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PUBLIC INTEREST COMMENT

THE SEC LACKS LEGAL AUTHORITY TO ADOPT CLIMATE-CHANGE DISCLOSURE RULES

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The Enhancement and Standardization of Climate-Related Disclosures for Investors
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Thank you for the opportunity to comment on the proposal of the Securities and Exchange Commission to require climate-change disclosures (Proposal).[1] I am a scholar with the Mercatus Center at George Mason University. I taught securities regulation at the University of Virginia School of Law, served as deputy general counsel at the SEC, and practiced securities law. The Mercatus Center is dedicated to bridging the gap between academic ideas and real-world problems and to advancing knowledge about the effects of regulation on society. This comment is not submitted on behalf of any other person or group.

The Proposal would create new, detailed, and extensive obligations for reporting companies and companies issuing securities to the public to make disclosures of climate-related information. The SEC apparently expects that, for the most part, the disclosures would operate in tandem with the existing disclosure obligations that issuing and reporting companies must meet.

My view is that the SEC does not currently have statutory authority to adopt the disclosure rules described in the Proposal, particularly the obligations to disclose and provide a third-party attestation of greenhouse gas (GHG) emissions.[2] If the SEC acts to compel climate-related disclosures without additional enabling legislation, the rules face a significant chance of being set aside by a reviewing court. The commission should not adopt a set of rules when its legal power to do so is in such substantial doubt.

1. Sec. and Exch. Comm'n, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Release Nos. 33-11042; 34-94478 (Mar. 21, 2022).
2. This comment is based on a Mercatus Policy Brief published in August 2021. ANDREW N. VOLLMER, DOES THE SEC HAVE LEGAL AUTHORITY TO ADOPT CLIMATE-CHANGE DISCLOSURE RULES? (Aug. 2021).

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This comment does not take a position on the desirability of requiring certain businesses to make public disclosures on topics related to climate change. Disclosure might be a good idea or a bad idea as a matter of public policy. The purpose of this comment is to question whether the SEC has legal authority under its current statutes to adopt mandatory climate-change disclosure rules. Congress, and not the SEC on its own, should decide whether and how the country should proceed on such mandatory public disclosures.

This comment begins with a reminder of why the SEC's need for a solid statutory basis for its actions matters to the US form of government. It then describes the usual but incomplete legal analysis of the SEC's power to issue disclosure rules that the SEC and proponents of climate-change disclosures use. The next sections look at the full picture of the statutory context surrounding the SEC's power to write disclosure rules and conclude that, with few exceptions, Congress limited that power to subjects closely bearing on the disclosing company's business, management, securities, and financial results. Key congressional reports for the Securities Act in 1933 and the Securities Exchange Act in 1934 and a 2016 SEC position confirm the statutory text and the conclusion that the SEC may not require climate-change disclosures without additional explicit legislative direction.

The comment then discusses the ways in which a set of mandatory disclosures on the effects of climate change differs from the type of company disclosures Congress has permitted the SEC to require. The final section discusses materiality and attempts to respond to some of the misunderstandings of the role of materiality in the debate about climate-change disclosure rules.

THE SEC'S NEED FOR STATUTORY AUTHORITY ON CLIMATE-CHANGE DISCLOSURE MATTERS

The need for the SEC to have an adequate statutory basis to adopt climate-change rules is not a legal technicality or a formalism. It is fundamental to the structure of the federal government. The absence of authority from Congress is fatal to agency regulations.

Responding to global warming and the effects of greenhouse gases on climate will test the institutions created in the Constitution. The key test will be for Congress. It must decide on the policies for the country and enact them into law with a reasonable level of detail and specificity. It must decide what approaches should be taken and which federal administrative agencies should have what powers.[3] Under the US system of self-government, a law attains its legitimacy and force because voters give their elected and accountable representatives in Congress the authority to pass binding rules.

Until Congress enacts appropriate legislation on climate change, federal agencies and courts will face their own tests. The president and federal agencies, frustrated by the lack of movement, direction, and progress in Congress, will feel an urge to act, but they must exercise restraint for the sake of democracy and ordered liberty. An agency that adopts a regulation before Congress has given explicit instructions in a statute acts on the personal views of a small number of unelected people and creates a high risk of implementing an arbitrary and subjective policy choice as law. Unauthorized agency action can preempt and prejudice the approach Congress might have wanted to take. It invites public criticism of partisanship and increases the risk of a seesaw of reversal and

3. *See* Gundy v. United States, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting) (stating that the need for Congress to give more detail in legislation "is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions").

retaliation when a different political party takes control of the White House and agency. Public confidence in government suffers.

To preserve the legitimacy and accountability of the lawmaking function, the SEC should respect the role of Congress in setting national policy and direction. A federal agency must stay within the bounds of its statutory authority.[4] Government by bureaucracy must not supplant government by the people.[5]

The courts, for their part, must be resolute in keeping the actions of agencies in check.[6] They must police the terms of the laws granting authority to administrative agencies. When an agency attempts to use a statutory power to address a problem, such as GHG emissions, the courts must fairly and objectively examine the statute to determine the scope of the powers Congress actually allowed. Sometimes an agency does have power from Congress to regulate or to require public reports of substances contributing to climate change, such as the EPA authority to regulate emissions of carbon dioxide as a GHG and to issue public reports of facility-level GHG emissions.[7] Agencies should be kept within those boundaries. The question for a reviewing court "is always whether the agency has gone beyond what Congress has permitted it to do."[8]

THE LEGAL ANALYSIS SUPPORTING THE SEC'S POWER TO ADOPT CLIMATE-CHANGE DISCLOSURES

The question of the SEC's statutory authority to issue new rules on climate-change disclosures therefore matters. Supporters of such disclosures assert that the SEC's rulemaking power is clear.

Those favoring broad SEC power to adopt disclosure rules claim the SEC may act after it follows two steps. First, the SEC must determine whether a disclosure rule is "necessary or appropriate in the public interest or for the protection of investors."[9] That phrase is in two of the statutes authorizing SEC disclosure rules: section 7(a) of the Securities Act and section 12(b) of the Securities Exchange Act.[10] Second, as required by statute, the SEC must consider several factors

4. *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, [2446] (2014) (stating that to avoid "a severe blow to the Constitution's separation of powers," an agency must act within the bounds established by Congress and may not rewrite statutory terms to suit its own sense of how a statute should operate); City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) ("No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*.") (emphasis in original); Stark v. Wickard, 321 U.S. 288, 309 (1944) ("When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted."); California Independent Sys. Operator Corp. v. FERC, 372 F.3d 395, 398 (D.C. Cir. 2004) (stating that a federal agency is a creature of statute, has no constitutional or common law existence or authority, and has "*only* those authorities conferred upon it by Congress") (emphasis in original).

5. *See* National Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661 (2022) (Gorsuch, J., concurring).

6. *See* Kathryn E. Kovacs, *Avoiding Authoritarianism in the Administrative Procedure Act*, 28 GEO. MASON L. REV. 573, 597 (2021) (discussing judicial review as a key part of the protections in the Administrative Procedure Act against growing power in the executive).

