WORKING GROUP ON SECURITIES DISCLOSURE AUTHORITY
COMMENTS ON CLIMATE-RELATED DISCLOSURES FOR INVESTORS

June 16, 2022

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, Northeast
Washington, D.C. 20549-1090
File No: S7-10-22

Dear Ms. Countryman:

The Working Group on Securities Disclosure Authority respectfully submits these comments on the Commission's recent proposal related to mandated, standardized climate-related disclosures for investors. We write to make clear the view among experts in securities law that the Commission has statutory authority to promulgate disclosure rules in this area.

Our bipartisan Working Group is comprised of leading academics, former Commission officials, and market participants who have studied and overseen development of SEC rules for decades, including:

- Fifteen former senior SEC officials, including four SEC Chairs, five SEC Commissioners, five SEC General Counsel, and four Directors of the SEC's Division of Corporation Finance;
- Seventeen senior scholars of corporate, securities and administrative law, as well as accounting and finance, from top law and business schools across the Nation; and
- Leading practitioners who advise companies on their disclosure obligations under SEC rules.

We act in our individual capacities; our current and former institutional affiliations are noted for identification purposes only.

We differ in our views on the specifics of the Commission's proposal. Our Working Group's members may write to the Commission separately on whether, as a matter of policy, the proposal should be adopted or modified; those matters are beyond the scope of these comments.

Instead, we write to express our unanimous view the SEC has clear statutory authority to mandate additional climate-related disclosures for publicly traded companies. Some have argued that, because the Nation's approach to climate change is politically contested,[1] and since these matters affect major policy questions over which Congress has not granted the SEC new, explicit powers, the Commission lacks authority to require disclosure in this area.[2] For the reasons given below, the Commission should disregard these claims, focusing instead on the challenging policy choices that any finalization of the proposal would require. Our comments proceed as follows:

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[1] Andrew Vollmer, *Mercatus Center Policy Brief: Does the SEC Have Authority to Adopt Climate-Change Disclosure Rules?*, at 13 (August 2021) (because "questions about the country's response to climate change" "are major and contentious policy areas," any SEC rules in this area "would be misusing general rulemaking powers that Congress provided" to the SEC); Letter to SEC from Lawrence A. Cunningham et al. (April 25, 2022), at 17.

[2] We focus only on the Commission's authority to mandate disclosure at public companies. Questions about the Commission's authority regarding disclosure at private companies, the requirement that the SEC support regulatory decisions with adequate cost-benefit analysis, or the Commission's compliance with the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, are beyond the scope of these comments.

- First, we describe the history of SEC rules in this area, explaining that the SEC has long mandated public-company disclosure of environmental-related matters.
- Second, we present evidence on public-company disclosures consistent with issuers' understanding that the SEC has long had authority to take regulatory action in this area.
- Third, we explain why existing disclosures in this area provide support for, rather than reason to oppose, standardized, mandatory climate-related disclosures.
- Fourth, we explain why claims that the SEC lacks authority to mandate public-company climate-change disclosures are unwarranted.

We conclude that there is no legal basis to doubt the Commission's authority to mandate public-company disclosures related to climate.

HISTORICAL SEC RULEMAKING ON ENVIRONMENTAL-RELATED DISCLOSURE

SEC authority to mandate disclosures in this area is drawn from the Securities Act of 1933 and the Securities Exchange Act of 1934, which each "authorize the Commission to promulgate rules for registrant disclosure 'as necessary or appropriate in the public interest or for the protection of investors.'"[3] The Commission's broad authority to regulate the proxy voting process, found in Section 14(a) of the Exchange Act, outlaws proxy solicitations in contravention of such "regulations as the Commission may prescribe as necessary or appropriate in the public interest and for the protection of investors." As explained below, the SEC and practitioners have understood for years that these statutes authorize the Commission to mandate climate-related disclosure for public companies.

