June 2, 2022

Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609
Re: File No.

Dear Ms. Countryman,

I write to comment on legal authority. The proposal is well within the Commission's authority to adopt. Critiques on legal grounds fall far short of what would be needed for a court to overturn the rule.

Congress, having made a fundamental policy judgment to require "full and fair" disclosure to protect investors, directed the Commission to make ongoing subsidiary choices of precisely what details of disclosure to require and when, after engaging in fact-finding and analysis that Congress chose not to try to do itself. Here, the proposal frames difficult, subsidiary choices, which divide reasonable observers. Those choices I do not here address. They require fact-finding and expert factual judgments about likely effects, costs, benefits and risks of alternatives, including inaction, in the face of investor needs that have led most large companies to publish inconsistent and variable climate-related disclosures. The Constitution, and Congress, have given the Commission – and not the courts – authority to make those judgments.

Throughout I describe rather than argue for what the law should be.[1] Many legal issues are open to reasonable debate. However, many legal questions have clear answers. The proposed rule specifies the details of disclosure, just as Congress directed the Commission to do. It does not regulate climate activity itself (e.g., greenhouse gas emissions) and would have modest effects on the economy as a whole. It is authorized by clear statutes, is consistent with settled understandings, and addresses disclosure topics covered by rules adopted long ago by the Commission and ratified by Congress. It is not a "transformative" surprising regulatory departure, raising such a "major question" as to justify interpretive methods other than those of a faithful agent of Congress.

Nor has the "major questions doctrine" ever been used to overturn authority unambiguously granted by the plain text of a statute. "Clear statement" canons play no role when statutes speak clearly. Striking down regulations adopted pursuant to clear and limited delegated authority would turn the doctrine's purpose against itself,[2] prevent Congress from assigning traditional fact-finding and implementation roles to agencies, turn courts into unelected mini-legislatures, and subvert rather than reinforce the separation of powers. Overturning this rule as unauthorized on that basis would wipe out most of the Commission's disclosure rulebook. Nothing at stake in this proposed rule justifies such judicial lawmaking.

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[1] For example, I believe as a policy matter that Congress should revisit the decision to limit disclosure to companies with stock exchange listings because they are no longer the only sorts of companies in which the public has a financial interest in understanding and holding accountable, due to trends in how individuals invest through institutions, and because Section 12(g) of the Securities and Exchange Act of 1934 (the **1934 Act**) no longer effectively extends the Commission's reach to non-listed companies. But under current law, the authority of the Commission is at its greatest with respect to disclosure by those companies, as under the proposed rule, and nothing in the proposed rule would stretch that basic authority.

[2] "A [substantive] canon [of statutory interpretation] cannot moderate the obligation of faithful agency [by courts] unless it actually advances the constitutional value it purports to protect." Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 179 (2010).

Introduction and overview

The case for the Commission's authority to adopt the proposed rule is a simple, two-premise syllogism:

1. Congress created and in plain words authorized the Commission to protect investors by specifying public company disclosures of information about financial risks and opportunities.

2. The rule proposes disclosures of information about financial risks and opportunities that are reasonably understood as appropriate for the protection of investors.

Hence the rule is authorized. As discussed in Point I, critics of the rule cannot plausibly attack premise one. The Commission's authority is plain in its organic statutes, legislative history, in long-standing precedent, in both court decisions and its own rules, and repeatedly accepted by Congress through amendments of the statutory bases for those rules. The Commission's authority to consider **environmental** risks was reinforced and made even more clear by another statute, which critics do not seem to have even noted, much less considered, as detailed below.

So, instead, like a cuckoo putting its eggs into another's nest, critics have resorted to mischaracterizing the proposal, and inventing their own, fictional rule – not actually proposed – to attack premise two, and claim the Commission lacks authority for their fictional new rule. For example, they point to the broader "ESG" movement and claim the fictional new rule requires disclosure about ESG, or about environmental impacts not relevant to investors. They argue that because the fictional new rule requires disclosure of environmental impact, the Commission's authority was silently removed when Congress authorized the Environmental Protection Agency (**EPA**) to address that impact. They argue that the disclosures required by the fictional new rule would be opinions, not facts, so it would violate the First Amendment. Because (they claim) the fictional new rule reflects climate change policy, and because climate change is new and important, the plain text of the Commission's statutory authority cannot really mean what it says. Or they argue without evidence about secret motivations, socialist agendas, and "political" goals to cripple industries and to reduce our nation's energy security.

As discussed in Point II, each attack is mistaken and misleading because the proposed rule is not the critics' fictional new rule. Read fairly and dispassionately – non-politically, one might say – disclosures specified by the rule are not about environmental impact, or climate change, but about financial risks and opportunities related to climate change. Indeed, the actual proposed rule requires disclosure about subject matters long covered by indisputably authorized disclosure requirements – the first point made by Commissioner Peirce in her dissent. What is proposed is to not to add new subject matters to public company disclosures, but to refine the mode and detail of already-required disclosures.

The focus of the actual rule is the impact of **climate change on companies, and not vice versa**. The actual rule's "fit" with the goals of environmental activists is poor, and its "fit" with the goals of investor advocates is tight. The disclosures would consist of **facts, not opinions**, and raise no First Amendment concern. Because, finally, the disclosures are financial and do not extend to the large part of the economy owned by private companies, they would not constitute general climate change policy, such as a carbon tax or emissions cap-and-trade scheme. Those important topics remain for Congress, and the proposal on its own does not raise new "major questions" warranting a deviation from standard statutory interpretation. As to motivations, the long and extensive record leading to the proposal of the rule can be reviewed in its entirety and nowhere will any evidence be found that the purpose of the rule is other than to protect investors.

In sum, each attack succeeds only as applied to a fictional new rule. The Commission's authority to adopt the actual proposed rule remains intact, and clear. The rest of this letter details Points I and II.

I. The Commission's undisputed authorities

The legal authorities cited by the Commission in the proposing release are the conventional authorities for disclosure rules over nearly a century.[3] Those authorities are general in nature, not limited to specific topics. In plain unambiguous text, they encompass financial risks and opportunities related to any source.

A. Unambiguous disclosure authority to protect investors under the 1933 Act

Specifically, Section 7 gives the Commission[4] unambiguous authority to specify the contents of disclosure documents used to register securities for sale to the public. In that section, companies are required to disclose a specified list of financial disclosure and documents set out in Schedule A, to obtain consents from "any accountant, engineer, or appraiser" or other professional identified in the disclosures, and – in a separate sentence – to disclose "**such other information**, and be accompanied by such other documents, **as the Commission may by rules** or regulations **require as** being necessary or **appropriate** … f**or the protection of investors**."[5]

Three points about this text are worth emphasizing.

> ***First***, the 1933 Act itself required disclosure not only of specified financial items, but also qualitative, open-ended information, such as the "**general character**" of the company's business, compensation, and material contracts, and reinforced its breadth by referring not only to opinions of "accountants" and "appraisers" but also "engineers" and other professionals, such as lawyers or – as under the present proposal – experts on greenhouse gas accounting. If useful for "the protection of investors," disclosure was not limited to the four corners of, or even commentary on, financial statements.[6]
>
> ***Second***, the 1933 Act makes clear that Congress expected and directed the Commission to go beyond content specified in the Act, and granted authority to go beyond what is "necessary" to include what the Commission concludes is "**appropriate**"[7] for the protection of investors. Congress expected the Commission to use expert judgment to update disclosure over time, as new or newly identified risks emerge.
>
> ***Third***, the 1933 Act includes a specific limit to this authority, that it be "**for the protection of investors**" – but **no further qualifier**. The 1933 Act does not limit additional disclosures to those that are "related" or "similar" to the items in Schedule A, or "material," or "financial," despite the fact that Congress frequently used those very qualifiers elsewhere in the statute.[8] The Commission

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[3] Sections 7, 10, 19(a) and 28 of the Securities Act of 1933 (the **1933 Act**), and Sections 3(b), 12, 13, 15, 23(a) and 36 of the 1934 Act. SEC Rel. No. 33-11042; 34-94478 (Mar. 21, 2022) ["Proposing Rel."]. This comment focuses on basic authorities, such as Section 7.
[4] Technically, the "Commission" at the time of the 1933 was the Federal Trade Commission (**FTC**), but the Securities and Exchange Commission was created by and substituted for the FTC under the 1934 Act, an example of how Congress has shifted regulatory responsibility **explicitly** when it wants to do so. Similarly, see the statutes creating the Commodity Futures Trading Commission.
[5] Emphasis added. The 1933 Act also permits disclosures that are more generally "in the public interest" (those are the words replaced by the ellipsis in the quote in the text). It is not necessary to establish the precise additional reach of "the public interest" for the proposed rule, as it is "for the protection of investors," a distinct ground for additional disclosure in Section 7.
[6] It should be noted that in 1933, "generally accepted accounting principles" did not yet exist for the content of financial statements.
[7] By contrast, other statutory authorities, including some given to the Commission (e.g., Section 19(a)), are limited to what is "necessary" (and not merely "appropriate") for specific purposes.
[8] "Similar" is used 35 times as a qualifier in the 1933 Act (e.g., 2(a)(4), 2(a)(13), 2(a)(18), 2A(b)(4),3(a)(2), 3(a)(5), 4(c)(1)(A), 27A(h), and 71 times in the 1934 Act (e.g., 3(a)(4), 3(a)(6), 3(a)(7), 3(a)(11)). "Related" is also used many times (e.g., 3(b)(2)(G), 4(c)(1)(A), and 4A(a)(3) of the 1933 Act and 3(a)(4), 3(a)(40), 3(a)(53A) and 6(h)(3) of the 1934 Act). Not all of these uses were included in the initial versions of these statutes, but many were. "Material" is used 43 times in the 1933 Act, including in the anti-fraud sections of both the 1933 and 1934 Acts. The word "financial" is not used in the heading to the section (which may be used in conventional statutory interpretation), "Information Required in the Registration Statement," but is used 35 times in the 1933 Act. Because the general requirement of disclosure of "such other information" as the Commission requires does not follow Schedule A or any specific list of disclosures, and instead rests in a separate sentence, separated from the mention of Schedule A by two lengthy sentences addressing other topics, with its own sentence-specific qualification ("for the protection of investors") that is not part of the Schedule A

has commonly limited requirements to "material" and "related" items, but that is not because of a legal limit on its authority, but as a subsidiary choice of how to implement Congress's policy judgment to require full and fair disclosure, based on its experience and expertise.

The context of this authorizing language reinforces these conclusions. For example, the famous phrase "full and fair disclosure" is in the full title to the 1933 Act, and so part of its statutory meaning.[9] The caption to Section 7 -- "Information required in registration statement" – contains no qualifiers on "information." The authorizing language in Section 7(a)(1) is limited by Section 7(a)(2), but only for a designated class of "emerging growth companies," and not as to content. The limitations in 7(a)(2) were imposed in 2012, by which time (as detailed below and in Annex A), the Commission had repeatedly relied upon the language in Section 7(a)(1) to require disclosures of all kinds, including non-financial disclosures, environmental disclosures and climate-change related disclosures. Congress in 2012 thus ratified long-standing Commission exercises of the unambiguous authority in 7(a)(1).

In sum, the text and context of the 1933 Act itself gives the Commission broad authority to require disclosures about financial risks and opportunities beyond the inevitably incomplete initial lists of information and documents included in the statute. As discussed in Point II, the proposed rule requires disclosures about financial risks and opportunities, so even if there were an explicit limit on the Commission's authority that disclosures under Section 7 be "financial" in nature, or "related" to the financial statements, or to the elements in the statute, the proposed rule would still be authorized. Regardless, as long as the disclosures are fairly designed "for the protection of investors," a factual assessment of the kind commonly delegated by Congress to regulatory agencies,[10] they would fall within the clear limiting principle of that law. Imposing further limiting principles may for some "be appealing from a policy standpoint," but doing so has "no basis whatsoever in the statute's text."[11]

B. Legislative history and contemporaneous commentary confirm this authority

Although some are reluctant to consider legislative history or expert contemporaneous commentary in interpreting statutes, it is useful to do so briefly here for a simple reason. To the extent that those who disfavor consideration of legislative history truly give primacy to legislative text and structure, there is no plausible basis on which to argue the Commission lacks authority to adopt the proposed rule. The plain language could not be clearer in directing the Commission to do what it is proposing to do: specify the details of disclosure appropriate to protect investors, based on its fact-finding and expert judgment. But as some critics do ignore the plain language of the statute, it should be emphasized that they find no more support for the notion that the Commission lacks authority in the legislative history, or in generations of legislative, executive, and judicial understanding of the statute's meaning.

All those sources here align with the 1933 Act's plain, ordinary meaning, and so confirm the above conclusions. A draft of what would become the 1933 Act in the Senate included disclosure items directly in the statute, and did not contain the equivalent language later adopted in Section 7, which directs the Commission to go beyond that list (which is separate from the Commission's general rulemaking authority in Section 19). This demonstrates that the broader direction was consciously added during the legislative

sentence, the *ejusdem generis* canon cannot reasonably be understood to add any further implied limits on its meaning, and in the nearly 90 years since the Act was adopted no court has found such a limit. In context, it is clear that the phrase "such other information" does not refer back to Schedule A, but refers forward to the limiting phrase "as the Commission may by rules … require … for protection of investors."