7. *See* Massachusetts v. EPA, 549 U.S. 497 (2007); *but see Util. Air Regul. Grp.*, 573 U.S. at 302; *see also Greenhouse Gas Reporting Program*, ENV'T PROT. AGENCY, https://www.epa.gov/ghgreporting (last updated July 16, 2021). The author is grateful to Joseph Grundfest for information about the EPA program.

8. *City of Arlington*, 133 S. Ct. at 1869.

9. *See, e.g.*, 15 U.S.C. §§ 77g, 78*l*, 78m, 78*o*.

10. 15 U.S.C. §§ 77g(a)(1), 78*l*(b)(1). Section 13(a) of the Securities Exchange Act has a similar phrase: "as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security." *Id.* § 78m(a). All three sections are discussed in more detail later in this comment. This comment does not address other disclosure areas such as disclosures in proxy solicitations or by investment companies. *Id.* §§ 78n, 80a-24, 80a-29.

when making a public interest determination: whether the rule will promote efficiency, competition, and capital formation.[11]

The SEC follows this approach in the Proposal:

> The Commission has broad authority to promulgate disclosure requirements that are "necessary or appropriate in the public interest or for the protection of investors." We have considered this statutory standard and determined that disclosure of information about climate-related risks and metrics would be in the public interest and would protect investors. In making this determination, we have also considered whether the proposed disclosures "will promote efficiency, competition, and capital formation."[12]

Supporters of climate-change disclosure rules also followed this approach when describing the legal prerequisites for issuing new disclosure obligations.[13] Petitioners for more SEC climate-change disclosures conclude that "the SEC has clear statutory authority to require disclosure of [environmental, social, and governance] information."[14]

Is that the end of the correct legal analysis? Does the SEC have the power and discretion to impose disclosure obligations related to securities on any topic as long as an acceptable case on public interest, investor protection, efficiency, and capital formation can be made? If so, the SEC's ability to require disclosures is nearly limitless because of the facial appeal of the claim that more information is better for investors and because convoluted connections between information and asset pricing can usually be made. The SEC could approve a rule ordering filing companies to disclose the locations of dog parks near corporate properties or the average number of sunny days each year at corporate offices. The SEC could insert itself into areas regulated by other federal agencies, requiring, for example, the disclosures needed in a consumer credit transaction other than a mortgage transaction or the disclosure of policies against sex discrimination in federally supported education programs.[15]

The appropriate legal analysis has two further steps. The first is to identify the method the Supreme Court uses to determine an agency's rulemaking power. The second is to apply that method to the statutes giving the SEC authority to write disclosure rules for issuing or reporting

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11. *See* 15 U.S.C. §§ 77b(b), 78c(f); *see also id.* § 78w(a)(2).
12. Proposal, *supra* note 1, at 7 (footnotes omitted); *see also* Sec. and Exch. Comm'n, Concept Release, Business and Financial Disclosure Required by Regulation S-K, 81 Fed. Reg. 23,918–19, 23,922 (Apr. 22, 2016) (S-K Concept Release) ("The Securities Act and the Exchange Act authorize the Commission to promulgate rules for registrant disclosure as necessary or appropriate in the public interest or for the protection of investors.").
13. *See* Letter from Cynthia A. Williams, Osler Chair in Bus. L., Osgoode Hall L. Sch., et al., to Brent J. Fields, Secretary, Sec. and Exch. Comm'n 3–6 (Oct. 1, 2018) (petitioning for rulemaking on ESG disclosures) (https://www.sec.gov/rules/petitions/2018/petn4-730.pdf); MADISON CONDON ET AL., MANDATING DISCLOSURE OF CLIMATE-RELATED FINANCIAL RISK 33–34 (2021); Virginia Harper Ho, *Modernizing ESG Disclosure*, UNIV. OF ILL. L. REV. (forthcoming) (manuscript at 22–23), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3845145 (finding that the SEC has broad power to adopt disclosure rules based on "economic rationales" but should have further congressional authority for disclosures with public policy or corporate behavioral goals); *see also* Allison Herren Lee, Comm'r, Sec. and Exch. Comm'n, Keynote Remarks at the 2021 ESG Disclosure Priorities Event: Living in a Material World: Myths and Misconceptions About "Materiality" (May 24, 2021) ("Indeed our statutory rulemaking authority under Section 7 of the Securities Act of 1933 gives the SEC full rulemaking authority to require disclosures in the public interest and for the protection of investors.").
14. Williams et al., *supra* note 13, at 3–6; *see also* CONDON ET AL., *supra* note 13, at 33–34.
15. *See* 12 C.F.R. § 1026.18 (regulation issued by Bureau of Consumer Fin. Prot.); *see* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30573 (May 19, 2020) (discussing section 106.8(b) on policy dissemination).

companies. Proceeding through these steps shows that the SEC's power to issue disclosure rules has subject-matter limitations and that a reviewing court is highly unlikely to accept that the SEC may adopt a disclosure rule on any topic, even if the rule is in the public interest and promotes efficiency, competition, and capital formation.

THE NEED TO IDENTIFY THE APPROPRIATE STATUTORY CONTEXT

The Supreme Court's normal and straightforward method of determining an agency's rulemaking power is to examine relevant statutes in their context and with a view to their place in the overall statutory scheme. Examining a word, phrase, or provision in isolation is not sufficient. The full statutory picture gives content and meaning to general rulemaking authority and to the use of general words, such as "public interest," in a statute.

The court explained its approach in a case deciding that the FDA did not have statutory authority to write regulations curbing tobacco use:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole . . . . In addition, we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.[16]

An example of this approach occurred when the court considered whether the Federal Power Commission (FPC) had the power to adopt a rule requiring power companies not to discriminate in their employment practices.[17] One argument in favor of the rule was that the FPC was charged with advancing the public interest and that ending employment discrimination was in the public interest.[18] The court agreed that eliminating employment discrimination was an important national goal but concluded that Congress had not granted the FPC the necessary authority.[19]

The court began its reasoning by observing that it had "consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation," which were expressed in a provision of the relevant acts.[20] Those purposes "give content and meaning to the words 'public interest'" in the acts.[21] "The use of the words 'public interest' in the [acts] is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge to

16. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000) (citations and quotation marks omitted); *see also* National Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661 (2022); AMG Capital Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1348-49 (2021); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 318–20, 321 (2014); Texas v. United States, 809 F.3d 134, 179–84 (5th Cir. 2015).
17. NAACP v. FPC, 425 U.S. 662 (1976).
18. *Id.* at 666.
19. *Id.* at 665.
20. *Id.* at 669, 670 n.5.
21. *Id.* at 669.

promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates."[22]

Just as general and vague statutory phrases such as "public interest" do not liberate an agency from the need to attend closely to statutory context and structure, the grant of general rulemaking authority does not either. The DC Circuit made this point in striking down an SEC rule:

> The controlling principle here is that [an] agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority. When an agency acts pursuant to its rulemaking authority, a reviewing court determines whether the resulting regulation exceeds the agency's statutory authority or is arbitrary and capricious. A court does not simply assume that a rule is permissible because it was purportedly adopted pursuant to an agency's rulemaking authority. Nor does a court presume that an agency's promulgation of a rule is permissible because Congress did not expressly foreclose the possibility.[23]

Statutory context and structure also often provide the congressional guidance and instructions to avoid an unconstitutionally indefinite delegation of legislative power. A court must construe the "statute to figure out what task it delegates and what instructions it provides."[24] General standards for agency action "derive much meaningful content from the purpose of [an] Act, its factual background, and the statutory context in which [it] appear[s]."[25] Reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole.[26]

The statutes giving the SEC the authority to adopt disclosure rules for issuing and reporting companies must be examined under these standards. Statutory context and structure are essential to an accurate interpretation of the SEC's power to require public disclosures, and the SEC commissioners should not adopt mandatory disclosures on climate-change issues without a fuller and more careful consideration of the agency's statutory authority.