The SEC has mandated environmental disclosure at least as far back as the Nixon Administration. In a 1971 release, the SEC "called attention to the requirements" under the Securities Act of 1933 and the Securities Exchange Act of 1934 "for disclosure of legal proceedings and a description of the registrant's business as these requirements relate to material matters involving the environment and civil rights."[4]

Thus, nearly fifty years ago, the SEC concluded that environmental disclosure would "promote investor protection."[5] At the same time, the SEC found, such disclosure would "promote the purposes of" the National Environmental Policy Act of 1969 ("NEPA"), which was adopted months before President Nixon created the Environmental Protection Agency ("EPA"). That the SEC had authority to require that disclosure was not controversial. One future General Counsel and Chairman of the Commission wrote then that the SEC "should impose affirmative environmental disclosure requirements upon all corporate entities subject to its jurisdiction"; "[t]hat the Commission's authority is not so limited as to preclude such an approach," he thought, "is apparent from a reading of its statutory authority."[6]

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[3] *See, e.g.*, Sections 7, 10, and 19(a) of the Securities Act of 1933, 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 of 1934, 15 U.S.C. §§ 78c(b), 78l, 78m(a), 78n(a), 78o(d), and 78w(a); *see also* 15 U.S.C. § 78n(a) (voting and proxy authority).

[4] Disclosures Pertaining to Matters Involving the Environment and Civil Rights, Release Nos. 33-5170, 34-9252, 36 Fed. Reg. 13,989, 13989 (July 29, 1971) [hereinafter 1971 Release]; *see also* Theodore Sonde & Harvey Pitt, *Utilizing the Federal Securities Laws to "Clear the Air! Clean the Sky! Wash the Wind!,"* 16 HOWARD L.J. 831, 850 (1971). The SEC informed issuers not disclosing information under the 1971 Release that it would be "the practice of the Division of Corporation Finance to request registrants to furnish" to the SEC a "description of the omitted information" and a "statement of the reasons for its omission." 1971 Release at 13,989.

[5] Disclosure with Respect to Compliance with Environmental Requirements and Other Matters, Release Nos. 33-5386, 34-10116, 38 Fed. Reg. 12,100 (May 9, 1973) (citing NEPA, 42 U.S.C. §§ 4321 *et seq.*). These rules reflected growing issuer disclosures in this area. For example, in 1970 the Florida Power and Light Company, Armco Steel Corporation, and the Consolidated Edison Company all provided disclosures to investors regarding environmental matters. Sonde & Pitt, *supra* note 4, at 854 (citing Consolidated Edison Co., Inc., SEC File No. 2-38155 (Sept. 17, 1970) (noting issuer's commitment "to use 0.37% sulfur content fuel oil for its entire system").

[6] Sonde & Pitt, *supra* note 4, at 850.

In 1975, the SEC considered petitions for further disclosure mandates on environmental matters. After 19 days of public hearings producing a 10,000-page record, the Commission concluded that NEPA did not *require* the SEC to mandate such disclosures, and the courts later agreed.[7] While the SEC in the 1971 release had limited disclosure to "material matters," in 1975 the Commission mandated disclosure of all environmental proceedings to which a government was a party, whether or not the amounts at issue were material. The SEC explained:

> [W]e believe that NEPA requires and authorizes the Commission to consider the promotion of environmental protection along with other considerations in determining whether to require affirmative disclosures by registrants under the Securities Act and the Securities and Exchange Act . . . . [W]hile the disclosure of non-material information is generally not required for the reasons discussed [above], adding the promotion of environmental protection to the other factors considered by the Commission in the administration of the disclosure process causes a different balance to be struck here. . . .
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> . . . . By requiring a description of all such litigation, regardless of whether the amount of money involved is itself material, the Commission believes it has given recognition to both the importance of the national environmental policy and the far-reaching effects, both financial and environmental, of violations of environmental laws.[8]

Importantly, the SEC also concluded that Congress expected SEC disclosure authority to be used to "require the dissemination of information which is or may be economically significant" for investors. In 1975, the SEC found, "there [was] virtually no investor interest in voluminous information" related to climate.[9] That was true, in part, because there was no "uniform method by which the environmental effects of corporate practices may be described," and in part because "both the costs to registrants and the administrative burdens involved . . . would be excessive." But the Commission also made clear that the SEC's "broad discretion to require disclosure provides necessary latitude to expand or contract disclosure rules in light of changes in the relevant context in which securities issuers conduct their business."[10]

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[7] *Nat. Res. Def. Council* v. *SEC*, 606 F.2d 1031, 1051 (D.C. Cir. 1979) (Congress has given SEC "complete discretion" "to require in corporate reports" "such information as it deems necessary" "to protect investors," and "NEPA made environmental considerations part of the SEC's mandate").

[8] Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, Release No. 5627 (Oct. 14, 1975), at 3; Notice of Commission Conclusions and Final Action on the Rulemaking Proposals Announced in Securities Act Release No. 5627 Related to Environmental Disclosure, Release No. 5704 (May 6, 1976), at 7.