[9] "An Act to provide **full and fair disclosure** of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." Emphasis added.

[10] Gundy v. US, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting) ("once Congress prescribes [a] rule governing private conduct, it may make the application of that rule depend on executive fact-finding").

[11] Lawson v. FMR LLC, 134 S. Ct. 1158 (2014) (Scalia, J., concurring, with J. Thomas, interpreting Sarbanes-Oxley Act).

process.[12] In contrast, proposals to give the Commission discretion to approve or disapprove of the "soundness" of stock offerings was rejected by Congress – the 1933 Act in the end embraced full and fair disclosure as the method to protect investors.[13]

This legislative choice – disclosure, but not "merit review" – is an important and real "intelligible principle" limiting the Commission's general authority, along with the specific, and limited purpose for those disclosures, that they be those "appropriate" for the "protection of investors." These limits explain why further restrictions on the Commission's authority to specify disclosures to protect investors were not needed to constitutionally cabin Congress's delegation to the Commission under the 1933 Act.

At hearings on what became the 1933 Act, the Senate heard testimony advocating longer or shorter periods of time for financial statements, specific proposals for additions to or eliminations from the list of disclosure items, arguments about whether audits should be done by reference to industry peers, and how expensive audits would be. The resulting awareness of the need for detailed specification of disclosures led to the delegation reflected in the 1933 Act. During the hearings, it was explicitly noted by a former FTC Commissioner and an advisor to President Roosevelt that:

> We are trying not to have this bill be too long. I think it is only about 30 pages, while the British Companies Act is over 300 pages. But we do have a provision that permits the Commission to set up rules and regulations which will have the effect of law. In those rules and regulations we expected them, in drafting their forms, to go more into detail with regard to requirements.

In other words, the delegation to the Commission was deliberate, was specifically intended to apply to required disclosures, and was sensible, reflecting an anticipation that the Congress itself could not reasonably work out in detail the kinds of choices necessary to develop and keep up to date an appropriate disclosure regime.

An extended comment on the 1933 Act published in the Michigan Law Review in March 1934 echoes these points, summarizing the law as having two purposes:

> (1) that there shall be filed with the Federal Trade Commission[14] a full, accurate and complete statement of ***all pertinent facts*** concerning issues of the securities and (2) that instruments of transportation or communication in interstate commerce and the mails shall not be used directly or indirectly to effectuate fraudulent sales.[15]

In other words, public companies' disclosures were expected to go beyond basic financial statements. Because the items listed in the statutes themselves could not reasonably be understood to cover "all pertinent facts," the final language in the statute also reflected an expectation that Commission regulations would be needed to augment the statute itself. The commentary distinguishes between the full disclosure purpose of the 1933 Act from its separate, anti-fraud purpose. The law went beyond combating affirmative fraud, where intent, materiality, and damages had a role to play, and added to it a general philosophy of "seller beware," in which "all pertinent facts" must be disclosed before a company sells stock, and liability could attach even without traditional hallmarks of fraud, albeit with separate limiting conditions.[16]

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[12] S. 875, 73rd Cong., 1st Sess., discussed in Hearings before the Committee on Banking and Currency, U.S. Senate (Mar. 31 to Apr. 8, 1933), available https://babel.hathitrust.org/cgi/pt?id=uc1.$b387956&view=1up&seq=7 (Senate Hearings).

[13] Id., at 63 et passim.

[14] See note 5 above on why this reference is to the FTC.

[15] Laylin K. James, The Securities Act of 1933, 32 Mich. L. Rev. 624, 630 (1933).

[16] Id. at 650; Senate Hearings, supra note 13, at 72. Section 11 of the 1933 Act makes companies strictly liable for material misstatements or omissions.

As stressed by Justice Alito, when he was a Judge on the Third Circuit:

> Because the materiality standards for Rule 10b-5 [the Commission's primary anti-fraud rule] and SK-303 [an affirmative disclosure requirement for "known trends and uncertainties," among other things] differ significantly, the 'demonstration of a violation of the disclosure requirements of Item 303 does not lead inevitably to the conclusion that such disclosure would be required under Rule 10b-5.'"

In short, disclosure authority extends beyond what would constitute fraud at common law, and has long been used by the Commission to specify disclosure of what would not necessarily be "material" for that purpose.[17]

C. The Commission's unambiguous disclosure authorities under the 1934 Act

But the Commission's authorities go further, precisely because Congress recognized that investors need information beyond the moment of initial offer and sale, which are addressed by the 1933 Act. One of the primary purposes of the 1934 Act was to augment the 1933 Act by giving the Commission authority to require ongoing reports by companies whose securities were traded on stock exchanges. Section 12 of the 1934 Act conditions exchange-trading privileges unless securities are registered by companies disclosing "**such information, in such detail, as to the [company] … as the Commission may by rules** and regulations **require**, **as** necessary or **appropriate** in the public interest or **for the protection of investors**, in respect of the following: … the organization, financial structure, and nature of the business."[18]

Section 13(a)(2) of the 1934 Act goes further still, and requires companies to disclose, under rules the Commission:

> may prescribe **as** necessary or **appropriate for the proper protection of investors** and to insure fair dealing in the security … **such annual reports** … and such quarterly reports … **as the Commission may prescribe**.

Again, this language is not limited to what is "necessary" to protect investors, but gives the Commission discretion to specify what information is "appropriate" to protect investors and markets, based on its fact-finding and expert application of the statute's goals to evolving investor needs. As with the 1933 Act, this statutory language authorizes periodic reports and imposes no subject-matter restriction on those reports. It does not say, for example, "annual financial reports," but simply "annual reports." As with the 1933 Act, the authority is not unbounded – it is limited by the phrase "appropriate for the proper protection of investors," with the gloss that the rules also be appropriate "to insure fair dealing in the security," a reflection of the fact that the 1934 Act was designed to govern securities that were already trading on securities markets.[19]

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[17] Oran v. Stafford, 226 F.3d 275, 288 (3d Cir. 2000).

[18] Section 3(b) of the 1934 Act adds Commission authority to "define technical, trade, accounting, and other terms used [in the statute], consistently with the provisions and purposes" of the statute, and Section 13 and 15 of the 1934 Act authorize the Commission to require annual and other reports containing the same breadth of information required under Section 12, and extends authority over companies with securities not traded on exchanges if they meet thresholds specified by Commission rule.

[19] The statute goes even further in 13(b)(1) to further given the Commission authority to prescribe "forms" in which required disclosures are to be set forth, and in that context, lists specific elements that go beyond the financial statements, to include "the appraisal or valuation of assets and liabilities," which are normally not components of standard financial statements. Section 13(b)(1), however, does not (as some have suggested) qualify Section 13(a)(2), but adds to it. Although separate components of statutes are generally read together, it is an unjustifiable misreading to assert that an affirmative grant of power to specify the "form" of a report to create a limit "from context" on the content of the report, when the separate grant of power to require the report contains no such limit, nor is one explicit in the authority to create the form.

D. Legislative history on authority under the 1934 Act

Authority for disclosure under the 1934 Act addressed more than the need for protection of the initial investor acquiring securities. The purpose of the disclosure was also to protect markets and market pricing, and improve the resulting allocation of capital. As the House Report accompanying the 1934 Act explained:

> The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings about a situation where the market price reflects as nearly as possible a just price. Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value. . . . The disclosure of information materially important to investors may not instantaneously be reflected in market value, but despite the intricacies of securities values truth does find relatively quick acceptance on the market.[20]

One need not be a strong believer in the efficient market hypothesis[21] to believe that disclosure often aligns market prices with investment risk and returns, albeit sometimes with delays and errors, which makes ongoing refinements in disclosure requirements all the more important to healthy markets.

Congress also recognized that full and fair disclosure would enhance investor confidence. Without such confidence, Congress astutely observed:

> Easy liquidity of the resources in which wealth is invested is a danger rather than a prop to the stability of [the market] system. When everything everyone owns can be sold at once, there must be confidence not to sell.[22]

These understandings help explain Congress's decision to direct the Commission to specify additional disclosures under the 1934 Act, to adapt the statute to emerging financial risks and opportunities and maintain efficient capital market pricing and investor confidence over time.

E. The Commission's continuous exercises of authority and Congressional acceptance thereof

Over time, the Commission has used its authorities under the 1933 Act and the 1934 Act to specify the details of required disclosures about a range of matters, both in and outside corporate financial statements, as illustrated in detail in **Annex A** to this comment letter. Often these requirements have been specific and prescriptive in nature. They have been adopted under Chairs appointed by both Democratic and Republican Presidents, in every decade since 1933. Many contain materiality qualifiers, but many do not.

Annex A contains just a sampling – many more additions and refinements have been adopted in the decades since 1933. Few of the requirements in Annex A directly involved current or even near-term financial cash flows of the kind required to be reflected in financial statements, such as reserves for contingent liabilities or non-cash commitments to invest in the future. To be clear, the Commission has also routinely added required disclosures that do affect the financial statements, too.

And to be yet more clear, the Commission has not simply expanded or added to required disclosures over time – it has cut, compressed, and consolidated as well, in step with the needs of investors over time. The result is a continuously adjusted, detailed system of disclosure specifications, reflecting the Commission's

[20] H.R. Rep. No. 1383, 73d Cong., 2d Sess. 11 (1934).

[21] Cf. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2417-27 (2014) (Thomas, J., concurring, with J. Alito and J. Scalia) (advocating overruling Basic v. Levinson on ground that market prices cannot be relied upon by investors for purposes of Rule 10-5; "'overwhelming empirical evidence' now suggests that even when markets do incorporate public information, they often fail to do so accurately").

[22] H.R. Rep. No. 1383, 73d Cong., 2d Sess. 11 (1934), at 5.

fact-finding and expertise. In sum, throughout its history, and consistently, the Commission has fulfilled its statutory mandate to specify required disclosure of information that was not directly financial in nature, but posed risks about a future financial impacts, often indirect, contingent or both.

Some claim the Commission has acknowledged or adopted limits on its disclosure authorities, beyond limits in the text of the statutes. They point to a footnote in a 2016 Concept release to support this claim.[23] Aside from the elementary fact that the Commission has no authority to edit Congressionally adopted statutes, the concept release actually says precisely the opposite. Citing to a 1975 release, the Commission in 2016 noted, non-controversially, that "In [the 1975] release, the Commission concluded that, although it is generally not authorized to consider the promotion of social goals **unrelated to the objectives of the federal securities laws**, **it is authorized and required by NEPA [the National Environmental Policy Act] to consider promotion of environmental protection as a factor** in exercising its rulemaking authority." This statement denies authority only if disclosure is "unrelated to" investor protection, protection of market integrity, or the public interest more generally. It does not suggest any limit other than what is in the statutes themselves, including NEPA.

As detailed in **Annex B** to this comment letter, not only has the Commission repeatedly specified more than the minima in the 1933 Act itself, it has repeatedly had its augmented disclosure rules acknowledged, accepted and ratified by Congress, through multiple amendments to its organic statutes. Congress both expanded authorities and limited which and how specific types of ***companies*** and ***transactions*** are covered by its disclosure regime. It also cut back on liability of disclosure. But Congress has never cut back on the Commission's general obligation to specify the ***contents*** of its disclosure regime, such as by editing or reversing prior disclosure specifications. As noted above, the JOBS Act, for example, limited the full requirements in Section 7 for "emerging growth companies," but left the Commission's overall authority to require disclosure for other public companies intact. Congressional ratification has been repeated and affirmative – not mere inaction. Congress repeatedly amended and expanded the Commission's disclosure regime, including by adding to the authorities relied upon for the present proposed rule.

Congressional support for the Commission's clear (but statutorily limited) disclosure authority is shown by the fact that over time, in the face of repeated Congressional amendments and annual budget laws (in which Congress can and has inserted "riders" further limiting Commission discretion[24]), the Commission's requirements ranged far beyond the limited lists of information in the 1933 and 1934 Acts themselves. The requirements and have specifically included disclosures ***related to the environment***. The requirements have included disclosures about risks and uncertainties generally, and of information both qualitative (business segments; competitive conditions; management, environmental and other litigation; and contracts) and quantitative (mineral reserve estimates, loan performance statistics, coverage ratios, material transactions, and compensation). The brief historical review in Annexes A and B (and much more detail could be added) shows that nothing about the current proposed rule's contents (discussed more below) should be legally surprising in any meaningful way, to Congress or to companies or their investors.

F. Judicial assessments of the Commission's disclosure authorities

No court has ever found that this long line of exercises of the basic authorities on which the current rule relies were beyond the Commission's authority. Indeed, the texts are so clear that – in contrast to the many times the Commission has been challenged on anti-fraud rulemakings, where authority has been interpreted

[23] SEC Release No. 33-10064, 34-77599 (Apr. 22, 2016) at n.663.

