter from States of West Virginia, et al. to Vanessa Countryman, Secretary, SEC (June 15, 2022), https://bit.ly/3R8Z8YL ("States Letter"). We would have expected that comments like ours might have prompted the SEC to revisit the aggressive regulatory approach that the Commission has taken as of late. Evidently, we were wrong.

The Proposed Rule here continues the Commission's recent attempt to transform itself from the federal regulator of securities into the regulator of broader social ills. This time, the SEC has imagined that the market requires more Environmental, Social, and Governance ("ESG") disclosures from investment managers. But these disclosures—distant from areas of ordinary

finance—are well outside the SEC's area of expertise. "Congress created the SEC to protect investors and financial markets." *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 895 (5th Cir. 2019). The Proposed Rule largely ignores those interests.

The Proposed Rule may not be as egregious as some of the SEC's other recent efforts in that it does not purport to regulate essentially the entire American economy—but that is about the most that can be said for it. The Proposed Rule is still deeply problematic for many reasons. *First*, the Commission does not have the statutory authority to issue it. *Second*, the Proposed Rule would violate the First Amendment's free-speech guarantees. *Third*, the Proposed Rule does not reflect reasoned decisionmaking and would fail arbitrary-and-capricious review.

The Commission must not continue this illegal and misguided effort. The SEC should instead table the Proposed Rule (and similar recent proposed rules) and return to the important but focused work of regulating with an eye towards *financial* concerns.

BACKGROUND

The Proposed Rule would amend several forms and add onerous reporting requirements for investment funds with no rational justification.

Among other things, the Proposed Rule creates a three-tier spectrum for funds that use ESG factors. Integration Funds are funds that use ESG factors in investment decisions, but not in a dispositive way. *See* 87 Fed. Reg. at 36,657. ESG-Focused Funds are funds that have a name suggesting an ESG focus or that focus on ESG factors "by using them as a significant or main consideration." *Id.* Impact Funds are ESG-Focused funds that also seek to achieve a specific goal. *Id.* at 36,662. The proposed requirements for funds differ depending on their category—they are lowest on Integration Funds and highest for Impact Funds.

Integration Funds will have to "summarize in a few sentences how the fund incorporates ESG factors" in their prospectuses. 87 Fed. Reg. at 36,660. These summaries cannot be too "extensive," though, or they "could cause an Integration Fund to overemphasize the role ESG factors play in the fund's investment selection process." *Id.* Along with this brief-but-not-too-brief narrative, the fund would have to provide "a more detailed description" later in its prospectus. *Id.* at 36,660-61. Lastly, the Proposed Rule imposes extensive new methodology requirements on Integration Funds that consider the greenhouse gas emissions of portfolio holdings. *Id.* at 36,661.

ESG-Focused Funds will have to "provide specific disclosures about how the fund focuses on ESG factors in its investment process" in their prospectuses, including an "ESG Strategy Overview Table." 87 Fed. Reg. at 36,662. This "table" must include "key information about [the fund's] consideration of ESG factors." *Id.* Specifically, the table must embrace three sections that lay out the fund's specific thinking on ESG: the "Overview of the Fund's [ESG] strategy," "How the Fund incorporates [ESG] factors in its investment decisions," and "How the Fund votes proxies and/or engages with companies about [ESG] issues." *Id.*

The disclosures in the "ESG Strategy Overview Table" are extensive. The table's first section—"Overview of the Fund's [ESG] strategy"—in turn has two subparts. The first requires a "concise description in a few sentences of the factor or factors that are the focus of the fund's strategy." 87 Fed. Reg. at 36,664. The second takes a "check the box" approach that contains seven boxes detailing specific actions the fund may or not be taking. They are: (1) "Tracks an index," (2) "Applies an exclusionary screen," (3) "Applies an inclusionary screen," (4) "Seeks to achieve a specific impact," (5) "Proxy voting," (6) "Engagement with issuers," and (7) "Other." *Id.* The second section of the table requires a fund to "summarize how it incorporates ESG factors into its" investment process. *Id.* at 36,665. This "specific information" must be "supplement[ed] … with a more detailed description later." *Id.* Funds must "provide specific information, in a disaggregated manner with respect to each of the common ESG strategies applicable to the fund as defined by the "check the box" disclosure." *Id.* This specific information is descriptive and requires painstaking detail of the methods and processes the fund uses in each box. *See id.* at 36,665-67. Then, in the third section, funds are required to "provide a brief narrative overview … of how the fund engages with portfolio companies on ESG issues." *Id.* at 36,669. These descriptions must again be "specific," containing "an overview of the objectives" and supplemented with longer disclosures "on the objective [the fund] seeks to achieve with its engagement strategy." *Id.* at 36,670.

Impact Funds must follow all the new prospectus rules for ESG-Focused Funds. 87 Fed. Reg. at 36,662-63. But beyond those requirements, they must also "clarify the impact the fund is seeking to achieve" and include disclosures on "how the fund measures progress towards the stated impact." *Id.* Still other requirements compel these funds to disclose "the time horizon used to measure that progress" as well as "the relationship between the impact the fund is seeking to achieve and the fund's financial returns." *Id.*

And those are just the prospectus requirements. ESG funds must also make similar disclosures in their annual reports, 87 Fed. Reg. at 36,672-82, and adviser brochures, *id.* at 36,686-89.

