Is the SEC Proposing a “Loaded-Question” Climate-Change Disclosure Rule?

John P. Anderson

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John P. Anderson*

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INTRODUCTION

Shortly after President Barack Obama’s first press conference in 2009, the Huffington Post published an article entitled When Did You Stop Beating Your Wife? that challenged the false premises of many of the questions being asked of the new president.¹ The article opens by noting:

Sooner or later every human being on the face of this planet is confronted with tough questions. One of the toughest and most common is the infamous loaded question, “when did you stop beating your wife?” which implies that you have indeed been beating your wife. How do you answer without agreeing with the

implication? How do you not answer without appearing evasive?\textsuperscript{2}

The author’s solution to such dilemmas was that one should refuse to answer the question by simply responding “no,” or by challenging the false assumption imbedded in the question.\textsuperscript{3} But what if the question is not asked at a press conference, by opposing counsel in the courtroom, or at a cocktail party, but as part of a federally mandated disclosure regime? This is the quandary issuers may face if the Securities and Exchange Commission’s (SEC’s) proposed rule of “The Enhancement and Standardization of Climate-Related Disclosures for Investors” is adopted.\textsuperscript{4}

Existing SEC disclosure rules and guidance already require that issuers disclose man-made climate-change-related risks that would materially impact market participants’ investment decisions concerning the company.\textsuperscript{5} Nevertheless, the SEC has determined that the existing regime grants boards too much discretion in deciding whether and how to disclose climate risk—which has resulted in climate-related disclosures that are insufficiently “consistent,” “comparable,” and “reliable.”\textsuperscript{6}

The SEC’s proposed changes to the disclosure regime would correct this shortcoming by compelling all publicly traded companies to answer specific standardized climate-related questions concerning, for example, the physical risks of human-caused climate-related events on their business models and earnings in a manner that will be consistent and comparable with the answers of the thousands of other regulated issuers.\textsuperscript{7} But what if the boards’ honest answers to these difficult questions cannot

\begin{itemize}
  \item \textsuperscript{2} Id.
  \item \textsuperscript{3} Id.
  \item \textsuperscript{7} See, e.g., Fact Sheet, supra note 4. The occurrence of “severe weather events and other natural conditions” are offered as examples of such physical risks. Id.
\end{itemize}
be made to fit the SEC’s proposed one-size-fits-all mold? What if some issuers question the premises of the questions?

What if, for example, a board is not convinced that extreme weather events such as hurricanes, tornadoes, wildfires, and droughts can be traced directly to human versus non-human causes? In such circumstances, mandatory reporting on either transitional or physical risks due to human-caused climate change might look a lot like mandatory disclosures on questions like “When did you stop beating your spouse?” Can issuers satisfy the SEC’s reporting requirements by simply answering “no,” as the Huffington Post author suggested President Obama should have answered such questions, or by challenging the premise of the question?

Part I of this Article offers a brief summary of the current SEC disclosure expectations as they relate to human-caused climate change. Part II summarizes some of the principal changes the SEC’s proposed rule would implement. Part III raises concerns that some of the new disclosure requirements in the proposed rule may compel corporate speech that is contrary to an issuer’s legitimate business interests and its board’s good judgment. With this in mind, the proposed rule may run counter to the SEC’s historical mission—and may set a concerning precedent for mandatory disclosure on other controversial and politically charged topics. Finally, setting aside the wisdom of the proposed rule vis-à-vis the agency’s congressional mandate, Part IV considers whether it violates freedom of speech protection under the First Amendment of the U.S. Constitution.

I. EXISTING CLIMATE CHANGE DISCLOSURE REGIME

Financial risk associated with human-caused climate change is often broken into two categories: transitional and physical. The Congressional Research Service (CRS) defines transitional risks as risks arising “from policy, legal, technology, and market changes as the world transitions to a lower-carbon economy, with potential financial or reputational effects on businesses.” Whereas physical risks include “direct and indirect risks arising from extreme weather events and from longer-term shifts in climate patterns, including, for example, changes in water availability and food security.” According to the CRS, physical risks “have important implications for many companies’ physical facilities, operations, transportation costs, supply chains, and employees.”

