



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.  
330 E. Kilbourn Avenue, Suite 725, Milwaukee, WI 53202-3141  
414-727-WILL (9455) | Fax 414-727-6385 | www.will-law.org

May 20, 2022

**VIA EMAIL TO [rule-comments@sec.gov](mailto:rule-comments@sec.gov)**

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

**RE: Proposed Rule Regarding “The Enhancement and Standardization of Climate-Related Disclosures for Investors,” File Number S7-10-22**

Dear Ms. Countryman:

Thank you for the opportunity to comment on the Securities and Exchange Commission’s proposed Rule S7-10-22<sup>1</sup>, which would create or amend portions of 17 C.F.R. §§ 210, 229, 232, 239, and 249 relating to additional disclosures by publicly-traded companies pertaining to risks allegedly linked to climate change. These comments are submitted on behalf of the Wisconsin Institute for Law & Liberty, Inc. (“WILL”). WILL is a non-profit law and policy center based in Milwaukee, Wisconsin. Our mission is to advance the public interest in the rule of law, individual liberty, constitutional government, and a robust civil society.

#### Brief Background on the Proposed Rule

The proposed Rule is one of unprecedented breadth and depth. Unlike other public disclosures the Commission requires, which divulge information to investors and shareholders concerning the risks that a company could lose value or otherwise face negative impacts due to the risk of violations of substantive law, this Rule requires companies to disclose information that is, at best, only tenuously connected to the company’s financial performance and not linked to the enforcement of existing, substantive laws. By way of illustration, the Commission requires publicly-traded companies to divulge information related to significant pending lawsuits in Item 3 of a company’s annual 10-K, with any updates in the quarterly 10-Q reports. Significant litigation, by its very nature, must be rooted in substantive state or federal law. For example, if a manufacturer is facing a nationwide class action lawsuit over the safety of one of its products, the plaintiffs in that lawsuit are generally alleging that the

---

<sup>1</sup> The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed April 11, 2022) (to be codified at 17 C.F.R. §§ 210, 229, 232, 239, 249) (hereinafter the “proposed Rule”).

company committed a tort under state and/or federal law for which there could be significant financial repercussions, with an attendant impact on the company's value and share price. Likewise, the Commission requires that the company provide financial statements independently audited by an outside firm and in keeping with Generally Accepted Accounting Principles in Item 8 of a 10-K. Congress conferred the authority on the Commission to promulgate rules and require such disclosures to combat the temptation that a company may otherwise have to commit fraud on its investors—activity punishable under both state and federal substantive laws that can be either criminal or civil in nature.<sup>2</sup>

Unlike the above examples, the proposed Rule requires disclosures that are not tied to any existing enforcement mechanisms or to civil or criminal penalties that could affect shareholder value. Whether for good or for ill, there is no legal requirement that a publicly-traded company registered with the Commission pledge to “go green” or eliminate most carbon emissions, or that the company take affirmative steps to further such a promise under the penalty of civil or criminal process. To be sure, there are environmental risks that publicly-traded companies must disclose, such as spills, litigation risks associated with contaminated property, and the like. But these risks are tied to existing legal requirements imposed by agencies like the Environmental Protection Agency or state counterparts, such as the Departments of Natural Resources, that derive their authority from their respective legislative branches. The effect of the proposed Rule is to accomplish via regulation what elected officials have not, to date, been able to accomplish legislatively<sup>3</sup>—mandate, via a disclosure requirement and the Commission's enforcement power, that companies shoulder the burden of so-called climate change risks by reporting on (and, by necessity, undertaking) changes the company will make to address greenhouse gas emissions (GHG) and other environmental externalities.

The scope of the disclosure requirements create new obligations for many companies beyond simply reporting information readily available to them. For example, the proposed Rule would require a registrant to disclose information concerning oversight by its board of climate-related risks, with “many commenters” claiming that “climate-related issues should be subject to the same level of board oversight as other financially material matters.”<sup>4</sup> If a company does not believe it faces climate-related risks at a greater rate than any other participant in the

---

<sup>2</sup> See, e.g., 17 C.F.R. § 229.103(c)(3) (requirement to describe material pending legal proceedings related to enforcement of environmental laws); 18 U.S.C.A. § 1348 (criminal prohibition on securities and commodities fraud); 15 U.S.C. § 78u-1(a) (governing civil penalties for insider trading).

