



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

Re: RIN 3235—AM87, The Enhancement and Standardization of Climate-Related Disclosures for Investors, File Number S7-10-22

Dear Ms. Countryman:

In *West Virginia v. EPA*,¹ the Supreme Court held unlawful an EPA rule that would have repurposed a minor provision of the Clean Air Act to give EPA authority over immensely consequential policy questions far outside the agency's expertise—authority the agency would have applied to impose regulatory requirements expressly rejected by Congress. The SEC's proposed climate disclosure rule would do something practically indistinguishable: it would reformulate the standard for disclosures under the Securities and Exchange Acts to give the Commission a role in U.S. climate policy for which it lacks any expertise and which would set the Commission on a collision course with Congress, which has already rejected the climate disclosures the Commission proposes. The Commission should withdraw the climate disclosure proposal in light of *West Virginia*.

We write to petition the Commission, if it elects to proceed in the above-captioned matter, to reopen the comment period and to issue a supplemental notice soliciting the views of the public on the effect of the recent decision by the Supreme Court in *West Virginia* on this rulemaking. Further, the supplemental notice should explain the Commission's decision to proceed with the rulemaking and solicit public comment thereon.

If the agency decides to proceed, it must make the rationale of that decision available to the public for comment. After all, the APA requires agencies to offer a "sufficient ... rationale for [a] rule to permit interested parties to comment meaningfully."² If the SEC elects to proceed with this rulemaking, an important part of its rationale for doing so must be its conclusion that *West Virginia v. EPA* permits that choice. The public deserves to understand the basis for that conclusion, and the SEC stands to benefit from the comments the public would offer in response.

¹ Nos. 20-1530, et al. (June 30, 2022).

² *Honeywell Int'l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004).

In particular, public comment is important with respect to several questions about the application of *West Virginia* to the Commission's proposed rule. Among them are, *first*, whether and the extent to which the proposal would transform the SEC's disclosure authority, leaving it effectively without limits. *West Virginia* made clear that the working of such a transformation is among the principal features that, when present, trigger application of the case's clear statement rule.³ Determining whether a regulation presents this trigger requires analyzing the extent of the issuing agency's authority before the rule, as evinced by understandings articulated in pre-existing case law, practice, scholarly literature, etc. It also requires careful analysis of the rule at issue to draw out the implications of the statutory interpretation upon which it relies for future rulemakings and to consider what, if any, limiting principles are available to cabin the authority available under that interpretation. The public may have valuable information about current understandings of the Commission's authorities and the real-world limitations, or lack thereof, inherent in the theories upon which the proposal relies. Further, while some commenters may already have addressed these questions in passing, the general public was not on notice that these questions are decisive ones for whether Supreme Court case law permits the proposed rule and so did not submit comments as they otherwise would have done.

Second, another important question under *West Virginia* is whether the Commission's proposal departs from the understanding of the Securities and Exchange Acts upon which the Commission's prior rulemakings have been based.⁴ The Commission did not meaningfully discuss this point in the preamble accompanying its proposal; the public was therefore not on notice of its relevance, let alone its importance. While the Commission doubtless has its own views of the interpretations upon which its prior rulemakings have been based, *West Virginia* itself demonstrates that an agency's characterization of its past rulemakings is not always accurate and can benefit from the views of others.⁵

Third, yet another important question under *West Virginia* is whether the proposal would involve the Commission in matters with regard to which it lacks expertise.⁶ To understand whether it has expertise to issue and implement the proposal, the Commission needs to determine the kind of knowledge that is necessary to guide companies as they tackle extensive new climate disclosures and then to evaluate the disclosures that companies submit to the Commission. In making that determination, the Commission would profit from the submissions of industry participants, academics, activists, and others with views about the kind of expertise needed to make accurate climate disclosures and to evaluate them. But again, because the public was not

³ Nos. 20-1530, et al., slip op. at 20.

⁴ *Id.* at 20-21.

⁵ *Id.* at 21-22.

⁶ *Id.* at 25.

on notice that the nature of the expertise needed to issue and implement the rule was likely to be a dispositive issue, members of the public were not on notice to comment.

Fourth, the magnitude of the proposal's impacts is also likely relevant to the analysis under *West Virginia*.⁷ And while the Commission opined on some of the proposal's impacts, such as the paperwork and compliance costs of the enhanced filings it would demand, it did not attempt to fathom the proposal's impact on the broader economy; in particular, it made no effort to understand the proposal's effect on American jobs, on the growth of some industries and regions and the stagnation of others, etc. To assess whether the proposal passes muster under *West Virginia*, the Commission must attempt to analyze the proposal's broader economic effects and must offer that analysis for comment. The public has invaluable data to assist the Commission in understanding the proposal's broader impact—but until the *West Virginia* decision many of its members were not on notice that such information may be decisive for the proposal's lawfulness; nor did they have the benefit of the Commission's own assessment of impacts to evaluate.

The public deserves the chance to comment on these and other questions raised by the application of *West Virginia v. EPA* to the proposal. In the event the Commission elects to proceed with this rulemaking, we therefore petition it to reopen the public comment period, to make available to the public the rationale for its decision to proceed (including its analysis with respect to the issues identified above), to solicit the public's views on that rationale and on the effect of *West Virginia* on this rulemaking more broadly, and to consider carefully the public's comments in response.

Sincerely,



Mary Thomas
Executive Director
Club for Growth Foundation

Cc: Hon. Gary Gensler, Chair, Securities and Exchange Commission

⁷ *Id.* at 10 (Gorsuch, J., concurring).