9. Id.
10. Id.
The SEC’s existing disclosure regime already requires certain disclosures relating to transitional and physical risks associated with human-caused climate change.11 Recognizing that climate change “has become a topic of intense public discussion in recent years,” the SEC issued its interpretive “Commission Guidance Regarding Disclosure Related to Climate Change” in February 2010 (2010 Guidance).12 The 2010 Guidance focuses primarily on disclosure Items under Regulation S-K13 and “outlines [the SEC’s] views” on how “they apply to climate change matters” in order to “assist companies in satisfying their disclosure obligations under the federal securities laws and regulations.”14

For example, Item 101 of Regulation S-K “expressly requires disclosure regarding certain costs of complying with environmental laws.”15 Specifically, the Item requires disclosure of “[t]he material effects that compliance with government regulations, including environmental regulations, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.”16 Since there “have been significant developments in federal and state legislation and regulation regarding climate change,” the 2010 Guidance explains that the transitional risks associated with such “developments may trigger disclosure obligations under” Items such as 101.17 In addition to any direct impact such legislation, treaty, or regulation might have on an issuer’s business model—e.g., a tax or penalty on emissions—there may be material indirect consequences as well—e.g., decreased demand for goods that emit significant greenhouse gases, or increased demand for goods resulting in lower emissions.18 Moreover, the 2010 Guidance makes it clear that Item 103’s19 requirement that issuers “briefly describe any material pending legal proceeding to which it or any of its subsidiaries is a party” has clear application to any environmental litigation relating to climate change.20 Indeed, the 2010 Guidance notes that there may be

11.  See generally 17 C.F.R § 229.
13.  17 C.F.R § 229.
15.  Id. at 13.
17.  Commission Guidance, supra note 5, at 22. The Guidance adds that disclosure of material climate-related transition risks of this type might also be required under Item 103 (“Legal proceedings”), Item 105 (“Risk factors”), and Item 303 (“Management’s discussion and analysis”).
18.  Id. at 25.
19.  17 C.F.R § 229.103.
heightened reporting requirements for actions arising under Federal, State, or local climate-related statutes, regulations, or provisions.\textsuperscript{21}

The 2010 Guidance explains that disclosure of similar categories of material transitional risk to registrants as the world transitions to a lower-carbon economy may also be required under Items 105\textsuperscript{22} and 303\textsuperscript{23} of Regulation S-K.\textsuperscript{24} Item 105 requires that issuers disclose any “‘Risk Factors’” that could make investment in their company speculative.\textsuperscript{25} The 2010 Guidance explains that disclosure under Item 105 “should clearly state the risk and specify how the particular risk affects the particular registrant; registrants should not present risks that could apply to any issuer or any offering.”\textsuperscript{26} Item 303, the Management’s Discussion and Analysis disclosure (MD&A), is intended to (1) provide a narrative of the issuer’s financial statements through the management’s eyes; (2) provide context for the entire disclosure; and (3) “provide information about the quality of, and potential variability of, a registrant’s earnings and cash flow, so that investors can ascertain the likelihood that past performance is indicative of future performance.”\textsuperscript{27} In sum, the MD&A is intended to give investors a general sense of management’s assessment of an issuer’s future prospects—in light of current trends. Focusing specifically on the transition to a lower-carbon economy, the 2010 Guidance points out that Item 105 “may require risk factor disclosure regarding existing or pending legislation or regulation that relates to climate change.”\textsuperscript{28} And the MD&A “requires registrants to assess whether any enacted climate change legislation or regulation is reasonably likely to have a material effect on the registrant’s financial condition or results of operation.”\textsuperscript{29}