STATUTORY CONTEXT FOR SEC DISCLOSURE OBLIGATIONS

The statutory context of the Securities Act and the Securities Exchange Act limits the SEC's power to issue disclosure rules to specific types of information closely related to the disclosing company's value and prospects for financial success. When listing the information an issuer or reporting company should disclose, Congress consistently has restricted the subjects to financial statements, core business information, directors and management, and a description of the securities being sold. Some exceptions exist, but Congress, not the SEC, has introduced those. As discussed in the final section of this comment, materiality is not an independent basis for an SEC disclosure rule.

The SEC claims expansive authority to make disclosure rules. In the Proposal, it cites sections 7 and 19(a) of the Securities Act and sections 12, 13, and 23(a) of the Securities Exchange

22. *Id.* at 670.
23. N.Y. Stock Exch. LLC v. SEC, 962 F.3d 541, 546 (D.C. Cir. 2020) (citations and quotation marks omitted).
24. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019).
25. Am. Power & Light Co. v. SEC, 329 U.S. 90, 104 (1946); *see also Gundy*, 139 S. Ct. at 2123.
26. *Gundy*, 139 S. Ct. at 2126; Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321 (2014).

Act,[27] as well as a few provisions of less direct relevance.[28] A look at the context of the statutes reveals significant limitations rather than broad, unconfined rulemaking power.

Section 7(a)(1) of the Securities Act says that a registration statement for a public offer must contain the information and documents specified in Schedule A of the act.[29] The House report explaining the main bill that became law summarizes the disclosures required by the 32 items in Schedule A as essential facts about the property in which a person would be investing, "essential facts concerning the identity and the interests of the persons with whom he is dealing or to whom the management of his investment is entrusted," and "essential facts in regard to the price and cost of the security he is buying and its relation to the price and cost of earlier offerings."[30]

The report mentions in particular that Schedule A required disclosure of basic financial statements and hidden interests that usually have not been revealed to buyers. The requirements were "designed to reach items of distribution profits, watered values, and hidden interests that usually have not been revealed to the buyer despite their indispensable importance in appraising the soundness of a security. A balance sheet that gives an intelligent idea of the assets and liabilities of the issuer and a profit and loss statement that gives a fair picture of its operations for the preceding three years must be certified by an independent public accountant."[31] The report also says, "The items required to be disclosed, set forth in detailed form, are items indispensable to any accurate judgment upon the value of the security" and to the proper direction of capital resources.[32] The SEC has said the items "in Schedule A are largely financial in nature and were intended to help investors assess a security's value."[33]

Congress has added two qualifications to the disclosures required by Schedule A. First, the SEC may, by rule, exclude some of the information if it concludes that the information is not necessary for adequate disclosure to investors in particular classes of issuers. Second, the SEC also may adopt rules to require a registration statement to include other information or documents as "necessary or appropriate in the public interest or for the protection of investors."[34]

27. 15 U.S.C. §§ 77g, 77s(a), 78*l*, 78m, 78w(a).
28. Proposal, *supra* note 1, at 469 (also citing sections 10 and 28 of the Securities Act and sections 3(b), 15, and 36 of the Securities Exchange Act); *see also* Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2,080, 2,126 (Jan. 11, 2021) ("The amendments contained in this release are being adopted under the authority set forth in Sections 7, 10, 19(a), and 28 of the Securities Act of 1933, as amended, Sections 3(b), 12, 13, 14, 23(a), and 36 of the Securities Exchange Act of 1934, as amended, and Sections 8, 24, 30, and 38 of the Investment Company Act of 1940, as amended."); Modernization of Regulation S-K Items 101, 103, and 105, 85 Fed. Reg. 63,726, 63,759 (Oct. 8, 2020) ("The amendments contained in this release are being adopted under the authority set forth in Sections 7, 10, and 19(a) of the Securities Act, as amended, and Sections 3, 12, 13, 15, and 23(a) of the Exchange Act, as amended."); Executive Compensation Disclosure, 71 Fed. Reg. 78,338, 78,349 (Dec. 29, 2006) ("We are adopting rule amendments pursuant to Sections 3(b), 6, 7, 10, and 19(a) of the Securities Act, as amended, Sections 12, 13, 14, 15(d) and 23(a) of the Exchange Act, as amended, Section 38 of the Investment Company Act, and Section 3(a) of the Sarbanes-Oxley Act of 2002."); *see also* S-K Concept Release, *supra* note 12, at 23,921 n.50 (citing sections 7, 10, and 19(a) of the Securities Act, 15 U.S.C. §§ 77g(a)(10), 77j, and 77s(a); and sections 3(b), 12, 13, 14, 15(d), and 23(a) of the Securities and Exchange Act, 15 U.S.C. §§ 78c(b), 78*l*, 78m(a), 78n(a), 78*o*(d), and 78w(a)).
29. 15 U.S.C. § 77g(a)(1). A different schedule applies to securities sold by foreign governments.
30. H.R. REP. NO. 73-85, at 18–19 (1933).
31. *Id.* at 7.
32. *Id.* at 3.
33. S-K Concept Release, *supra* note 12, at 23,921.
34. 15 U.S.C. § 77g(a)(1).

It is that second qualification that is often taken out of context to support broad SEC power to issue disclosure rules.[35] With an understanding of the detail and prominence of Schedule A and of the SEC's power to issue rules relieving a class of issuers of a Schedule A requirement, the sentence giving the SEC the ability to require additional disclosure takes on a different and much more circumscribed meaning: the SEC may supplement Schedule A for good reasons but should not stray far from it.

The House report warns that the exception was not to be the rule. "To assure the necessary knowledge for [an investor's] judgment, the bill requires enumerated definite statements. Mere general power to require such information as the Commission might deem advisable would lead to evasions, laxities, and powerful demands for administrative discriminations."[36]

Proponents of an expansive SEC disclosure rulemaking power also refer to the general rulemaking provision in section 19(a) of the Securities Act.[37] Those rules must be necessary "to carry out" the provisions of the Securities Act and, therefore, for purposes of disclosure in a registration statement, go no further than the more specific rulemaking provision in section 7(a)(1). The general rulemaking authority in section 23(a)(1) of the Securities Exchange Act is similarly limited and does not expand the specific disclosure rulemaking provisions in that act.[38] General rulemaking authority remains subject to statutory context.[39]

In addition, those who rely on section 19(a) generally neglect to discuss and quote the long passage in the statute after the initial grant of rulemaking power. The long passage is quoted in this note,[40] and its overwhelming emphasis is on disclosures of financial information such as the balance sheet and earnings statement and the preparation of accounts. According to the statute, these items are "among other things" the SEC may require and therefore are examples rather than limitations, but Congress undeniably wanted the primary object of the SEC's authority to be

35. *See* text accompanying notes 9–13.

