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May 20, 2022

Vanessa A. Countryman, Secretary  
Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549-1090  
**Submitted electronically:**  
**rule-comments@sec.gov**

**Re: File No. S7-10-22 Proposed Rule on the Enhancement and Standardization of Climate-Related Disclosures for Investors**

Washington Legal Foundation is pleased to submit this comment on the Securities and Exchange Commission's proposed rule, *Enhancement and Standardization of Climate-Related Disclosure for Investors*, 87 Fed. Reg. 21,334 (Apr. 11, 2022).

Founded in 1977, WLF is a nonprofit, public-interest law firm and policy center that promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF supports protecting the stock markets from improper manipulation, preventing shareholder losses due to abusive securities litigation, and restoring investor confidence in the financial markets through regulatory and judicial reforms. WLF believes that the Securities and Exchange Commission best furthers these goals when it avoids regulations—such as the proposed climate-related disclosure rule—that are unrelated to protecting the integrity of financial markets.

Climate change is not the proper province of the securities laws or the SEC. Because it provides no benefit or meaningful information to investors, the proposed climate-related disclosure rule lacks any investor-protection justification and exceeds the Commission's statutory authority. Moreover, by compelling companies to speak publicly on a matter when they otherwise would prefer not to, the proposed rule raises serious First Amendment

concerns. WLF urges the Commission to abandon its current course and withdraw the proposed rule.

## **The Proposed Rule**

The SEC's proposed rule would require a domestic or foreign registrant to include certain climate-related information in its registration statements or periodic reports. New mandatory disclosures would include (1) climate-related risks and their actual or likely material impact on the registrant's business, strategy, and outlook; (2) the registrant's mitigation of climate-related risks and relevant risk-management processes; (3) the registrant's greenhouse gas emissions; (4) certain climate-related financial metrics; and (5) information about climate-related targets and transition plan, if any.

### **I. The Proposed Rule's Climate-Change Disclosure Exceeds The Commission's Statutory Authority.**

The SEC's powers are not unlimited. As "creatures of statute," administrative agencies "possess only the authority Congress has provided." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational & Safety Health Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam). Under current law, the SEC lacks any authority to adopt mandatory climate-related disclosures. This lack of congressional authority dooms the proposed rule.

Section 13(a) of the Exchange Act authorizes the Commission to prescribe rules and regulations, but *only* "as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security." 15 U.S.C. § 78m(a). The Commission claims that disclosure of "climate-related risks and metrics would be in the public interest and would protect investors." 87 Fed. Reg. at 21,335.

But nothing grants the Commission broad powers to compel issuers of securities to make statements on any given topic simply because it incants the magic phrases "the public interest" or "protection of investors." If that were so, the SEC's ability to require disclosures would be nearly limitless. That is why the Supreme Court has "consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general

public welfare.” *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 669 (1976). Rather, “the words take meaning from the purposes of the regulatory regulation.” *Id.*

To give context and meaning to the words “public interest” and “protection of investors” in the Exchange Act, we must look to the statute’s overall purposes. “Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority ‘in a manner that is inconsistent with the administrative structure that Congress enacted into law.’” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

The Exchange Act’s text and context limit the SEC’s power to require disclosures to information about the disclosing company’s financial value and prospects. Section 12 grants the SEC power to adopt disclosure rules for registering companies, but the scope of this power is limited to a dozen distinct categories and documents. 15 U.S.C. § 78l(b)(1). These include the nature of the business, the terms of outstanding securities, descriptions of major directors, officers, and shareholders, balance sheets, and other financial statements. *Id.* Likewise, Section 13 grants the SEC power to adopt disclosure rules for registered companies, but the scope of this power is limited to requiring (1) any update of the information the company supplied to register under Section 12 and (2) certified annual reports and quarterly reports. 15 U.S.C. § 78m(a)(1)-(2). Neither of these enumerated lists includes climate-related information.

Nor may the SEC impose a disclosure obligation simply because it considers the requested information to be material. To start, materiality is a high bar. As defined by the Supreme Court, materiality requires “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information available.” *TSC Indus., Inc. v. Northway*, 426 U.S. 438, 448-49 (1976). The materiality standard ensures that the information companies must disclose is relevant and helpful for promoting efficient capital markets. The proposed rule’s climate-change disclosures flunk this basic test and undermine materiality as an important safeguard. That strongly suggests that the proposed rule exceeds the Commission’s congressional delegation of power.

