

# National Legal and Policy Center

“promoting ethics in public life”



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June 17, 2022

Submitted via email at  
[rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Vanessa Countryman  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-0609

**Re: Request for Comments on Proposed for The Enhancement and Standardization of Climate-Related Disclosures for Investors; Release No. 33-11042; File No. S7-10-22 (March 21, 2022)**

Dear Secretary Countryman:

The National Legal and Policy Center (NLPC) hereby submits these comments opposing the proposed rule that would require registrants to compile and disclose certain climate-related information in their registration statements and annual reports, including information about a registrant’s climate-related risks that are allegedly “likely” to have a material impact on its business, results of operations, or financial condition.

Not only would the rule exceed the statutory authority of the SEC, but it is also unworkable, unnecessary, duplicative of EPA requirements, based on questionable science, does not protect investors’ interest, and will have a deleterious effect on businesses, the United States economy and national security. As SEC Commissioner Hester M. Peirce aptly put it in the title of her well-reasoned and lengthy dissenting statement to the rule, “*We are Not the Securities and Environment Commission - At Least Not Yet.*”<sup>1</sup>

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<sup>1</sup> See Dissenting Statement of SEC Commissioner Hester M. Peirce “*We are Not the Securities and Environment Commission - At Least Not Yet*” (March 21, 2022).”  
<https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321>

## **Interest of NLPC**

NLPC is a nonprofit, public interest and policy center founded in 1991, whose overall mission is to promote ethics in public life. NLPC has a Corporate Integrity Project that promotes integrity in corporate governance, including honesty and fair play in relationships with shareholders, employees, business partners and customers. In doing so, NLPC places special emphasis on the responsibility of the corporation to defend and advance the interests of the people who own the company, the shareholders, and not someone else's political agenda.<sup>2</sup>

In that regard, NLPC filed comments last year opposing the SEC's so-called Nasdaq Board Diversity Rule as being an unconstitutional quota, unnecessary and likely to result in tokenism.<sup>3</sup> Moreover, over the years NLPC representatives have attended many annual stockholder meetings as a shareholder to advocate the interests of shareholders and oppose calls by activists to advance one-sided special interests that are often hypocritical, including climate-related issues.<sup>4</sup>

## **The Climate Disclosure Rule**

The Disclosure Rule requires those registered with the SEC to make several disclosures related to "climate change" in their registration statement or annual report. 87 Fed. Reg. at 21345-46. Those disclosures include:

- "The oversight and governance of climate-related risks by the registrant's board and management;"
- "How any climate-related risks identified by the registrant have had or are likely to have a material impact on its business and consolidated financial statements, which may manifest over the short-, medium-, or long-term;"
- "How any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook;"
- "The [company's] processes for identifying, assessing, and managing

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<sup>2</sup> <https://www.nlpc.org/>

<sup>3</sup> <https://www.nlpc.org/corporate-integrity-project/sec-approves-nasdaq-diversity-rule-over-nlpc-objections/>

<sup>4</sup> See, e.g., NLPC Demands General Motors to Disclose Child Labor in EV Supply Chain (June 13, 2022) <https://www.nlpc.org/corporate-integrity-project/nlpc-demands-general-motors-disclose-child-labor-in-ev-supply-chain/>

climate- related risks and whether any such processes are integrated into the registrant’s overall risk management system or processes;”

- “The impact of climate-related events (severe weather events and other natural conditions as well as physical risks identified by the registrant) and transition activities (including transition risks identified by the registrant) on the line items of a registrant’s consolidated financial statements and related expenditures, and disclosure of financial estimates and assumptions impacted by such climate- related events and transition activities;”
- The Disclosure Rule also requires a separate disclosure of the company’s greenhouse gas (“GHG”) emissions. And the company must also disclose whether it “has set a GHG emissions reduction target or goal” and its “climate-related targets or goals, and transition plan, if any.”

*Id.* at 21345 (footnotes omitted).

These vague and subjective reporting requirements require companies to predict climate risks to their businesses and their supply chain, and include non-material climate-risk factors. The proposed rule should be withdrawn for both legal and policy reasons.

## **I. THE DISCLOSURE RULE EXCEEDS THE SEC’S STATUTORY AUTHORITY.**

The SEC cites “Sections 7, 10, 19(a), and 28 of the Securities Act, as amended, and Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act, as amended” as the grounds for its authority to promulgate the Disclosure Rule. 87 Fed. Reg. at 21464. None of these provisions, individually or together, authorize the SEC to promulgate a rule requiring companies to compile and disclose climate-related data.

### **A. The Securities Act Has Nothing To Do With Compelling Disclosure Of Environmental Data.**

The SEC cites Sections 7, 10, 19(a), and 28 of the Securities Act, as amended, as its statutory authority for the Disclosure Rule, but those sections authorize the SEC to compel disclosure of traditional financial data and not environmental data.