Items 105 and 303 may also require disclosures pertaining to the physical risks to issuers of human-caused climate change. As the 2010 Guidance notes, “[s]ignificant physical effects of climate, such as effects on the severity of weather (for example, floods or hurricanes), sea levels, the arability of farmland, and water availability and quality, have the

\begin{thebibliography}{99}
\bibitem{21}Id.,
\bibitem{22}17 C.F.R § 229.105 (formerly Item 503(c)); \textit{id.} § 229.503(c).
\bibitem{23}Id. § 229.303.
\bibitem{24}Commission Guidance, \textit{supra} note 5, at 15–20, 22–24.
\bibitem{25}Id. at 15.
\bibitem{26}Id. (citing 17 C.F.R § 229.503(c)).
\bibitem{28}Id. at 22.
\bibitem{29}Id. at 22–23.
\end{thebibliography}
potential to affect a registrant’s operations and results.”\textsuperscript{30} If such risks are deemed material by management, then they should be disclosed.\textsuperscript{31}

But if the preceding Part demonstrates that the existing regime already requires disclosure of material transitional and physical risks associated with human-caused climate change, then what motivates the new rule?

II. PROPOSED RULE CHANGES

One of the principal justifications for the proposed rule, “The Enhancement and Standardization of Climate-Related Disclosures for Investors,” is that it imposes a mandatory climate-disclosure regime that requires clearer, more consistent, and more comparable climate-related disclosures from issuers in light of Environmental, Social, and Governance (ESG) investing trends.\textsuperscript{32} In other words, the concern addressed by the newly proposed mandatory regime is that the current rules grant issuers too much flexibility in determining \textit{whether and how} to report their understanding of their climate-related risks.

Among other things, under the proposed regime, \textit{all} issuers would be \textit{required} to include certain climate-related disclosures in their periodic reports.\textsuperscript{33} These disclosures can be grouped roughly into three categories: governance, emissions data, and risks. Concerning governance, for example, every registrant would be required to disclose information about the “oversight and governance of climate-related risks by the registrant’s board and management,”\textsuperscript{34} including whether any of the issuer’s board members are climate-related risk experts.\textsuperscript{35} Concerning emissions, registrants are required to disclose direct (Scope 1), indirect through purchased energy (Scope 2), and upstream and downstream (Scope 3) greenhouse gas emissions.\textsuperscript{36} Finally, concerning risks, issuers will be

\textsuperscript{30} Id. at 26.
\textsuperscript{31} Id. at 27.
\textsuperscript{32} \textit{See} The Enhancement and Standardization of Climate-Related Disclosures, \textit{supra} note 4.
\textsuperscript{33} Id.
\textsuperscript{34} Id. at 42.
\textsuperscript{36} \textit{See} The Enhancement and Standardization of Climate-Related Disclosures, \textit{supra} note 4; \textit{Fact Sheet, supra} note 4.
required to disclose, *inter alia*, how they identify human-caused climate-change risk; whether such risks are expected to have a “material impact” on the company’s business and bottom line; how any identified risks are likely to affect the issuer’s business model; and whether the issuer has adopted a climate-related “transition plan as part of its climate-related risk management strategy.” Registrants will also be required to disclose information about the “impact of climate-related events (severe weather events and other natural conditions….) and transition activities (including transition risks identified by the registrant) on the line items of a registrant’s consolidated financial statements.”

Though there has been much critique of the proposed new governance and emissions disclosure requirements, this short Article will have a limited focus on only the newly proposed risk disclosures. The obvious question raised by these new disclosure requirements is the following: if, pursuant to the 2010 Guidance as outlined above, issuers are already required to disclose any material transitional or physical risks due to climate change, how can this proposed rule advance the ball for investors? The only potential “enhancements” under the proposed regime would presumably be that all issuers will now be required to say something about human-caused climate risk in a standardized, one-size-fits-all format—even if it is to say the issuer sees no such material risk for the firm. In other words, under the current rule, management does not have to say anything about climate change unless it identifies some related transitional or physical risk as material. Under the proposed rule, however, *every* issuer *must say something* specific about human-caused climate change. Under the proposed rule, even an issuer whose management foresees no material transitional or physical climate risk to the firm would have to explicitly state that no such risk exists and why. But since the firm’s judgement that no material transitional or physical climate change risk exists is already implicit in the issuer’s silence on the question under the current regime, why is the SEC so concerned about forcing an explicit statement of the negative? And are such negative climate disclosures helpful to investors and markets? Is something else going on?