While the courts have made clear that NEPA does not require agencies to take particular action, it is equally clear that NEPA permits consideration of environmental issues in an agency's administration of its organic statutes. The SEC thus promulgated environmental-disclosure rules under the 1933 and 1934 Acts that were prompted by the enactment of NEPA. Notice of Commission Conclusions and Rulemaking Proposals, Release No. 33-5627 (Nov. 6, 1975) ("[t]he [SEC] has concluded that" "it is authorized and required by [NEPA] to consider the promotion of environmental protection as a factor in exercising its rulemaking authority"). The Council of Environmental Quality (CEQ) has promulgated NEPA regulations making clear that each agency "shall interpret [NEPA] as a supplement to its existing authority and as a mandate to view policies and missions in light of the Act's national environmental objectives." 40 C.F.R. § 1500.6. Although the CEQ "comprehensively updated" its NEPA rules in July 2020, the Trump Administration retained that interpretive text. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304, 43,359 (2020).

[9] Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, *supra* note 8, at 51,658; *Nat. Res. Def. Council*, 606 F.2d at 1038 (the securities laws, in the "SEC's view, were designed" "to require disclosure of financial information in the narrow sense only.").

[10] Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, *supra* note 8; Sonde & Pitt, *supra* note 4, at 850 ("[T]he federal securities laws embody a flexible approach to corporate disclosure designed to be molded to the needs of the times." (citing then-

Thus, the SEC mandated extensive disclosure of environmental proceedings, making clear that the Commission would recalibrate this disclosure standard over time. And indeed the SEC did so, responding to Staff experience with that standard by making adjustments to these rules in the 1980s.[11]

In 2010, in light of decades of experience with these disclosures, the SEC took further regulatory action in the form of Commission-level guidance regarding when climate-change developments require disclosure under SEC rules. Noting that legislation, regulation, international accords, business trends, and physical impacts of climate change could all affect a registrant's operations or results, the release "remind[ed] companies of their obligations under existing federal securities laws" "to consider climate change and its consequences as they prepare documents to be filed with us and provided to investors."[12]

Even opponents of the guidance agreed that the SEC has authority to mandate environmental-related disclosures—and that such disclosures have long encompassed climate-related matters. One Commissioner who dissented on policy grounds nevertheless noted that the SEC's "disclosure regime related to environmental issues *including climate change* is highly developed and robust, and registrants are well aware of, and have decades of experience complying with, these disclosure requirements."[13] Another dissenting Commissioner said that "a number of [SEC] disclosure requirements have long related to environmental matters," pointing to many "analyses from law firms explaining" SEC "disclosure requirements regarding climate change."[14] And Members of Congress who wrote the SEC to object to the guidance as a policy matter agreed that "the SEC has had the long standing authority to impose requirements on companies to disclose environmental risk."[15]

Moreover, in response to the Commission's 2010 guidance dozens of major law firms counseled clients regarding their climate-change related disclosure obligations under the securities laws.[16] Although law firm memoranda on that subject were often signed by former or future Commission officials, and many described policy objections to the guidance in detail, sophisticated counsel did not contend that the SEC lacked authority to require disclosure in this area.[17]

Professor, and later Supreme Court Justice, Felix Frankfurter, *The Securities Act: Social Consequences*, FORTUNE (1933), at 53 ("social standards newly defined [may] establish themselves as new business habits")).

[11] In 1981 the SEC proposed to limit these disclosures to cases involving proceedings that produce fines exceeding $100,000 in light of Staff experience under the prior standard. Proposed Amendments to Item 5 of Regulation S-K Regarding Disclosure of Certain Environmental Proceedings, 46 Fed. Reg. 25,638, 25,639 n.17 (May 8, 1981) (citing SEC, Staff Report on Corporate Accountability, 96th Cong., 2d Sess. (Comm. Print 1980)); Adoption of Integrated Disclosure System, 47 Fed. Reg. 11380 (March 16, 1982).

[12] Commission Guidance Regarding Disclosure Related to Climate Change, Release Nos. 33-9106, 34-61469, FR-82 (Feb. 8, 2010).

[13] Commissioner Kathleen Casey, Interpretive Release Regarding Disclosure of Climate Change Matters (Jan. 27, 2010) (emphasis added); *see also id.* (arguing that the 2010 guidance was premised on the "false notion that registrants may not recognize that disclosure related to 'climate change' issues may be required" under the securities laws).