**Section 7** requires those issuing securities to file a registration statement. 15 U.S.C § 77g. Registration statements, according to the statute’s text, require disclosures of traditional **financial data**, such as a “balance sheet” showing liabilities, *id.* at § 77aa(25); and a “profit and loss statement,” *id.* at § 77aa(26). All of these requirements are a far cry from compelling disclosures about a company’s Greenhouse Gas (GHG) emissions and those of its suppliers.

**Section 10** requires that advertisements, such as a “prospectus,” include the information in the registration statement. 15 U.S.C. § 77j. In addition to the registration statement’s garden variety financial information, Section 10 allows the SEC to promulgate regulations that require

a “prospectus” to include “other information as the Commission may . . . require as being necessary or appropriate in the public interest or for the protection of investors.” 15 U.S.C. § 77j. Thus, although Section 10 gives the SEC seemingly broad authority to make rules for the “public interest” and the “protection of investors,” the statute associates that authority with the registration statement’s disclosures of traditional financial data. Read in context, the language is not so broad. The term “public interest” does not give a license to regulate on any matter outside the confines of the agency’s governing statute.

**Section 19(a)** allows the SEC to promulgate rules to carry out the Securities Act’s provisions, including those related to registration statements and prospectuses. 15 U.S.C. § 77s(a). This authorization includes “defining accounting, technical, and trade terms.” *Id.* It can also “prescribe the form or forms in which required information shall be set forth.” *Id.* This includes the “the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income” *Id.* Congress provided in subsection (b) that in “issuing such rules the SEC can use generally accepted accounting practices.” *Id.* Again, the broad grant of authority to promulgate rules to effectuate the Security Act is associated with more specific provisions pertaining to **traditional financial data**.

**Section 28** gives the SEC the power to “conditionally and unconditionally exempt” a “person, security, or transaction” from many of the requirements above, including regulations that the SEC promulgates. 15 U.S.C. § 77z–3. But the exemption must be “necessary or appropriate in the public interest” and “consistent with the protection of investors.” *Id.* Once again, although the exemption power is broad, it is cabined by provisions that focus on **financial data**.

In short, none of the sections of the Securities Act cited above give the SEC the power to promulgate the Disclosure Rule.

## **B. The Exchange Act Similarly Has Nothing To Do With Disclosing Environmental Data.**

The SEC cites “Sections 3(b), 12, 13, 15, 23(a), and 36 of the Exchange Act, as amended” as grounds for its authority to promulgate the Disclosure Rule. 87 Fed. Reg. at 21464. Just like the Securities Act, these sections of the Exchange Act focus on financial data.

**Section 3(b) (15 U.S.C. § 78c–2)** has nothing to do with the power to require disclosures. It provides that certain agreements exempted by the Commodity Futures Trading Commission under a certain statute are deemed “securities,” for purposes of “securities laws.”

**Section 12 (15 U.S.C. § 78l)** makes it illegal to trade a security on an exchange unless it is registered. Registration requires a company to file an application containing information “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

section then lists issues such as organizational structure, rights of shareholders, terms on the securities, company officials with 10% more of stock, executive compensation, and bonuses. Additionally, the SEC may require applicants to submit “any further financial statements which the Commission may deem necessary or appropriate for the protection of investors.” 15 U.S.C. § 78l(b)(1)(L). Thus, the more specific provisions about financial data inform and restrict the more general power to issue rules as “necessary or appropriate in the public interest or for the protection of investors.” The term “public interest” is not an open vessel where SEC regulators can impose their political agenda on the regulated community.

**Section 13 (15 U.S.C. § 78m)** requires companies to file with the SEC supporting documents for their registration statements and annual reports “as the [SEC] may prescribe.” Both filings must be done “in accordance with such rules and regulations as the [SEC] may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security.” 15 U.S.C. § 78m(a). It also allows the SEC to prescribe the “form” that these reports are to take, including the “items or details to be shown in the balance sheet and the earnings statement, and the methods to be followed in the preparation of reports, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income.” *Id.* at § 78m(b)(1).

Not surprisingly, the statute requires companies filing these reports to keep accurate books that “fairly reflect the transactions and dispositions of the assets of the issuer.” They must also “devise and maintain a system of internal accounting controls” with various safeguards, such as ensuring that transactions are executed in accordance with management’s general or specific

authorization.” *Id.* at § 78m(b)(2)(B)(i). Thus, Section 13’s focus on **financial data** informs what Congress meant when it authorized the SEC to promulgate rules for filing registration statements and annual reports.

**Section 15 (15 U.S.C. § 78o)** requires brokers and dealers to file registration statements. The SEC may determine the contents of these registration statements and may require information that is “necessary or appropriate in the public interest or for the protection of investors.” But given that registration statements pertain to financial data, Section 13 should be construed as only authorizing those types of disclosures.