But perhaps the most burdensome requirement in the new disclosures is a familiar one now: required emissions disclosures. In particular, ESG-Focused Funds and Impact Funds that consider environmental factors must "disclose the aggregated [greenhouse gas] emissions of the portfolio." 87 Fed. Reg. at 36,672. Funds must use at least two separate measures. *First*, the fund must disclose the "carbon footprint" of its portfolio. *Id.* at 36,676. That figure reflects a complex calculation of "the total carbon emissions associated with the fund's portfolio, normalized by the fund's portfolio, normalized by the fund's net asset value and expressed in tons of CO_2e per million dollars invested in the fund." *Id.* at 36,678. *Second*, the fund must disclose the "weighted average carbon intensity" of the fund's portfolio. *Id.* at 36,676. WACI "is the fund's exposure to carbon-intensive companies, expressed in tons of CO_2e per million dollars of the portfolio company's total revenue." *Id.* at 36,678. To calculate WACI, a fund must first calculate "the portfolio weight of each portfolio holding by dividing the value of the fund's investment in the portfolio company by the current net asset value of the fund"; it must then "calculate the carbon emissions of each

portfolio company by dividing the portfolio company's Scope 1 and Scope 2 GHG emissions by the portfolio company's total revenue (in millions of dollars)." *Id.* at 36,679.

Other provisions in the Proposed Rule pile on still more requirements. For example, Unit Investment Trusts must "provide investors with clear information about how portfolios are selected based on ESG factors." 87 Fed. Reg. at 36,671. And funds must "submit all proposed ESG-related registration statements and fund annual report disclosures filed with the Commission in a structured, machine-readable data language." *Id.* at 36,685. The Commission also proposes changes to various forms that will allow the Commission to collect "census-type information about funds' and advisers' uses of ESG factors." *Id.* at 36,718.

But despite all of these new requirements, funds and investors are still left to guess as to what the umbrella of ESG encompasses since the SEC has decided that it is "not proposing to define 'ESG' or similar terms." 87 Fed. Reg. at 36,660. With no definition, these requirements are doomed from the start—they cannot possibly lead to "consisten[cy]" or "comparab[ility]," as the Commission promises the Proposed Rule will do. *Id.* at 36,655.

DISCUSSION

The Proposed Rule would fail a legal challenge for several reasons. The Commission should abandon it.

I. The SEC Lacks The Legal Authority To Adopt The Proposed Rule.

Before it can issue any rule, an agency must have the statutory power to do so. This power must be found in a statute, and an agency cannot confer the power upon itself. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986). And so "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). The agency may not act beyond the confines of these statutes "even in pursuit of desirable ends." *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2490 (2021).

Congress did not give the Commission power to implement the Proposed Rule.

A. The Commission's Enabling Statutes

The Proposed Rule relies on two statutes as the basis for the Commission's purported power. 87 Fed. Reg. at 36,654. *First*, 15 U.S.C. § 80a-1 *et seq.* ("Investment Company Act") requires the Commission to promulgate rules that are "consistent with the public interest" and "will promote efficiency, competition, and capital formation, in addition to the protection of investors." 87 Fed. Reg. at 36,697 (citing 15 U.S.C. § 80a-2(c)). *Second*, 15 U.S.C. § 80b-1 *et seq.* ("Investment Advisers Act") requires that rules be "necessary or appropriate in the public interest" and consider the "protection of investors" along with "whether the action would promote

efficiency, competition, and capital formation." 87 Fed. Reg. at 36,698 (citing 15 U.S.C. § 80b-2(c)).

The Commission cites these statutes, but it does not meaningfully consider the limits that run with the power they confer. Instead, the Commission seems to believe the statutes give it the power to do anything as long as it is said to be in the public interest. Not so: Courts have specifically told the Commission before that "'public interest' is never an unbounded term." *Bus. Roundtable v. SEC*, 905 F.2d 406, 413 (D.C. Cir. 1990). Instead, the phrase is "limited to the purposes Congress had in mind when it enacted the legislation." *Id.* (cleaned up). Similarly, authority to take "necessary or appropriate" actions conveys powers that "have their limits" and "can only be exercised within the confines" of the relevant statute. *In re Cajun Elec. Power Co-op., Inc.*, 185 F.3d 446, 452 n.9 (5th Cir. 1999).

Congress did not give the Commission the power it claims in the Proposed Rule. If any questions remain from the text, then "the intent of Congress must be culled from the events surrounding [their] passage." *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 199 (1963). Both the Investment Advisers Act and the Investment Company Act were "designed to eliminate certain abuses in the securities industry." *Id.* at 186. They targeted the "abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's." *Id.* In this regard, the Acts are part of "a series of Acts." *Id.* at 186. This series of acts sought to fight "misrepresentations," *SEC v. Lauer*, 52 F.3d 667, 670 (7th Cir. 1995), and "manipulation of stock prices," *In re Bernard L. Madoff Inv. Sec. LLC*, 12 F.4th 171, 193 (2d Cir. 2021). Congress designed this package of laws to ensure that "dealing in securities [would be] fair and without undue preferences or advantages among investors." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976).

In general, the SEC has no power to mandate disclosures on anything it wants to for any reason. Both the Investment Advisers Act and the Investment Company Act "serve[] the fundamental purpose of substituting a philosophy of full disclosure for the philosophy of *caveat emptor*." *Kokesh v. SEC*, 137 S. Ct. 1635, 1640 n.1 (2017) (cleaned up). This philosophy focuses on "achiev[ing] a high standard of business ethics in the securities industry." *Id.* Yet the Proposed Rule does not speak to price manipulation, fraud, or the other kinds of "serious abuses" that the Acts target. It instead pushes supposed benefits of a more general sort, such as making ESG disclosures "consistent" and "decision-useful." 87 Fed. Reg. at 36,654. Vague justifications like these could justify almost any disclosure regime. The Proposed Rule thus seeks to solve an indeterminate problem by deploying very real burdens. *Id.*

And truth is, little evidence suggests that the perceived problem the Commission sets out to solve even *exists*. The Proposed Rule says only that there *might* be a "risk" of ESG practice exaggeration. 87 Fed. Reg. at 36,655. In enacting securities laws, Congress did not "intend to provide a broad federal remedy for all fraud," much less for potential overstatements that fall below actual fraud. *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982). So the Commission needs to explain why this particular problem presents a uniquely damaging threat that warrants special attention. It has not.