<sup>3</sup> While the proposed Rule identifies the current administration's goals in this area, such as President Biden's National Climate Task Force and its “commitments to reduce economy-wide net greenhouse gas emissions by 50-52% by 2030 . . . and to reach net zero emissions by 2050,” *Congress* has taken no action that would make such pledges legally enforceable. See Proposed Rule at 21349 n.176.

<sup>4</sup> Proposed Rule at 21359. Notably, the first source cited for this proposition is a Bloomberg entity. Michael Bloomberg is the Chairman of the Task Force on Climate-Related Financial Disclosures—the entity that put forward the standards that the Commission is eager to adopt, and whose members will likely be called upon (and compensated) to bring registrants into compliance with these rules.

economy, the implication is that the company must create a committee of its board to make climate risks a priority—whether it makes sense as part of that particular company’s business plan or not—and to provide it the *same level of attention* as the audited financials that directly affect its share price. The company is likewise required to disclose “whether and how the board sets climate-related targets or goals and how it oversees progress against those targets or goals,” including goals “to achieve net-zero carbon emissions for all or a large percentage of its operations” or “to reduce the carbon intensity of its products by a certain percentage.”<sup>5</sup> By mandating the disclosure of such information, the Commission either assumes that it already exists or induces companies to adopt a plan addressing these issues and requiring it to gather and analyze this information. Again, it matters not whether the registrant’s future business plans, investment priorities, or the risks it has identified before the introduction of the proposed Rule had anything whatsoever to do with going green. In other words, the proposed Rule does not merely require that companies disclose information about the material risks to their businesses that could have a material effect on shareholder value (which has long been required)—the Rule dictates to companies *what those risks are* and obligates the company to speak about them, as well as to speculate on their tie to the company’s value.

The text of the proposed Rule itself makes clear that the impetus behind it is neither a substantive Congressional authorization nor developments that fall fairly within an existing delegation of rulemaking authority. Rather, the Commission is responding to a vocal subset of investors that have expressed a desire for climate-related information.<sup>6</sup> The Commission’s mission, as it states on its own website, is to “protect investors; maintain fair, orderly, and efficient markets; and facilitate capital formation,” as well as to “promote a market environment that is worthy of the public’s trust.”<sup>7</sup> Its mission is not to cater to a favored political subset of market participants, nor to goad publicly-traded corporations into adopting policy initiatives that would be otherwise inconsistent with their business priorities under the guise of regulation.

WILL requests that the Commission not adopt the proposed Rule for two primary reasons: 1) the Rule exceeds the SEC’s statutory authority as conferred on the agency by Congress; and 2) the Rule would require registrants to engage in compelled speech in violation of the First Amendment to the United States Constitution.

Whether or in what manner Congress, as the elected legislative body accountable to the American public, should address climate change and its effects as a policy matter is beyond the purview of these comments, though some practical problems with the proposed Rule as composed are noted in these comments. WILL’s interest in commenting on the rule is confined to its concerns about ensuring respect

---

<sup>5</sup> Proposed Rule at 21359-60.

<sup>6</sup> Proposed Rule at 21337, 21340-43.

<sup>7</sup> <https://www.sec.gov/about.shtml>

for statutory and constitutional authority and supporting public confidence in the rule of law. The Commission’s decision to backdoor environmental policy under the guise of administrative rulemaking does not serve those ends when the agency does not have the authority to make these rules in the first instance.

### The Commission Lacks Statutory Authority to Impose These Regulations

As an initial matter and at the most basic level, the Commission is an executive agency that derives its rulemaking authority from statutes passed into law by Congress and signed into law by the President. Only those powers that Congress has specifically delegated to the Commission form proper subjects for rulemaking—the creation of the Commission through the Securities Act of 1933 (“1933 Act”)<sup>8</sup> and the Securities Exchange Act of 1934 (“1934 Act”)—<sup>9</sup>did not create *carte blanche* for the agency to enact wide-ranging policy schemes that Congress would not (or could not) otherwise pass for fear of public scrutiny or the electoral repercussions on members of Congress.

The 1933 and 1934 Acts specify that publicly-traded companies disclose certain information related to the financial performance of those companies and specifically authorize the Commission to engage in rulemaking governing the disclosure of a narrowly cabined set of priorities, such as regulating who may issue securities and under what conditions.