36. *See* H.R. REP. NO. 73-85, at 7 (1933). The same construction applies to the SEC's disclosure power over prospectuses in section 10(a)–(c) of the Securities Act, although the ability to add disclosures is more understandable because the SEC had more power to shorten a prospectus. *See* H.R. REP. NO. 73-85, at 8 (1933).

37. 15 U.S.C. § 77s(a) ("The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this subchapter, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this subchapter.").

38. *See id.* § 78w(a)(1) ("The Commission [and certain other agencies] shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter for which they are responsible or for the execution of the functions vested in them by this chapter, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser, or different requirements for different classes thereof.").

39. N.Y. Stock Exch. LLC v. SEC, 962 F.3d 541, 546 (D.C. Cir. 2020).

40. 15 U.S.C. § 77s(a) provides as follows:

> Among other things, the Commission shall have authority, for the purposes of this subchapter, to prescribe the form or forms in which required information shall be set forth, 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, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

financial statement information. That preoccupation should be given weight when interpreting the SEC's power to add disclosure obligations.

The relevant Securities Exchange Act provisions, sections 12 and 13,[41] also emphasize financial and essential company information. Section 12 requires disclosures by companies that register securities for trading on a stock exchange or that have a certain number of equity shareholders and meet an asset test.[42] The statute gives the SEC power to adopt rules governing the information a company must disclose, but this SEC rulemaking power is expressly limited to 13 categories of information and documents. It provides that an application for this type of registration shall contain such "information, in such detail" as the SEC may by rule require "as necessary or appropriate in the public interest or for the protection of investors, in respect of" the specified categories.[43] The categories include the nature of the business; the terms of outstanding securities; descriptions of directors, officers, and major shareholders; material contracts; balance sheets; profit and loss statements; and other financial statements.[44] The House report for the Securities Exchange Act said the bill was not to give the SEC "unconfined authority to elicit any information whatsoever."[45]

The periodic reporting obligations in section 13 apply to the companies that have registered their securities because of size or exchange trading or that have had a Securities Act registration statement go effective.[46] Section 13(a) requires companies to disclose, in accordance with rules the SEC "may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security," (1) the information needed to keep reasonably current the information supplied to register securities under section 12 and (2) annual reports, certified by independent public accountants if the SEC requires, and quarterly reports.[47]

The statutory language allowing the SEC to issue rules for periodic reports of companies has no subject-matter restriction, but it must be read together with section 13(b)(1). Section 13(b)(1) states that the rulemaking power granted to the SEC for periodic reports covers certain subjects.[48] The subjects are accounting items, such as the details for a balance sheet and the methods to be followed in the valuation of assets and liabilities. In fact, section 13(a)(2) hinted that this is the case for annual reports because it provides that the SEC may require annual reports to be certified by independent public accountants. The House report for the Securities Exchange Act emphasizes

41. *Id.* §§ 78*l*, 78m.
42. *Id.* §§ 78*l*(a)–(b), (g)(1).
43. *Id.* § 78*l*(b)(1).
44. *Id.*
45. H.R. REP. NO. 73-1383, at 23 (1934).
46. 15 U.S.C. §§ 78m(a), 78*o*(d)(1).
47. 15 U.S.C. § 78m(a)(1)–(2).
48. *Id.* § 78m(b)(1) ("The Commission may prescribe, in regard to reports made pursuant to this chapter, the form or forms in which the required information shall be set forth, 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, and in the preparation, where the Commission deems it necessary or desirable, of separate and/or consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer . . . .").

that periodic company reports would provide financial and accounting information "to give some assurance that reports will not hide the true condition of the company."[49]

Over time, the SEC has issued disclosure rules that have loosely adhered to the statutory authorizations but that also have grown considerably in detail and complexity. In 1977, the SEC began a project to meld the disclosures required by the Securities Act and the Securities Exchange Act and create a common source and description of disclosures required in the two acts.[50] The result was Regulation S-K and, later, a separate set of rules for accounting and financial reporting called Regulation S-X.[51] Schedule A of the Securities Act provides the basis for many of the disclosure requirements in Regulation S-K,[52] as can be seen in the table of contents of the regulation.[53] The main subparts are business and property, securities, financial information, management and security holders, and, in a registered offering, use of proceeds, pricing information, and plan of distribution. The obligatory disclosures are broad and cover the aspects of a company that are of significance to investors.[54]

Other statutes in the Securities Act provide further context for the extent of the SEC's power to issue rules on disclosure. In these statutes, Congress sets the terms for types of offerings other than public offerings and for certain resale transactions and specifies the disclosure topics along with a grant of some amount of rulemaking power to the SEC. Time and again, when Congress has spoken about a company's disclosure obligations, it has consistently singled out essential information about the company's business, securities, management, financial statements, and securities offering process.[55]

Congress has taken two other kinds of actions indicating limitations on the SEC's ability to adopt disclosure obligations related to climate-change issues. First, Congress has used statutory authorizations to expand mandatory company disclosures beyond the topics already covered in the Securities Act and the Securities Exchange Act. Examples of such topics include corporate responsibility, corporate governance, and selected aspects of executive compensation.[56] Congress has required new disclosures on specific public policy concerns, such as conflict minerals and payments by resource extraction companies.[57] The SEC has therefore concluded that it is generally

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49. H.R. REP. NO. 73-1383, at 11–13, 24 (1934). The DC Circuit reviewed most but not all the statutes discussed in the text and said that the SEC was "given very broad discretion to promulgate rules governing corporate disclosure." Nat. Res. Def. Council v. SEC, 606 F.2d 1031, 1050 & n.26 (D.C. Cir. 1979).
50. *See* S-K Concept Release, *supra* note 12, at 23,918–22.
51. 17 C.F.R. pt. 229; *id.* pt. 210.
52. S-K Concept Release, *supra* note 12, at 23,921.
53. The *Electronic Code of Federal Regulations* has a table of contents for Regulation S-K at 17 C.F.R. pt. 229.
54. S-K Concept Release, *supra* note 12, at 23,924.
55. See 15 U.S.C. § 77c(b)(2)(G)(i) (requiring a company selling a small issue to disclose audited financial statements, a description of the business operations, its financial condition, corporate governance principles, and use of investor funds); *id.* § 77c(b)(4) (requiring a company selling a small issue to make continuing periodic disclosures about its business operations, financial condition, corporate governance principles, and use of investor funds); *id.* § 77d(d)(3) (requiring, in a resale transaction from a buyer of securities to an accredited investor, disclosure of information about the issuing company; its business, securities, officers and directors; information about payments to sell the securities; and various financial statements); *id.* § 77d-1(b)(1) (requiring, in a crowdfunding transaction, disclosures of information about the issuing company, its business, securities being sold and capital structure, officers, directors, and major shareholders, and use of proceeds).
56. S-K Concept Release, *supra* note 12, at 23,922.
57. *Id.* at 23,969–70.

not authorized to order disclosures relating to environmental, sustainability, or other social goals except in response to "a specific congressional mandate."[58]

That conclusion is correct. The SEC's disclosure rulemaking power is limited. Congress must act to expand public and issuing company disclosures beyond the fundamental areas covered in the Securities Act and the Securities Exchange Act before the SEC may promulgate implementing regulations. SEC adoption of climate-related disclosure rules in the absence of explicit enabling legislation would exceed the limitations on the rulemaking powers that the agency has itself recognized.

