*** Reprinted from the Summer 2022 issue of *Administrative & Regulatory Law News*, a publication of the Section of Administrative Law of the American Bar Association. ***

Climate Change, *West Virginia v. EPA*, and the SEC's Distinctive Statutory Mandate

By Jill E. Fisch[*], George S. Georgiev[**], Donna M. Nagy[***] & Cynthia A. Williams[****]

JILL E. FISCH

GEORGE S. GEORGIEV

DONNA M. NAGY

CYNTHIA A. WILLIAMS

In March 2022, the Securities and Exchange Commission (SEC) proposed a rule that would require publicly traded companies to provide investors with various climate-related disclosures. *See The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21344 (Apr. 11, 2022) (the Proposal). The rule has generated extensive debate; to date, the SEC has received more than 4,000 substantive comment letters and more than 10,000 form letters. Commenters have raised a variety of concerns about the Proposal, including questioning the extent to which the SEC has the authority to mandate climate-related disclosure. Since the Supreme Court's June 2022 ruling in *West Virginia v. EPA*, some commentators have also asserted that the Proposal runs afoul of the major questions doctrine (MQD).

We submitted a detailed comment letter that directly addressed the first of these concerns.[1] But our analysis of the SEC's longstanding and indisputable authority to regulate the disclosure practices of publicly traded companies also demonstrates why requiring climate-related disclosures does not raise a new "major question" that would prevent the SEC from acting if warranted by the record before it. As we explained in our letter, starting in 1933 and 1934, the federal securities laws established the SEC as the primary regulator of the capital markets, and, in so doing, Congress expressly stated that capital market regulation was essential, not just for investor protection, but to serve the broader interests of the U.S. economy. Congress also made a choice to use disclosure as the primary vehicle to effectuate such regulation.

The Purpose, Structure, and Content of Securities Regulation

Congress structured securities regulation as principally disclosure-based, instructing the SEC to regulate the capital markets through an extensive disclosure regime for publicly traded companies. The SEC's statutory authority over disclosure is broad by congressional design, extending not just to information relevant to investor trading decisions but also to information used by investors in connection with the exercise of their voting rights.

In the 88 years since Congress gave it this authority, the SEC has adjusted and refined its disclosure requirements continuously in response to market, technological, and economic developments. For example, the SEC has adopted detailed disclosure rules on executive compensation, related-party transactions, asset-backed securities, and certain technical industry-specific items. Since the 1970s, the disclosure regime has also included rules pertaining to environmental matters, including environmental litigation, environmental loss contingencies, and so on. In 2020 (and while under Republican control), the SEC adopted a disclosure rule regarding human capital management after finding that new economic conditions and investor demand warranted such an action. Each of the above disclosure requirements was adopted in reliance on Congress' original grant of authority to the SEC, without any additional statutory authorization.

In addition to formal disclosure rules, the SEC has also developed a practice of providing real-time disclosure guidance, which in most cases results in substantially enhanced disclosure. The topics of such guidance have included "Year 2000" (Y2K) risks, the impact of the Eurozone crisis and Brexit, and, most recently, the Covid-19 pandemic and Russia's war on Ukraine.

Importantly, at no time has Congress legislatively overridden the SEC's new or enhanced disclosure requirements, even though it has amended the securities laws on

---

* Saul A. Fox Distinguished Professor of Business Law, University of Pennsylvania Carey Law School.

** Associate Professor of Law, Emory University School of Law.

*** C. Ben Dutton Professor of Business Law, Indiana University Maurer School of Law.

**** Professor Emeritus, York University, Osgoode Hall Law School.

1 *See* Comment Letter of Professors Jill E. Fisch, George S. Georgiev, Donna M. Nagy & Cynthia A. Williams on Behalf of Thirty Securities Law Scholars (June 6, 2022), http://ssrn.com/id=4129614. For a broader based analysis of commenters' challenges to the Proposal, see George S. Georgiev, The SEC's Climate Disclosure Proposal: Critiquing the Critics (Mar. 27, 2022), http://ssrn.com/id=4068539.

multiple occasions since the 1930s. The U.S. Court of Appeals for the D.C. Circuit also affirmed the broad scope of the SEC's rulemaking authority, finding that "[r]ather 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." *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1045 (D.C. Cir. 1979).