[14] Commissioner Troy Paredes, Commission Guidance Regarding Disclosure Related to Climate Change (Jan. 27, 2010).

[15] Letter to Hon. Mary Schapiro from Congressman Bill Posey et al. (March 15, 2010).

[16] *See, e.g.*, SULLIVAN & CROMWELL LLP, SEC PROVIDES GUIDANCE TO PUBLIC COMPANIES ON CLIMATE CHANGE DISCLOSURE (Feb. 5, 2010) (advising clients that the 2010 guidance addressed "application of the SEC's existing disclosure requirements to climate change matters").

[17] DAVIS POLK, ENVIRONMENTAL DISCLOSURE IN SEC FILINGS—2011 UPDATE (Jan. 11, 2011) (cataloging objections to the guidance from regulated energy producers and Members of Congress that the guidance "require[d] too much speculation by registrants," could "discourage voluntary disclosures," and "advance[d] a political agenda," but not that the SEC had exceeded its authority with the guidance or previous environmental disclosure mandates (citing Letter to Hon. Mary Schapiro from Richard McMahon, Executive Director, Edison Electric Institute (July 13, 2010) and Letter to Hon. Mary Schapiro from Representative Spencer T. Bachus et al. (Feb. 2, 2010)).

In sum, the Commission, the courts, and practitioners have understood for decades that the SEC's statutory mandate includes authority to require environmental and climate-related disclosure. And, as we explain below, the public companies that are subject to the SEC's disclosure rules have long provided such disclosure to investors.

REGISTRANTS' RESPONSES TO PREVIOUS SEC ENVIRONMENTAL-DISCLOSURE MANDATES

Having established that the SEC has long used its legal authority to mandate environmental disclosure, we consider regulated companies' responses to previous SEC regulation in this area. To examine that question, we extracted the text from annual reports issuers filed on Form 10-K between 1998 and 2021. Figure 1 below describes the probability that environmental-related disclosures will appear in a given Form 10-K, both before and after the Commission's 2010 guidance:

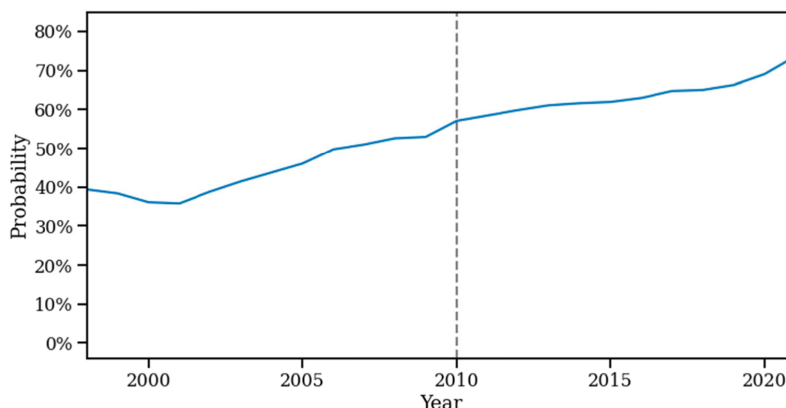

FIGURE 1. PROBABILITY OF ENVIRONMENTAL-RELATED DISCLOSURE, 1998-2021[18]

As Figure 1 shows, a significant proportion of public companies have long provided environmental-related disclosure to investors. In the years just before the 2010 guidance, the probability that a given registrant would include information related to climate change in their annual reports rose, an increase that continued in the years immediately following issuance of the guidance.[19] This evidence is consistent with a view among issuers that the SEC has authority to require climate-related disclosure.[20]

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[18] We begin with the sample of all firms filing on the SEC's Electronic Data Gathering And Reporting (EDGAR) system, filtering to firms with primary issues traded on major stock exchanges with a stock price of at least $5.00, starting in 1998, when EDGAR has a comprehensive collection of such filings. We then search the body of each Form 10-K, excluding exhibits, for text related to the SEC's environmental and climate-disclosure mandates, see Disclosure with Respect to Compliance with Environmental Requirements and Other Matters, *supra* note 5; Commission Guidance Regarding Disclosure Related to Climate Change, *supra* note 12. Our search includes phrases such as "environmental proceeding," "environmental litigation," "environmental regulation," "environmental compliance," "climate change," "carbon footprint," "emissions," "cap and trade," "greenhouse gas," "carbon credits," "sea level rise," "climate change legislation," and "Kyoto protocol." We are grateful to Bradford Lynch-Levy of the Wharton School of the University of Pennsylvania for his assistance in preparing this analysis.