Second, Congress has not been entirely happy with what the SEC has done in Regulation S-K.[59] Congress used two enactments to express disapproval of the length and complexity of the disclosure rules and to instruct the SEC to modernize and simplify Regulation S-K. These actions are evidence that Congress does not favor unilateral SEC steps to expand the disclosure burdens of SEC-regulated companies. In the past 10 years, Congress has demanded fewer and simpler disclosure obligations, not more and more complicated ones.

The statutory context and structure and the other relevant evidence from Congress provide a strong basis for reliable conclusions about the scope of the subjects Congress wants to be part of SEC rules on mandatory company disclosures. Congress has been consistent in identifying essential information about a company's business; capital structure; directors, officers, and major shareholders; material contracts; balance sheets; profit and loss statements and other financial statements; the securities being sold; and other aspects of a securities offering. As the House report for the Securities Exchange Act says at one point, the SEC was not to have "unconfined authority to elicit any information whatsoever."[60]

Congress has also demonstrated that it prefers statutory mandates to authorize SEC disclosure rules in new policy areas and that it disfavors the growing burdens in the disclosure rules developed by the SEC. Those connected legislative concerns are further reasons that the SEC should not require new climate-related disclosures in SEC filings without explicit congressional direction.

This discussion of statutory context demonstrates that the SEC does not have statutory authority to adopt a disclosure rule resting solely on showings that a disclosure is necessary or appropriate in the public interest or for the protection of investors and that a disclosure promotes efficiency, competition, and capital formation. Investor demand and a desire for "consistent, comparable, and reliable" disclosures, which the Proposal frequently cites,[61] are not independent grounds for compelled disclosures. The federal securities laws impose subject-matter boundaries on the SEC's power to order company disclosures.

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58. *Id.* at 23,971.
59. Section 108 of the JOBS Act, Pub. L. No. 112-106, 126 Stat. 306 (2012), requires the SEC to review Regulation S-K to determine how it could be modernized and simplified and to reduce the costs and burdens of compliance for emerging growth companies. At the end of 2015, Congress ordered the SEC to revise Regulation S-K to reduce the disclosure burden on emerging growth companies and small issuers. Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 72002, 129 Stat. 1784, 1784 (December 4, 2015). Congress also ordered the SEC to conduct a study to determine "how best to modernize and simplify" the requirements in Regulation S-K "in a manner that reduces the costs and burdens on issuers while still providing all material information." *Id.* § 72003, 129 Stat. 1784, 1785 (2015).
60. H.R. REP. NO. 73-1383, at 23 (1934) (addressing the list of disclosure topics in section 12 for registration of securities for exchange trading).
61. *E.g.*, Proposal, *supra* note 1, at 7–8.

EXISTING STATUTES DO NOT AUTHORIZE SEC CLIMATE-CHANGE DISCLOSURES

Disclosure rules aimed at climate change would be different in several critical ways from traditional SEC disclosure rules that Congress has authorized. A discussion of four main differences follows.

DIFFERENT SUBJECT AND OBJECTIVE

A key distinction is that disclosures envisioned in the Proposal would have a subject and objective different from the disclosures Congress requires under the federal securities laws.

The subject of every disclosure in the Proposal is "climate-related risks" or GHG emissions,[62] which are not subjects Congress lists for disclosures to address. The main subjects Congress authorizes for disclosure are the business, financial performance, securities, and management of the disclosing company.

A principal objective of the Proposal is different from the purpose of the company disclosures in the current securities laws. In the existing statutes, Congress lists types of company-specific information to be made public to allow investors to value securities and direct capital resources.[63] The truth is that the objective of climate-change disclosures is predominately the policy goal of combating the causes of climate change and reducing fossil fuel emissions.[64] The disclosures would create incentives and disincentives to guide the behavior of corporations toward the policy goals of those advocating strong action against the causes of climate change.[65] Supporters of climate-change disclosures link the disclosures to reduced global emissions and "sustainable solutions":

- The Proposal explains that the proposed rules might affect firm behavior and refers to empirical evidence showing "that mandatory reporting of GHG emissions results in reduced aggregate reported emissions among affected firms."[66] Registrants "might respond to the proposed disclosures by devoting more resources to climate-related governance and risk management," might seek to decrease GHG emissions or minimize other negative effects, or might change some suppliers or disengage with some customers.[67]
- The Proposal is modeled in part on the recommendations of the Task Force on Climate-Related Financial Disclosure.[68] The task force argues that better disclosures help promote a smooth transition to a lower-carbon economy.[69]

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62. *Id.* at 481–94, 499–500.
63. *See* H.R. REP. NO. 73-85, at 2, 3 (1933); Jay Clayton, *Statement on Proposed Amendments to Modernize and Enhance Financial Disclosures*, SEC. AND EXCH. COMM'N (Jan. 30, 2020), https://www.sec.gov/news/public-statement/clayton-mda-2020-01-30 ("[O]ur disclosure-based regulatory regime is built largely around the provision by issuers of currently verifiable and largely historic issuer-specific information.").
64. *See* Harper Ho, *supra* note 13, at 20–21.
65. Amanda M. Rose, *A Response to Calls for SEC-Mandated ESG Disclosure*, 98 WASH. U. L. REV. 1821, 1843 & n.103 (2021) ("[A]dvocates for ESG disclosure clearly see it as a mechanism for promoting certain types of corporate behavior and discouraging others.").
66. Proposal, *supra* note 1, at 416.
67. *Id.* at 416, 419–22.
68. *Id.* at 36.
69. TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES, RECOMMENDATIONS OF THE TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES iii (June 2017) (arguing that better disclosures would "help investors engage with companies on the

- The leading advocate on the SEC for climate-change disclosure rules has said that "investors want to and can help drive sustainable solutions on" climate change issues. The "issues do not observe artificial distinctions between society and financial markets."[70]

This goal of mitigating climate change is a significant distinction between disclosures on climate change and the normal disclosures Congress has authorized the SEC to require. The Proposal seeks to use the securities disclosure system to advance a public policy goal extraneous to the federal securities laws. The different purpose of climate-change disclosures indicates they do not fall within existing SEC authority for disclosure rules.