The Proposed Rule is not tied to the specific problems that prompted Congress to pass these laws in the first place. Contrary to the Proposed Rule's new expansion, courts have typically construed the Acts in a way "most conducive to the effectuation of [their] goals" when they were passed. *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 720 (1975). And when Congress passed these laws, it was worried about a "bootleg market" of fraudulent securities running rampant in the country. *Id.* at 709. Congress wanted to address this specific problem, and so the Acts were "enacted with these abuses in mind." *Id.* The Supreme Court agrees that "Congress intended [the Acts] to be construed like other securities legislation." *Cap. Gains Rsch. Bureau*, 375 U.S. at 195. That is, they were "enacted for the purpose of avoiding frauds." *Id.* at 195-96.

The Proposed Rule "expands [the Acts'] words beyond their natural meaning" to encompass an issue "which is not the mischief and defect aimed at by the Act[s]." *Willheim v. Murchison*, 342 F.2d 33, 42 (2d Cir. 1965). And these issues are so far afield from the facts traditionally disclosed in securities filings, "it is doubtful that Congress would have wished to include" ESG disclosures even "if it had considered the problem." *Id.* Even a former general counsel of the SEC recently noted that disclosures like these in the Proposed Rule are generally "outside the scope of the subjects Congress has allowed the [Commission] to cover in disclosure rules." ANDREW N. VOLLMER, MERCATUS CENTER, DOES THE SEC HAVE LEGAL AUTHORITY TO ADOPT CLIMATE-CHANGE DISCLOSURE RULES? 18 (2021), https://bit.ly/3OB28dG. These disclosures "would have a subject and objective different from the disclosure provisions in the federal securities laws." *Id.*

The Acts' legislative history confirms this. When interpreting a statute to discern its meaning, at least some believe that "[l]egislative history can be a legitimate guide to a statutory purpose obscured by ambiguity." *Burlington N.R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987). And using this history, we know that the "essential purpose of [the Acts] is to protect the public from the frauds and misrepresentations of unscrupulous tipsters and touts." H.R. Rep. No. 2639, 76th Cong., 3d Sess. 28 (1940). The Senate confirmed this purpose and said that "the dangerous potentialities of stock market tipsters imposing upon unsophisticated investors, convinces this committee that protection of investors requires" the passage of the Acts. S. Rep. No. 1775, 76th Cong., 3d Sess. 21 (1940). This purpose does not support the Proposed Rule; rigidly mechanical carbon disclosures for an investment portfolio hardly speak to the problem of fly-by-night hucksters, selling make-believe investments.

The Commission should not stretch its empowering statutes beyond their limits. The Proposed Rule should be withdrawn.

B. Materiality

The Proposed Rule also violates the materiality requirement. Materiality is what allows the SEC to "distinguish between what is trivial and what is significant to an investor." Philip A. Loomis, Jr., Commissioner, SEC, Presentation Before the Third Annual National Conference of

the National Investor Relations Institute, Materiality and the SEC (Oct. 2, 1972), https://bit.ly/38bl3wz. Since its inception, the materiality standard has been "absolutely essential" to the SEC. *Id.* And courts have found that the requirement of materiality extends to the Acts as well. *See*, *e.g.*, *Cap. Gains Rsch. Bureau*, 375 U.S. at 194 (holding that investment advisers have an "affirmative duty of utmost good faith, and full and fair disclosure of all material facts" (cleaned up)). It is even directly codified in the Investment Advisers Act which makes it "unlawful for any person willfully to make any untrue statement of a *material* fact." 15 U.S.C. § 80b-7 (emphasis added).

We have explained in other comments the centrality of the materiality requirement, but some of those points bear repeating. The Supreme Court has said, for example, that "the notion of materiality assumes heightened significance" in the securities-disclosure context. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 444 (1976). Further, there is "universal[]" agreement that "the question of materiality" is "an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." *Id.* at 445. Thus, "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 449. Despite the Proposed Rule's apparent wish otherwise, this definition still stands today. *See Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 187 (2015) (citing *Northway*, 426 U.S. at 445, and explaining that the materiality test is "objective" and turns on whether a statement is "misleading to an ordinary investor").

Investors' primary concern is the profitability of the company in which they are investing; in the Supreme Court's words, investors purchase securities because they "expect profits." *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). As a result, materiality must be an objective standard that looks at the financial qualities of a security and considers whether a given fact's "impact" on a company's "fortune" is "certain and clear" or "contingent and speculative." *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988). This financial focus is intuitive. After all, the very definition of "invest" is to "put money into financial schemes, shares, or property with the expectation of achieving a profit." *Invest*, CONCISE OXFORD ENGLISH DICTIONARY (11th ed. 2008).

And the Supreme Court recognizes that materiality cannot include everything any individual investor might want to know. As it happens, the Court has specifically rejected a definition of materiality that would "include[] all facts which a reasonable stockholder might consider important." *Northway*, 426 U.S. at 445 (citing *Northway, Inc. v. TSC Indus., Inc.*, 512 F.2d 324, 330 (7th Cir. 1975)). A fact is only material "if there is a substantial likelihood" that its omission would "have a significant propensity to affect" the decision-making of a reasonable investor. *Id.* at 449.