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37. The Enhancement and Standardization of Climate-Related Disclosures, *supra* note 4, at 1, 103.
38. *Id.* at 42.
There is no doubt that the extent, effects, and appropriate response to human-caused climate change is a partisan issue in the United States.\textsuperscript{40} One Vanderbilt survey found that 77.3\% of respondents who identify as “liberal” believe that climate change is a serious problem, but only 17.2\% of those who identify as “conservative” and 45\% of moderates regard climate change as a serious problem.\textsuperscript{41} Moreover, the division over the impacts and appropriate responses to climate change are not just political—they exist in the scientific community as well. For example, Steven E. Koonin, a former Undersecretary for Science in the U.S. Department of Energy under President Obama and member of the Academy of Sciences, recently published a book, \textit{Unsettled: What Climate Science Tells Us, What It Doesn’t, and Why It Matters},\textsuperscript{42} which questions a number of the premises informing the SEC’s proposed disclosure regime. And more recently, over 1,600 scientists, including two Nobel laureates, signed a declaration claiming there is “no climate emergency.”\textsuperscript{43} These signatories claim that current climate models are immature and inaccurate and that “[t]o believe the outcome of a climate model is to believe what the model makers have put in.”\textsuperscript{44} As a result, they claim “[c]limate science has degenerated into a discussion based on beliefs, not on sound self-critical science.”\textsuperscript{45} Of course there are many more scientists who are convinced that a demonstrable human-caused climate emergency

\begin{itemize}
\item 41. \textit{Id.} Another, more recent, poll shows that only 49\% of Americans “believe climate change is mostly caused by human activity, unchanged from 2017 and 2018.” See Christopher Moessner & Jennifer Berg, \textit{Many Americans believe that climate change is mostly caused by human activity, but few report making changes to help limit it}, \textit{IPSOS} (May 4, 2023), https://www.ipsos.com/en-us/many-americans-believe-climate-change-mostly-caused-human-activity-few-report-making-changes-help [https://perma.cc/NRF5-4KBY].
\item 42. \textit{See generally STEVEN E. KOONIN, UNSETTLED: WHAT CLIMATE SCIENCE TELLS US, WHAT IT DOESN’T, AND WHY IT MATTERS} (2021).
\item 43. \textit{GLOBAL CLIMATE INTELLIGENCE GROUP, WORLD CLIMATE DECLARATION: THERE IS NO CLIMATE EMERGENCY} 3 (2023).
\item 44. \textit{Id.} at 4.
\item 45. \textit{Id.}
exists and can be averted by changes in human behavior. The goal here is not to weigh into this debate, but just to note that it continues to be the subject of hot political and scientific debate—and that the SEC’s proposed mandatory climate disclosure rule appears to assume its outcome. This is what a loaded question does.

Take, as just one example, the proposed rule’s mandatory disclosure of physical risks to issuers due to extreme weather events resulting from human-caused climate change. The home page of the Task Force on Climate-Related Financial Disclosures, which the SEC credits as a principal source for its proposed rule, includes a video presentation by the Task Force Chair, former Democratic Presidential Candidate Michael Bloomberg, stating that climate change is a “crisis [that] shocked the [financial] system” in 2021: “wildfires, heat, flooding, and other extreme weather events have devastated communities and cost trillions of dollars this year alone.”

The premise of Bloomberg’s statement is that current models can reliably trace these extreme weather events to human causes. The SEC has effectively adopted this premise as a foundational assumption behind its requirements that issuers disclose the “impact of climate-related events (severe weather events and other natural conditions ... ).” But is this premise uncontroversial, or is the disclosure prompt loaded? Steven Koonin points out that while a recent U.S. government climate report claims that heat waves across the U.S. have become more frequent since 1960, it neglected to mention that the body of the report shows they are “no more common today than they were in 1900.” Koonin also points out similar holes in common claims that human-caused climate change is

49. See The Enhancement and Standardization of Climate-Related Disclosures, supra note 4, at 42; Fact Sheet, supra “note 4.
51. Koonin, supra note 42, at 11.
responsible for extreme weather events like flooding, wildfires, and hurricanes. More fundamentally, Koonin argues that the new field of "event attribution studies," which provides the principal basis for claimed causal links between human influences and extreme weather events, is "rife with issues," and he is "appalled that such studies are given credence, much less media coverage." Similarly, the World Climate Declaration claims that there "is no statistical evidence that global warming is intensifying hurricanes, floods, droughts and suchlike natural disasters, or making them more frequent." In short, the SEC’s proposed disclosure requirement concerning physical risk appears to beg the question against those who claim there is no reliable evidence of, or method for determining, a clear connection between extreme weather events and human-caused climate change.