Rather than requiring disclosures related to financial performance, recognized business risks (such as significant litigation), or the prevention of fraud or other activity made illegal by other substantive laws, the Rule imposes an obligation on companies to disclose, as risks, impacts related to climate change—whether the company would independently identify climate change as a factor that creates a material risk to the value of the business or not.

The Commission argues, as do the proposed Rule’s supporters, that the broad language of the 1933 Act, which includes language conferring on the Commission the ability to “promulgate disclosure that are ‘necessary or appropriate in the public interest or for the protection of investors’” or that “promote efficiency, competition, and capital formation,”<sup>10</sup> provide the Commission with the legal cover it needs to create the proposed Rule.<sup>11</sup> But much like the current administration’s recent effort to mandate the COVID-19 vaccine relying on similar, generalized language in OSHA’s enabling statute, justifying these specific (and politically controversial) policy directives with broad generalizations is doomed to legal challenge and,

---

<sup>8</sup> 15 U.S.C.A. §§ 77a *et seq.*

<sup>9</sup> 15 U.S.C.A. §§ 78a *et seq.*

<sup>10</sup> 15 U.S.C.A. § 77b(19)(b)

<sup>11</sup> Proposed Rule at 21335, 21340.

ultimately, judicial invalidation.<sup>12</sup> Reading the statute in this manner creates a “public interest” exception that swallows the larger, more fundamental rule that Congress must explicitly delegate the Commission rulemaking power in a specific area if the Rule is to be valid.<sup>13</sup>

Furthermore, the Rule does not protect investors from fraud or deceit, another common justification for other existing aspects of SEC rulemaking. Rather, the pressures to which the Commission itself says it is responding to is simply the desire from some segments of investors for additional environmental information. There is absolutely no reason why investors who, by purchasing shares, want to reward companies that decided highlighting and combating the effects of climate change is a fundamental part of their mission, cannot simply vote with their pocketbooks and invest only in those companies (or funds that include those companies in their portfolios). In fact, many already do.<sup>14</sup> That not every publicly-traded company sees this as a priority for the operation of its business or its share price does *not* mean that a vocal segment of investors should get to tell those businesses (in which they are likely not investing anyway) how their companies should be run. The Commission cannot put its thumb on the scale to favor companies with certain policy initiatives in the name of ensuring “efficient markets” when the effect is the opposite.

It is one thing to require a company to disclose what could be a damaging conflict of interest created by a member of its board, or a particular person’s ownership stake in the company that could influence the company’s future direction. It is quite another for the federal government to instruct that company that climate change is a risk and then demand that the company respond by parroting language regarding that risk and spend significant financial resources on both quantifying it and attempting to use that information to predict the company’s economic future. The connection between the information required by the disclosures and the alleged risks is so attenuated, and not tethered to the concerns Congress raises in the 1933 and 1934 Acts, as to raise the question of what information (if any) the Commission would be *prohibited* from compelling of companies if the proposed Rule is finalized and enforced. The same investor desire for information that drives the proposed Rule

---

<sup>12</sup> *Nat’l Fed. of Indep. Bus. v. Dep’t of Labor*, 595 U.S. \_\_\_, Nos. 21A244 and 21A247 (Slip. Op., Jan. 13, 2022) (*per curiam*); see also First Amendment analysis, *infra*.

<sup>13</sup> *Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 594 U.S. \_\_\_, at 8 (Aug. 26, 2021) (*per curiam*).

<sup>14</sup> See, e.g., Pippa Stevens, *Your Complete Guide to Investing with a Conscience, a \$30 Trillion Market Just Getting Started*, available at <https://www.cnbc.com/2019/12/14/your-complete-guide-to-socially-responsible-investing.html> (Dec. 14, 2019) (noting tens of trillions invested in strategies that “take a company’s environmental, social and governance factors into consideration”); E. Napoletano, Benjamin Curry, *Environmental, Social and Governance: What is ESG Investing?*, available at <https://www.forbes.com/advisor/investing/esg-investing/> (Feb. 24, 2022) (describing strategies for finding ESG investments for those who “would rather invest in those [companies] that are champions in leading ESG movements”).

could conceivably justify a demand for disclosure of just about anything, no matter how strained the connection between the information sought and the stock price.