But against this background, the Proposed Rule marks a strange new understanding of materiality. The Proposed Rule notes that institutional investors have joined climate-change-related initiatives or signed supportive statements. Drawing from those sentiments, the Commission seems to have assumed materiality. The Proposed Rule calls this "[i]nvestor interest

in ESG strategies." 87 Fed. Reg. at 36,655. And the "key information" that the Proposed Rule will require only becomes "material" to an investor if they already have "an interest in ESG investing." *Id.* But meeting the wants of certain investors at the expense of market efficiency and competition is not the goal of securities disclosures. Any attempt to satisfy the supposed wants of such investors is unachievable, as some group of investors is always likely to want more information that is immaterial to the market as a whole. In fact, as Commissioner Hester Peirce noted, "[t]he cool kids have already moved on to '*E*ESG,'" a concept that adds "Employees" to the ESG mix. Hester M. Peirce, Commissioner, SEC, Statement on Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies (May 25, 2022), https://bit.ly/3z1dXnR.

But the Commission never explains how the generalized wish of a few investors to support climate-change-related initiatives translates into the need for specific information that will have an identifiable effect on stock price. Instead, the Proposed Rule conclusorily says that its disclosures provide investors with "key information that is material to their investment decisions." 87 Fed. Reg. at 36,655. The Commission never justifies this conclusion beyond proclamations that it will "help investors." *Id.* And the SEC never explains why information on ESG-focused investment strategies is uniquely helpful to investors, while information on other investment strategies is not. In short, the Proposed Rule provides no evidence that it is "certain and clear" that *any* of the ESG factors will affect a fund's or its portfolio companies' "fortune[s]." *Basic*, 485 U.S. at 232.

With its recent actions, the SEC has made clear that it believes it is moving beyond the principle of materiality. In fact, just last year, one commissioner stated outright that the requirement was a "myth." Allison Herren Lee, Commissioner, SEC, Keynote Remarks at the 2021 ESG Disclosure Priorities Event: Living in a Material World: Myths and Misconceptions about "Materiality" (May 24, 2021), https://bit.ly/3B6xaat. The Proposed Rule is yet another step in this same dangerous direction. The Proposed Rule would require the disclosure of information "of such dubious significance that" it "may accomplish more harm than good," as investors will simply be swamped with data. *Northway*, 426 U.S. at 448.

C. Major Questions Doctrine

Even if the relevant statutes were ambiguous, the SEC's view of its authority in the Proposed Rule would violate the major questions doctrine.

An unelected body like the SEC cannot answer major questions like those in the Proposed Rule. The major-questions doctrine recognizes that "in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make [courts] reluctant to read into ambiguous statutory text the delegation [to an agency] claimed to be lurking there." *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (cleaned up). "To overcome that skepticism, the Government must … point to clear congressional authorization to regulate in that manner." *Id.* at 2614 (cleaned up). This clear statement must be something more than a "merely

plausible textual basis" to allow the SEC to enact a "radical or fundamental change to a statutory scheme." *Id.* at 2609 (cleaned up).

Determining whether the Proposed Rule reaches the realm of major questions starts with "the nature of the question." *Brown & Williamson*, 529 U.S. at 159. The first relevant indicator is that the SEC has located "newfound power" in a decades-old statute. *West Virginia*, 142 S. Ct. at 2610. And with the Proposed Rule, the SEC "claim[s] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*"). The SEC no longer protects investors from mere fraud. Now, it has assumed the responsibility of fighting climate change and other social ills. It wishes to use mandatory disclosure to pressure companies and investors to change their behavior. And to advance that agenda, it means to impose tens of thousands of additional manhours on regulated investors. Until recently, the SEC had never used its power this way. And "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power … is equally significant in determining whether such power was actually conferred." *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941).

The Proposed Rule is not only unprecedented, but it also represents a "fundamental revision of the statue, changing it from [one sort of] scheme of [] regulation" into a different one. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). Before, the Commission protected the public against the "abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's." *Cap. Gains Rsch. Bureau*, 375 U.S. at 186. Now, the Commission has set out on a mission to solve new problems pressed by the powerful few. But if the Commission can mandate disclosures on anything it wants, "[i]t is hard to see what measures this interpretation would place outside [its] reach." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

Further, "[t]here is little reason to think Congress assigned" the Commission the power to solve issues such as social ills or climate change, so the Proposed Rule's attempt to do so is another indicator of a major question. *West Virginia*, 142 S. Ct. at 2612. The SEC's expertise is in the securities market. It is not in climate change, social consciousness, or any other supposed ESG factor. "Administrative knowledge and experience largely account for the presumption that Congress delegates interpretive lawmaking power to [an] agency." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (cleaned up). So, "[w]hen [an] agency has no comparative expertise" in making certain policy judgments, "Congress presumably would not" task it with making them. *Id.* The agency seemingly admits that it is out of its depth by confessing that it is "not proposing to define 'ESG' or similar terms." 87 Fed. Reg. at 36,660. If the Commission cannot even define the thing it seeks to regulate, how could it possibly make a claim to having expertise over it?

That the Commission is "attempting to work [a]round the legislative process to resolve for itself a question of great political significance" is another indicator of a major question. *West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring) (cleaned up). Congress has specifically considered disclosures like those in the Proposed Rule before but has ultimately decided not to pass them. *See*, *e.g.*, S. 1217, 117th Cong. (2021) ("Climate Risk Disclosure Act of 2021); H.R.

2570, 117th Cong. (2021) ("Climate Risk Disclosure Act of 2021"); H.R. 1187, 117th Cong. (2021) ("Corporate Governance Improvement and Investor Protection Act").

So the SEC is tackling a major question—but Congress has not given it the clear go-ahead to do so. Nothing in the relevant statutes constitutes a clear statement of authority for the Commission. Lacking that statutory anchor, the Commission may not act.

II. The Proposed Rule Would Violate The First Amendment.

West Virginia and many other States have noted before that broad, non-finance-related disclosures like those in the Proposed Rule would raise serious free speech concerns. *See*, *e.g.*, States Letter, *supra*, at 23-28. Commissioner Peirce has raised this objection before too, so the SEC knows of these concerns. *See* Hester M. Peirce, Commissioner, SEC, We are not the Securities and Environment Commission – At Least Not Yet (Mar. 21, 2022), https://bit.ly/3S1LirC. But by proposing to conscript ESG investment funds in its continuing fight against greenhouse gases, the Commission will run into the First Amendment.

