

6/14/2021

Ms. Vanessa Countryman
Secretary
US Securities and Exchange Commission
100 F Suite NE
Washington DC 20549-1090
VIA EMAIL

RE: Proposed Plan to Craft Climate-Change Disclosure Mandates for US Issuers

Ms. Countryman,

I'm writing on behalf of Modern Networks IR LLC (trade name ModernIR) in response to the request for public comment¹ dated Mar 15, 2021, by then Acting Securities and Exchange Commission Chair Alison Herren Lee, about mandating climate-change disclosures for public companies.

ModernIR is the leading provider of quantitative equity Market Structure Analytics to US-listed public companies. These issuers spend billions of dollars² annually disclosing qualitative information to investors, even though data show fundamental investment drives just 9% of equity market volume today³.

In practical terms, dependence on what public companies say about themselves bears less and less on trading and investment decisions, yet the rules have not kept pace with these changes and ever greater disclosure burdens have been placed on issuers. It's cognitively dissonant and anachronistic.

We can debate whether requiring yet another compendium of disgorged data from public companies is the cynosure of confusion between busy and productive, or whether the dissection of business activities relative to the climate is akin to describing one's effect on the rising and setting sun.

That's not the matter here.

¹ <https://www.sec.gov/news/public-statement/lee-climate-change-disclosures>

² A report submitted by Rep Jeb Hensarling in support of the Fostering Innovation Act of 2015, HR 4139, estimated companies spend about 2.5% of revenue on compliance and related audit costs.
<https://www.govinfo.gov/content/pkg/CRPT-114hrpt588/html/CRPT-114hrpt588.htm>

³ 50-Day average for components of the S&P 500 as of June 20, 2021. Data from ModernIR behavioral analytics.

All of us – citizens, business leaders, executive-branch agencies, elected representatives, the judiciary – bear responsibility to understand, preserve, protect, and uphold the form of government that ensures our liberty and our free-market society. We don't have – or we're not supposed to, anyway – Government By Idea in the USA. We have a Constitution that separates and limits powers.

These considerations exist outside the realm of opinion, no matter how strident and sweeping a notion happening to lay hold of the populace in a moment may be, such as concern over climate change (which has been necessarily relentlessly changing since the planet's birth).

The Constitution of the United States says in Article I Section 1: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The word "legislative" means having the power to make laws. All federal lawmaking authority is vested in Congress. Any debate or disagreement?

Law by definition is a set of rules regulating the conduct of a society or community, which may be enforced with penalties. A mandate is an official authority to require an action. They are thus roughly the same.

Is the executive branch empowered to make laws? The Constitution says in Article II Section 3 that the President, the chief executive and head of the executive branch under which the Securities and Exchange Commission resides, is to "take care that the laws be faithfully executed."

No, the executive branch doesn't make laws or impose mandates. It's unequivocal in the manifest tenor of the Constitution that Congress makes the laws and the executive branch carries them out.

Returning to the Mar 15, 2021 request for comments, Ms. Lee said:

"In light of demand for climate change information and questions about whether current disclosures adequately inform investors, public input is requested from investors, registrants, and other market participants on climate change disclosure."

The public's interest in information doesn't empower the Commission to require disclosures, no matter how compelling the sociological or political climate around them.

Alexander Hamilton wrote in Federalist 78 – selling the Constitution to the populace – about how the government should respond to what he called momentary inclinations happening to lay hold of a majority:

*"Though I trust the friends of the proposed Constitution will never concur with its enemies, in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution, whenever they find it inconsistent with their happiness, yet it is not to be inferred from this principle, that the representatives of the people, **whenever a momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions**⁴; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually...."*

⁴ Emphasis ours.

That the Commission is comprised of appointed officials does not negate the instruction here. It means simply that the people can alter or abolish their government if they wish. But the government can do neither as that power springs solely from the people.

The record then is resounding in telling us the Commission has no authority to issue mandates on climate disclosures because it is not a lawmaking body and the people have not altered the Constitution.

Neither has the Congress acted to pass legislation empowering the Commission to institute mandates for participants of the National Market System including issuers – the Securities Act explicitly prohibits discrimination against any constituency including issuers by name – to make climate-change disclosures.

And where in the Constitution does Congress derive authority over the climate? The Constitution explicitly limits Congress's authority to the purposes outlined in Article I Section 8, and any added by amendment. Those powers are as follows:

- To regulate commerce with foreign countries, the States ratifying the Constitution, and Indian tribes.
- To establish a uniform rule of naturalization and uniform laws for bankruptcies.
- To coin money, set its value and the value of foreign money, and to set a standard of weights and measures, and to provide for punishing the counterfeiting of the securities and money of the country.
- To build post offices and post roads.
- To provide copyright protection in order to promote progress in arts and sciences.
- To create courts below the Supreme Court.
- To define and punish piracies and felonies on the high seas and offenses against the Law of Nations.
- To declare war, grant letters of marque and reprisal and make rules for captures outside our borders.
- To raise and support armies though for no term longer than two years.
- To provide and maintain a Navy, and to make rules for marshaling and training land and naval forces.
- To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions, and to organize, arm and train the militia and support the part of the militia that may be employed in the service of the United States, but the States appoint the officers and train the militia in the manner Congress prescribes.
- To exercise exclusive legislation in all cases whatsoever over the district serving as the seat of the United States Government.

Federal rules and expenditures related to climate-change do not exist in this list. The 9th Amendment to the Constitution prohibits the construction of these enumerated powers in ways that deny or disparage rights the people and the states have retained, and the 10th Amendment explicitly reserves to the states and the citizens any rights not enumerated.

While it may be observed that the largest part of the federal government's power behind its initiatives and spending now is not derived from enumerated powers anymore but seized in violation of Article I Section 8, and the 9th and 10th amendments, and the Article V amendment process, that condition-precedent does not justify further violations of the Constitution.

In sum, neither the Commission as an executive-branch agency executing the laws of the country nor the Congress as constrained by the plain text of the Constitution possesses the power currently to issue climate-change disclosure rules or laws.

Let me clearly stipulate: What I'm contending here should in no wise be construed as lack of care or concern for the condition of our planet or the essence of good stewardship. But altruism and ideas are not our form of government. We are a representative republic constrained by a charter.

We could amend that charter, the Constitution. There are 27 amendments thus far, with the last proposed in 1792 and ratified in 1992. If two-thirds of members of Congress agree that a power to regulate the climate is necessary, and three-fourths of the states concur – as Article V directs – then you may proceed after Congress legislates in accordance with its new powers.

Unless and until that solemn act occurs, however, it would be, as Alexander Hamilton wrote, a violation of the Constitution. We don't need lawyers to tell us. We can read the document.

No matter how altruistic the objective and the endeavor, if the rule of law still exists, the Commission must defer to it, and the Congress must defer to the Constitution, and the will of the people. We either have the rule of law emanating from our Constitution, or we don't.

If you choose contemporary zeitgeist over the Constitution, you will have done so knowingly and willfully.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Tim Quast', written in a cursive style.

Tim Quast
President and founder