The Proposal attempts to fit the climate-change disclosures into standard, traditional SEC disclosure rules for issuing and reporting companies.[71] 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.[72] Climate-related physical and transition "risks can affect a company's business and its financial performance and position,"[73] and disclosures on "climate-related risks public companies face would serve both investors and capital markets."[74]

The problem with these claims is that existing SEC disclosure rules already cover nearly all of what the new disclosure rules would address.[75] 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. In 2010, the SEC issued guidance about the application of the disclosure rules to climate-change matters and listed a variety of specific disclosure obligations that, depending on the particular circumstances of a company, could require disclosure of the effects of climate change developments.[76] For example, one item in Regulation S-K requires a company to disclose and discuss a trend or uncertainty that is reasonably likely to have a material positive or negative consequence for the company's liquidity, capital resources, or results of operations.[77] Another item requires disclosure of the role of the company's board of directors in risk oversight,[78] which is one of the recommended climate-change disclosures.[79]

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resilience of their strategies and capital spending, which should help promote a smooth rather than an abrupt transition to a lower-carbon economy").

70. Allison Herren Lee, then Acting Chair, Sec. and Exch. Comm'n, Keynote Address at A Climate for Change: Meeting Investor Demand for Climate and ESG Environmental, Social and Governance Information at the SEC (Mar. 15, 2021).

71. *See* Ann M. Lipton, *Not Everything Is about Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 531–57 (2020) (observing that advocates for disclosures on social issues such as climate change seek to accomplish particular policy goals but conceal that motivation and cast the demands in the language of investor protection and financial return to fit within the federal securities laws).

72. Proposal, *supra* note 1, at 9.

73. *Id.* at 11.

74. *Id.* at 13.

75. Current SEC rules do not require disclosure or attestation of GHG emissions. That part of the Proposal is discussed later in this comment.

76. Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290 (Feb 8, 2010).

77. 17 C.F.R. § 229.303(a).

78. *Id.* § 229.407(h).

79. *See* Proposal, *supra* note 1, at 100–101, 106–108.

Those who want more detailed and targeted climate-change disclosures have their criticisms of the 2010 guidance and current disclosure obligations.[80] Nonetheless, the analysis in the guidance is straightforward and sound, and the coverage of regulations S-K and S-X is sweeping. The genuine need for further climate-related disclosure rules to meet the aims of the federal securities laws is doubtful,[81] which the SEC essentially concedes.[82] The adequacy of the current disclosure obligations reinforces the conclusion that the real reason for the demands for more climate-change disclosure is to use the SEC to implement a climate-change agenda without a mandate from Congress.

ADDITIONAL VOLUME AND DETAIL OF DISCLOSURES

The volume and detail of the disclosures in the Proposal distinguish them from the disclosures that Congress already authorizes and that the SEC has implemented over many decades. Climate-change information would become a second, separate body of disclosures, which evidences the need for Congress to endorse them.

The disclosures in the Proposal are lengthy, specific, prescriptive, and complicated. Their common element is the single topic of climate change, and they are treated as additive to the SEC's existing and established disclosure obligations. New disclosure obligations in the Proposal would require companies to describe how they are organized to consider climate risks and opportunities and how climate issues affect strategy, business model, and outlook. Companies would need to report certain measurements in the financial statements, measure and disclose GHG emissions, and set up new management processes to prepare and verify the new disclosures. The Proposal would require a registration statement or annual report to have a separately captioned "Climate-Related Disclosures" section, although a registrant would be able to incorporate by reference information in other parts of the filed document.[83] Climate-change information would become a lengthy, second set of disclosures separate from or interspersed with the information responsive to the current disclosure obligations.

These factors are evidence of the magnitude of the potential change from the current system. Changes of such significance raise a question about the SEC's current legal authority to adopt systematic climate-change disclosures and are a reason that Congress should first give the necessary rulemaking power in express terms to the SEC.

The concerns with a new set of regulations of this magnitude make the regulations a candidate for the Supreme Court's major questions doctrine. Under the doctrine, courts look for clear authorization from Congress when an administrative agency embarks on a new and

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80. *See* Allison Herren Lee, *Public Input Welcomed on Climate Change Disclosures*, SEC. AND EXCH. COMM'N (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures#_ftnref6 (questioning whether the current disclosure approach is adequate and sufficiently consistent); Williams et al., *supra* note 13, at 2 (arguing that ESG disclosure in required SEC filings is episodic, incomplete, incomparable, and inconsistent).
81. *See* Hester M. Peirce, Comm'r, Sec. and Exch. Comm'n, We Are Not the Securities and Environment Commission -- At Least Not Yet (Mar. 21, 2022) (asserting that the Proposal lacks a "credible rationale for such a prescriptive framework when our existing disclosure requirements already capture material risks relating to climate change").
82. *See* Proposal, *supra* note 1, at 132, 355, 358 (stating "we agree that registrants are currently required to disclose material financial impacts on the financial statements" and claiming that the Proposal would provide only marginal benefits such as "better insights" or "a more detailed understanding").
83. *Id.* at 55.

expansive regulatory mission that has economic and political significance. Congress needs to have spoken directly when an agency claims power to regulate a substantial policy area.[84]

Congress has not spoken directly and plainly to give the SEC the power to write regulations requiring disclosure of climate-related information. To the contrary, questions about the country's response to climate change and, specifically, about climate-change disclosures by public companies continue to be important and contentious. Congress has not resolved its disagreements on climate legislation and has not enacted a statute directing public companies to make specific types of climate-related disclosures. Many questions and choices about climate-change disclosures need to be settled and should be addressed by Congress as the primary policy making institution in the government. If the SEC were to adopt the disclosure rules in the Proposal, it would be misusing general rulemaking powers that Congress provided decades ago for different purposes and possibly would be usurping or preempting decisions Congress would make.

The failure of Congress to act on a serious and urgent matter, such as setting a national policy to respond to global warming issues, does not justify an administrative agency decision to assert its own regulatory power. As the Supreme Court said in *FDA v. Brown & Williamson Tobacco Corp.*,

> [N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And [i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.[85]

DISCLOSURES THAT LOOK OUTWARD, NOT INWARD

The Proposal's plan to require reports of GHG emissions is different from traditional issuing and reporting company disclosures in a third way. The GHG emissions report mainly looks outward rather than inward. Outward-looking disclosures discuss the effect of the reporting company on the environment, markets, communities, and the like. Inward-looking disclosures discuss the effect of external environmental or climate developments, such as reduced demand for fossil fuels or the increased losses from wildfires or floods, on the reporting company's business, financial results, and plans.