The federal government usually cannot "tell people that there are things they must say." *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 170 (2d Cir. 2020) (cleaned up). Even "requiring content-neutral speech may violate the First Amendment, although it will be subject to a different level of scrutiny than content-based requirements." *Miller v. Mitchell*, 598 F.3d 139, 151 n.14 (3d Cir. 2010). And for-profit businesses are protected just the same. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1177 (10th Cir. 2021) ("[A]s the Supreme Court has recognized, for-profit businesses may bring compelled speech claims."), *cert. granted*, 142 S. Ct. 1106 (2022).

If the SEC wishes to compel speech of this sort, then at a minimum it would likely need to justify its proposed regulations under intermediate scrutiny. *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) ("*NAM II*") (applying intermediate scrutiny in invalidating SEC disclosure requirements). Intermediate scrutiny requires the SEC to identify a "substantial" "governmental interest[]" that the Proposed Rule "directly advances." *United States v. Edge Broad. Co.*, 509 U.S. 418, 424 (1993) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). Beyond that, the Proposed Rule must not be "more extensive than is necessary to serve that interest." *Id.* To meet this latter requirement, the Commission must "have drawn reasonable conclusions" with evidence that "must fairly support the [regulatory] judgment." *Duncan v. Bonta*, 19 F.4th 1087, 1108 (9th Cir. 2021) (cleaned up). And this evidence must be "*substantial*." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015) (emphasis in original).

We observe again that SEC disclosure regimes like the Proposed Rule's have failed this test before. In *National Association of Manufacturers v. SEC*, the D.C. Circuit held that an SEC regulation compelling certain companies to declare their products not "DRC conflict free" did not satisfy intermediate scrutiny. 748 F.3d 359, 373 (D.C. Cir. 2014) ("*NAM I*"). The court found that the Commission "provided no … evidence" that "less restrictive means would fail." *Id.* at 372. Simply aiding the sale of securities was not enough, and the court pointed out that that rationale

"would allow Congress to easily regulate otherwise protected speech using the guise of securities laws." *Id.* The Proposed Rule cannot sidestep the First Amendment "just because Congress used the 'securities' label." *Id.*

The Proposed Rule fails to show that it advances any substantial government interest, and in fact, it does not *identify* such an interest. *See Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018) (rejecting a "purely hypothetical" governmental interest). The closest the Commission comes is by declaring an interest in providing investors more information. But "it is plainly not enough for the Government to say simply that it has a substantial interest in giving consumers information." *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment). This justification is insufficient because it "would be true of any and all disclosure requirements." *Id.*

Even if the Commission did identify an interest, the Proposed Rule does not advance any tangible goal. No evidence establishes that the specific disclosures in the Proposed Rule will inform investors' judgments in a meaningful way. In fact, the Proposed Rule would force regulated entities to make guesses based on incomplete data. Camden D. Burton, *An Inconvenient Risk: Climate Change Disclosure and the Burden on Corporations*, 62 ADMIN. L. REV. 1287, 1299-300 (2010) ("With respect to climate change, the greatest concern to corporations is the incredible uncertainty found in environmental risk. Quantifying environmental risks is difficult in all circumstances."). For example, the Proposed Rule will require funds to "make a good faith estimate" when there is no available emissions reporting by a portfolio company. 87 Fed. Reg. at 36,681. This estimate is far "too speculative and subjective to comport with fundamental principles of accounting … that underl[ie]" securities laws. Letter from J.W. Verret, Associate Professor, GMU Antonin Scalia L. Sch., to Vanessa Countryman, Secretary, SEC (June 5, 2022), https://bit.ly/3xAnsuB. We fail to understand how funds are to even undertake such an estimate, short of simply calling dozens or hundreds of companies within their portfolio and begging for information.

Finally, other less restrictive means remain available to achieve the Commission's goals. For example, to achieve its environmental goals, why is the Proposed Rule better than a more direct action by the EPA? The Commission could also simply enforce its existing fraud provisions or continue to support and promote voluntary disclosures. Instead, the Commission chose to skip straight to a Proposed Rule that places unconstitutional burdens on free speech.

Some might argue that the Proposed Rule should face the more deferential standard of scrutiny under *Zauderer* and its progeny. *Zauderer v. Off. of Disciplinary Council*, 471 U.S. 626 (1985). But that view is directly opposed to *NAM I*. We see nothing about the Proposed Rule that would counsel a different result.

Anyway, the Proposed Rule would still fail under *Zauderer* review. Under *Zauderer*, a court would ask whether the Proposed Rule's compelled disclosures are "(1) purely factual, (2) noncontroversial, and (3) not unjustified or unduly burdensome." *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 756 (9th Cir. 2019). The Proposed Rule fails each step.

First, it is not factual in that it often requires guesses, judgment calls, and qualitative assessments. *See*, *e.g.*, 87 Fed. Reg. at 36,681 (requiring funds to make a "good faith estimate" if a portfolio company does not disclose its greenhouse gas emissions); *id.* at 36,672 (requiring Impact Funds to describe "the fund's progress on achieving its impact"). These matters of opinion are not the kind of disclosures *Zauderer* governs as disclosures are only "factual" if there is "no debate" about their accuracy. *Kimberly-Clark Corp. v. District of Columbia*, 286 F. Supp. 3d 128, 140 (D.D.C. 2017). *Second*, the Proposed Rule is controversial. By design, it forces funds to take positions on the controversial subjects of climate change and any number of social consciousness issues. "Controversial" disclosures are "inflammatory," "matter[s] of opinion," or relate to a "dispute about simple factual accuracy." *Id.* at 140-41 (cleaned up). And even the Supreme Court has recognized that at the very least "climate change" is a "controversial subject." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018). *Third*, as explained throughout this comment, the Proposed Rule is both unjustified and unduly burdensome. It tries to address a problem that is beyond the SEC's mandate by imposing enormous expenses on funds, with the end result of giving investors more information than they can reasonably use. *See* Celia R. Taylor, *Drowning in Disclosure: The Overburdening of the Securities & Exchange Commission*, 8 VA. L. & BUS. REV. 85, 112-19 (2014) (describing the increasing requirements for securities disclosure and how these excessive requirements can harm investors through overwhelm).