[19] We make no claim regarding whether the 2010 guidance caused the frequency of disclosures to rise or whether the rising level of disclosures caused the Commission to issue that guidance, nor with respect to the quality of the disclosures, Alan Palmiter, *Climate Change Disclosure: A Failed SEC Mandate* (2017). We note, however, that the increased frequency of disclosures prior to the adoption of the guidance is consistent with the Commission's long history of responding to consensus among issuers and investors about needed changes to disclosure rules. We note, too, that Figure 1 documents an increase in the frequency of these disclosures in 2020 and 2021, potentially reflecting issuers' and practitioners' view that additional disclosure of this type of information is warranted.

[20] To our knowledge, no litigant asserted that the Commission lacked authority to adopt the 2010 guidance, although in that year the courts proved receptive to arguments supporting vacatur of SEC rules. *Business Roundtable*

The fifty-year history of SEC rulemaking in this area, and registrants' responses to those rules, reflect the well-recognized, commonly-held understanding that the SEC's authority encompasses mandatory climate disclosures. It might be argued that, in light of the above findings regarding existing SEC mandates and issuer disclosures, no further SEC action in this area is necessary. Whether that argument has merit as a policy matter is, as noted above, beyond the scope of our comments. But as we explain below, to the extent that this argument is advanced as a limit on the SEC's authority to require additional disclosure, the Commission has consistently and correctly rejected that claim.

THE SEC'S AUTHORITY TO REQUIRE ADDITIONAL CLIMATE-RELATED DISCLOSURE

Because the Commission has long mandated environmental disclosure, and since firms already provide investors with those disclosures, some have argued that the SEC lacks authority to mandate more disclosure in this area. Instead, these commentators argue, the Commission should allow voluntary, private ordering to dictate whether investors receive further climate-related information.[21] For three reasons, however, existing disclosures in this area do not provide support for the view that the SEC lacks the authority to mandate that companies give investors additional climate-related information.[22]

First, there is a great deal of variation in the type of climate-related information that issuers now provide.[23] This lack of uniformity makes comparison among companies costly for investors,[24] and issuers frequently face overwhelming requests for different information.[25] Second, as a result of excessive variability, the quality of information that companies now provide appears to some to be low. "[I]ssuers can choose which issues to address and which reporting metrics to apply," so "issuers overwhelmingly disclose only information about the areas in which their business practices are highly sustainable."[26]

Third, even if the information companies currently provided was uniform and of high quality, not all public companies provide that information to investors. Many of these disclosures are responsive to investor requests. Investors, who face well-known collective action problems that make it costly for them to take action at individual firms, cannot be expected to persuade all public companies to disclose comparable, high-quality information.[27] And even if the group of companies refusing to disclose in response to investor requests is small, at least some of the companies which resist disclosure are likely to be those for which disclosure would reveal activities that investors find objectionable.

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v. *SEC*, 647 F.3d 1144 (D.C. Cir. 2011). Similarly, defendants facing SEC enforcement in this area have not claimed that the rules they are alleged to have violated lie beyond the SEC's authority. *In re United States Steel Corporation*, Ad. Proc. File No. 3-5819 (Sept. 27, 1979) ("In light of its mandate under [NEPA] to consider environmental values and its mandate under the federal securities laws for investor protection, the Commission [has] promulgated specific environmental rules. . . . The Commission finds that [the company's] reports filed with the Commission . . . have failed to comply in material respects with [SEC] rules relating to disclosure of environmental matters.").

[21] *See, e.g.*, Letter from Lawrence Cunningham et al., *supra* note 1, at 9-10.

[22] We emphasize that we do not here address whether, as a policy matter, the SEC should conclude that additional disclosure is, or is not, necessary. We point out only that the fact that there is disclosure arising from existing rules and private ordering provides no basis for the conclusion that the Commission is prohibited, as a matter of its statutory authority, from mandating additional disclosure in this area.

[23] *See* Jill Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 947 (2019) ("Under the current regime, sustainability disclosures are fragmented, of inconsistent quality, and often unreliable.").

[24] Deloitte, SUSTAINABILITY DISCLOSURE: GETTING AHEAD OF THE CURVE 5 (2016) (nearly 80% of investors are dissatisfied with "comparability of sustainability reporting between companies in the same industry").