In addition to the fundamental separation of powers issues inherent in enacting significant policy objectives through unelected federal bureaucrats, the Rule presents significant practical issues for companies while not actually providing the promised benefits to investors. First, the proposed Rule imposes significant compliance costs on public companies. The commentary to the Rule gives relatively short shrift to this consideration (and undersells the estimated cost of compliance itself), chiefly arguing that because many public companies have already chosen to provide some sort of climate disclosure or sustainability plan to interested investors by other means, such as publicizing their environmental initiatives on their websites, much of the upfront cost has already been incurred. However, there is a significant difference between a company voluntarily providing selected, feel-good information about its environmental proposals and what the Rule would actually require—an analysis, subject to independent audit and inclusion in aspects of the financial statements, of GHG emissions and other so-called climate change risks that, in most cases, have not been previously measured or analyzed. Compliance with the Rule will require hiring additional employees or retaining outside consultants to obtain and analyze this information, and the retention of specialized attorneys and accountants who can ensure compliance with the disclosure requirements in the Rule.

If the costs of compliance will go down over time, as the Commission asserts as a likely outcome,<sup>15</sup> there will be one simple reason for that: these disclosures will inevitably devolve into the same milquetoast, boilerplate disclosures investors typically receive concerning other similar risks that are so broad based as to apply to virtually any participant in the economy.<sup>16</sup> The fact that a company has a facility built in a flood plain, or in an area that could potentially be devastated by wildfires, is arguably already required by existing disclosures, and that information will not change over time absent divesting certain property assets, relocating the headquarters, or making other large-scale changes to the company (which existing rules would require be disclosed to investors). Taking the next step of attempting to predict and quantify the extent of these so-called environmental risks (by, for example, attempting to predict how likely a hurricane is in the region in the short or long term, or how many wildfires may occur in the area over the next decade as a result of climate change) and how the company will weather those issues cannot conceivably provide the level of certainty the SEC typically desires for a disclosure to

---

<sup>15</sup> Proposed Rule at 21339-40.

<sup>16</sup> The Commission acknowledges that its own regulations “discourage the presentation of generic risks that could apply generally to any registrant or offering,” but denies with little further comment that the “fact that climate risks are broad-based” necessarily makes them “generic,” reasoning that “while the source of the risk may be common to many companies, the impact is not.” Proposed Rule at 21338 n.35.

current and prospective investors,<sup>17</sup> as it provides the investor with no more reliable information about the future financial prospects of the company than would flipping a coin or consulting the Farmers' Almanac. And if a company fails to comply with the Rule, or does not do so to the Commission's satisfaction, it will face stiff penalties from the agency following the safe harbor period—also to the detriment of investors, as the costs of defending an SEC investigation, as well as any fines and the negative public fallout from reporting on the company's noncompliance, will be borne by investors in the share price.

Additionally, the Commission has not sufficiently considered the practical effects of requiring a company to disclose Scope 2 and Scope 3 emissions—those not directly incurred by the registrant, but instead by other participants in its supply and delivery chains. Requiring a publicly-traded company to account for the use of all GHG, both upstream and downstream from its own operations, has two obvious negative effects.

First, the Rule has the practical effect of excluding smaller businesses from market participation in a publicly-traded company's supply chain. This is so because many smaller concerns lack the financial and/or personnel resources to collect information on their own GHG emissions, much less any companies downstream or upstream from them. Because there are significant penalties associated with failing to comply with a disclosure requirement the Commission imposes, publicly-traded companies may inevitably be required to sever relationships with suppliers and vendors that themselves do not have the resources to comply with the GHG disclosure requirements of the proposed Rule. This concern raises two potential legal concerns: a) a potential restraint on trade; and b) the *de facto* expansion of the application of this Rule far beyond not only what Congress has intended for publicly-traded companies, but to companies that are not, have never been, and never will be publicly-traded, and over which this agency therefore has no jurisdiction.

Second, any such information (even if it could be feasibly collected from all market participants) will necessarily trail the time period for which the publicly-traded company seeks the information by many months, negating any real value this information provides to shareholders. In other words, by the time the supply chain participants can gather this information for the time period at issue and provide it to the publicly-traded company—after which time, the publicly-traded company must assess the information and apply it to its own risks and put it in the format required by the proposed Rule—the information will be stale and of little or no utility in predicting future risk to investors. The result of the Rule as applied is a high cost to shareholders and investors, which will likely drive share price down, in exchange for information that provides those same investors and shareholders with little to no

---

<sup>17</sup> The Commission has suggested that the disclosures “would require a registrant to disclose any climate-related risks reasonably likely to have a material impact on the registrant's business or consolidated financial statements.” Proposed Rule at 21349.

information they can reasonably act on in exchange. Such a result is counter to the purposes for which the Commission generally requires disclosures in the first instance—namely, to protect shareholders and their investments to the extent feasible.