[24] E.g., Section 631 of Consolidated Appropriations Act of 2021, Pub. L. 116-260 (limiting Commission authority to require disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations).

as limited by common law anti-fraud principles[25] – few attempts have been made to challenge the Commission's use of its basic disclosure authorities to require disclosure. Instead, as summarized by the D.C. Circuit Court of Appeals in 1979:

> the Commission has been vested by Congress with broad discretionary powers to promulgate (or not to promulgate) rules requiring disclosure of information beyond that specifically required by statute. Rather than casting disclosure rules in stone, Congress opted to rely on the discretion and expertise of the SEC for a determination of what types of additional disclosure would be desirable.[26]

The Commission's authority, to reiterate, includes discretion to promulgate rules governing corporate disclosure. This discretion continues to be sensible, in light of the fact that:

> The Commission's task [is] a peculiarly difficult one, requiring it to find a path between the views of the parties to the rulemaking polarized in support of the broadest disclosure or in opposition to any disclosure, to interpret novel statutory commands, and to make decisions against the background of rapidly changing conditions ….[27]

Recognition of the need for exercises of delegated disclosure authority can be found in other court decisions. The U.S. Supreme Court has repeatedly and recently emphasized that "the fundamental purpose of the 1934 Act [was] 'to substitute a philosophy of full disclosure for the philosophy of caveat emptor' . . .."[28] The Court has stressed the structure and design of the 1933 and 1934 Acts reflect an understood need for regulatory flexibility, even in decisions limiting the reach of Commission rules where the precise limits of its authority are less clear, such as Rule 10b-5: "Congress recognized that efficient regulation of securities trading could not be accomplished under a rigid statutory program."[29] In numerous cases, the Court and lower courts have held that the federal securities laws are to be construed broadly, "not technically and restrictively, but flexibly to effectuate its remedial purposes."[30]

Some claim that the statutory limits on the Commission's disclosure authority have no real meaning – because one can pretend that anything is "for protection of investors," no real limiting principle exists in the 1933 and 1934 Acts on the Commission's authority, so either it impermissibly delegates or further limits need to be invented to make the statutes constitutional. As noted above, this claim is wrong because the securities laws already limit the Commission's power in two ways, to the use of disclosure (versus merits review) as a regulatory tool, and to the use disclosure "for the protection of investors." These claims are further belied by

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[25] E.g., Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); see also Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (limiting Rule 10b-5's reach based on text of statute). Other decisions have addressed the liability implications of Commission-adopted disclosure requirements, premised without discussion on that disclosure rule being authorized under the 1934 Act. E.g., Oran v. Stafford, 226 F.3d 275, 286 n.6 (3d Cir. 2000) (Alito, J.) (holding that Regulation S-K's Item 303, requiring MD&A disclosures, do not give rise to an independent private right of action, or create omission liability under Rule 10b-5).

[26] NRDC v. SEC, 606 F.2d 1031, 1045 (1979).

[27] Id., at 1057.

[28] Lorenzo v. SEC, 139 S.Ct. 1094, 1103 (2019); Affiliated Ute Citizens v. US, 406 U.S. 128, 151 (1972); SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963); see also Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) ("we are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes. The [1934] Act quite clearly falls into the category of remedial legislation. One of its central purposes is to protect investors through the requirement of full disclosure by issuers of securities").

[29] Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), a decision written by Justice Powell, who in the 1970s took the lead in curtailing the reach of Rule 10b-5. E. Thomas Sullivan and Robert B. Thompson, The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust, 53 Emory L.J. 1571 (2004). The need for flexibility was recognized earlier, in a landmark administrative law case, SEC v. Chenery, 332 U.S. 194, 208 (1947) (where the Commission has "broad powers to protect the various interests at stake," the exercise of those powers in light of the statutory criteria, "whether in the form of a particular order or a general regulation, necessarily requires the use of informal discretion by the Commission. The very breath of the statutory language precludes a reversal of the Commission's judgment save where it has plainly abused its discretion in these matters").

[30] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) (interpreting Investment Advisers Act of 1940 consistently in this respect with "other securities legislation"); Affiliated Ute Citizens, 406 U.S. at 151; Tcherepnin, 389 at 336.

a string of decisions in which courts have **rejected** attempts by the Commission to rely on disclosure and anti-fraud authority to engage in substantive regulation of corporate transactions or corporate mismanagement.[31] These decisions show that the Commission's delegated power is limited, and that the statutory limits (protection of investors and markets) are intelligible and have bite. These decisions underscore the need for the Commission to have broad rulemaking authority to protect investors on the disclosure side of the "firebreak" between federal securities law and state corporate law.[32]

That there are limits on the limits is also clear from prior decisions. Courts have rejected attempts to deny application of the securities laws and the philosophy of "full disclosure" in cases involving the sale of a whole company, if effected through the sale of securities,[33] or where conduct may violate both corporate law and the Commission's disclosure laws.[34] These cases also show that "protection of investors" includes disclosure not only about securities, but also companies that issue them, and risks to investors their activities create. No case is the contrary, and critics of the Commission's proposed rule cite none.

G. Congress explicitly added environmental protection to the SEC's disclosure mandate

As noted above, subsequent to the initial passage of the securities laws, but after the passage of the initial Clean Air Act[35] and in the same year EPA was created (1970), Congress directed the Commission (along with all other agencies of the federal government) to consider environmental protection in its rulemakings. In the National Environmental Policy Act (**NEPA**),[36] Congress "made environmental considerations part of the SEC's substantive mission."[37] That statute – still on the books – provides (among other things):

> The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. … The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) **all agencies of the Federal Government shall**— … **make available** to States, counties, municipalities, institutions, and individuals, advice and **information useful in restoring, maintaining, and enhancing the quality of the environment**…

Although the D.C. Circuit concluded in 1979 that based on the record before it at that time, the Commission was **not required** to adopt environmental disclosure obligations beyond what it had already adopted, the Court also concluded that it was **authorized to and could do so**, if the Commission itself came to an expert judgment that doing so was in service of its statutory missions of protecting investors and promoting the public interest. The D.C. Circuit's decision, moreover, was premised in part on a representation by the Commission that the Commission would "continue to reevaluate the need for such [new disclosure]

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[31] Santa Fe Indus., Inc. v. Green - 430 U.S. 462 (1977); Schreiber v. Burlington Northern, 472 U.S. 1 (1985); Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990); Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 638–39 (3d Cir. 1989); Kademian v. Ladish Co., 792 F.2d 614 (7th Cir. 1986); Kas v. Financial Gen. Bankshares, Inc., 796 F.2d 508, 513 (D.C.Cir.1986); Data Probe Acq. Corp. v. Datatab, Inc., 722 F.2d 1 (2d Cir.1983), cert. denied, 465 U.S. 1052 (1984); Panter v. Marshall Field & Co., 646 F.2d 271, 287–89 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Biesenbach v. Guenther, 588 F.2d 400, 402 (3d Cir.1978); Lewis v. McGraw, 619 F.2d 192, 195 (2d Cir.), cert. denied, 449 U.S. 951 (1980); Maldonado v. Flynn, 597 F.2d 789, 796 (2d Cir.1979).

[32] Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) ("firebreak" between securities law and corporate law is that the former addresses disclosure).

33 Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985); AES Corp. v. The Dow Chemical Co., 325 F.3d 174 (3rd Cir. 2003).

[34] Goldberg v. Meridor, 567 F.2d 209 (2d Cir.1977), cert. denied, 434 U.S. 1069 (1978).

[35] What is commonly called the Clean Air Act was implemented in several statutes over time, starting in 1963 (77 Stat. 392, Pub.L. 88–206). The Clean Air Act Amendments of 1970 created the EPA and gave it authority to enforce that law (84 Stat. 1676, Pub.L. 91–604), and was revised in 1977 (91 Stat. 685, Pub.L. 95–95) and 1990 (104 Stat. 2468, Pub.L. 101–549).

[36] Pub.L. 91–190, 83 Stat. 852 (1970), codified at 42 U.S.C. § 4321 et seq.

[37] NRDC v. SEC, 606 F.2d at 1039.

requirements from time to time."[38] The climate disclosure rule now proposed by the Commission is precisely in keeping with that long-standing commitment by the Commission.

II. Clarity on what the rule would and would not do, and responses to claims the proposal is unauthorized

Despite this clear authority, critics argue the Commission lacks authority to move forward with the proposal. To make their case, they distort the proposed rule beyond any fair reading, into a new, fictional rule that addresses environmental concerns rather than investor concerns. In truth, as this Point will detail, the actual proposed rule best "fits" with what investors need and want, and **not what climate activists seeking to reduce climate impacts of business would seek**, or even a rule they might write to elicit reporting about those impacts. The proposal is both narrower and broader than the critics' fictional rule because it calls for and is limited to investor-focused information from public companies – traditional and long-standing hallmarks of U.S. securities laws and regulations. It addresses global climate risks **to public companies**, and not all climate risks created **by** domestic activities of all companies, **public and private**. It is also not a rule the EPA or any other regulatory agency has adopted **or could legally adopt**. It is not a rule requiring or limiting opinions or "controversial" speech, and raises no First Amendment concerns. Because it is an investor-focused disclosure rule, and in no plausible way advances a general policy on climate, it raises no new "major question" of that kind, that might theoretically justify a departure from standard methods of statutory interpretation.

1. The rule is a disclosure rule, in keeping with the Commission's expertise

The proposed rule is a rule that specifies details of disclosure requirements. It does not embody a general policy to address climate change, or engage the range of social and economic issues that climate change raises. If the American people, through their representatives, wish to remediate climate change, or fulfill climate-related treaty obligations, this rule will not do those jobs. Other agencies will need to tackle the many tasks those greater ambitions involve. For example:

- The proposed rule does not itself restrict or limit environmentally harmful activity.
- It does not cap emissions, an approach that would be typical of environmental regulation generally.
- It does not impose a carbon tax or create a "cap-and-trade" regime.
- It does not address how to measure or use the "social cost of carbon," as is done by other agencies.
- It would not itself force any company to shut down greenhouse-gas-emitting factories.

Instead, the proposed rule would increase the climate-related information provided by public companies to investors. That information may play a role in affecting the kinds of opportunities and risks that public companies can pursue with other people's (investors') money, and how investors price those opportunities and risks, and use whatever governance or liquidity rights they have to respond to corporate behavior. But companies will not be limited by the rule itself in how they and their investors respond to climate change.

Because the rule is an investor-oriented disclosure rule, it is within the Commission's expertise. It is true that the subject matter of the financial risks and opportunities raised by climate change are complex, and climate experts have specialized knowledge about climate science. But to develop and apply a disclosure rule of the kind proposed here does not require the same level of climate expertise as held by EPA (or, for climate change's impact on weather, the National Oceanic and Atmospheric Administration), and those agencies lack the expertise in finance, accounting and investment that is also necessary for any investor-oriented disclosure rule that addresses climate-related financial risk.

[38] NRDC v. SEC, 606 F.2d at 1040-41, citing 40 Fed. Reg. at 51667.

The Commission's proposed rule relies upon a traditional role for regulatory agencies – to find facts and use the facts so found to implement Congress's direction to require disclosures for a stated purpose[39] – the protection of investors. Specifically, the Commission relied upon wide-ranging and deep engagement over more than a year, gathering input from public comments, in public discussions, and meetings with and through letters from companies, investors, trade groups, climate specialists, EPA and other experts regarding corporate environmental and climate reporting, to craft its proposed rule, just as it has done in other areas.

The fact-finding for this rule, and the financial and accounting expertise on which it is based, is in keeping with the long tradition in which the Commission and its staff have applied expert knowledge about general risk/return, accrual and related concepts to an array of different source of risk and potential liability. These include (for example) asbestos and other sources of tort liability, contract and other kinds of commercial litigation, and cybersecurity and other kinds of technology risks. Executive compensation is its own, complex and specialized area of management and finance, leading companies to hire expert advisors to develop compensation plans.[40] The fact that those areas are themselves specialized, with their own experts with far more knowledge than exists at the Commission, does not mean the Commission cannot adequately apply its disclosure regime to those risks. In part, that is because of one of the key limits on the Commission's authority – it is delegated the job of specifying information for disclosure, not the job of "merits review," which would require it to have far more substantive expertise in those specialized areas.

Numerous other disclosure requirements adopted by the Commission over the years are similar in applying to specialized areas of expertise primarily existing outside the agency.

- Credit quality of loan portfolios requires expertise to understand in detail, which is typically found in bank regulatory agencies. Yet the Commission nonetheless has long protected investors in bank holding companies by requiring detailed disclosure beyond the financial statement for such companies, as noted in Annex A.
- So, too, for mining companies, asset-backed issuers, and other sectors, as also detailed in Annex A. Aircraft manufacturers essentially have their own specialized "program" accounting, due to the unusually long and complex capital investment process they follow.[41]
- Most companies now include – and sometimes are required to include[42] -- industry- or firm-specific key performance indicators in their Commission filings, which require industry- or firm-specialized knowledge to understand and evaluate.[43]
- Companies in the defense industry report in their Commission-required filings using technical, specialized industry jargon on government procurement,[44] budgets, military strategy, products and market dynamics about which staff at the Department of Defense have far more detailed knowledge than the Commission.