[25] Letter to Hon. Gary Gensler from Keir D. Gumbs, Vice President and Deputy General Counsel, Uber Technologies, Inc. (April 27, 2021), at 2 (noting that the current voluntary-disclosure "ecosystem . . . has created a myriad of cumbersome and time-consuming commitments for companies.").

[26] VINTAGE & MERGERMARKET, A QUESTION OF QUALITY: HOW TO IMPROVE SEC DISCLOSURE 11 (2016).

[27] Lucian Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329, 340-42 (2010) (describing the limits of collective action by shareholders).

Mandating additional disclosure in the presence of private ordering is a common occurrence, consistent with the SEC's historical approach to developing disclosure rules. For example, in 1992 the SEC updated its longstanding narrative approach to executive-pay disclosure by mandating standardized, tabular disclosure. Rejecting commenters' claims that existing voluntary disclosures gave investors adequate detail on executive-pay practices, the final rules expressly noted investors' need to compare practices among firms.[28] Announcing the adoption of those rules, the Commission's Chairman explained that existing disclosures were "lengthy, legalistic narratives that obscure rather than illuminate the most relevant facts"; the SEC's goal, he said, should be to "improve public disclosure of the facts."[29]

Similarly, the SEC has mandated climate-related disclosure for years. Determining that standardization of the disclosed information is necessary, and updating SEC rules accordingly, is consistent with the approach the Commission has long taken to the development of its disclosure rules. Nevertheless, some have argued that doing so with respect to climate-related disclosure is beyond the SEC's authority. In light of the foregoing, below we explain why those arguments have no legal merit.

CLAIMS THAT THE COMMISSION LACKS AUTHORITY TO MANDATE CLIMATE DISCLOSURE

Commentators have advanced two reasons why the SEC lacks authority to require disclosure in this area. First, some claim that, because climate change is a politically sensitive subject, the SEC lacks authority to require disclosure on that issue; any such action should instead be taken only by Congress.[30] Second, others argue that, because regulation of climate change involves a major policy question, the Commission lacks authority to act in this area without explicit, additional Congressional authorization.[31]

Neither argument provides any basis to conclude that the SEC lacks authority to mandate additional climate-related disclosures. To begin, the SEC has long rejected the view that it cannot require disclosure on politically sensitive subjects. Members of the major political parties disagree about many matters within the SEC's jurisdiction; for example, they disagree about whether CEO pay reflects arms' length bargains.[32] That disagreement did not stop—and should not have stopped—the SEC from requiring disclosure of executive pay, or doing so through increasingly mandatory regulatory increments over time.

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[28] Executive Compensation Disclosure, Release No. 33-6962, 57 Fed. Reg. 48126, 48129 (Oct. 21, 1992) (noting the SEC's need to ensure that "shareholders [are] able to . . . compare [a company's practices] with those disclosed by other registrants"); *id.* (noting, in another context, that "[a]dopting a mandatory measurement point not only will reduce the potential for manipulation, but will also enhance inter-company comparability").

[29] Hon. Richard C. Breeden, Chairman, U.S. Sec. & Exch. Comm'n, Opening Statement: Proxy Rules and Executive Compensation (June 23, 1992), at 4. In 2006, despite commenters' claims that further disclosure was not necessary, the SEC again amended the executive compensation rules to mandate additional tabular disclosure. Executive Compensation and Related Person Disclosure, Release No. 33-8732A (2006).

[30] Vollmer, *supra* note 1, at 13.

[31] Letter from Lawrence Cunningham et al., *supra* note 1, at 13 ("Concerning major questions such as climate change, moreover, federal law also recognizes that Congress can be expected to speak explicitly, thereby narrowing the scope of inferences of authority . . . . Indeed, this was the rationale for the Supreme Court's recent repudiation of an agency rule imposing national COVID vaccination requirements." (citing *National Federation of Independent Business* v. *Department of Labor*, 142 S. Ct. 661 (2022))).

[32] *Compare Empowering Shareholders on Executive Compensation: Hearing Before the Comm. on Fin. Servs.*, 110th Cong. 2 (statement of Rep. Frank) (contending that critics who believe "the private market works" should not oppose allowing shareholders to vote about how to "pay[] the people whom they hire to run companies") *with id.* at 7 (statement of Rep. Paul) (regulation on executive pay is a "violation of the free market," "because in the free market, what would happen if salaries got out of whack, the shareholders . . . can sell their shares").