The same can be said concerning the proposed mandatory disclosures concerning transitional risk. The SEC is looking to require issuers to disclose if they have "adopted a transition plan as part of its climate-related risk management strategy" and to disclose the "impact of climate-related ... transition activities." The questions appear to assume that every issuer has climate-related risk to manage and that a transition plan is warranted for every issuer. In other words, the disclosure expectation is set in a way that a response along the lines of "The issuer has no climate-related transition plan in place" or "Management has determined no climate-related transition plan is warranted" would come off as incomplete or tone deaf. And what would further explanation or justification for a negative response look like, if not geo-political or scientific speculation? The question appears to place the burden on the issuer to support or justify a negative response with, for example, a statement about who management believes will win the next U.S. presidential or mid-term election—rolling back or increasing regulatory fossil-fuel restrictions—or which international treaties will be entered into. And what would put the management of a soft-drink producer or car manufacturer in a privileged position to offer such speculation on political trends and their impacts on environmental regulations? How could such speculation possibly educate investors? The answer is that such speculation will probably not help

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53. KOONIN, supra note 42, at 98–99.
54. WORLD CLIMATE DECLARATION, supra note 43, at 3.
55. Fact Sheet, supra note 4.
investors. But one asks a loaded question to *trap* one’s interlocutor to one’s own advantage—not to benefit the person questioned, and not in an authentic attempt to inform or gather information.

So why would the SEC need to trap issuers into making statements on human-caused climate change? The SEC emphasizes that “many issuers already provide” this information voluntarily. Why do others resist such that a mandate is needed? It may be because the management of some issuers are not convinced that there is a climate emergency. Or perhaps some registrants recognize human-caused climate change as a risk, but they do not distinguish it as warranting special attention over the many other market-wide imminent existential threats to humankind such as overpopulation, global pandemics, substance abuse and addiction, inadequate healthcare, conflict, human rights violations, and generative AI. Given the vast diversity of climate models and the inherent uncertainty associated with resting on just one, or one set, some issuers may worry that any concrete disclosure in this space would either be unhelpful to investors or worse—carry significant risk of misrepresentation and consequent shareholder litigation or enforcement action.

But this Article suspects the biggest reason why so many issuers have chosen to remain silent on the issue of human-caused climate change is that, as noted above, it is a politically charged and divisive topic—and taking a public stance on the issue may be bad for business. If the general public is evenly divided on a hotly contested political or cultural issue, it makes sense that many firms will exercise their business judgment and determine that taking sides is not in the interest of their investors. After all, most companies want to sell their products to consumers of *all* political persuasions. The recent experiences of The Walt Disney Company and Anheuser-Busch InBev illustrate how a company’s taking sides in

56. Sara Bedford, *What is Disney’s endgame in battle with Florida?*, WASH. EXAMINER (Mar. 31, 2022) [https://perma.cc/VAL7-UY82] (noting that most companies “want to sell their wares to people of all political persuasions”) (this article is no longer available online, however, it is on file with the *Louisiana Law Review*).