Yet no one has ever successfully argued that the Commission should not develop, adapt or apply disclosure rules to banks, mining companies, asset-backed issuers, airlines or defense contractors, despite the specialized

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[39] Gundy v. US, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting) ("once Congress prescribes [a] rule governing private conduct, it may make the application of that rule depend on executive fact-finding").
[40] See Albuquerque, Ana M. and Carter, Mary Ellen and Guo, Zhe (Michael) and Lynch, Luann J., Complexity of CEO Compensation Packages (Mar. 25, 2022), Darden Business School Working Paper No. 4066889, https://ssrn.com/abstract=4066889 (developing a method for estimating the complexity of executive compensation).
[41] See https://tinyurl.com/yr5d2ue9 (Boeing Form 10-K, discussing program accounting throughout).
[42] See SEC Rel. No. 34-48960 (Dec. 29, 2003); SEC Rel. No. 33-6176, (Jan. 15, 1980).
[43] SEC Rel. Nos. 33-10751; 34-88094 (Commission guidance on key performance indicators and metrics in MD&A).
[44] E.g., Boeing Form 8-K dated Apr. 27, 2022 (reporting, among other things, "Defense, Space & Security captured an award for 6 MH-47G Block II Chinook rotorcraft for U.S. Army Special Operations. Defense, Space & Security completed mission profile flights on the SB>1 DEFIANT and completed the 400th test flight on the T-7A Red Hawk. Also in the quarter, Defense, Space & Security began build of the first P-8A for the Royal New Zealand Air Force…").

knowledge that a full understanding of those companies would require, and despite the fact that the Commission does not have full-time staff who are themselves experts of the same kind that other regulators may have, or which companies hire to provide them with advice about such topics.

2. The proposed disclosures refine the mode of disclosure, but do not add topics not covered by prior, long-standing, and Congressionally blessed disclosures requirements

As stressed by Commissioner Peirce in her dissenting statement,[45] the proposed disclosures called for by the rule are in line with prior Commission-required disclosures, as detailed in Annex A. "**Existing rules already cover material climate risks"** is the first point she makes. And she is right: environmental compliance costs and risks from non-compliance have been required by the basic business description line item in Regulation S-K, which ultimately traces back to Schedule A in the 1933 Act itself,[46] and MD&A and risk factor requirements that would encompass known climate-related risks and "uncertainties" were first adopted in 1968. As the proposing release notes, half of all public companies already make some climate disclosures in their SEC reports, and the Chamber of Commerce reports that more than half of surveyed companies publish sustainability reports.[47] "About 1,020 U.S. companies voluntarily disclosed their Scope 3 emissions last year."[48]

Of course, as Commissioner Peirce does not do much to dispute, and as the proposing release makes clear, existing disclosures are spotty, inconsistent, incomplete and unverified under existing Commission rules. Letting companies determine for themselves what is "material" in a given context can be a reasonable way to implement Congress's choice of "full and fair" disclosure as a policy – sometimes, companies exercise such discretion well enough to generate enough information to protect investors; but particularly as applied to risks that are new, or which raise difficult management challenges, and where there are limited sources of external scrutiny relevant to the judgments, companies predictably fail to comply with their requirements.[49] Although the content and nature of the disclosure have long been covered by Commission rules, the proposed rules add specificity, detail, and consistency (and require assurance) in ways that existing rules do not.

But nothing in the 1933 Act or the 1934 Act imposes limits on the Commission's authority to refine the mode, detail, format, method, or specificity of required disclosures. In fact, its basic disclosure authorities (in Section 7 of the 1933 Act and Sections 12 and 13 of the 1934 Act) are augmented by additional specific authority to "**to prescribe the form or forms in which required information shall be set forth**."[50] If the Commission after fact-finding reasonably believes more detail is needed to protect investors about a concededly authorized topic, it is legally authorized to require more detail, as it has done through both rules and disclosure review since 1933. Economic analysis and expert fact-finding and assessments may inform choices about how detailed and what the details should be, and the Commission needs to follow its own

[45] https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.

[46] E.g., Levine v. NL Industries, 926 F.2d 199, 203 (2d Cir. 1991) ("Disclosure of potential costs for violations of environmental laws, if material, is ordinarily required. … [T]he cost of failing to comply with environmental regulations must be disclosed."), citing In re US Steel Corp., SEC Release No. 34-16,223 (Sep. 27, 1979) and Item 101 of Regulation S-K.

[47] Proposing release at 302.

[48] Five Key Takeaways from SEC's Proposal for Climate Disclosures, Bloomberg Law (Apr. 8, 2022).

[49] Similar problems are evident from inconsistent and incomplete compliance with the Commission's well-intended 2020 requirement that companies disclose human capital information "if material." See SEC Worker Safety Disclosure Rule Yielding Scattershot Results, Bloomberg Law (Mar. 3, 2022) ("Only about 20% of the reports review by Bloomberg Law included the company's injury and illness numbers they are required to measure by the Occupational Safety and Health Administration or the Federal Railroad Administration.").

[50] Section 19(a) of the 1933 Act; Section 13(a) of the 1934 Act. The authority in Section 19(a) is augmented by additional, separate, general rulemaking authority, in another sentence in that same section, to "to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this [statute]," which in turn further specifies authority to adopt rules "defining accounting, technical, and trade terms used in this subchapter."

economic analysis guidance in arriving at its conclusions, as well as comply with administrative law.[51] But its basic statutory authority does not limit the level of generality at which an otherwise long-required disclosure topic may be addressed.

Specifically, for the largest companies, the proposed rule would require three types of specific disclosures:

> (a) **qualitative disclosures** (about financial risks, trends, and governance) of the kind that are already in principle required in ***risk factors***, ***MD&A***, the proxy rules, and other line items in Regulation S-K, and which therefore many companies already provide, but not in a consistent or comparable way),[52]
>
> (b) **Scope 1 and Scope 2 emissions data** (**and if material** or the subject of a target the company has chosen to disclose, **Scope 3 emissions**), equivalent to key performance indicators of the kind required to be disclosed in MD&A,[53] and
>
> (c) financial statements **footnote breakouts**, where climate affects an item by 1% or more.[54]

Of these, the first and third are inarguably about financial risks and opportunities related to climate change. The second – emissions data – is widely used as measures of transition risk, that is, the risk that energy costs and policy responses by other lawmaking bodies (not the Commission) (some of which are already reflected in treaty commitments or other enacted policies of the US and other countries in which US public companies do business) will force companies to expend money to reduce their emissions or mitigate their impacts. Evidence regarding the clear and present financial materiality of transition risk is discussed below. These data, again, are thus directly relevant to financial risks and opportunities for public companies.

Far from calling for lengthy or complex sustainability reports of the kind most S&P 500 companies already publish, these requirements could be met with relatively succinct disclosure for companies with minimal climate-related risks. For example, many companies have no major facilities in flood plains, do not consume significant amounts of energy, and do not produce significant greenhouse gas emissions. Based on a review of current sustainability reports that cover the same topics as would be required by the proposed rule, companies with material climate risks could create compliant disclosure that would take up a relatively small share of a typical annual report.

Companies may choose – as many do now – to go beyond what is required, to convince investors and others that (for example) their strategies are going to succeed. The same could be said of most existing disclosure requirements. Earnings statements, analyst call scripts, investor presentations, and the regular flows of press releases, investor relations communications and other ways companies supplement disclosure requirements

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[51] The legal implications of economic analysis are sometimes overstated. For a recent, balanced decision in which the court understood both the need for but the limits of appropriate court oversight of rulemaking, see Inv. Co. Inst. v. U.S. Commodity Futures Trading Comm'n, 891 F. Supp. 2d 162 (D.D.C. 2013).

[52] Some critics seem to think that the fact that companies are already making climate disclosures means (somehow) the Commission lacks authority to require them. As discussed below, however, the Commission's authority has long been understood to include authority to bring consistency, comparability and reliability to disclosures relevant to investors, and many line item disclosure requirements were already being provided in part prior to the adoption of a rule. That begins with the basic requirement of audited financial statements, which Senate testimony prior to the 1933 Act suggested were already provided by more than 75% of listed companies.

[53] SEC Rel. No. 34-48960 (Dec. 29, 2003) (requiring disclosure of material key performance indicators used to manage the business); see also Release No. 33-6176, (Jan. 15, 1980). EPA requires collection of information relevant to Scope 1 emissions, and public reporting of certain emissions if they exceed set emission-source-specific thresholds.

[54] The SEC has routinely incorporated 1% thresholds as triggers for disclosure. E.g., 17 CFR 210.5-03.1(a) (excise taxes); 17 CFR 210.12-13 (option contracts); 17 CFR 229.404(d) (related person transactions for small reporting companies); 17 CFR 229.103(c)(3)(iii) (governmental proceedings).

are commonly longer or more complex than anything required by the Commission's rules. That does not make those rules unduly burdensome or costly.[55]

3. The proposed disclosures are rationally designed for investor protection

The question of whether the proposed disclosures would in fact be an all-in good idea, cost-justified, appropriately considering efficiency, competition and capital formation is not a legal question. Rather, as long as the Commission considers that question in good faith and follows appropriate process, Congress has directed that the Commission make that decision, not the courts. However, the rule does need to at least be rationally designed for investor protection to be authorized. That is because it is true that the Commission's authority does not run so far as to require disclosures for any reason, or for reasons not specified in its organic statutes.

That legal question – whether the proposed disclosures could reasonably be viewed in good faith by the Commission as beneficial for investor protection – is easy to answer in the affirmative, based on the record before the Commission when it voted to propose them. As background, noted in the proposing release, the Commission published a request for comment a year earlier – on March 15, 2021 – so that its current process has already gone beyond the requirements of administrative law. That request elicited massive amounts of public input on potential climate-related disclosure, and gave anyone skeptical about the project ample notice that it was on the Commission's agenda, and ample time to adduce evidence against it.[56]

Instead of the resulting input showing the idea would be a bad one, or not reasonably designed to protect investors, the request generated substantial evidence that climate-related disclosures would be valued by investors. Importantly, supporting letters came from many public companies (e.g., Adobe; Bank of America; BNP Paribas; Chevron; Dow Credit Suisse; Etsy; Microsoft; Paypal; Salesforce.com). Public companies have a strong incentive to keep abreast of what information their investors would reasonably value.

Supporting statements were also overwhelmingly filed directly by investors of all kinds (not just or even primarily from socially activist or "impact" investors). These investors included individuals and institutions. The institutions included both passive index funds and actively managed funds, as well as pension funds and other kinds of institutions. Among them were Alliance-Bernstein, Neuberger-Berman, Schroder and Wellington, as well as BlackRock and State Street. Contrary to some critics, letters from individuals also supported climate-related disclosures and were cited several times in the proposing release.[57] Thousands more have been filed since the release was proposed, including many from self-identified individual investors.[58] Surveys of institutional investors published in peer-reviewed financial journals confirm this

[55] The length of the proposing release (490 pages) has also been stressed by critics, as if it were damning that the Commission fully discussed the proposal and reasonable alternatives. The line items in the proposed rules themselves are 23 pages long – not short, but far from MOBY DICK, as suggested by some. The length of the release is the product of sustained industry-funded legal challenges to all manner of new regulations by the Commission and other agencies over the past thirty years, in which courts have been asked to hold agencies to increasingly higher standards in explaining and analyzing the implications of their rules. Financial self-interest provides an enormous supply of chutzpah for critics to attack agencies for doing exactly what those same critics and their allies have required as a result of their challenges to rules under administrative law.
[56] See https://www.sec.gov/news/public-statement/lee-climate-change-disclosures.
[57] Proposing Release at 18 (citing "600 unique letters and over 5800 form letters … from academics, accounting and audit firms, individuals, industry groups, investor groups, registrants, nongovernmental organizations, professional climate advisors, law firms, professional investment," and linking to those letters), 49 n.154 (citing individuals advocating for the TCFD framework), 153 n. 412 (citing letter signed by 14,600 individuals).
[58] https://www.sec.gov/comments/s7-10-22/s71022.htm. Neither the Commission nor its critics have the ability to validate or verify generally the identify of individual commenters, much less whether they are in fact individual investors, and critics have offered no robust evidence of their own showing that individual investors generally oppose disclosure about climate-related risks.

evidence.[59] Surveys of individual investors by firms such as Morgan Stanley confirm this evidence.[60] Shareholders stunned virtually everyone, including ExxonMobil's management, when they elected dissident directors pledged to change the company's climate policy with 62% of the vote, while shareholders voted for emissions disclosure proposals at ConocoPhillips and Chevron. Efforts by critics to dismiss these votes ignore the fact that most shareholder proposals fail due to well-known collective action problems affecting public company governance.