To be sure, the SEC cannot use its disclosure authority for the purpose of favoring one political orthodoxy over the other, or to alter primary behavior in a fashion intended to favor one such orthodoxy. The Commission recognized this limitation in 1976, noting that the "Commission cannot, itself, undertake to regulate corporate conduct which affects the environment."[33] To the degree that commenters contend that substantive environmental regulation of that kind is beyond the Commission's authority, we agree. But the claim that disclosure rules can change corporate conduct, and that the possibility of such changes places climate-related disclosure rules beyond the SEC's authority, is incorrect.

The reason is that virtually all SEC disclosure rules can be expected to affect conduct. Recognizing that in 1975 did not stop the SEC from requiring disclosure of environmental proceedings.[34] Recognizing it again in 1992 and 2006 did not stop the SEC from requiring mandating disclosure of executive pay. The framers of the Securities Act expressly recognized it, too, contemplating that the disclosure mandate they created would affect corporate behavior.[35] The claim that a disclosure requirement's effects on primary conduct place it beyond SEC authority, if accepted, would provide a basis to object to virtually any disclosure rule.[36]

The claim that climate disclosure involves a major question of policy for which the SEC requires explicit, new Congressional authorization is also mistaken. It is true that the Supreme Court has said that an agency may not assert authority that Congress has not granted. But the Court has taken that view in cases where an agency "ha[d] never before, in its [decades] of existence," claimed the challenged authority.[37] Indeed, in some cases the agency had previously said that it lacked authority it later asserted.[38]

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[33] Notice of Commission Conclusions and Final Action on the Rulemaking Proposals Announced in Securities Act Release No. 5627 Related to Environmental Disclosure, *supra* note 8.

[34] As the Commission explained in 1978, the "legislative history of the federal securities laws reflects a recognition that disclosure, by providing corporate owners with meaningful information about the way in which their corporations are managed, may promote the accountability of corporate managers . . . . Accordingly, although the Commission's objective in adopting these rules is to provide additional information relevant to an informed voting decision, it recognizes that disclosure may, depending on determinations made by a company's management, directors, and shareholders, influence corporate conduct. This sort of impact is clearly consistent with the basic philosophy of the federal securities laws." Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally, Exchange Act Rel. No. 15,384 (Dec. 6, 1978).

[35] Sonde & Pitt, *supra* note 4, at 850 ("Disclosure, as the Commission knows, can be a potent weapon and its utilization in the environmental area . . . could be extremely useful in compelling corporations and their managements to focus their attention on environmental problems." (citing SEC Chairman and Supreme Court Justice William O. Douglas, *Directors Who Do Not Direct*, 47 HARV. L. REV. 1305 (1934)); FRANCIS M. WHEAT, DISCLOSURES TO INVESTORS—A REAPPRAISAL OF FEDERAL ADMINISTRATIVE POLICIES UNDER THE '33 AND '34 ACTS 10 (1969) ("Disclosure is and has from the outset been a central aspect of national policy in the field of securities regulation. The emphasis on disclosure rests on [a] belief that appropriate publicity tends to deter questionable practices and to elevate standards of business conduct.").

[36] We note that such rules are likely to affect conduct only to the degree that disclosure of information investors deem material can lead corporations to reconsider behavior that investors will find concerning. A requirement for issuers to give investors accountability-related information naturally induces corporate leaders to reflect on their policies and practices, knowing that they will disclose them to investors and be held accountable if investors disapprove. The Commission's proposal does not require corporations to change their climate-related policies. Instead, it uses the SEC's longstanding authority to require disclosure on that subject.

[37] *National Federation of Independent Business*, 142 S. Ct. at 666 ("This 'lack of historical precedent,'" "is a 'telling indication' that the mandate extends beyond the agency's legitimate reach." (quoting *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 505 (2010))); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146 (2000) ("As the FDA concedes, it never asserted [the challenged authority] until it promulgated the regulations at issue here.").