**Section 23(a) (15 U.S.C. § 78w)** gives the SEC general power to issue rules “as may be necessary or appropriate to implement the provisions of [the Exchange Act].” 15 U.S.C. § 78w(a)(1). But the SEC must consider “competition” when making rules and not adopt a rule that imposes a “a burden on competition not necessary or appropriate in furtherance of the purposes of” the Exchange Act. *Id.* at § 78w(a)(2). Again, this general power should be construed in light of the more specific provisions dealing with the disclosure of financial data and no other types of information or data, particularly uncertain climate-risk assessments.

Lastly, **Section 36 (15 U.S.C. § 78mm)** gives the SEC the power to exempt people and companies from the Exchange Act’s requirements and regulations. But the power to create

exemptions to rules compelling disclosure of financial data is not the power to compel disclosure of other types of data.

The conclusion that the Congress intended the SEC to require disclosure of only traditional **financial data** is further strengthened by the fact that when Congress wanted the SEC to promulgate disclosure rules **unrelated** to financial data, it did so explicitly.

For example, in 2010, Congress amended Section 13 to require that the SEC promulgate regulations forcing certain companies to make “[d]isclosures relating to conflict minerals originating in the Democratic Republic of the Congo.” *Id.* at § 78m(p). Thus, if “conflict minerals are necessary to the functionality or production of a product manufactured” by a company, it must disclose the minerals that are not “conflict free,” meaning that they did not “directly or indirectly finance or benefit armed groups in the Democratic Republic of the Congo or an adjoining country.” *Id.* at §§ 78(p)(1)(A)(ii), 78(p)(1)(D), 78(p)(2)(B). If Congress believed that the Exchange Act already authorized the SEC to compel disclosures on moral issues like defunding armed groups in Congo, it would not have added this provision to Section 13.

### **C. *Alabama Association of Realtors v. CDC Shows That The Securities Act And The Exchange Act Do Not Authorize The Disclosure Rule.***

The SEC’s reliance on broadly worded portions of the Securities Act and the Exchange Act cited above is similar to the Centers for Disease Control and Prevention’s (CDC) reliance on a broadly worded portion of a public health statute in *Alabama Association of Realtors v. CDC*. 141 S. Ct. 2485 (2021). There, the CDC issued a nationwide eviction moratorium. *Id.* at 2486. For its statutory authority, the CDC relied on the first sentence of a section of the “Public Health Service Act” that allowed the CDC “to make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries” into the U.S. or between one state to another. *Id.* at 2487 (quoting 42 U.S.C. § 264(a)). Yet the next sentence said that “[f]or purposes of carrying out and enforcing such regulations, the [CDC] may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in [its] judgment may be necessary.” *Id.*

The Supreme Court held that the moratorium was unlawful. It reasoned that the “second sentence informs the grant of authority by illustrating the kinds of measures that could be necessary. *Id.* at 2488. It explained that those measures “directly relate” to preventing disease spread, but the moratorium did so “far more indirectly” *Id.* It concluded that the “downstream connection between eviction and the interstate spread of disease is markedly different from the direct targeting of disease that characterizes the measures identified in the statute.” *Id.* at 2488.

This reasoning also applies to the Disclosure Rule. Although there are certain provisions in the Securities Act and the Exchange Act that seem to give the SEC broad authority, they are almost always associated with more specific provisions that refer to traditional financial information. For example, while Section 13 of the Exchange Act allows

the SEC to require companies to make reports “in accordance with such rules and regulations as the [SEC] may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security” (15 U.S.C. § 78m(a)), other provisions in that section refer more specifically about the SEC prescribing “items or details to be shown in the balance sheet and the earnings statement.” *Id.* at § 78m(b)(1). Thus, the types of reports the SEC can compel relate to traditional financial information and **not** speculative climate-risk and environmental information.

Indeed, the only subject **not** relating to traditional financial information in Section 13 (or any of the sections the SEC cites) as previously discussed is the disclosure of the use of “conflict minerals” that finance armed groups in the Congo. The fact that Congress specifically mentioned that in an amendment several decades after the Exchange Act’s enactment shows that Congress did not think the SEC had this authority before 2010. Additionally, Congress has enacted specific statutes authorizing—not the SEC—but the EPA to collect reports about emissions in certain circumstances. Vollmer, *supra* note 3, at 2 & n.3 (citing 42 U.S.C. § 7414).

To be sure, the SEC could claim that shaming companies into fighting “climate change” is “for the proper protection of investors,” by arguing that climate change in the long term will destroy the world and, therefore, impacts a company’s financial data, but under *Alabama Association of Realtors* that attenuated reasoning fails. Congress already provided examples of what is necessary to protect investors by requiring companies to have accurate balance sheets. Thus, it intended that factors that **directly impact** a company’s financial performance. It was not thinking of something indirect like how one company’s GHG emissions may affect the climate and harm its long-term profitability. Such a downstream connection between climate change disclosures and protecting investors is in stark contrast to the balance sheet-type disclosures that directly protect investors and that are listed in Section 13.