Some critics argue that "investor demand" should not be equated with "investor protection," and it is true that the Commission has not (for good reason) attempted to survey investors in setting its own rulemaking agenda. The Commission is charged with protecting investors generally, and even if a subset of investors believe that they do not (or do) want or need particular information, their views should not necessarily control the Commission in the exercise of its expert judgment. Although Congress gave the Commission power to conduct "temporary testing programs" to evaluate the effectiveness of disclosures in the Dodd-Frank Act, in neither that statute nor the original 1933 and 1934 Acts did it suggest the Commission use polling or surveys to establish the content of disclosures appropriate to protect investors.

But the proposing release goes beyond the numerous supportive investor comments in the March comment file to note at length many kinds of additional evidence showing ways in which more, more comparable, and more reliable information would protect investors by improving their ability to assess and price climate-related financial risks and opportunities, both at the time of initial stock investments and in secondary market trading. The release cites a number of studies to this effect. One study worth highlighting, now published in a leading finance journal, finds that climate disclosures are already actively if imperfectly priced in the capital markets, effects confirmed in other published articles.[61] Another finds that climate risks are reflected (but imperfectly) in out-of-the-money put option prices.[62] Another peer-reviewed, published study finds that exposure to sea level rises and flooding is causally reducing property values, consistent with physical risk already being actively if imperfectly priced in property markets, which in turn expose investors in public companies that own real estate to related financial risks.[63] Still another study finds that mutual fund managers are misestimating climate risks based on current, inconsistent and unreliable disclosures.[64] One need not believe any of these studies is the final word on the subject to believe that collectively, they provide sufficient evidence to believe, reasonably, that verified, consistent climate-related financial disclosures would be useful to protect investors.

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[59] Philipp Krueger, Zacharias Sautner, Laura T Starks, The Importance of Climate Risks for Institutional Investors, The Review of Financial Studies, Volume 33, Issue 3, March 2020, Pages 1067–1111.

[60] Morgan Stanley Institute for Sustainable Investing, Sustainable Signals: Individual Investors and the Covid-19 Pandemic (4th ed. 2021) (survey of 800 U.S. individual investors age 18 or older with minimum investable assets of $100,000 conducted on behalf of the Morgan Stanley Institute for Sustainable Investing in which 74% of investors expressed interest in climate-themed investments).

[61] Patrick Bolton and Marcin Kacperczy, Do Investors Care About Climate Risk?, 42 J. Fin. Econ. 517-549 (2021). Other published articles reaching consistent findings include Oguzhan Cepni, Riza Demirerc and Lavinia Rognone, Hedging Climate Risks with Green Assets, 212 Econ. Letters (Mar. 2022) (measures of transition risk and physical risk derived from textual analysis of Reuters News items correlate with capital asset prices); Robert F Engle, Stefano Giglio, Bryan Kelly, Heebum Lee, Johannes Stroebel, Hedging Climate Change News, The Review of Financial Studies, Volume 33, Issue 3, March 2020, Pages 1184–1216 (same). See also Ravi Bansal, Dana Kiku and Marcelo Ochoa, Climate Change Risk, Federal Reserve Working Paper (Oct. 25, 2019) (long-run global temperature expectations reflected in equity risk premiums); S. Chava, Environmental externalities and cost of capital, 60 Manage. Sci. 2223-2247 (2014) (investors demand higher returns on stock screened on climate); Valentin Jouvenot1 and Philipp Krueger, Working Paper, Mandatory Corporate Carbon Disclosure: Evidence from a Natural Experiment (Dec. 2020) ("firms that reveal high GHG emissions relative to peers exhibit negative equity valuation effects").

[62] Emirhan Ilhan, Zacharias Sautner, Grigory Vilkov, Carbon Tail Risk, The Review of Financial Studies, Volume 34, Issue 3, March 2021, Pages 1540–1571.

[63] Asaf Bernsteina, Matthew T. Gustafson, Ryan Lewis, Disaster on the horizon: The price effect of sea level rise, 134 J. Fin. Econ. 253 (2019).

[64] Shashwat Alok, Nitin Kumar, Russ Wermers, Do Fund Managers Misestimate Climatic Disaster Risk, Rev. Fin. Stud., Volume 33, Issue 3, March 2020, Pages 1146–1183.

In addressing this research, it is insufficient for critics to gesture generically at the fact that correlation is not necessarily causation, or that no single such study can definitively prove a causal effect of climate on financial returns. If arguments of that kind could limit rulemaking authority, the Commission could never have adopted any disclosure rules.[65] Empirical studies of financial markets and regulation have always had strong and inherent methodological limits, well-known and not seriously disputed, as well as data limitations.[66] Those limits were even more acute in 1933 (or even in 1996 when the Commission was first statutorily tasked with considering "efficiency" in some of its rulemakings[67]). Congress wanted and authorized the Commission to require disclosure to protect investors despite these limits, based on its expert judgment about what its experience and qualitative evidence showed it, supplemented by whatever science can add. Nothing in law suggests that uncertainty, however reasonable, legally forbids rulemaking.

But beyond academic research, hardest for any neutral observer to challenge as evidence of the financial risks related to climate – and the reasonableness of climate-related financial disclosures to protect investors – comes from public companies themselves. Sixty percent of the Fortune 500 have announced climate targets, typically stated with reference to emissions data, including 17% with net-zero targets, yet 72% of investors lack confidence companies are serious about these targets.[68] If those emissions targets are serious, they will matter to investors by leading to major changes in corporate strategy and investment policy, and in the financial risks and returns companies will generate for investors. If those targets are simply greenwashing, the proposed rules will reduce their potential to harm investors caused by fraud or misleading disclosure short of fraud. Evidence that such targets are at least partly serious can be easily compiled from public sources, some cited in the proposing release:

- General Motors announced it plans to sell only electric passenger vehicles by 2035.[69]
- Volkswagen announced $180 billion of investments in electronic vehicles.[70]
- Chevron plans $2.75 billion in carbon-reduction projects, renewables and offset projects.[71]
- Exxon Mobil plans to invest $100 billion in carbon capture infrastructure.[72]
- A consortium of public energy companies is raising $1 billion for emissions reductions technology.[73]
- Duke Energy is investing $52 billion in transitioning to lower carbon resources.[74]
- Graphic Packaging is spending $600 million on the first paperboard line in the U.S. in decades, in part to lower carbon emissions.[75]
- US Steel abandoned plans to expand its Mon Valley Works in Pennsylvania, because it had "expanded our understanding of steelmaking's future in a rapidly decarbonizing world," resulting in $56 million write-off in 2021.

[65] In another unpersuasive critique, some briefly misportray a limited number of studies of varying kinds to conclude, not surprisingly, that the studies produce inconsistent results, including studies of "ESG" ratings, "sustainability" rankings, of fund flows, of fund performance based on voluntarily provided and inconsistent and unverified climate information, of impact investing generally, some published, some not, some peer-reviewed, some not, some using quasi-random designs, some not. It is in the nature of research that any loose collection of studies on different subtopics, even if thematically related, will produce varied results: academics are rewarded in part for novelty. That fact provides no basis for assessing any particular question, or any one study, no basis for second-guessing the Commission's judgments on a proposed rule, and certainly no reason to reach any conclusions about authority.

[66] John C. Coates, Towards Better Cost-Benefit Analysis: An Essay on Regulatory Management, 78 L. & Contemporary Prob. 1 (2015); John C. Coates, Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications, 124 Yale L.J. 882 (2014-2015).

[67] See note 136 on this statutory requirement and its limits.

[68] See https://tinyurl.com/2p9fbcd7 and https://tinyurl.com/4aj2ahzw.

[69] Tom Krisher and Aamer Madhani, US automakers pledge huge increase in electric vehicles, AP News, Aug. 5, 2021.

[70] Vivienne Walt, VW is making an $180 billion bet to dominate EVs and catch Tesla, Fortune (Jan. 31, 2022).

[71] https://tinyurl.com/yeymfvvm.

[72] Cathy Bussewitz, Exxon Sees $100 billion for Houston carbon capture plan, AP News (Nov. 1, 2021).

[73] Ron Bousso, Top energy companies prepare to launch new $1 bln clean tech fund, Reuters (Mar. 10, 2022).

[74] https://tinyurl.com/ynrt9uuw.

[75] Ryan Dezember, Can Paper Replace Plastic? A Packaging Giant Is Betting It Can, Wall St. J. (Jan. 2, 2022).

A list of massive – far beyond "material" – bets being won or lost with public investor capital driven by climate risk could be significantly longer without being exhaustive. An increasing number of US public companies are making major capital expenditures to pursue climate-related strategies, raising financial risks to pursue opportunities for their investors.[76] The proposed disclosures, including emission data, will help investors assess and price these risks and opportunities. The claim that the proposed rule's requirements are so unrelated to investor protection as to altogether fall outside the Commission's obligation to specify financial risk disclosures is without merit.

Finally, critics sometimes argue that investors do not need protection of mandatory climate-related financial disclosures because companies are already voluntarily making such information available. It is true that many companies are spending money to do this – further evidence of the importance of the information. But it is also clear that companies are not doing so consistently, comparably, or reliably. Voluntary, unassured disclosures are more likely to include greenwashing, impairing investors' ability to assess and price risk, and undermining honest companies' ability to communicate with investors and build confidence; some greenwashing rises to the level of fraud, while other disclosures or omissions may not rise to the level of actionable fraud with proof of scienter.[77] The proposed rule is reasonably designed to address these inconsistencies, give investors comparable information, and make it more reliable. This is exactly how the Commission has taken on similar issues in the past, as detailed in Annex A. In adopting mandatory "risk factor" disclosures, for example, which had previously been made by many companies, but not by all; in adopting disclosure requirements for derivative contracts, which many companies had disclosed in detail, but others had not; and in codifying thresholds for disclosure of environmental liabilities, which many companies had been previously disclosing, but not all, or consistently, or reliably.

4. **The rule builds on existing, widely used and privately developed disclosure frameworks**

Further reducing concerns about whether the rule is within the Commission's expertise, the proposed rule aligns with ways that companies and investors have jointly and voluntarily agreed to provide climate-related information. The rule builds on decades-long efforts by public companies – such as 3M, Abbott Laboratories, Amazon, Apple, Chevron, Fujitsu, IBM, Johnson Controls, Michelin, P&G, Verizon and Walmart[78] – to develop practical, decision-useful, consistent, comparable and verifiable ways to report about climate risks and opportunities. As a result, the rule will minimize costs and maximize benefits of compliance.

In its overall framework, the proposed rule builds on the Task Force on Climate Related Financial Disclosure (**TCFD**), whose leadership includes the CFO of Unilever, the General Manager of Mitsubishi, and the former CAO of HSBC, and whose work has been supported by Bank of America, Barrick Gold, Dupont, Hewlett Packard, and Pepsico, among scores of other companies.[79] Its greenhouse gas emission disclosure elements are aligned with the EPA's existing requirements for US emission sources, which in turn are aligned with the

[76] Equally large investments in climate-related strategies are being made by venture capitalists not known for "politically motivated" investing. https://techcrunch.com/2022/02/23/climate-investment/; see also https://tinyurl.com/cjnnpazs.
[77] E.g., SEC v. Vale S.A., 1:22-cv-02405 (E.D.N.Y. Apr. 28, 2022), an action likely prompted by a prior private lawsuit, see In re Vale S.A. Securities Litigation, 1:19-cv-00526 (E.D.N.Y. Oct. 25, 2019). For other evidence of corporate greenwashing, see, e.g., EH Kim, TP Lyon, Strategic environmental disclosure: Evidence from the DOE's voluntary greenhouse gas registry, 61 J. Env. Econ. and Mgt. 311-326 (2011) ("We … use data from the Department of Energy's Voluntary Greenhouse Gas Registry to compare reported reductions to actual emissions. We find that participants in the program engage in highly selective reporting: in the aggregate, they increase emissions over time but report reductions"); see also de Vries, G., Terwel, B. W., Ellemers, N., and Daamen, D. D. L. Sustainability or Profitability? How Communicated Motives for Environmental Policy Affect Public Perceptions of Corporate Greenwashing, 22 Corp. Soc. Responsib. Environ. Mgmt. 142– 154 (2015).
[78] All of these companies are members of World Business Council for Sustainable Development (WBCSD), a CEO-led organization, which for over twenty years has sponsored and developed of the Green House Gas Protocol, with which the Commission's proposed rule is designed to align. See https://www.wbcsd.org/ and https://ghgprotocol.org/about-us.
[79] See https://www.fsb-tcfd.org/supporters/.

widely used and privately developed Greenhouse Gas Protocol, which was a joint product of companies, investors and other organizations.[80]

5. **The rule addresses financial-physical risks, which EPA regulations do not address**

Consistent with the long tradition of disclosure requirements sketched above and in Annex A, the proposed rule specifies disclosure of climate-related financial risks to and opportunities for public companies. Financial risks importantly include physical risks, such as those arising from severe weather events, such as floods, hurricanes, and wildfires. It cannot fairly be argued that losing production or even permanent asset impairments due to weather damage are not financial risks for companies with property, plant and equipment in flood plains or otherwise exposed to climate-related weather events.