[38] *See, e.g., Brown & Williamson*, 529 U.S. at 146 ("In the 73 years since the enactment of the original Food and Drug Act, and in the 41 years since the promulgation of the modern Food, Drug, and Cosmetic Act, the

Here, however, the SEC has long taken the clear, unchallenged position that its organic statutes confer authority to mandate environmental-related disclosures. It is true that, in 1975, the SEC itself identified limited investor interest in detailed information in this area at that time, and therefore concluded that further disclosure mandates were unwarranted as a policy matter. But the facts on the policy front have changed considerably in forty-seven years.[39] Then, there was "no uniform method by which the environmental effects of corporate practices [could] be described"; now, the market offers several accepted frameworks for doing so.[40] Then, shareholders proposals in this area drew "an average of from 2% to 3% of the vote;" now, they attract more than ten times that level of shareholder support.[41]

Whether these changes warrant a different policy conclusion today than the Commission reached in 1975 is an appropriate subject for debate beyond the scope of these comments. But the claim that SEC disclosure requirements related to climate can be challenged on the ground that the SEC has "never before, in [decades] of existence," interpreted its statutes to confer this authority is contrary to history. The SEC has long said that the securities laws give the agency "necessary latitude to expand or contract disclosure rules" in this area "in light of changes in the relevant context in which securities issuers conduct their business."[42] The SEC's current consideration of those changes is consistent with its statutory authority and its long tradition of developing a dynamic disclosure framework over time.

It might also be argued that, while Congress gave the SEC adequate authority to mandate the climate-related disclosure rules promulgated over the last fifty years, those rules were different than those now being considered—and only prior rules, and not the current proposal, lie within the SEC's authority. We certainly agree that the current proposal is broader in scope than the SEC's existing rules in this area. But the SEC has mandated environmental disclosure for nearly fifty years under its organic statutes. The proposal does not involve a major area in which the SEC does not already make disclosure policy.[43]

FDA has repeatedly informed Congress that cigarettes are beyond the scope of the statute." (citing Brief for FDA in *Action on Smoking and Health* v. *Harris*, 655 F.2d 236 (D.C. Cir. 1980))).

[39] Even in the 1970s, practitioners and policymakers predicted that changing investor needs could warrant a different policy choice in this area in the future. Bevis Longstreth, *ABA National Institute Corporate Social Responsibility Panel: the Role of the SEC*, 28 BUS. LAW. 215 (1973) (if "a significant number of investors [eventually want] data in order to measure an investment" based on environmental considerations, "the SEC [would] have the power [to], and . . . should[,] mandate disclosure in response")).

[40] *Compare* Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, *supra* note 8, at 51,664 *with* SEC Investor Advisory Committee Recommendation Relating to ESG Disclosure (May 14, 2020), at 5 (describing private standards in this area).

[41] Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, *supra* note 8, at 51,658; Marc Treviño et al., *2021 Proxy Season Review: Shareholder Proposals on Environmental Matters*, HARV. L. SCH. F. CORP. GOV. (Aug. 11, 2021).

[42] Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569, *supra* note 8, at 51,658; *Nat. Res. Def. Council*, 606 F.2d at 1045 (Congress "opted to rely on the discretion and expertise of the SEC for a determination of what types of additional disclosure would be desirable" over time) (quoting H.R. Rep. No. 1383, 73d Cong., 2d Sess. 6-7 (1934)); SEC Staff Accounting Bulletin No. 99 (1999) (noting the relevance of qualitative factors in determining whether disclosure is warranted).

[43] *United States Telecom Assoc.* v. *FCC*, 855 F.3d 381, 422 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("The key reason for the doctrine . . . is the strong presumption of *continuity for* major policies unless and until Congress has deliberated about and enacted a change in those major policies." (emphasis added) (quoting WILLIAM N. ESKRIDGE, JR., INTERPRETING THE LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 288 (2016)); *see also Biden* v. *Missouri*, 142 S. Ct. 647, 653 (2022) (*per curiam*) ("Of course the vaccine mandate goes further than what the Secretary has done in the past to implement infection control. But . . . . there can be no doubt that addressing infection problems in Medicare and Medicaid facilities is what he does.").

In sum, these arguments provide no legal basis to question SEC authority to mandate climate-related disclosures at public companies.[44] As noted above, we hold a wide range of views on the specifics of the SEC's proposals. But whatever our views on those subjects, we are unanimous in our conclusion that the Commission has statutory authority to mandate climate-related disclosures. We urge the SEC to give little weight to claims that it lacks authority in this area, instead focusing on the difficult policy choices that developing these rules will necessarily require.

* * * *

We hope that these comments, drawn from long experience as leaders of the Commission, as teachers and students of the securities laws, and as senior practitioners in the field, are helpful as the SEC considers these important issues. Should the Commission or the Staff have any questions, or if we can be of assistance in any way, please do not hesitate to contact us at your convenience.

Very truly yours,

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[44] The Commission must, of course, adopt any final rule consistent with otherwise generally applicable provisions of the Administrative Procedure Act and an adequate cost-benefit analysis. *See supra* note 2.

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