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84. *See* National Fed'n of Indep. Bus. v. Dep't of Labor, 142 S. Ct. 661 (2022) (staying agency rule requiring large employers to enforce a vaccine and Covid-testing mandate because the relevant act empowered the agency to set workplace safety standards, not broad public health measures); Alabama Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021) (vacating stay of lower court decision because agency exceeded its authority in imposing nationwide moratorium on evictions of tenants in reliance on a decades-old statute that authorizes it to implement measures like fumigation and pest extermination); Paul v. United States, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (requiring express and specific delegation of authority from Congress for an agency to exercise regulatory authority over a major policy question of great economic and political importance); King v. Burwell, 576 U.S. 473, 485–86 (2015) (holding that the relevant statute does not authorize the IRS to determine that tax credits were available for certain health insurance exchanges); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (holding that the relevant statute does not authorize the EPA to require permits for motor-vehicle greenhouse gas emissions); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133, 159–60 (2000) (holding that the relevant statute does not authorize the FDA to regulate tobacco products); Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring in judgment) (stating that major national policy decisions must be made in the legislative process and not by an agency); Am. Lung Ass'n v. EPA, 985 F.3d 914, 959 (D.C. Cir. 2021) (collecting cases).
85. *Brown & Williamson Tobacco Corp.*, at 161 (quotation marks and citations omitted).

The types of disclosures Congress authorizes in the securities acts and the disclosure obligations currently in Regulation S-K mainly look inward. For example, a registrant must disclose how risks affect the company or its securities and must discuss the company's financial condition and results of operations, such as revenue, net sales, and expenses.[86] Some proposed climate-related disclosures also would involve discussion of climate effects on the company, but, as already discussed, Regulation S-K already largely covers that type of disclosure.

The rules as proposed would require companies to disclose their direct and indirect emissions of seven GHGs measured in terms of carbon dioxide equivalents.[87] These are discharges from the operations of the disclosing company that have effects outside the company, specifically "significant climate impacts."[88] Some information for the disclosures would necessitate data from third parties or not in the books and records of the company.[89] The disclosures therefore are outward looking.

The Proposal goes to great lengths to depict the GHG emissions disclosures as normal, traditional SEC disclosures about the business and financial prospects of the disclosing company. The Proposal argues that GHG emissions information is important to investment decisions because it can be useful in conducting transition risk analysis. Transition risk is an actual or potential negative effect on the business or financial statement items of a company from regulatory, technological, or market changes addressing the mitigation of or adaptation to climate changes, such as changes in law or policy or reduced market demand for a product.[90] Emission disclosures "would allow investors to identify registrants whose assets may be more likely to become obsolete or non-performing or lose economic value ahead of their anticipated useful life due to a potential transition to a lower-carbon economy."[91]

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.[92] The chain connecting an undependable disclosure of GHG emissions to a material financial effect on the disclosing company is long and speculative.

The outward look and the speculative nature of requiring disclosure of GHG emissions make that disclosure obligation different from nearly all other mandatory SEC disclosures. That is another reason to doubt that the SEC currently has authority to require a company to disclose GHG emissions.

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86. 17 C.F.R. §§ 229.105(b), 229.303(a).
87. Proposal, *supra* note 1, at 156–60.
88. *Id.* at 155.
89. *Id.* at 230, 232.
90. *Id.* at 62.
91. *Id.* at 365; *see also id.* at 39, 154–55, 162, 166, 172, 367–69.
92. *See id.* at 230.

The Proposal would require some larger filers to include an attestation from a third party of the company's GHG emissions report.[93] 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. When Congress wants to give the SEC power to order third-party verifications, it will do so explicitly in a statute, such as the securities statutes providing for the use of public accounting firms.[94] The SEC regulations cited in the Proposal as examples of the use of experts to review specialized quantitative data do not require third-party verification.[95]

DIFFERENT AGENCY EXPERTISE

A fourth difference between climate-change disclosures and traditional company disclosures that helps show that the SEC does not currently have legal authority to adopt disclosures on climate change is that the SEC lacks the expertise, knowledge, and experience to set the terms for climate-change disclosures. As the Supreme Court said in *King v. Burwell*, an agency's claim to regulate an area beyond its expertise is an indicator that the claim is not consistent with statutory purposes and design.[96]

The main experience and prowess of the SEC in the corporate disclosure area are specifying the elements and details of a company's business and finances that help investors evaluate the company's likelihood of successful financial performance. That is not what the Proposal does. It attempts to define—for purposes of corporate disclosure—threats, opportunities, and events from climate change that could affect a company's business and financial statements. The SEC and its staff of accountants, lawyers, and economists do not have scientific expertise or experience in these areas, in "GHG intensity,"[97] or in the indirect emissions upstream and downstream within a company's value chain that should be included in scope 3 GHG emissions.[98] The past work of the SEC and its staff does not qualify them to review the reasonableness or accuracy of these disclosures and does not put them in a position to make reliable and trustworthy judgments that an enforcement investigation or charge should be initiated against a disclosing company.[99]

THE ROLE OF MATERIALITY

The final topic in this comment concerns the concept of materiality, which has been used loosely for various purposes in the debate about mandatory climate-change disclosure rules. Some writers

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93. *Id.* at 225–32.
94. Financial statement items are subject to audit by an outside accounting firm. 15 U.S.C. § 77g(a)(1) sch. A(25)–(26); *id.* § 78m(a)(2). An outside accounting firm must attest to the management assessment of the procedures and controls on financial reporting. *Id.* § 7262(b).
95. *See* Proposal, *supra* note 1, at 231, 232 (citing SEC obligations to use qualified persons for mineral reserves, although the regulations permit a company employee to provide the reports).
96. *See* King v. Burwell, 576 U.S. 473, 486 (2015); *see also* Gonzales v. Oregon, 546 U.S. 243, 266–67 (2006).
97. Proposal, *supra* note 1, at 188–89.
98. *Id.* at 158.
99. *See* Hester M. Peirce, Comm'r, Sec. and Exch. Comm'n, We Are Not the Securities and Environment Commission -- At Least Not Yet (Mar. 21, 2022) (stating that "the regulators designing the framework have no expertise in capital allocation, political and social insight, or the science used to justify these favored ends"); Hester M. Peirce, Comm'r, Sec. and Exch. Comm'n, Remarks at the 17th Annual SEC Conference, Center for Corporate Reporting and Governance: My Beef with Stakeholders (Sept. 21, 2018) (arguing that regulators do not "have the requisite expertise to assess how well companies adhere to ESG standards and properly disclose whether their practices conform to those standards").

cite investor demand for climate-change information, conclude the information is therefore material, and assert that the materiality of the information is a sufficient ground for the SEC to exercise its power to impose new obligations to disclose the information.[100] Others believe that the SEC's mandatory disclosure regime is based on the Supreme Court's longstanding definition of materiality in the federal securities laws.[101] Another has equated the disclosure of material information with investor protection.[102]

The purpose of this section is to clarify the applicability of materiality in the climate-change disclosure discussion. First this section gives a general definition of materiality. Then it addresses some of the misunderstandings about materiality.