The financial effects of physical risks are large and growing. As noted in the Commission's 2010 climate guidance, "A 2007 [GAO] report states that 88% of all property losses paid insurers between 1980 and 2005 were weather-related."[81] Since 1980, the US alone has experienced 323 severe weather events causing more than $1 billion of damage each.[82] The World Meteorological Organization has tracked damage from weather events for the past fifty years; the top five most economically destructive events all occurred since 2005.[83]

By contrast, the focus of traditional environmental regulation – including EPA reporting rules – is solely the reverse – the impact ***of companies*** on climate change. EPA is charged by Congress to have a concern for the environment, not for investors. Neither EPA nor any other federal agency has authority to elicit the full range of information about financial risks that would be provided to investors under this rule. Protecting investors has been the Commission's job since 1934. It has never been EPA's job.

6. **The rule is limited and calibrated to public companies with securities trading in the U.S.**

The rule is limited to companies from which the Commission has traditionally required full disclosure. It requires no disclosure from privately held unlisted companies. As a result:

- Climate-affecting companies owned by individuals, governments, families, or private equity funds would not be directly affected.
- Large multinationals – even in the oil and gas or energy sectors, even actively emitting greenhouse gases in the US – would be unaffected if they list no securities in our markets.

As a result of these limits, climate advocates appropriately view the rule as incomplete, and from the point of view of environmental protection, the rule could not reasonably be viewed as complete or effective at addressing climate change. Anyone who sees a role for law to require disclosure of comprehensive information about the sources of greenhouse gas emissions will not be satisfied by this rule. If comprehensive, economy-wide disclosure of climate impacts of all types of business is to be required by regulation, doing so will require more than the Commission's authority. But for the protection of investors, these limits are features, not bugs – they precisely show how the rule adheres to Congress's clear but limited delegation of disclosure specification to the Commission.

Some may view these limits as creating incentives for public companies to go private, or for private companies to not go public. Public companies are already subject to more regulation, however, and if the requirements of the Sarbanes-Oxley Act did not drive a wave of going private transactions (and they did not), the marginal additions to disclosure required by this rule is highly unlikely to do so. Most public companies

[80] For EPA requirements, see 40 C.F.R. § 98.2; for the Greenhouse Gas Protcol, see https://ghgprotocol.org/.
[81] SEC Rel. 33-9106 (2010), at 2422-24.
[82] https://www.ncei.noaa.gov/access/billions/.
[83] https://tinyurl.com/383vtjee.

could "go dark" today, if they were prepared to surrender their stock exchange listings. Most large public companies report much climate information, albeit in a non-comparable and inconsistent way. Private equity fund investors are already and increasingly demanding climate-related information and commitments from the funds or their advisors.[84] Banks and insurance companies are increasingly demanding similar information to make loans or underwrite policies. Large asset managers are already having to comply with similar requirements in Europe (regardless of where their portfolio investments are located).

Nonetheless, whatever one thinks about the incentives for companies to go public or private, that question only bears on the efficiency or capital-formation impacts of the proposed rule, and how they compare to its advancement of investor protection, not on its legality. Instead, the rule's limits – to public companies with securities trading in the U.S. – again underscore how it is well within the scope of traditional securities law, designed for investor protection, and not for other goals.

The rule is also calibrated to companies, not the environment. That is, the rule's perspective of that of investors and companies – their strategies, risk management, governance and metrics – without regard to whether a given company independently creates a climate impact that is large or small for the overall environment, or whether it is more or less exposed than other companies to physical risks of climate change. If a given climate risk or opportunity is large **for a company**, then its investors need and would under the rule obtain information about that risk or opportunity, even if (when compared to the overall impact of all human activity on the environment) the risk or opportunity is not large enough to require reporting under some other regime (such as the EPA's greenhouse gas reporting regime).

Again, some may view this company-calibrated focus as distracting, because the rule is not limited (for example) to industries that have the greatest environmental impact, such as oil and gas, or energy. From an environmental policy perspective, prioritizing based on environmental impact might make sense. EPA, for example, exempts from reporting emission sources below source-specific thresholds. A public company might have a large amount of transition risk due to many different emission sources, each of which is below EPA thresholds. For EPA, those emissions may not be a priority. But for investors in that company, they reasonably could be, because the transition risks (in the form of higher energy costs or potential need for capital expenditures to mitigate their impacts) could be large for that company, depending on its size, capital, liquidity and financial resources. From a legal authority point of view, company- and investor-based calibration is in keeping with the Commission focusing on investors, rather than on environmental priorities.

7. **The rule does <u>not</u> include non-investor-oriented impacts**

In addition to being limited and calibrated to U.S. public companies, the rule does not require disclosure related to non-investor impacts. For example, it does not call for disclosure of a company's climate-related impacts on employees or customers or communities, except to the extent those impacts result in overall financial or business risks or opportunities (which do impact investors). If the public wants comprehensive disclosures of climate impact that extend beyond impacts on investors, legal authorities other than those used here may need to be used – perhaps by other agencies or Congress itself. Again, this limit may leave some climate advocates disappointed. But for purposes of assessing the legal issues raised by the proposed rule, this limit underscores how the rule is investor-oriented and tailored, consistent with the securities laws.

8. **The rule extends to global climate-financial risks and opportunities of US public companies**

Although the rule is more limited than what an "impact" advocate would want, it is in one important way broader than anything EPA has adopted or is likely to have to power to implement: its geographic reach. If a

[84] Cf. https://tinyurl.com/mvbpx844 (Carlyle NetZero commitment); Hiroko Tabuchi, Private Equity Funds, Sensing Profit in Tumult, Are Propping Up Oil, N.Y. Times (Oct. 13, 2021) (Carlyle among biggest buyer of assets from public oil companies).

U.S. public company owns facilities outside the US, as many do, they would be required to provide investors with information about those facilities. Currently, EPA does not purport to require disclosures about greenhouse gas emissions from facilities located outside the US, even if they are owned by US companies. US public companies (e.g., the S&P 500) derive 40% of their revenues on average from non-US operations, and many have larger shares of their activities located offshore.[85]

Again, this difference is in keeping with the Commission's focus on investors. In the nature of corporate investment, investors in multinational US public companies bear climate-related financial risks and have opportunities to profit from their global activities. The Commission has always required information about a U.S. public company's consolidated subsidiaries – wherever located. This is for the obvious reason that investors in the parent company face the consequences of all economic results created by that company.

EPA, by contrast, focuses on conduct in the United States. As regards climate change, environmental agencies might do well to focus on global activities as well, but it is unclear how EPA could with its existing legal authority impose requirements on companies not operating in the US. Anyone who argues that the Commission should leave the job of climate disclosure to the EPA has to have an answer to how the EPA could possibly protect US investors with information about the large amount of activities of US public companies that are located beyond the reach of the EPA's jurisdiction.

9. The provides a framework for reliable disclosures about opportunities (and risks), enabling capital cost reductions (or increases) for public companies regardless of their exposures to climate change

The rule would create a framework for reliable disclosures of climate-related information that is potentially positive for investors, such as opportunities, and is not limited to risks. If markets are currently overly negative about a company's physical risks (e.g., to floods), such disclosures would facilitate a reduction in that company's cost of capital.[86] If a company would benefit from climate-mitigation policies adopted by other agencies, that information would be no less useful to investors than information about transition risk.

The rule as proposed would provide a framework for companies to inform investors about all of the effects – profitable and loss-causing – that climate risks may have on a company. The ways investors may use the information are not predetermined by the rule, nor would the rule itself limit how companies speak about whether (for example) climate risks are currently being overestimated or producing excessive disinvestment. As a result, depending on current capital market pricing, the rule could increase climate-impacting activities. Claims that disclosure would incentivize companies only to reduce or mitigate climate change impacts are not well considered.

10. Congress did not reduce Commission authority in giving EPA climate disclosure authority

EPA was created in 1970. Its creation was accomplished by Presidential directive, subsequently approved by Congress in 1984.[87] The directive consolidated authorities and activities spread across six different departments and agencies, ranging from the Department of Agriculture to the Atomic Energy Commission.[88] In contrast to the specific mentions of these other federal agencies, the authorizing document, Reorganization Plan No. 3 of 1970, nowhere mentions the Securities and Exchange Commission.

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[85] https://tinyurl.com/yc237upd.

[86] For evidence on this possibility, see Shashwat Alok, Nitin Kumar, Russ Wermers, Do Fund Managers Misestimate Climatic Disaster Risk, The Review of Financial Studies, Volume 33, Issue 3, March 2020, Pages 1146–1183.

[87] Reorganization Acts Amendment, Pub. L. 98–614.

[88] US Reorganization Plan No. 3 of 1970, 35 FR 15623 (Oct. 6, 1970).

In the Clean Air Act amendments of 1970,[89] Congress gave EPA authority to require disclosures relating to the environment. The focus of those amendments, however, was the creation of national air quality standards – what we generally call "pollution" – and the enforcement of those standards on a set schedule.[90] Reporting requirements regarding emissions of all kinds were a subsidiary authority given to EPA to supplement the more direct, substantive power to regulate the amount and type of emissions.

More than thirty years later, EPA had not applied its authority to require emissions disclosures to greenhouse gas emissions. Over that time, as noted above, the SEC proposed and adopted rules requiring environmental disclosures, in part to satisfy its obligations under NEPA. The D.C. Circuit affirmatively held that the Commission had authority to do that, and, in its judgment, to potentially go further.

No one at the time of *NRDC v. SEC* in 1979 argued that the creation of EPA in 1970 had overridden NEPA, or limited the 1933 or 1934 Acts, as the Commission itself would have done (because, recall, it was being sued in the 1970s for not doing enough to require environmental disclosure). If Congress had intended to displace Commission disclosure authority regarding environmental matters (including climate-related financial disclosures) when it gave EPA authority to require disclosure in 1970, it seems surprising (to put it mildly) that Congress did not respond after the Commission adopted environmental disclosure rules in the 1970s.

EPA did not use its authority to develop greenhouse gas emission disclosure requirements until 2009, and did so only after being directed to do so by Congress in an annual budget appropriations rider.[91] Only at that time did EPA take the position its 1970 authority over air pollution gave it authority to require climate-related disclosures. In the budget rider, Congress made no mention of any other agency, nor can the text of that law be reasonably interpreted to displace any agency's authority. Nor did Congress trim back the Commission's authority when – after the Commission published climate-related disclosure guidance in February 2010 – Congress adopted the Dodd-Frank Act four months later, with numerous additions (not subtractions) to the Commission's disclosure authorities.

But critics' claim that EPA authority repealed the Commission's authority is even more basically addressed by noting the significant differences in the two agencies' organic statutes as applied to climate-related financial risk. To recap what is discussed above, EPA's authority is both materially broader and narrower than the Commission's, even as to the subpart of the Commission's rule addressing greenhouse gas emissions:

- EPA only has authority over US emission sources. The Commission has authority over disclosure about all activities of a consolidated multinational if it is a US public company, including the 40+% or more of those activities that are located outside the US, as noted above.
- EPA has no authority over disclosures about physical risks, or the financial risks of climate change to companies (and investors). The Commission does, but has no investor-protection authority over climate impacts more generally, such as those on communities or habitats, beyond impacts that are important to investors' decision-making.
- EPA has authority over private companies, while the Commission's proposed rule covers only public companies.

[89] 84 Stat. 1676, Pub.L. 91–604 (1970), codified at 42 U.S.C. §7401 et seq.
[90] Paul G. Rogers, EPA History: The Clean Air Act of 1970, EPA J. (Jan/Feb. 1990).
[91] EPA–HQ–OAR–2008–0508, published in 74 Fed. Reg. 56260 (Oct. 30, 2009); for the budget rider, see Pub. L. 110–161 (Dec. 26, 2007).

In sum, EPA could not duplicate (or even approximate) the proposed investor-oriented rule, and the Commission could not duplicate (or even approximate) EPA's greenhouse gas disclosure rules.[92] The Commission cannot shirk its duty to protect investors even if that duty to an extent overlaps with EPA's duty to protect the environment.[93]

Finally, it is beyond argument that the Clean Air Act nowhere mentions the Commission much less modifies its disclosure authority. For centuries, it has been a "cardinal rule" that "repeals by implication are not favored."[94] Indeed, a standard reference on statutory interpretation by Antonin Scalia and Bryan Garner goes further, makes the "rule" one of its black-letter canons, and emphasizes it, writing: "Repeals by implication are disfavored—'very much disfavored.'"[95] It also offers a sensible explanation for the canon: "A doctrine of readily implied repealer would repeatedly place earlier enactments in doubt."

Implied repeals occur only when two statutes are in "irreconcilable conflict" or when a later act "covers the whole subject of the earlier one and is clearly intended as a substitute."[96] "In either case, the intention of the legislature to repeal must be clear and manifest."[97] Nothing about the Clean Air Act is in "irreconcilable conflict" with the securities laws, and as just discussed, the Clean Air Act and subsequent EPA rulemaking address and could address only a part of what the proposed rule would address, even focusing narrowly on greenhouse gas emissions disclosure alone.[98] Bare claims that a later-in-time-statute addressing a different agency and a different set of legislative purposes are ever viewed by courts as silently trumping earlier statutes if their content overlaps in any way, or if the later one is in some way more specific than the earlier one, are wrong as a matter of law.