And even more daunting for the Commission, it might have to justify the Proposed Rule under strict scrutiny. It cannot. At least in the view of some, "regulation compelling speech is by its very nature content-based, because it requires the speaker to change the content of his speech or even to say something where he would otherwise be silent." *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014). And when a policy "imposes a content-based burden on speech," it "is subject to strict-scrutiny review." *McClendon v. Long*, 22 F.4th 1330, 1337-38 (11th Cir. 2022) (cleaned up) (compelled speech case). As former-Justice Stephen Breyer explained, "governmental regulation of securities" of this sort necessarily "involve[s] content discrimination." *Reed v. Town of Gilbert*, 576 U.S. 155, 177 (2015) (Breyer, J., concurring in the judgment); *see also Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2360 (2020) (Breyer, J., concurring in part) ("[T]he regulatory spheres in which the Securities and Exchange Commission … operate[s] [are] defined by content."). Thus, strict scrutiny could apply. *See*, *e.g.*, Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 251-52 (2021) (explaining how recent Supreme Court decisions have "intensifie[d] concern that a heightened level of scrutiny might apply to mandatory ESG disclosure").

Strict scrutiny is the "most demanding" test in constitutional law. *Reed*, 576 U.S. at 182 (Kagan, J., concurring in the judgment). It "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (cleaned up). "If a less restrictive alternative would serve the Government's purpose," then that alternative must be used. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000). "[T]he government cannot be excused from the obligation to identify *evidence* that supports its restriction of a constitutional right," no matter what. *Cornelio v. Connecticut*, 32 F.4th 160, 177 (2d Cir. 2022) (emphasis added). The SEC would need to

"specifically identify [and prove] an actual problem in need of solving, and the curtailment of the constitutional right must be actually necessary to the solution." *Mance v. Sessions*, 896 F.3d 699, 705 (5th Cir. 2018) (cleaned up).

The Commission again flunks every part of the test. The Commission has presented no evidence of a genuine interest in the content of its disclosures. The best the Commission can do is suggest that some investors might want the information for their own edification. This barebones assertion is not enough. And if the Commission did somehow scrape together a compelling interest, the Proposed Rule is not "narrowly tailored." Targeted enforcement, support for voluntary enforcement, or inter-agency cooperation are all more obvious and narrow alternatives.

The Proposed Rule fails every potential level of scrutiny. The Commission should not finalize its unconstitutional requirements.

III. The Proposed Rule Is Arbitrary And Capricious.

In its current form, the Proposed Rule violates the Administrative Procedure Act. The APA "requires agencies to engage in reasoned decisionmaking and directs that agency actions be set aside if they are arbitrary or capricious." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (cleaned up). To determine this, courts look to whether a rule is based "on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* The Commission will have to show that it "examined the relevant data and articulated a satisfactory explanation for [its] decision, including a rational connection between the facts found and the choice made." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2569 (2019) (cleaned up). "Unsubstantiated or bare assumptions will not be credited." *Nat. Res. Def. Council v. EPA*, 31 F.4th 1203, 1207 (9th Cir. 2022) (cleaned up).

The Proposed Rule would not survive this review for many reasons.

First, the Commission has not appropriately considered the Proposed Rule's costs and benefits. Under the Investment Company Act, the SEC is specifically required to consider not just if a rule is "consistent with the public interest" but also "whether the action will promote efficiency, competition, and capital formation" besides promoting the "protection of investors." 15 U.S.C. § 80a-2(c). Likewise, the Investment Advisers Act requires that any rulemaking must consider "whether an action is necessary or appropriate in the public interest" as well as "the protection of investors" and "whether the action will promote efficiency, competition, and capital formation." *Id.* § 80b-2(c). Beyond these statutory mandates, "SEC Chairmen have [also] made a commitment to Congress that the SEC will conduct cost-benefit or economic analyses in connection with its rulemaking activities." CONGRESSIONAL RESEARCH SERVICE, COST-BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULEMAKING PROCESS 18 (2014), https://bit.ly/3J2PXVW.

As we have explained before, courts react sternly when the SEC only plays at this mandatory cost-benefit process. For example, in *Business Roundtable v. SEC*, the D.C. Circuit concluded that the Commission had "inconsistently and opportunistically framed the costs and

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benefits" of a new rule on proxy access. 647 F.3d 1144, 1148-49 (D.C. Cir. 2011). The Commission also "failed adequately to quantify the certain costs or to explain why those costs could not be quantified." *Id.* With the Proposed Rule, the Commission has "neglected to support its predictive judgments [and] contradicted itself." *Id.* *Business Roundtable* was not the first example either. That case noted two other instances when the Commission "failed … adequately to assess the economic effects of a new rule." *Id.* (citing *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 167-68 (D.C. Cir. 2010)); *Chamber of Com. of U.S. v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005)). And yet another case found that "the Commission abdicated its statutory responsibility to investors" by failing to *meaningfully* consider costs. *Am. Petroleum Inst. v. SEC*, 953 F. Supp. 2d 5, 23 (D.D.C. 2013). Put another way, "the SEC ought not to be able to institute new regulation of securities markets and corporate affairs unless the Commission either provides a full, quantified cost-benefit analysis demonstrating that the regulation is net beneficial or else explains why quantification is impossible." Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 435 (2015).