**D. The “Major Questions Doctrine” Shows That The Disclosure Rule Is The Type Of Question Of Vast Political And Economic Significance That Congress Did Not Implicitly Delegate To The SEC. Indeed, Pending Climate Disclosure Legislation Is Evidence That There Was No Such Delegation.**

. Under the Major Questions Doctrine, courts “expect Congress to speak clearly when authorizing an agency to exercise powers of “vast ‘economic and political significance.’” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (quoting *Utility Air Regulatory Group v. EPA*, 573 U. S. 302, 324 (2014)); *see also Brown & Williamson*, 529 U.S. at 160. The doctrine shows that Congress’ silence on the SEC’s ability to compel climate change disclosures is fatal to the legality of the Disclosure Rule.

In fact, in 2018, Senator Elizabeth Warren and her colleagues proposed legislation, “**The Climate Risk Disclosure Act**,” that would expressly require public companies to disclose their climate-related risks to the SEC.<sup>5</sup> When Congress did not enact the bill, Senator Warren

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<sup>5</sup> See <https://www.warren.senate.gov/newsroom/press-releases/warren-colleagues-unveil-bill-to->

reintroduced the legislation in 2021.<sup>6</sup> On the House side, Representative Sean Casten and his colleagues introduced a companion bill **H.R.2570 - Climate Risk Disclosure Act of 2021**. While the House passed the bill,<sup>7</sup> it is not expected to pass the Senate or enacted into law. In any event, the pending legislation clearly demonstrates that the Congress **never** gave power to the SEC to enact such momentous and significant reporting requirements by unelected regulators but intended that it be fully debated and enacted into law by duly elected representatives. The SEC cannot do an end-run around Congress’s authority by this rulemaking.

The Disclosure Rule’s significance mirrors the significance of the eviction moratorium in *Alabama Association of Realtors*. In that case, an additional reason for the Court striking the down the eviction moratorium was its reliance on the “Major Questions Doctrine.” The Court explained that the CDC lacked statutory authority because “[e]ven if the text were ambiguous, the sheer scope of the CDC’s claimed authority under [its statute] would counsel against the Government’s interpretation.” 141 S. Ct. at 2489. It noted that since the statute’s “enactment in 1944, no regulation premised on it has even begun to approach the size or scope of the eviction moratorium.” *Id.*

This reasoning also shows that the Disclosure Rule must fail. Since the 1930s when Congress enacted the Securities Act and the Exchange Act, the SEC has never claimed the broad authority to mandate that publicly listed companies make general disclosures about the environmental impact their companies or those in its supply chain may have on their operations and products. Rather, many companies have voluntarily disclosed such information in order to attract investors who care about such matters, regardless of the profitability of the company.

This absence occurred despite the environmental “crises” that led Congress to pass a slew of statutes in the 1960s and 1970s, such as the Clean Air Act and Clean Water Act, and even to create an entire agency (EPA) dedicated to regulating pollution. The concept of “climate change” has also been around since the 1970s at least.<sup>8</sup> Yet the SEC waited until over a half century to propose the Disclosure Rule.

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require-every-public-company-to-disclose-climate-related-risks

<sup>6</sup>See <https://www.warren.senate.gov/newsroom/press-releases/warren-casten-colleagues-reintroduce-bill-requiring-public-companies-to-disclose-climate-related-risks>

<sup>7</sup> <https://casten.house.gov/media/press-releases/casten-s-climate-risk-disclosure-act-passes-house>

<sup>8</sup> See Mark J. Perry, *18 spectacularly wrong predictions made around the time of first Earth Day in 1970, expect more this year*, Am. Enter. Inst. (Apr. 21, 2019) <https://www.aei.org/carpe-diem/18-spectacularly-wrong-predictions-made-around-the-time-of-first-earth-day-in-1970-expect-more-this-year-3/>

Also, the Disclosure Rule is vast in scope because of the significant economic consequences it will produce. Many commenters have described the economic impact this rule would have on businesses, especially smaller ones.<sup>9</sup> The Disclosure Rule coerces companies into doing more to combat climate change by shaming them through their disclosures. If companies respond to this pressure by switching to more expensive energy sources or curtailing their activities and outputs, then that will likely result in lower wages, lower profits, and lower returns to shareholders. In the aggregate, this will cause massive harm throughout the nation's economy. Courts should not assume that Congress implicitly delegated such policy tradeoffs to the SEC.