As a general proposition, information is material if there is a substantial likelihood that a reasonable investor would consider it important or significant in deciding whether to buy or sell a security or how to vote as a shareholder. When a relevant event is contingent or speculative, materiality will depend on a balancing of the probability that the event will occur and the anticipated magnitude of the event to the company. The standard of materiality should not be set too low. The materiality standard filters out information that an investor would not consider significant, protects investors from being buried in an avalanche of trivial information, and protects the company from a duty to collect and disclose every minor detail about its operations.[103]

The materiality standard has variations. The definition in the preceding paragraph is from Supreme Court cases concerning a company's liability for a false or misleading statement, but lower courts apply the definition in different ways.[104] The SEC has several definitions of materiality.[105]

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100. *See* Lee, *supra* note 80; Allison Herren Lee, *Statement on the Review of Climate-Related Disclosure*, Sec. and Exch. Comm'n (Feb. 24, 2021), https://www.sec.gov/news/public-statement/lee-statement-review-climate-related-disclosure ("It is our responsibility to ensure that [investors] have access to material information" on climate-related issues). Commissioner Lee has also discussed myths and misconceptions about materiality. *See* Lee, *supra* note 13.

101. Chamber of Commerce of the U.S., Comment Letter on Request for Information on Climate Change Disclosure, 2–4 (June 11, 2021), https://www.sec.gov/comments/climate-disclosure/cll12-8907271-244249.pdf; *see also* CONDON ET AL., *supra* note 13, at 12 ("The core standard for determining whether a piece of information must be disclosed under Regulation S-K is materiality.").

102. Williams et al., *supra* note 13, at 3, 6.

103. *See* Basic Inc. v. Levinson, 485 U.S. 224, 231–32, 234, 238 (1988); *see also* Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011); TSC Industries, Inc. v. Northway, Inc., 426 U. S. 438, 448–49 (1976).

104. *See, e.g.*, City of Pontiac Policemen's and Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 183 (2d Cir. 2014) (stating that general statements about reputation, integrity, and compliance with ethical norms are immaterial puffery); Litwin v. Blackstone Group, 634 F.3d 706, 717 (2d Cir. 2011) (rejecting a formulaic approach to assessing materiality and stating that courts must consider quantitative and qualitative factors); *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1425 (3d Cir. 1997) (stating that, in an efficient market, information is material when it alters the price of a company's stock).

105. *See* 17 C.F.R. § 210.1-02(*o*) ("material" means "those matters about which an average prudent investor ought reasonably to be informed"); 17 C.F.R. § 230.405 ("material" means "those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered"); 17 C.F.R. § 240.12b-2 ("material" means "those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered"); SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150 (1999) (quantitative and qualitative factors for financial statement materiality); Management's Discussion and Analysis of Financial Condition and Results of Operations, Exchange Act Release No. 6835, 43 SEC Docket 1330, at *6 n.27 (May 18, 1989) (stating that the probability and magnitude test does not apply to disclosure under item 303 of Regulation S-K).

The Sustainability Accounting Standards Board has its own definition of materiality.[106] Europeans have weighed in with the concepts of "double materiality" and "dynamic materiality."[107]

Materiality remains an important concept in the disclosure area despite the variations, but it does not bear all the weight being assigned to it in the debate about climate-change disclosures. The following principles limit the function of materiality.

1. The SEC does not have authority to impose a disclosure obligation solely because information is material. As discussed earlier, a disclosure rule must fall into one of the subject areas Congress wants to address and must be in the public interest or for the protection of investors, and the SEC must consider the likely effects of the rule on efficiency, capital formation, and competition. The materiality of information is not a separate and independent basis for a disclosure rule. The statutes for the SEC do not say that the agency may issue a rule to require a company to disclose any information that is material to investors or that investors demand.
2. The SEC may require disclosure of immaterial information. When the statutes permit the SEC to order company disclosures, the statutes do not also demand that an SEC rule apply only to material information. Some mandatory disclosures in Regulation S-K do not have a materiality qualifier, such as certain executive compensation information.[108]
3. A disclosing company does not have an obligation to disclose information solely because the information is material. Commissioner Allison Herren Lee usefully made this point in a speech.[109]

   The federal securities laws do not require a filing company to disclose all information material to potential investors. For the purposes of this comment, a company has a disclosure obligation when a federal securities statute or valid regulation specifies a particular subject or topic for disclosure or when a disclosure of additional (material) information is necessary to prevent another statement from being misleading.[110]
4. Many of the mandatory disclosure items in Regulation S-K specify a type of information and then add a materiality qualifier. For example, a company must disclose material physical properties, material pending legal proceedings, and material trends and uncertainties in liquidity and results of operations.[111]

   Materiality and the subjects for required disclosures are different. The subject and materiality of a disclosure are separate considerations. When a type of information that must be disclosed is modified with the word "material," two conditions must be satisfied: the discloser must have something to say about that item, and the information must be material.

106. *See* SUSTAINABILITY ACCT. STANDARDS BD., PROPOSED CHANGES TO THE SASB CONCEPTUAL FRAMEWORK & RULES OF PROCEDURE 7 (2020).
107. *See* David A. Katz & Laura A. McIntosh, *Corporate Governance Update: "Materiality" in America and Abroad*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (May 1, 2021), https://corpgov.law.harvard.edu/2021/05/01/corporate-governance-update-materiality-in-america-and-abroad/#more-137820.
108. *See* Lee, *supra* note 13, (stating that SEC disclosure rulemaking authority is "not qualified by 'materiality'"); Letter from Jill E. Fisch, Saul A. Fox Distinguished Professor of Bus. L., Univ. of Penn. L. Sch., & Cynthia A. Williams, Osler Chair in Bus. L., Osgoode Hall L. Sch., to Gary Gensler, Chair, Sec. and Exch. Comm'n, 13–14 (June 11, 2021) (https://www.sec.gov/comments/climate-disclosure/cll12-8911728-244385.pdf).
109. *See* Lee, *supra* note 13, ("There is no general requirement under the securities laws to reveal all material information.").
110. *See, e.g.*, 17 C.F.R. § 240.12b-20.
111. *See id.* §§ 229.102, 229.103, 229.303(a)(1)–(3).

5. Unless it has a good reason, the SEC should limit mandatory disclosures to material information. This is good disclosure policy because a materiality limitation protects investors from being inundated with irrelevant details. It also allows each company to tailor its disclosures to its own individual circumstances.

The principles operate in the following way. Say, for example, that reasonable investors want to know the number of dog parks within a half mile of the major properties of companies. For some reason, the investors think that information is extremely important to trading decisions. The companies would not be obliged to provide that information, even though it would satisfy a materiality test, unless a securities statute or valid disclosure rule were to require the company to address the number of proximate dog parks. Under current law, an SEC disclosure rule on dog parks would not be valid because it is outside of the types of information the securities statutes list for required public disclosure.

CONCLUSION

Even if climate-change information is material to investors, the SEC does not currently have statutory authority to make rules requiring companies to disclose it. Climate-change information is outside the scope of the subjects Congress has allowed the SEC to cover in disclosure rules, and adopting the Proposal would have a subject and objective different from the disclosure provisions in the federal securities laws. The requirements also would dominate the public disclosure process so much that they would, in effect, create a second disclosure regime.

None of this means that disclosure of climate-related risks or opportunities is a bad idea, and the purpose of this comment is not to take a position on the desirability of such disclosures. Disclosure might be a good idea or a bad idea as a matter of public policy. What is indisputable, however, is that Congress should make that decision and not the SEC on its own.