What's more, materiality is not a freestanding basis for a disclosure rule. No statute says that the Commission may require a company to disclose *any* material information to investors. Rather, every disclosure rule must fall into one of the categories of information set forth by Congress. And from start to finish, when listing the kinds of information that the Commission may require a regulated company to disclose, Congress consistently cabined the scope of disclosures to material financial data and company information related to competition, capital formation, and investor protection.

As the House Report for the Exchange Act confirms, the Act was not intended to give the SEC “unconfined authority to elicit any information whatsoever.” H.R. Rep. No. 73-1383, at 23 (1934). And the Commission itself admitted in 2016 that, absent “a specific congressional mandate,” the agency “is not authorized to consider the promotion of goals unrelated to the objectives of the federal securities laws when promulgating disclosure requirements.” SEC, *Business and Financial Disclosure Required by Regulation S-K*, Rel. No. 33-10064, 34-77559 (Apr. 13, 2016), at 209-10. Nothing about the SEC’s statutory authorization has changed since 2016.

The SEC is not a legislative body; it must abide by the words of the statutes that Congress enacted. The proposed rule does violence to this basic constitutional principle.

## **II. The Proposed Rule’s Climate-Change Disclosure Raises Serious First Amendment Concerns.**

The First Amendment’s guarantee of “freedom of speech” encompasses “the decision of what to say and what *not* to say.” *Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 797 (1988). By compelling companies “to speak a particular message” they would not otherwise recite, the proposed climate-related disclosure rule “alters the content of [their] speech.” *Id.* at 795. The Commission has been down this road before and lost. *See Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518 (D.C. Circ. 2015) (holding that SEC’s conflict-mineral disclosure rule violated the First Amendment). There, as here, the SEC could not satisfy its burden of showing that the disclosure it adopted would “in fact alleviate” the harms it recited “to a material degree.” *Id.* at 527.

As the District of Columbia Circuit has explained, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), and *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), both apply the same intermediate scrutiny to commercial-speech regulations. *Zauderer* simply applies that scrutiny to one kind of regulation: government-mandated disclosures. *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 26-27 (D.C. Cir. 2014) (en banc). In such cases, “the means-end fit is self-evidently satisfied when the government acts only through a reasonably crafted mandate to disclose ‘purely factual and uncontroversial information’ about attributes of the product or service being offered.” *Id.* at 26. *Zauderer* is thus best understood as “an *application* of *Central Hudson*, where several of *Central Hudson*’s elements have already been established.” *Id.* at 27 (cleaned up).

But requiring companies to disclose climate-related risks is *not* uncontroversial. Given its extremely broad reach into all sectors of the economy, climate-change regulation is one of the most highly charged policy issues in the United States. Over the course of decades, Congress has carefully struck a delicate balance between energy production, economic growth, and environmental stewardship. What’s more, a disclosure is always controversial when it is inconsistent with the statutory text and purpose that the mandating agency relies on. *Nat’l Ass’n of Mfrs.*, 800 F.3d at 529-535. As shown above, the proposed climate-change disclosures are unrelated, or even tangentially related, to Congress’s statutory objectives; they are the epitome of controversial.

Above all, a disclosure is controversial if it is “dispute[d].” *Id.* at 529. Yet as many companies have shown in earlier comments, establishing a causal link between company actions undertaken at a particular time and in a particular place and global climate change is an exceedingly difficult task. It would be nearly impossible, in fact, to disaggregate a single company’s actions from all other potential causes of climate change.

“Disclosures on the physical risk side will require companies to select a climate model and adapt it to assess the effects of climate change on the specific physical locations of their operations, as well as on the locations of their suppliers and customers.” Commissioner Hester M. Peirce, *We are Not the*

*Securities and Environment Commission—At Least Not Yet* (Mar. 21, 2022). Such disclosures inevitably “will entail stacking speculation on assumptions.” *Id.* More to the point, “[h]ow could the results of such an exercise be reliable”? *Id.* Not only is such speculation immaterial, compelling its disclosure would further no legitimate government interest.

“If the disclaimer creates confusion, rather than eliminating it, the only possible constitutional justification for [the] speech regulation is defeated.” *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080, 1080 (2002) (Thomas and Ginsburg, JJ., dissenting from denial of certiorari). Here, the value to the viewing public of the SEC’s proposed climate-related disclosure rule’s controversial compelled speech is zero.

The proposed rule’s compelled-speech mandate thus constitutes a significant constitutional and commercial harm.

### **Conclusion**

Because it exceeds the scope of the agency’s statutory authorization and likely violates the First Amendment’s limits on compelled speech, the Commission’s proposed rule should be withdrawn.

Respectfully submitted,

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