57. Dawn Chmielewski, *Disney CEO says company will ‘quiet the noise’ in culture wars, according to analyst note*, REUTERS (Sept. 20, 2023), https://www.reuters.com/business/media-telecom/disney-ceo-says-company-will-quiet-noise-culture-wars-analyst-2023-09-20/ [https://perma.cc/YR7T-FV9J] (noting the “company was thrust at the center of the nation’s culture wars in 2022, when it publicly criticized Florida legislation restricting classroom discussion of sexual orientation and gender identity”).

culture wars can lead to reduced market share and share value—to the
detriment of investors. Walt Disney lost significant share value after
publicly challenging Florida’s Parental Rights Education bill restricting
classroom discussion on sexual orientation and gender identity in primary
grade levels. In the wake of this experience, the company has recognized
that “consumers’ perceptions of our position on matters of public interest,
including our efforts to achieve certain of our environmental and social
goals, often differ widely and present risks to our reputation and brands.”
This recognition has led Disney CEO, Bob Iger, to state that he does not
want to “be drawn into any culture wars.” Anheuser-Busch InBev had
a similar experience after one of its brands, Bud Light, partnered with a
transgender influencer in an advertising campaign that did not sit well with
many beer drinkers. The brand lost significant market share and lost its
position as the nation’s top-selling beer. As a result, the CEO of
Anheuser-Busch stated that the company “never intended to be part of a
discussion that divides people. We are in the business of bringing people
together over a beer.” As one commentator notes, when corporations are


62. See Valinsky, supra note 58.


64. Adam Sabes, Anheuser-Busch breaks silence after Bud Light’s Dylan Mulvaney controversy, FOX BUS. (Apr. 14, 2023), https://www.foxbusiness
forced into making a stand on a controversial topic, their subsequent goal 
“‘is mass amnesia’”; they “‘want to get past it, and then they want 
everyone to forget about it.’”65 Indeed, a recent poll found that 87% of 
American voters want companies to stay out of politics and that voters 
were either “very or somewhat likely to stop using a product or service of 
a company that openly advocates for a political agenda” that contradicts 
their beliefs.”66

To this point, this Article has argued that since the existing SEC 
disclosure regime already requires companies to disclose any material 
transitional or physical risks associated with human-caused climate 
change, the only enhancement in the proposed mandatory disclosure 
regime pertaining to such risks is that it would force all issuers who do not 
foresee a material risk to explicitly state so—and why. This Article noted 
that it is hard to see how forcing such negative disclosures from firms 
would add anything to the total mix of information available to the average 
investor. But there is something more concerning about this mandatory 
disclosure. This Article has argued that the SEC’s proposed prompts 
themselves are arguably question-begging or loaded, such that even a 
negative response can commit a firm to controversial and politically 
charged premises. If a registrant questions those premises and explains 
why, then it does not avoid the unwanted cultural or political controversy; 
rather, it risks sinking further into it. Since most firms would prefer to stay 
out of politics and culture wars, the SEC’s proposed mandatory disclosure 
regime arguably places issuers in a catch-22 that may be harmful to 
shareholders.

One final question remains: if, on its face, these aspects of the 
proposed rule do not provide investors with new material information and 
may even place shareholder value at risk, then what is truly motivating the 
SEC in pushing this rule change? One obvious motivation is that the new 
mandatory climate-disclosure regime is an attempt to implement the Biden 
Administration’s climate agenda through regulation. In May 2021, 
President Biden issued an “Executive Order on Climate-Related Financial 
Risk.”67 The order explains that “intensifying impacts of climate change present physical risk to . . . publicly traded securities . . . [due to] extreme

65. See Bedford, supra note 56.
66. Sean Salai, 87% of American voters want corporations out of politics, 
poll shows, WASH. TIMES (May 16, 2022), https://www.washingtontimes.com/ 
news/2022/may/16/87-american-voters-want-corporations-out-politics/ [https:// 
perma.cc/AQ23-HTXR].
The order also claims that the “global shift away from carbon-intensive energy sources [through increased regulation also] presents [] risk to many companies.”

For these—and other—reasons, the President ordered the Secretary of the Treasury to issue a report concerning, among other things, “the necessity of any actions to enhance climate-related disclosures by regulated entities.” Against this backdrop, a number of U.S. Senators have alleged that the SEC’s recent climate disclosure rule is “yet another example” of the Biden administration’s efforts to have “unelected bureaucrats implement its preferred agenda through regulation” after failed attempts to “enact radical climate policy via legislation.”