Here, the Commission's cost-benefit analysis is underwhelming. The SEC recognizes that "[m]any of the benefits and costs" associated with the Proposed Rule are "difficult to quantify." 87 Fed. Reg. at 36,698. The Proposed Rule does little to explain why the SEC cannot provide more accurate metrics. For the most part, the Commission treats its own declaration of impossibility as a good reason to just skip a cost-benefit analysis altogether. *Id.* For example, the Commission says that some "data needed to quantify" the "economic effects are not currently available." *Id.*

Even where the Commission does try to offer some detail on the potential benefits, those benefits prove illusory. For example, the Commission seems to assume some significant benefit exists from compiling all ESG-related information in securities filings like the 10-K. But most modern investors draw their information from many other sources other than securities filing, so this compilation benefit is marginal at best. Likewise, the Commission espouses the benefits of "enhanced transparency and consistency." 87 Fed. Reg. at 36,698. But these purported benefits could be claimed by nearly any mandated disclosure. The SEC needs to explain why these specific and onerous disclosure requirements will produce benefits that warrant these substantial changes. "The SEC cannot justify the adoption of a particular rule based solely on the assertion that the existence of a rule provides greater clarity to an area that remained unclear in the absence of [one]." *Am. Equity Inv. Life Ins. Co.*, 613 F.3d at 177-78. And the core benefit of the Proposed Rule is not even clear. The Proposed Rule itself notes that the SEC "lack[s] data that would allow us to quantify the value of more complete information in ESG disclosures." 87 Fed. Reg. at 36,698.

Costs are also "difficult" for the Commission to determine. 87 Fed. Reg. at 36,698. So again, the Commission does not appear to try. Instead, the costs are described as "relatively lower for Integration funds and higher for ESG-Focused and Impact Funds." *Id.* at 36,709. The Commission never explains: lower or higher than what? Instead, the SEC assures us that these costs do not really matter since they are "ultimately borne by investors as funds are pass-through vehicles." *Id.* Moreover, the Commission openly states that "smaller funds … may potentially experience a competitive disadvantage" from the Proposed Rule, but the Commission acts anyway.

Id. The Proposed Rule does not include a small-entity exemption. This cavalier attitude toward such important stakeholders is jarring and in no way reflects a reasoned consideration of costs.

And that is to say nothing of the Proposed Rule's indirect costs. For example, some funds will likely stop using ESG factors and give up ESG goals rather than undertake these onerous new responsibilities. Some funds might never consider them in the first place. These outcomes would hardly serve the SEC's supposed goal of promoting ESG investing. Even the SEC recognizes that some funds "may decide to not have ESG factors" as part of their investing strategy anymore. 87 Fed. Reg. at 36,710. The Proposed Rule wishes away this problem by assuming that funds won't often make such a shift because "such a fund would incur costs in changing its current investment strategy." *Id.* But the Commission offers no data to support that assumption.

Further, the Proposed Rule would have an unjustifiably negative effect on certain industries. For example, the Proposed Rule intends to "highlight[] for investors the extent to which a fund's portfolio is exposed to portfolio companies with higher carbon intensity." 87 Fed. Reg. at 36,669. Thus, industries such as mining or power generation are likely to receive less investing under the Proposed Rule. Limiting investment in these areas would raise the cost of everyday necessities like electricity at a time when many Americans are already struggling. *See* Mark Lungariello, *4 in 10 Americans say they're financially 'struggling' amid high inflation and soaring gas prices*, N.Y. POST (July 5, 2022, 4:57 PM), https://bit.ly/3OBHLgP. Yet the Commission accounts for none of that.

This analysis is not reasoned decisionmaking. The Commission must "apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation." *Chamber of Com.*, 412 F.3d at 144.

Second, the Proposed Rule is redundant. Courts have reversed SEC action where the Commission failed to analyze already existing regulations covering the same ground before imposing additional burdens. *See*, *e.g.*, *Am. Equity Life Ins. Co.*, 613 F.3d at 179 ("The SEC's failure to analyze the efficiency of the existing state law regime renders arbitrary and capricious the SEC's judgment that applying federal securities law would increase efficiency."). Here, other regulatory frameworks "reduce the need for, and hence the benefit to be had from," the Proposed Rule. *Business Roundtable*, 647 F.3d at 1154.

Like the climate-risk disclosure proposed rule before it, the information that the Proposed Rule will mandate "could be responsive to a number of existing disclosure requirements." Statement from Hester M. Peirce (Mar. 21, 2022). For example, Advisers Act Rule 206(4)-8 ("Marketing Rule") bars advisers from making false or misleading statements to investors. *See* 17 C.F.R. 275.206(4)-8. This rule does what the Proposed Rule claims to do. In fact, the Commission agrees that "it generally would be materially misleading for an adviser materially to overstate in an advertisement the extent to which it utilizes or considers ESG factors." 87 Fed. Reg. at 36,697. And experience bears this out: Just two days before the Proposed Rule was announced, the SEC settled charges against an adviser for "misstatements and omissions about [ESG] considerations in making investment decisions for certain mutual funds that it managed." Press Release, SEC,

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SEC Charges BNY Mellon Investment Adviser for Misstatements and Omissions Concerning ESG Considerations (May 23, 2022), https://bit.ly/3vdRSl6. The Commission needs to explain why the Proposed Rule is necessary given all that.