11. **The rule calls for disclosure of facts, and in no way restricts free speech**

The proposed rule does not call for opinion or "controversial" speech of the kind that raises First Amendment concerns. It specifies disclosure of facts, in neutral language. Companies objectively do or do not have strategies that reflect transition risk or physical risks of climate change. Companies either do or do

[92] To its credit, as discussed above, the Commission has, nonetheless, not attempted to duplicate or replace the EPA disclosure regime in its proposed rule, but has aligned the proposed requirements with EPA rules, which also align with the methodology of the GHG Protocol developed with private, corporate engagement and consultation. These alignments should reduce the costs of the rule, and contribute to a consistent understanding of climate-related financial risks and opportunities.
[93] Mass. v. EPA, 549 U.S. 497 (2007) (where EPA resisted exercising authority over greenhouse gas emissions of automobiles, the Court wrote: "Also unpersuasive is EPA's argument that its regulation of motor-vehicle carbon dioxide emissions would require it to tighten mileage standards, a job (according to EPA) that Congress has assigned to the Department of Transportation. The fact that DOT's mandate to promote energy efficiency by setting mileage standards may overlap with EPA's environmental responsibilities in no way licenses EPA to shirk its duty to protect the public 'health' and 'welfare'").
[94] Posadas v. National City Bank, 296 U.S. 497, 503 (1936); Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976); US v. United Cont'l Tuna Corp., 425 U.S. 164, 168, (1976)). For examples of explicit shifts of authority in later statutes, see note 5 above.
[95] https://jm919846758.files.wordpress.com/2020/09/rlilt.pdf (canon 55), citing authorities from the Federalist papers to a 2001 opinion by Justice Thomas noting the "rarity" of courts finding implied repeals and the "stringent standard" for finding them. The same is true of "implied amendments." St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 787–88 (1981).
[96] 296 U.S. at 503.
[97] Id.
[98] International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979) is not to the contrary. That decision did not address the Commission's disclosure authority, but the definition of a "security," famously ambiguous, including "investment contract," which in that case was claimed to include pension plans. Before Congress adopted ERISA, the SEC's formal position had been that pension plans were not "securities," and employment agreements were not "sales" of rights in pension plans. Thus, "Congress believed that it was filling a regulatory void when it enacted ERISA, a belief which the SEC actively encouraged." Id. at 570. Even by analogy, the case is not probative, since ERISA indisputably "covered" the topic of pension plans in explicit detail, and went far farther in regulating their terms than would have been true if they were "securities." As noted in the Scalia and Garner treatise (note 96 above), this kind of effect of a later-in-time law is not contrary to the canon against implied repeals, because later laws "will often change the meaning that would otherwise be given to an earlier provision that is ambiguous," and offers a sensible explanation: "a law is to be construed as a whole (including later-added and later-revised provisions), and because laws in pari materia (including later-enacted laws) are to be interpreted together." Here, the Clean Air Act does not refer to climate change, much less climate-related financial risks, and as detailed in the text, does not comprehensively regulate disclosure of such risks.

not engage in activities that result in the emission of greenhouse gases. Companies either do or do not have property, plant and equipment in flood plains. The rule does not require them to use particular words, or characterize their own conduct in any controversial way. Although courts have increasingly applied the First Amendment to disclosure obligations over time,[99] critics are able to cite no case law supporting the notion that simply because facts may inform or be relevant to a political debate, requirements calling for disclosure of those facts are subject to heightened scrutiny, much less violate the First Amendment.

Companies could comply with the rule and say:

- They believe climate risks are minimal for the company, or for the world, for whatever reason, if that is their honest belief.
- They believe climate change is not primarily caused by human activity.
- That climate risks overall have been overstated by climate activists.

No debate over the level of risk created by climate change is predetermined or purported to be resolved by the rule. The only limit on companies' ability to speak about climate is a long-standing limit – not created by the proposed rule – that they not lie or deceptively omit material information in doing so. Laws against fraud have always been consistent with the First Amendment.

12. The rule does not address a "major question" justifying deviation from normal interpretation

As detailed above, the proposed rule could not fairly be viewed as embodying "climate change" policy generally. It only specifies disclosures, and does not "regulate climate change," or regulate climate emissions. It does not impose regulatory "control over millions of small greenhouse gas sources."[100] Even as a disclosure rule, it only calls for a subset of the climate-related disclosures from a subset of companies that affect climate change. A comprehensive reporting regime would apply to all companies, worldwide, regardless of ownership, and would encompass impacts generally, rather than solely physical risks and transition risks to investors in US public companies. Rather, it calls for specific disclosures that investors in US public companies need to evaluate and price climate-related financial risks and opportunities.

Although "climate change" overall indisputably raises important policy questions, those remain for Congress. They will go unresolved by this proposed rule. Even as to the financial system, it does not set out comprehensive climate policy. The proposed rule would not require national banks to consider climate-risks in lending activities – that is for banking regulators. It would not affect the way that property insurers underwrite, pool or reserve against climate risks – that is for insurance regulators. It would not affect how mutual funds and other collective investment vehicles market themselves, even as to the climate risks in their portfolios – that topic is within the Commission's authority, but it is not addressed in this proposed rule.[101]

This rule would not "transform" even the "portion of the American economy" regulated by the Commission[102] – which remains investments in and markets for securities of public companies, not privately held companies, and the proposal adds no new companies to its disclosure regime. It would have a relatively modest impact on the economy as a whole, and basically "levels up" disclosure requirements to disclosures already made by the majority of large companies. Nor does the proposal purport to be authorized by a newly discovered "power" in the securities laws – the power is disclosure, as it has been for nearly a century.

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[99] John C. Coates, Corporate Speech and the First Amendment: History, Data and Implications, 30 Const. Comm. 223 (2015).
[100] Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014).
[101] The Commission has subsequently and separately proposed rules relevant to funds and fund advisors, reflecting increased use of "ESG" considerations in how funds market themselves, form portfolios, and manage investments. See [ESG disclosures for investment advisors and investment companies](), and the [proposed amendments to the Names Rule.]()
[102] Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014); FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 133 (2000).

It does not even address new topics for purposes of disclosure, but instead (as discussed above) changes the specificity and mode of disclosure about long-regulated topics. As a result, it would not "intrude" into topics or company-investor relationships that are "markedly different" from other authorized and long-standing rules.[103] The "major questions doctrine" has no role to change the plain text of the 1933 and 1934 Acts. Even if some may find resistance to the rule (or new regulation generally) to be "appealing from a policy standpoint," doing that here has "no basis whatsoever in the statute's text."[104]

Instead, basic principles of statutory interpretation support the Commission's authority to adopt the proposed rule. The text, the ordinary meaning of its key words (that is, "other" and "information"[105]), and their context (the title and relevant headings of the Commission's organic statutes), as analyzed above, are clear as to the Commission's ability to require the proposed disclosures for the protection of investors.

The context for the authorizing sections of those statutes supports the Commission's authority:

- The title of the 1933 Act states its purpose as creating a regime of "full and fair disclosure."
- The specific reliance throughout the statutes on disclosure as an instrument.
- The long-recognized fact the statutes were "remedial" laws following the Crash of '29.
- The creation of an entire new agency (the Commission) to implement and enforce the laws.
- The multiple places the statutes give the Commission authority to go beyond its text (to create exemptions, tailor its requirements, and add to them).

Canons against "ineffectiveness"[106] and in favor of validity,[107] and the "general terms" canon[108] all caution against courts making up their own limits on textual authority, particularly on grounds such as:

- The subject of a disclosure is new, when the nature of business and investment is dynamic,
- A topic of a disclosure is "political," or "controversial," or is not "uncontroversially" for investor protection, any of which would only invite interest groups to politicize a topic in the hopes of later arguing it should be off limits for the Commission to address.[109]

For the Commission programmatically to refuse to protect investors due to concerns about "politics" would itself be a political and controversial policy position. Congress did not direct the Commission to protect investors through disclosure only when it is politically non-controversial to do so.

[103] Cf. Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2488 (2021) (per curiam).
[104] Lawson v. FMR LLC, 134 S. Ct. 1158 (2014) (Scalia, J., concurring, with J. Thomas, interpreting Sarbanes-Oxley Act).
[105] "Other" means "Different from that or those implied or specified" or "Of a different character or quality." American Heritage Dictionary of the English Language, https://ahdictionary.com/word/search.html?q=other. "Information" means "Knowledge or facts learned, especially about a certain subject or event." Id.
[106] "A textually permissible interpretation that furthers rather than obstructs the [statute's] purpose should be favored." Scalia and Garner, note 96 above (canon 4).
[107] "An interpretation that validates outweighs one that invalidates." Scalia and Garner, note 96 above (canon 5).
[108] "General words … are not to be arbitrarily limited in scope." Scalia and Garner, note 96 above (canon 9).
[109] It should be noted, too, that a large number of now-taken-for-granted disclosure specifications adopted by the Commission have been "controversial" and many have falsely labeled as "politically motivated," not to mention attacks on Congress as it contemplated the 1934 Act. E.g., Stock Bill Fight to Open Today: Republicans Charge Fletcher-Rayburn Measure Move to Russianize Industry, Wall St. J. (Apr. 30, 1934).

Indeed, as stressed by Joseph Grundfest:[110]

> Congress created the Commission as an expert agency with the capacity to address significant problems affecting the nation's securities markets. Congress also created the Commission as an agency that could thoughtfully address problems too politically charged to be easily resolved on Capitol Hill.

Finally, even if the "major questions doctrine" were thought relevant here, the contents of the proposal are – as discussed at length above and in Annex A – directly in keeping with the way that the Commission has functioned since inception. Traditionally, and as it has been used by the Supreme Court to date,[111] the "major questions doctrine" is one of many canons that courts – as faithful agents of the Constitution and the Congress – use to interpret statutes, not rewrite them.[112] Even if one has a strong belief in the value of the "major questions doctrine" as an important tool for enforcing the constitutional principle of separation of powers, there is no role for a clear statement principle when the text and context of a statute are as clear and consistent as the 1933 and 1934 Acts are.

When the only dissenting Commissioner's primary basis for dissenting is that **the Commission has already addressed the topic in prior rulemakings upheld by courts**, courts have no basis for using one discretionary canon to apply personal policy judgments on a topic within the Commission's conventional and textually clear statutory authority. To do so would turn the doctrine's purpose against itself, turn courts into unelected mini-legislatures, and subvert rather than reinforce the separation of powers. Nothing at stake in this proposed rule justifies such judicial lawmaking. "In the context of legislation that does not implicate fundamental rights or a suspect class, faithful enforcement of the Constitution requires a court to hew as closely as possible to the norm of faithful agency by enforcing the text unadulterated by judicial tweaking."[113]

Very truly yours

John C. Coates

[110] Joseph Grundfest, Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority, 107 Harv. L. Rev. 961, 966 (1994). See also John C. Coates, Private vs. Political Choice of Securities Regulation: A Political Cost/Benefit Analysis, 41 Va. J. Int'l L. 531, 538 (2001) (Congress has not only preserved the Commission in the face of academic calls for devolution of authority to states or stock exchanges, but has enhanced the Commission's role in the National Securities Markets Improvement Act of 1996 and the Securities Litigation Uniform Standards Act of 1998).

[111] Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014); FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 133 (2000).

[112] Indeed, according to another canon, no one canon has no specially favored role relative to other canons. See Scalia and Garner, note 96 above, Canon 3 ("No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point in other directions.")

[113] Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 180 (2010).

Annex A – Examples of Commission exercise of broad disclosure authority

In ***1935***,^ the Commission added a new registration statement Form A-2 for seasoned issue with requirements that went beyond Schedule A to require disclosure by name of compensation to the three highest paid officers, total compensation of all other officers, and total compensation of all employees who received compensation over $20,000.[114]s

In ***1947***,^ the Commission added requirements to disclose the ***relative*** importance of companies' different lines of business and general ***competitive conditions*** in their industries – ***qualitative*** and information not specifically mentioned in the text of the securities laws or directly related to the financial condition or results of operations of the companies, but adopted under the Commission's authority to add disclosure requirements discussed above.[115]

In ***1948***,^ the Commission added disclosures for loans to officers and directors,[116] and expanded disclosure requirements about interests in recently acquired property to disclosure about interests in ***any material transactions***, including property acquisitions.[117]

In ***1954***,^^ the Commission first adopted a requirement to disclose one type of ***financial risk*** (coverage) ratio (fixed charges to earnings).[118]

In ***1968***,^ the Commission required disclosure of "***risk factors***" – sources of risk for the investment, and thus for the company, without any limit on the nature of sources of risks requiring disclosure – as part of what was then called Guide 6[119] and later became Item 503(c) of Regulation S-K (noted below) as part of the adoption of the "integrated disclosure system," which consolidated disclosure requirements under both the 1933 Act and the 1934 Act.[120]

Also in ***1968***,^ the Commission required and subsequently elaborated requirements for companies to disclose "***management's discussion and analysis***," a qualitative overview of its performance.[121] Although that requirement initially and ever since has been designed to explain financial results and condition, it expressly requires ***risk disclosures***, including regarding contingencies that fall well short of what would trigger reserves in the financial statements, and regarding "known trends and ***uncertainties***" that are "reasonably expected" to have material effects, even if in the future. For this purpose, while "remote" risks (the canonical teaching example is an asteroid hitting the Earth) do not require disclosure, the triggering probability for disclosure is a "***lower threshold than 'more likely than not***,'"[122] such as a decline in new contracts that might occur during an industry downturn, or competitive risks arising from a competitor known to be developing products that could substitute for the companies.