In sum, the Proposed Rule exceeds the Commission’s rulemaking authority. If the Commission is to require such disclosures, Congress must explicitly confer the authority to do so on the agency.

### The Proposed Rule Compels Speech in Violation of the First Amendment

In addition, WILL urges the Commission to reject the proposed Rule because it unconstitutionally compels speech in violation of the First Amendment. The Supreme Court has recognized that corporations have certain rights, including First Amendment rights to be free from compelled speech.<sup>18</sup> Of course, constitutional limitations do not mean that the Commission lacks the authority to require a publicly-traded company to disclose *any* information—but the disclosures a regulatory body requires must be factually-based disclosures rather than opinions on controversial topics.

The proposed Rule requires registrants to identify and address what the Commission classifies as both “physical” and “transition” risks associated with climate change. Physical risks are defined as “harm to businesses and their assets arising from acute climate-related disasters such as wildfires, hurricanes, tornadoes, floods and heatwaves” as well as “chronic risks and more gradual impacts from long-term temperature increases, drought, and sea level rise.”<sup>19</sup> The Rule defines “transition risks” as those associated with a potential transition to a less carbon intensive economy, such as “climate-related regulatory policies” that may “potential[ly]” be adopted in the United States or elsewhere, and the changing “consumer, investor, and employee behavior and choices” as well as “changing demands of business partners.”<sup>20</sup> To the extent that these risks are material to a registrant’s business, they are already required under the existing rules.<sup>21</sup> Those that are not, such as the nebulous potential for “changing demands” that could be related to anything from climate change to inflation to shifting demographics, are so vaguely abstract as to elude any real use of that information by investors. These broad definitions, and the Commission’s command that registrants disclose and analyze any activity that comes within them as risks to their businesses, compel companies to speak out on matters of opinion and political controversy, rather than disclosing facts

---

<sup>18</sup> *Citizens United v. Fed. Elecs. Comm’n*, 558 U.S. 310 (2008).

<sup>19</sup> Proposed Rule at 21349.

<sup>20</sup> *Id.*

<sup>21</sup> 17 C.F.R. §229.03(3)(i) (disclosure of environmental litigation that is “material to the business or financial condition of the registrant”).



like a particular shareholder’s economic stake, the CEO’s salary, or the existence of material litigation. This requirement flies in the face of Supreme Court precedent.

While the government is free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, speech that is not false or deceptive or does not concern unlawful activities may generally only be restricted in service of a substantial government interest.<sup>22</sup> If the speech involved is neither false nor deceptive, the government bears the burden of establishing that the regulation of that speech “*directly advances* a substantial government[] interest.”<sup>23</sup> Under this test, the government must identify the governmental interest or objective, and the court must evaluate whether the measure will be effective in achieving the selected directive.<sup>24</sup> Alternatively, if a court determines that the speech at issue is *not* commercial in nature, the company’s First Amendment rights are even broader. The general rule is that a speaker “has the right to tailor” its speech, and that its right to do so “applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.”<sup>25</sup>

As one recent example, the Court of Appeals for the D.C. Circuit recognized in *Nat’l Ass’n of Mfg. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) (*NAM*) that Congress did not have the authority under either the 1933 or 1934 Acts to compel publicly-traded companies that used certain minerals originating in and around the Democratic Republic of the Congo in Africa to disclose whether their minerals were “DRC conflict free” in reports filed with the SEC and on their websites. The appellate court struck down the legislation and the associated rule, noting that the regulations compelled the companies to speak on a topic, rather than disclosing facts, in violation of the First Amendment. After concluding that the speech at issue was not commercial speech, the court noted that neither Congress nor the Commission could connect the aim of the regulation—helping the humanitarian crisis in the Congo—to the regulatory disclosure requirements concerning whether a company’s minerals fit the definition of “conflict free.” The aim to “achiev[e] overall social benefits” rather than “measurable, direct economic benefits to investors or issuers” could not withstand First Amendment scrutiny.<sup>26</sup> The government had the burden of demonstrating that the measure it sought to adopt would, in fact, alleviate the harms it identified “to a material degree.”<sup>27</sup> It was insufficient to rely on speculation and conjecture, or the mere hope that the disclosure requirements would produce desirable social benefits.