*Utility Air Regulatory Group* further shows that these economic consequences counsel against interpreting the SEC's statutes as authorizing the Disclosure Rule. In *Utility Air Regulatory Group*, the Court held that the EPA exceeded its statutory authority by requiring even small sources of green-house gas emissions to receive a permit. 573 U.S. at 333. The Court reasoned that this meant that the "number of sources required to have permits would jump from fewer than 15,000 to about 6.1 million; annual administrative costs would balloon from \$62 million to \$21 billion; and collectively the newly covered sources would face permitting costs of \$147 billion." *Id.* at 322. The Court concluded that this "interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Id.* at 324. The Court cited the Major Question Doctrine: "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

*Utility Air Regulatory Group*'s reasoning also shows that the SEC's statutes do not authorize the Disclosure Rule, given its "enormous and transformative expansion" of the SEC's powers. The Rule's vast economic impact in terms of compliance costs and economic consequences is further proof that the Disclosure Rule touches a subject of such economic significance that it does not make sense to assume that Congress delegated it to the SEC without a clear statement to that effect.

In addition, several commenters agree that the Disclosure Rule exceeds the SEC's statutory authority. Besides the Statement of Commissioner Hester Peirce, *supra*, n.1, see also Jacqueline M. Vallette & Kathryn M. Gray, *US SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges*, Mayer Brown (April 21, 2022)<sup>10</sup>; Andrew N. Vollmer, *The SEC Lacks Legal Authority to Adopt Climate-Change Disclosure Rules*,

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<sup>9</sup> See, e.g., Davis Polk Comments at 4 (June 9, 2022) (compliance costs will be excessive and deter smaller companies from registering with the SEC and being able to have access to the capital markets); U.S. Senators Comments (June 10, 2022) (describing harm s to the agricultural industry)

<sup>10</sup> <https://www.mayerbrown.com/en/perspectives-events/publications/2022/04/us-secs-climate-risk-disclosure-proposal-likely-to-face-legal-challenges#Eleven>

Mercatus Ctr. (Aug. 2021);<sup>11</sup> Jonathan D. Brightbill & Jennifer Roualet, *Evaluating Challenges To SEC’s ESG Disclosure Proposal*, Winston & Strawn LLP (Aug. 25, 2021).<sup>12</sup> Several of these commentators also argue that the Disclosure Rule violates the Administrative Procedure Act because it is arbitrary and capricious and that it violates the First Amendment because it is compelled speech.

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In sum, the Disclosure Rule exceeds the SEC’s authority to compel climate-related disclosures and is otherwise arbitrary, capricious and contrary to law under the APA.

## **II. CORPORATIONS ALREADY DISCLOSE “MATERIAL RISKS” UNDER SEC RULES, REGARDLESS OF CAUSE OR SOURCE**

As Andrew N. Vollmer, senior affiliated scholar for the Mercatus Center at George Mason University, explained regarding the Securities Exchange Act disclosure requirements in his Public Interest Comment<sup>13</sup>:

The Proposal attempts to fit the climate-change disclosures into standard, traditional SEC disclosure rules for issuing and reporting companies. It says that disclosures about “climate-related risks present financial consequences that investors in public companies consider in making investment and voting decisions” and are squarely within the SEC’s authority to require in the public interest and for the protection of investors. Climate-related physical and transition “risks can affect a company’s business and its financial performance and position,” and disclosures on “climate-related risks public companies face would serve both investors and capital markets.”

The problem with these claims is that existing SEC disclosure rules already cover nearly all of what the new disclosure rules would address. The current disclosure rules for issuing and reporting companies in regulations S-K and S-X comprehensively cover the areas of company information of interest to investors. When global warming or other environmental issues, including transition risk, affect or threaten the operations or financial performance of a specific company, many of the existing disclosure rules require discussion of the effects.

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<sup>11</sup> [https://www.mercatus.org/system/files/vollmer\\_-\\_policy\\_brief\\_-\\_does\\_the\\_sec\\_have\\_legal\\_authority\\_to\\_adopt\\_corporate\\_disclosure\\_rules\\_on\\_climate\\_change\\_-\\_v1.pdf](https://www.mercatus.org/system/files/vollmer_-_policy_brief_-_does_the_sec_have_legal_authority_to_adopt_corporate_disclosure_rules_on_climate_change_-_v1.pdf)

<sup>12</sup> <https://www.winston.com/en/winston-and-the-legal-environment/evaluating-challenges-to-secs-esg-disclosure-proposal.html>

<sup>13</sup> Vollmer, Andrew N.; “The Sec Lacks Legal Authority To Adopt Climate-Change Disclosure Rules,” Comment submitted to SEC (Apr. 12, 2022); <https://bit.ly/3kUfRA1> .

Most major U.S. corporations already have extensive departments to address Environmental, Social and Governance investor concerns, and engage consistently with those parties. Additionally, many of those same companies produce annual disclosures that specifically report risks associated with climate trends and projections.

For example, Bank of America Corporation maintains a Task Force on Climate-Related Financial Disclosures, and has produced a report<sup>14</sup> titled, “Responsible Growth and a Low-Carbon Economy.” Similarly, Apple Inc. issues an annual “Climate Change” report that discloses its impacts and risks – its 2021 edition<sup>15</sup> provided 46 pages of detail. In the same vein last year, The Coca-Cola Company delivered 66 pages of information<sup>16</sup> about its climate impacts.