In ***1970***,^^ the Commission amended what was then called Guide 55 to require disclosure of ***legal proceedings involving management,*** even when they did not rise to the level that would require reserves or other disclosures in the financial statements.

In ***1971***^^ and ***1973***,^^ the Commission published guidance and then amended its registration and reporting forms "to require more meaningful disclosure" of compliance with laws "***relating to the protection of the***

[114] SEC Release No. 33-276 (Jan. 14, 1935). Schedule A did not require individual compensation to be disclosed, and used a higher threshold for other employees ($25,000).
[115] SEC Release No. 33-3186 (Jan. 8, 1947).
[116] SEC Release No. 34-4185 (Nov. 5, 1948).
[117] Item 32 of Form S-1 adopted in Miscellaneous Amendments, SEC Release No. 33-3323 (Dec. 31, 1948).
[118] SEC Release No. 33-3509 (July 21, 1954).
[119] Guides for the Preparation and Filing of Registration Statements, SEC Release No. 33-4936 (Dec. 9, 1968).
[120] Adoption of Integrated Disclosure System, SEC Release No. 33-6383 (March 3, 1982).
[121] SEC Release No. 33-4936 (Dec. 9, 1968); SEC Release No. 33-5520 (Aug. 14, 1974); SEC Rel. No. 6231 (Sep. 2, 1980).
[122] https://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.pdf#topic9.

environment,"[123] a requirement that responded to the Commission's obligations under the National Environmental Policy Act of 1970, discussed above and in Annex B.

In ***1976***,^^ the Commission published Guide 3, specifying statistical disclosures for bank holding companies, including credit ratios, categories of credit extensions, and intermediate estimates of the kind commonly now called "key performance indicators" relating to their ***business and financial risk***, information not included in their financial statements, but bearing on financial risks and opportunities facing those companies, all of which were readopted in different form in 2020.

In ***1979***,^ the Commission published an interpretive release emphasizing "(1) the need to disclose total ***estimated expenditures for environmental compliance*** beyond two years in the future, (2) the obligation to disclose particular types of environmental proceedings, and (3) the circumstances under which companies must disclose their ***policies*** or approaches ***concerning environmental compliance***."[124]

In ***1981***,^^ the Commission published Guide 7, based, in part, on United States Geological Survey Circular 831 (issued in 1980), as a rule requiring disclosures by companies with significant ***mining operations***, including requirements as to mineral reserves (even if not likely to generate income in the near future), exploration results (and not merely their costs), and even ***feasibility studies*** for future exploration, as well as technical reports conducted by third parties, including the specific location of properties and names under which companies have rights in properties, and bearing on financial risks and opportunities facing those companies.[125]

In ***1982***,^^ the Commission adopted Regulation S-K,[126] collecting what it called **"non-financial" disclosure** requirements under both the 1933 and 1934 Acts in a unified set of rules. Its first "item," Item 101, requires a description of the company's business – a direct descendent of the first item in Schedule A to the 1933 Act. As built out since 1933, that item requires, among other things, ***descriptions of*** the company's principal ***products and services***, their ***status*** (planned, actually sold), the importance and duration of ***intellectual property*** held, the ***seasonality*** of the company's businesses, ***customer dependencies*** (i.e., risks), and order ***backlogs***. Directly relevant to the proposed rule, Item 101 requires disclosure of the material effects of ***compliance with environmental protection laws*** on capital expenditures, earnings, and competitive position, a component initially adopted in 1973, as noted above. This element of Item 101 has been interpreted to require disclosure of both ***compliance costs***, and risks of ***costs from non-compliance***.[127]

In ***1993***,^ Commission staff published Release No. SAB – 92, expanding and clarifying how companies are required to disclose ***environment liabilities***, premised on the view that "environmental liabilities typically are of such significance that detailed disclosures regarding the judgments and assumptions underlying the recognition and measurement of the liabilities are necessary to prevent the financial statements from being misleading and to inform readers fully regarding the range of reasonably possible outcomes that could have a material effect on the registrant's financial condition, results of operations, or liquidity."

In ***1995***,^ the Commission proposed to adopt (and later adopted) rules require both qualitative and quantitative disclosure of information about ***derivatives***, including information that would not be required to

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[123] SEC Rel. No. 9252 (July 19, 1971); SEC Rel. No. 33-5386 (Apr. 20, 1973).
[124] SEC Rel. No. 6130 (Sep. 27, 1979).
[125] Special disclosures for mining companies dated to 1941 as part of Form S-3, then used for such companies in their promotional stage. See Adoption of Form S-3 for Registration Under the Act of Shares of Mining Corporations in the Promotional Stage, SEC Release No. 33-2672 (Sept. 29, 1941).
[126] SEC Rel. Ns. 33-6383 (Mar. 3, 1982).
[127] Levin v. NL Indus., Inc., 926 F. 2d 1999, 203-04 (2d Cir. 1991).

be included in financial statements under GAAP, and which did not directly relate to near-term cash flows, but were simply useful in assessing potential future financial impacts.

In ***2003***,^^ the Commission published guidance regarding MD&A (following a review of Fortune 500 company disclosures) requiring additional disclosures, including "identif[ication] and discuss[ion of] ***key performance indicators,*** including non-financial performance indicators, that … management uses to manage the business," as well as "the substantial amount of financial ***and non-financial information available to them***," and more generally "***management's view of the implications*** and significance" of information presented.[128]

In ***2009***,^ the Commission required disclosures, regardless of materiality, for each ***director or nominee*** for election as director, about their "specific experience, qualifications, attributes, or skills that led to the conclusion that the person should serve."

In ***2010***,^ the Commission adopted guidance on ***climate-related risks***, reaffirming and clarifying ways that existing rules would apply to climate risks, particularly MD&A and risk factor requirements adopted in 1968.

In ***2014***,^ the Commission adopted required disclosures for asset backed securities contained detailed, prescriptive and "specified ***asset-level information*** about each of the assets in the pool," even though that level of detail is far more extensive than would be required by conventional financial accounting.

In ***2020***,^^ the Commission added a ***human capital*** disclosure requirement. Also in ***2020***,^^ despite cutting back on many disclosures in an overall revamp of its disclosure system, the Commission preserved extensive requirements not solely for current or normal liabilities and financial results, but to ***risks***, including risks that are not directly or immediately financial:[129]

- ***environmental protection*** law-related administrative or judicial proceedings arising, even if in the "ordinary course," adopted in 1973 (as noted above and discussed more below),
- ***legal proceedings***, with highly prescriptive requirements about the court, date, parties, factual basis and relief sought in a litigation,
- ***other administrative or judicial proceedings*** if they involve a governmental authority and potential sanctions exceeding the lesser of $1 million or 1% of a company's assets.

In the above list, requirements that were adopted:

- under SEC Chairs appointed by Democratic Presidents are noted with "^" – 11 additions or re-adoptions
- under SEC Chairs appointed by Republican Presidents are noted with "^^" – 9 additions or re-adoptions

[128] SEC Rel. No. 34-48960 (Dec. 29, 2003).
[129] SEC Rel. No. 33-10825, 34-89670 (2020).

Annex B – Congressional acceptance of Commission exercises of broad disclosure authority

In ***1964***, Congress extended the Commission's jurisdiction from listed companies to so-called "over-the-counter" companies,[130] and in so doing acknowledged and explicitly imposed the then-existing "disclosure requirements" previously been adopted by the Commission, which had been extended beyond the requirements Congress itself set in place in 1933 and 1934.

In ***1968***, and then again in ***1970***, Congress adopted and amended the Williams Act, which added subsections to the part of the 1934 Act that provides the Commission with disclosure authority. These amendments occurred shortly before and after the Commission adopted the forerunner of its MD&A requirements noted above. In each case they extended disclosure rulemaking authority over types of transactions (tender offers, open market purchases) not previously been covered by the 1934 Act, again demonstrating Congressional acceptance of the Commission's prior exercises of its disclosure authorities, including the significant broadening reflected in MD&A.[131] On the day the Williams Act passed the Senate, Senator Williams himself emphasized this point, noting:

> "The federal securities laws provide protection for millions of American investors by requiring full disclosure of information in connection with the public offering and trading of securities. These laws have worked well in providing the public with adequate information on which to base intelligent investment decisions."[132]

Also in ***1970***, President Nixon signed the National Environmental Policy Act,[133] which requires the Commission (along with all other federal agencies) to assess the environmental impact of their actions in all of its rulemaking activities, including with respect to disclosure.

In ***1975***, Congress adopted the Energy Policy and Conservation Act of 1975,[134] which required the Commission to "take such steps as may be necessary to assure the development and observance of accounting practices to be followed in the preparation of accounts by persons engaged, in whole or in part, in the production of crude oil or natural gas in the United States."

In ***1977***, Congress adopted the Foreign Corrupt Practices Act,[135] which added "books and records" requirements to Section 13 of the 1934 Act, and preserved all of the Commission's rulemaking authority under that and other sections of the 1934 Act. In neither 1977 nor subsequently did Congress curtail or reverse the Commission's rules requiring environmental risk disclosures, as it had done in 1971 and 1973, despite making changes to the very sections of the 1934 Act on which the Commission had relied for authority in adopting those rules.

In ***1996***, Congress adopted the National Securities Markets Improvements Act,[136] which added the requirement that in making "public interest" assessments as part of its rulemakings, the Commission is required to consider efficiency, competition and capital formation,[137] preempting state securities laws in

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[130] 78 Stat. 565 (1964).
[131] Pub. L. No. 90-439, 82 Stat. 454 (1968) and Pub. L. No. 91-567 (Dec. 22, 1970).
[132] 113 Cong. Rec. 854 (1967) at 24664.
[133] Pub. L. 91-190, 83 Stat. 852 (1970).
[134] Codified at 42 U.S.C. §§ 6201–6422.
[135] Pub. L. 95-213, 91 Stat. 1494 (1977).
[136] Pub. L. 104-290 (1996).
[137] In this law, Congress added a gloss to the 1933 and 1934 Acts, set out in Section 2(b) and 3(f), respectively, requiring that "Whenever … the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." This requirement, sometimes abbreviated the "***ECCF***" requirement, by its terms only applies when the Commission relies on authority "in the public interest," and not when it is seeking to "protect investors." The Commission has often considered ECCF on its own initiative, but it is not required to do so in requiring disclosures

various respects, and creating new exemptions from the 1933 Act – but significantly not curtailing the Commission's disclosure authorities or repealing or reversing any prior exercise of those authorities.

In ***2002***, Congress in the Sarbanes-Oxley Act significantly added to the statutory disclosure obligations of public companies, and added to the SEC disclosure authorities to address "control systems" in Section 404 of that law.[138] As controversial as that law was for a time, especially for companies and their lobbyists, Congress has never cut back on that statute.[139]

In ***2010***, Dodd-Frank further added to the statutory disclosure obligations of public companies, and added to the SEC disclosure authorities in respect of conflict minerals and resource extraction, and again did nothing to curtail prior Commission disclosure requirements.[140]

In ***2012***, Congress authorized the Commission to require disclosure of information on whether registrant has engaged in activities covered by the Iran Sanctions Act.[141]

In ***2012***, Congress also passed the JOBS Act,[142] which (a) directed the Commission to study and update its disclosure system, and (b) broadened a number of exemptions from the 1933 and 1934 Acts, including by explicitly amending the sections of those laws that give the Commission its broad disclosure authorities, without curtailing the content or subject matter of those authorities, or repealing or reversing the Commission's prior exercise of those authorities – which by that time included its MD&A requirements, its environmental risk disclosures, and **its 2010 climate guidance**.

to protect investors under Sections 2(b) and 7 of the 1933 Act, or relevant sections of the 1934 Act discussed below. Cf. Amer. Equity Inv. Life Ins. Co. v. SEC, 613 F.3d 166, 177-78 (2010) (concluding ECCF applied based on fact that SEC analyzed ECCF and did not state it was not required to do so in its rulemaking, but noting ECCF is only required for "certain" rulemakings); Business Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (assuming without analysis ECCF applies to rulemakings generally).

[138] John C. Coates, The Goals and Promise of the Sarbanes-Oxley Act, 21 J. Econ. Persp. 91 (Winter 2007).

[139] John C. Coates and Suraj Srinivasan, SOX After Ten Years: A Multidisciplinary Review, 28:3 Accounting Horizons 627 (2014).

[140] P.L. 111-203, 124 Stat. 1376 (2010).

[141] Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214. Section 219 of that law added a new Section13(r) to 1934 Act.

[142] Pub. L. No. 112-106, [126 Stat. 306] (2012).