The March 2022 Proposal is by no means the SEC's first foray into environmental and climate-related disclosure. Indeed, the SEC's long history of requiring environmental disclosures dates back more than five decades. In a 1971 release issued during the Nixon Administration, the SEC highlighted the requirement that public companies disclose "material matters involving the environment and civil rights." In 1973, the SEC mandated disclosure of various environmental proceedings, and in 1976 it required disclosure about capital expenditures relating to environmental compliance. The refinement of environmental disclosure rules continued during the 1980s. In parallel, the SEC and accounting standard setters developed detailed rules on the treatment of contingent environmental liabilities, as well as rules about disclosure and accrual of environmental obligations upon future asset retirement. The SEC's high-profile releases on management's discussion and analysis (MD&A) disclosure also referenced environmental matters. In 1993, the SEC issued detailed guidance addressing accounting and disclosure issues relating to environmental loss contingencies. Most recently, in 2010, the SEC provided additional guidance on climate-change developments that were required to be disclosed under SEC rules, noting the variety of ways in which climate change could affect firms' operations or results.

As this history reveals, market and business developments have, over time, changed both the importance of environmental disclosures and the practicality of requiring such disclosures. Today, investors are demanding more climate-related information about their portfolio companies than ever before. This is driven by the increasing importance of evaluating climate-related physical and regulatory risks on a firm's business model and operations and ensuring that this information is accurately reflected in valuations. Public companies are recognizing the importance of climate-related information and are collecting various data as part of their operational decisions. The absence of standardized methodologies and disclosure frameworks, however, facilitates greenwashing and ultimately undermines the efficiency of capital allocation.

The evidence from the operation of the capital markets and the behavior of market participants suggests that the scope of the Proposal should be understood as traditional capital market regulation. The Proposal requires publicly traded companies to disclose climate-related information relevant to their business operations. This information includes, inter alia, qualitative disclosures about climate-related governance, risks and strategy, quantitative disclosure of Scopes 1 and 2 greenhouse gas emissions, and, if (and only if) a firm has already elected to adopt transition plans or set targets, a summary of those. Notably, the Proposal does not mandate any operational changes with respect to climate. It does not require firms to adopt particular governance structures to oversee climate risk, to set carbon goals, or to implement a climate transition plan. Instead, it provides a standardized disclosure framework that allows investors and markets to value firms by ensuring that they can price in various factors, including climate-related risks, climate-related trends and uncertainties, and climate-related business opportunities.

The Major Questions Doctrine

The June 2022 Supreme Court decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), has led some commentators to raise an additional concern, arguing that the Proposal runs afoul of the Major Questions Doctrine (MQD). As articulated by the Court, the MQD constitutes a limit on an agency's claim of statutory authority. As the Court explained, the MQD applies when an agency "claims to discover in a long-extant statute an unheralded power … representing a transformative expansion in [its] regulatory authority." *Id.* at 2610 (citation omitted). The Court concluded that the EPA's regulatory approach in that case "effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of … regulation' into an entirely different kind." *Id.* at 2612.

In contrast to the Court's characterization of the EPA's actions in that case, the SEC's Proposal is not an expansion of its regulatory authority, let alone a "transformative expansion." The Proposal is limited to the SEC's traditional regulatory function: mandating that publicly traded companies include in their SEC filings certain new disclosures determined by the agency to be relevant to investor trading decisions and the exercise of shareholder voting rights. In other words, the Proposal does not constitute the exercise of "an unheralded power," but, rather, the exercise of a power that was explicitly authorized by Congress and that has always been the core part of the SEC's regulatory role.

In short, the entire statutory structure of federal securities regulation is based on mandating the provision of standardized and comparable information about publicly traded companies to the capital markets, and the original securities laws explicitly establish the authority of the SEC to enact disclosure requirements to protect those markets and market participants. Such policy determinations clearly involved "major questions," but those questions were asked and answered by Congress in the 1930s. The SEC, in turn, has exercised its disclosure authority consistently—and without legislative override—in the nearly ninety years that followed. The SEC has now done so once more with the Proposal on climate-related disclosure.