Disclosures such as these are provided as companies determine whether they are sufficiently material to the operations and financial performance of their companies, or do so voluntarily.<sup>17</sup>

#### **A. Existing ‘Science’ Behind Climate Modeling Is Deeply Flawed And Fails To Account For Other Factors Affecting Climate**

Standards and goals that have been established and widely disseminated have dubious origins not grounded in science. For example, the broadly accepted goal of limiting global temperature increase to two degrees Celsius above preindustrial levels was not arrived at by the result of any scientific research or analysis, but instead was reached by random assumptions fueled by political considerations.

As Ted Nordhaus of the Breakthrough Institute recalled<sup>18</sup> in *Foreign Affairs* in February 2018:

My uncle, the Yale University economist William Nordhaus, is widely credited with being the first person to propose that climate policy should strive to limit anthropogenic global warming to two degrees above preindustrial temperatures. He didn’t arrive at that

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<sup>14</sup> <https://bit.ly/3xqv0jw>.

<sup>15</sup> <https://apple.co/39dZHzh>.

<sup>16</sup> <https://bit.ly/3moVegk>.

<sup>17</sup> For an excellent analysis of the history of SEC’s regulation of climate disclosure, see Lawrence A. Kogan, Esq. *Exporting Precaution: How Europe’s Risk-Free Regulatory Agenda Threatens American Free Enterprise* 71-78 (Washington Legal Foundation Monograph) (2005) <https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/110405MONOKogan.pdf>.

Moreover, NLPC submits that the Disclosure Rule fails to comply with the Information Quality Act. See generally, Lawrence A. Kogan, Esq. *Revitalizing The Information Quality Act As A Procedural Cure For Unsound Regulatory Science: A Greenhouse Gas Rulemaking Case Study* (Washington Legal Foundation Working Paper) (Feb. 2015) [www.wlf.org/upload/legalstudies/workingpaper/2015Kogan.pdf](http://www.wlf.org/upload/legalstudies/workingpaper/2015Kogan.pdf)

<sup>18</sup> Nordhaus, Ted. “The Two-Degree Delusion,” February 8, 2018, *Foreign Affairs*. <https://fam.ag/3NwL0Xa>.

conclusion through any sort of elaborate climate modeling or cost-benefit analysis. Rather, he considered the very limited evidence of long-term climate variance available at that time and concluded that a two-degree increase would take global temperatures outside the range experienced by human societies for the previous several thousand years and probably much longer. **The standard was, by his own admission, arbitrary.**

In the decades that followed, the international community formalized his target through a series of UN conferences, assessments, and negotiations. (emphasis added).

Email communications that uncovered the “Climategate” scandal of the mid-2000s, further revealed the flimsy foundation for a two-degree limitation that has been established to protect the planet from a projected climatological catastrophe. In 2007, Phil Jones, former director of the Climatic Research Unit in the School of Environmental Sciences at the University of East Anglia and a lead author on the UN’s IPCC Report, noted<sup>19</sup> to a colleague:

The 2 deg C limit is talked about by a lot within Europe. It is never defined though what it means. Is it 2 deg C for globe or for Europe? Also when is/was the base against which 2 deg C is calculated from? I know you don’t know the answer, but I don’t either! I think it is plucked out of thin air.

Fellow climate scientists have echoed Jones on the two-degree contrivance. Hans Joachim Schellnhuber, director of the Potsdam Institute for Climate Impact Research, said<sup>20</sup> in 2010, “Two degrees is not a magical limit—it’s clearly a political goal.” And climatologist Roger Pielke, Jr., expounding<sup>21</sup> on Nordhaus’s original “arbitrary” landing on the two-degree goal, attributed it to the economist’s simple “what if?” exercise.

“As is often the case, it is an arbitrary round number that was politically convenient,” Pielke wrote. “So it became a sort of scientific truth. However, it has little scientific basis but is a hard political reality.” The “science” that has largely fueled global warming alarmism and climate policy – in both public and private realms – is almost exclusively grounded in computer modeling of our atmosphere’s future. Rarely is the “science” based on firm, historical, observed data – and when it is, there are often problems and prejudices that affect “adjustments” to the data. Some observers call this a “garbage-in, garbage-out” result.

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<sup>19</sup> Morano, Marc. “The Politically Incorrect Guide to Climate Change,” Regnery Publishing (2018); <https://bit.ly/3H0sST6>.

<sup>20</sup> Evers, Von Marco, Stampf, Olaf & Traufetter, Gerald. “A Superstorm for Global Warming Research,” Der Spiegel, Jan. 4, 2010. <https://bit.ly/3NqDZqM>.

<sup>21</sup> Pielke, Jr., Dr. Roger; “Climatologist Traces History of The Meaningless 2-Degree Temperature Target,” Principia-Scientific International, Sept. 21, 2017. <https://bit.ly/395g2q9>.