Third, the Proposed Rule appears to be pretextual. The Proposed Rule claims to rely on "investor demand," but in reality, the Commission is serving only a handful of large, institutional investors and mission-driven think tanks. *See* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1405 (2020) (explaining that "large asset managers like BlackRock, State Street, and Vanguard" are the "chief supporters" of "corporate social responsibility" initiatives like climate disclosures). Large-scale investment firms have different incentives; they might clamor for more information on climate to better market their funds or satisfy their own political preferences. Although "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons," including political ones, a court may set aside agency action where the record shows that "the sole stated reason" for the action is pretextual and "contrived." *Dep't of Com.*, 139 S. Ct. at 2573-75. The Proposed Rule appears to be another step in the recent "politicization of agency expertise—a particular problem that, while not new, has steadily evolved into a more dangerous phenomenon." Jack Thorlin, *Can Agencies Lie?: A Realist's Guide to Pretext Review*, 80 MD. L. REV. 1021, 1075 (2021). It appears targeted against fossil-fuel companies and others like them as part of a larger partisan strategy. To be sure, presidents have considerable sway over many agencies' directions. But when a proposed regulation fails to provide an adequate justification beyond the administration's will, the agency has left reasoned rulemaking behind.

Fourth, despite being required to do so, the SEC glossed over "reasonable alternatives." *Simms v. Nat'l Highway Traffic Safety Admin.*, 45 F.3d 999, 1004 (6th Cir. 1995). Throughout the Proposed Rule, the Commission treats the decision before it as all-or-nothing: impose massive new burdens or do not act. The Proposed Rule makes it clear that the SEC believes this is the only option available, purely for the sake of "consistency," "transparency," and so on. These "conclusory statements are not sufficient" to satisfy the APA—particularly without also explaining why less burdensome options would not do the job. *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1189 (D.C. Cir. 1990).

The Commission could have used many alternatives to achieve its desired results. For example, voluntary frameworks have "accelerated in recent years," leading to "additional voluntary" programs being developed. 87 Fed. Reg. at 36,656. The Proposed Rule also notes that private entities are already "increasingly focus[ing]" on issues like those the Proposed Rule mandates. *Id.* One voluntary framework already "represents $8.7 trillion in assets and over 1,400 underlying portfolio companies." *Id.* at 36,700. How can the SEC possibly claim such frameworks are not working? And when companies make material misstatements under these frameworks, the SEC has already proven that its existing enforcement mechanism is effective. *See Spotlight on Enforcement Task Force Focused on Climate and ESG Issues*, SEC (June 27, 2022), https://bit.ly/3b5Dg0i (detailing over a dozen "Examples of Enforcement Actions Related to ESG Issues or Statements").

Merely insisting that funds could say more in this burgeoning area is not enough to warrant such severe rulemaking, especially considering that the Commission "is required to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *Spirit Airlines, Inc. v. U.S. Dep't of Transp. & Fed. Aviation Admin.*, 997 F.3d 1247, 1255 (D.C. Cir. 2021).

Fifth, the Commission has not considered its statutory mandate to simplify disclosures. In two separate laws, Congress instructed the SEC to "modernize and simplify" disclosure requirements. *See* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, Sec. 108, 126 Stat. 306, 313-14 (2012); Fixing America's Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015). Nothing about the Proposed Rule would "simplify" disclosure obligations. The Commission plans to burden funds with expansive new disclosures on a subject it does not define, whose costs the Commission cannot estimate, and whose benefits are even less clear. Unsurprisingly, the Commission does not explain why it has chosen to complicate, rather than simplify, its disclosure requirements.

Sixth, and finally, the Proposed Rule is too vague. "Th[e] requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment," and "[i]t requires the invalidation of laws that are impermissibly vague." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). But here, the SEC does not even "propos[e] to define 'ESG' or similar terms." 87 Fed. Reg. at 36,660. Instead, regulated parties are left to make their own subjective determinations about what may or may not qualify under the Proposed Rule. *Id.* This guess-the-standard approach is not acceptable. A regulation flouts due process where it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Fox Television Stations*, 567 U.S. at 253. The SEC must explain what conduct it intends to regulate in the Proposed Rule.

For any one of these reasons, the Proposed Rule would be arbitrary and capricious. The Commission should not finalize it.

* * * *

Federal securities laws are a vital protection for investors across America. But now, the SEC has become more and more aggressive in implementing a political agenda untethered from its statutory mission. Beyond the legal problems in the Proposed Rule, the Proposed Rule worryingly ignores the interests of everyday Americans. We urge you to step away from imposing burdensome new requirements that only make investing more expensive. The Proposed Rule must not be finalized.

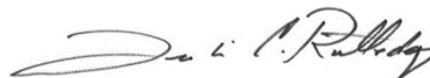
Sincerely,

Patrick Morrisey
West Virginia Attorney General

Steve Marshall
Alabama Attorney General

Treg Taylor
Alaska Attorney General

Mark Brnovich
Arizona Attorney General

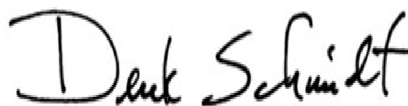


Leslie Rutledge
Arkansas Attorney General

Christopher M. Carr
Georgia Attorney General

Lawrence Wasden
Idaho Attorney General

Todd Rokita
Indiana Attorney General



Derek Schmidt
Kansas Attorney General

Daniel Cameron
Kentucky Attorney General

Jeff Landry
Louisiana Attorney General

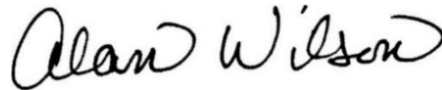
Lynn Fitch
Mississippi Attorney General

Eric Schmitt
Missouri Attorney General

Austin Knudsen
Montana Attorney General

Doug Peterson
Nebraska Attorney General

John O'Connor
Oklahoma Attorney General



Alan Wilson
South Carolina Attorney General

Ken Paxton
Texas Attorney General

Sean D. Reyes
Utah Attorney General

Jason S. Miyares
Virginia Attorney General

Bridget Hill
Wyoming Attorney General