The connection between the proposed Rule mandating climate-related disclosures and the promised benefits to investors is similarly unsubstantiated. While

---

<sup>22</sup> *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 638 (1985) (citations omitted).

<sup>23</sup> *Id.* at 641 (emphasis added).

<sup>24</sup> *NAM*, 800 F.3d at 524.

<sup>25</sup> *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573-74 (1995).

<sup>26</sup> 800 F.3d at 522.

<sup>27</sup> *Id.* at 527 (citing *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)).

the Commission has apparently learned from its experience in *NAM* not to explicitly tether its reasoning for the regulation to the underlying political goal (here, environmental protection), its reliance on generalized language in the securities laws that the Commission can mandate disclosures that are “necessary or appropriate” to ensure efficient capital markets does not fare any better. While the proposed Rule runs for an impressive 140 pages and includes hundreds of footnotes, the purpose for the rule is no less evidently a policy choice rather than an exercise in regulatory authority. A certain subset of investors want the information the Commission seeks to compel not because they are unable to make informed decisions without it or because they will be misled in its absence, but for reasons of individual preference. As noted previously, there are market-driven methods that do not violate the First Amendment’s prohibition on compelled speech—most notably investor pressure on companies—to accomplish these ends.

The *NAM* opinion used an apt analogy when describing what could be described as controversial—questioning whether the government would be within its rights to require labels on internal combustion engines stating that their use contributes to global warming, noting the ease of converting statements of opinion into assertions of fact simply by removing qualifiers on those statements.<sup>28</sup> Likewise, Congress’s effort to define “conflict free” in a broad manner could not save the statute from the requirement that disclosures be uncontroversial and purely factual. To allow Congress to define terms in this manner provides the governmental limitless “ability to skew public debate by forcing companies to use the government’s preferred language,” even if the company “vehemently disagreed” that its products fit the government’s definition.<sup>29</sup> While what should qualify as “uncontroversial” or “purely factual” may be concededly difficult to identify in certain circumstances, the proposed Rule in this case cannot satisfy these criteria because the registrants are required not to simply identify facts, but to classify them as business risks and to issue forward-looking statements of opinion connecting them to future performance.

Though the Commission has attempted to frame the climate-related disclosures as facts that can be shoehorned into existing definitions of materiality<sup>30</sup> or as permitted objects for rulemaking as a transparency measure for investors<sup>31</sup> rather than calling out the policy preferences underlying the rule (as Congress did in *NAM*<sup>32</sup>), the broad definitions of “physical risks” and “transition risks” of climate change in the proposed Rule violate the First Amendment in the same way. These definitions are so broad that any company on the exchange must necessarily address them in disclosures. Silence is not an option. As was the case with the conflict

---

<sup>28</sup> *Id.* at 528.

<sup>29</sup> *Id.* at 530.

<sup>30</sup> Proposed Rule at 21351.

<sup>31</sup> Proposed Rule at 21349.

<sup>32</sup> *NAM*, 800 F.3d at 524 (SEC identified the governmental interest as “ameliorating the humanitarian crisis in the DRC,” which the court assumed for the sake of argument could be a sufficient government interest).

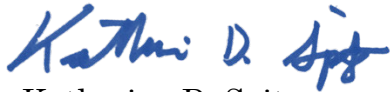
minerals disclosure, the proposed Rule in essence requires “an issuer to confess blood on its hands,” whether the company agrees with that assessment of its business practices or not.<sup>33</sup>

Notably, the disclosure provision in the conflict minerals case was the result of an explicit congressional delegation of rulemaking authority—a factor and justification completely absent from the current proposed Rule, and an omission which for the reasons described at length above is itself problematic. But *NAM* demonstrates that even Congress’s explicit approval for a certain type of disclosure will not suffice if, as is the case here, the disclosure mandated compels speech in violation of the First Amendment. The proposed Rule is invalid for both reasons.

### Conclusion

For the foregoing reasons, WILL recommends that the Commission reject the proposed Rule, respect Congress’s role in deciding which rulemaking powers to delegate to the Commission, and honor the limitations of the First Amendment as it applies to publicly-traded companies.

Sincerely,



Katherine D. Spitz  
Associate Counsel

---

<sup>33</sup> *Id.* at 530.