But there are genuine problems with projections of future weather phenomena based on climate models, as five scientists explained<sup>22</sup> in a May 2022 article for the scientific journal *Nature*. They wrote:

We are climate modellers and analysts who develop, distribute and use these projections. We know scientists must treat them with great care. Users beware: a subset of the newest generation of models are ‘too hot’ and project climate warming in response to carbon dioxide emissions that might be larger than that supported by other evidence. Some suggest that doubling atmospheric CO<sub>2</sub> concentrations from pre-industrial levels will result in warming above 5 °C, for example. This was not the case in previous generations of simpler models.

Earth is a complicated system of interconnected oceans, land, ice and atmosphere, and no computer model could ever simulate every aspect of it exactly. Models vary in their complexity, and each makes different assumptions about and approximations of processes that happen on small scales, such as cloud formation.

Raising questions about “complexity,” “assumptions” and “approximations” are the very point of what most critics of climate alarmism have attempted to infuse the debate with. Nonetheless, those who challenge such assumptions are often dismissed by anti-fossil fuel activists, sympathetic politicians, and sycophant media as “deniers” unworthy of serious consideration.

As the *Nature* authors note, earth is a “complicated system,” and so is its climate. Therefore, multiple atmospheric phenomena besides the demonized “greenhouse gases,” produced by fossil fuels, affect global temperature average – and many scientists argue other factors influence temperatures and weather phenomena far more than gases like carbon dioxide and methane. Many credible scientists – who don’t get the professional recognition from sensationalist media like catastrophe promoters do – contend that solar activity, cloud cover, jet streams, water vapor, pollution, volcanic activity, land use, and other variables greatly affect the data. So also does poor placement of temperature measuring instruments affect data accuracy.<sup>23</sup>

This highly disputed, shaky foundation upon which asserted future climate catastrophe is built is simply not justified based on real, scientific observation. Following this logically, then, establishing an additional SEC regulatory regime – especially when companies already make material risk disclosures under existing rules and do so as it pertains to climate – would be an additional, extremely costly, yet unnecessary compliance requirement.

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<sup>22</sup> Hausfather, Zeke; Marvel, Kate; Schmidt, Gavin A.; Nielsen-Gammon, John A.; & Zelinka, Mark; “Climate simulations: recognize the ‘hot model’ problem,” *Nature*, May 4, 2022. <https://go.nature.com/3Nuw0Zx>.

<sup>23</sup> Watts, Anthony; “New USGS study shows heat retaining concrete and asphalt have encroached upon US Climate Stations,” Sept. 22, 2016, WattsUpWithThat.com. <https://bit.ly/3O0xDow>.

Moreover, those companies who tout their carbon mitigating operations do not include other relevant offsetting factors. Consider, for example, General Motors EV vehicles, which are praised by green activist and the media for reducing carbon emissions for not using fossil fuels. What is not mentioned is that these electric vehicles run on electricity generated by coal-burning power plants as a clueless General Motors executive touting the Chevy Bolt soon found out in an embarrassing video.<sup>24</sup> In addition, the large batteries needed for these automobiles require mining rare earth metals that have a negative impact on the environment. So how “green” are these automobiles after all?

As SEC Commissioner Hester Peirce cogently observed in her dissenting statement::

With all due respect to my colleagues, society is in big trouble if we are looking to SEC lawyers, accountants, and economists to dictate how companies should address climate change.

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If the CEO’s compensation is tied to lower greenhouse gas emissions, she can forgo the focus on company financial value—so 20<sup>th</sup> century!—and spend her time following the proposal’s urging to convince suppliers to shift to electric transport fleets and customers to freeze their jeans instead of washing them.

\* \* \* \*

Investors will not be the only ones to suffer from the diversion of attention from financial to climate objectives. The whole economy, and all of the consumers and producers it sustains, could also be hurt. First, the proposal is likely counterproductive to the important concerns around climate change. Attempting to drive long-term capital flows to the right companies ex ante is a fool’s errand because we simply do not know what effective climate solutions will emerge or from where. Markets, if we let them work, are remarkably deft at solving problems of all sorts, even big problems like climate change, but they do so in incremental and surprising ways that are driven by a combination of chance, opportunity, necessity, and human ingenuity. (footnotes omitted).

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<sup>24</sup>Climate.News, *GM spokesperson Kristin Zimmerman admits 95% of “clean” energy to charge electric cars comes from COAL* (Feb. 7, 2021)

<https://www.climate.news/2021-02-07-gm-kristin-zimmerman-clean-energy-95percent-coal.html>

See also Scientific American, *Electric Cars Are Not Necessarily Clean: Your battery-powered vehicle is only as green as your electricity supplier* (May 11, 2016).

<https://www.scientificamerican.com/article/electric-cars-are-not-necessarily-clean/>

## **B. A Myriad Of Guidance ‘Standards’ That Need Measurement Will Create A Perpetually Disputed Enforcement Regime And Therefore A Nightmare Of Litigation Activity**

Several public policy groups, led by Competitive Enterprise Institute senior fellow Marlo Lewis, wrote in a June 2021 response<sup>25</sup> to SEC Acting Chair Alison Herren Lee’s questions<sup>26</sup> on climate change disclosures from three months earlier:

The climate risk disclosure movement is no mere chronicler of transition and liability risks but an active contributor. Politically, the function of climate risk disclosure is to extract confessions from fossil fuel companies that their business models are unsustainable in a carbon-constrained world. Such confessions could to some degree decapitalize and defund the companies, as investors and banks tend to shun businesses perceived to lack assets of durable value.

The confessions could also invite litigation by shareholder groups claiming the companies committed fraud by overpricing asset values in the past. Such litigation could further spook investors and lenders, causing additional capital flight. As capital and credit ratings decline, so would the companies’ ability to fend off legal and political predation. A death spiral is easily imagined in which pension funds, retirement accounts, and other owners of fossil-fuel company stock lose their shirts. In Climate-speak, this strategy is called “protecting shareholder value.”

## **C. Climate “Impacts” Are Global In Nature, And Thus Any SEC Standards Imposed On U.S. Corporations Will Be Unmeasurable And Unenforceable**

Mercatus Senior Fellow Vollmer writes that implementation of the proposed climate disclosure rule is not viable, and would be untethered to any actual, measurable emissions. This is even *further* removed from any financial materiality risks or impacts:

The rules as proposed would require companies to disclose their direct and indirect emissions of seven [greenhouse gases] measured in terms of carbon dioxide equivalents. These are discharges from the operations of the disclosing company that have effects outside the company, specifically “significant climate impacts.” Some information for the disclosures would necessitate data from third parties or not in the books and records of the company...

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<sup>25</sup> Comments of the Competitive Enterprise Institute, Caesar Rodney Institute, Committee for a Constructive Tomorrow (CFACT), Energy and Environment Legal Institute, FreedomWorks, Heartland Institute, National Center for Public Policy Research, and 60 Plus Association, June 11, 2021, <https://bit.ly/3kScERo>.

<sup>26</sup> Acting Chair Allison Herren Lee, Public Input Welcomed on Climate Risk Disclosures, March 15, 2021, <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>.

The reasoning to justify emissions disclosures is different from the purpose of the typical required disclosure. GHG emissions have no direct, immediate effect on a company. They are not like a decrease in revenue, an increase in salary expense, or the introduction of a new product. The effect on the company and the benefit of disclosure to investors are hypothetical and dependent on a series of contingent events. The SEC's justification for the disclosure is that governments, regulators, or consumers might take action against GHG emissions that might cause a negative financial effect at the company that might be significant to a reasonable investor. The reliance on this series of possibilities is on top of the reliance on the uncertain and imprecise methods for calculating GHG emissions. The chain connecting an undependable disclosure of GHG emissions to a material financial effect on the disclosing company is long and speculative...

The Proposal would require some larger filers to include an attestation from a third party of the company's GHG emissions report. Imposing that duty is well outside the boundaries of the SEC's statutory authority. The securities statutes do not allow the SEC to order companies to obtain and disclose a third-party attestation of GHG emissions.

The SEC justifies this rule by suggesting a large number of investors are clamoring for climate change disclosure. SEC lists several organizations that "demand" disclosure, but a cursory examination of the organizations and investors cited shows a minority of investors, most of whom are foreign. Foreign companies and international organizations do not have nor should have the power to compel U.S. regulation.

The organizations that demand climate change disclosure are by-and-large activists or activist investors. If American investors wish to impose regulations on American corporations, they should to engage in the democratic process to convince the American people and their elected representatives to pass legislation to require such regulations. As noted, legislation requiring such disclosure is pending before Congress. SEC should not help investment managers push a political agenda that their investors may or may not subscribe to. Many ESG funds exist that like-minded investors can invest in, but that choice should not be foisted upon all investors through an SEC rule to the detriment of businesses, investors, and the economy.

## CONCLUSION

As SEC Commissioner Peirce poignantly concluded in her dissenting statement:

Contrary to the hopes of the eager anticipators, the proposal will not bring consistency, comparability, and reliability to company climate disclosures. The proposal, however, will undermine the existing regulatory framework that for many decades has undergirded consistent, comparable, and reliable company disclosures. We cannot make such fundamental changes to our disclosure regime without harming investors, the economy, and this agency. For that reason, I cannot support the proposal.

For those same reasons and others presented in our comments, NLPC urges the SEC to withdraw the proposed rule and let Congress, through its elected representatives, debate and

decide whether to enact pending climate-risk disclosure legislation that would impose such a massive, unworkable, and costly disclosure requirement on the American economy.

Respectfully submitted,

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