According to the SEC, however, the proposed mandatory climate disclosure regime responds not to an Executive Order or a political agenda, but to investor demands. The Commission explains that “[m]any investors are concerned about the potential impacts of climate-related risks to individual businesses.” And investors are therefore “seeking more information about the effects of climate-related risks on a company’s business to inform their investment decision-making.” In addition, investors “also have expressed a need for more consistent, comparable, and reliable information” about climate risk.

But who are the investors the SEC is referring to? Are they the average Main Street investor, or are they institutional Wall Street investors? Evidence suggests the SEC is focused on the latter. A comment letter filed by 22 law professors urging the SEC to withdraw its proposed mandatory climate disclosure regime notes that the “investors demanding climate-related information are overwhelmingly institutional asset
managers who are managing other people’s money, not their own.” And there is reason to be suspect of these institutional investors’ motives. Professor Amanda Rose has noted the interests of institutional investors and Main Street investors have not always aligned. While many asset managers will claim their commitment to achieving ESG goals is in the interest of their investors, “agency costs offer an alternative potential explanation.” Professor Rose explains that:

emerging the ESG movement may help asset managers curry political favor, enabling them to fend off greater regulation of the industry; it may advance the personal sociopolitical commitments of those who ran them; or it may offer a way to attract investors to fund offerings without imposing any meaningful limitations on how a fund is managed.

Other commentators have noted that large index funds like BlackRock and State Street have additional incentives to promote mandatory ESG disclosure: “For the manager of an index fund that must invest in all or substantially all companies in the index, public statements that climate is a top priority across the entire portfolio can be an important competitive marketing tool.” And while these funds “may be interested in using climate-friendly voting and engagement as a marketing device, they cannot afford to incur substantial new costs to do so.” With a new mandatory climate-disclosure regime in place, the publicly traded companies and their shareholders—rather than the index funds—will be

79. Id.
80. Id. See also Stefan J. Padfield, To say they are shareholders only begins analysis., BUS. L. PROF. BLOG (May 2, 2022), https://lawprofessors.typepad.com/business_law/2022/05/to-say-they-are-shareholders-only-begins-analysis.html [https://perma.cc/3YGY-DE3K].
81. Cunningham et al., supra note 39, at 5.
82. Id. See also Michael Barzuza et al., Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance, 93 UNIV. S. CAL. L. REV. 1243, 1244 (2020) (noting that with “fee competition exhausted and returns irrelevant for index investors, signaling a commitment to social issues is one of the few dimensions on which index funds can differentiate themselves and avoid commoditization”).
forced to “bear the cost of producing and standardizing the climate-related information,” allowing the index funds to save those costs while advancing their agenda and increasing their returns in the form of fees.\(^{83}\) Since the average individual retail investor prioritizes return on investment over environmental issues when making investment decisions, the interests of Main Street and Wall Street investors may not be aligned when it comes to the SEC’s proposed mandatory climate disclosure regime.\(^{84}\) For these reasons, some commentators have expressed the concern that the SEC’s elevating of “the priorities and practices” of index funds and fund managers “over those of individual shareholders” through this proposed disclosure rule “is perverse for an agency whose historical raison-d’-etre and current website emphasize protecting individual investors.”\(^{85}\)

Another repeated justification for the proposed mandatory climate disclosure regime is that, unlike the existing disclosure rules, it will be required that issuers make their climate disclosures in a “consistent” and “comparable” format.\(^{86}\) There are, however, some good reasons for worry that this very demand for consistency and comparability could disadvantage investors. After all, much of the point of the current risk disclosure model is that it allows investors to view the firm’s prospects through the unique perspective of management. Whatever the new mandatory disclosure regime gains in consistency and comparability, it may lose by denying management the ability to offer its unique perspective. Demanding consistency and comparability on a topic as complex, politically charged, and controversial as the effects of human-influenced climate change risks forcing issuers to adopt what is effectively a “joint statement” on these matters—denying investors the nuanced viewpoints that might be shared under a model offering more latitude. Moreover, to the extent that the SEC’s proposed mandatory disclosure regime forces issuers to answer what are arguably loaded questions in a “consistent” and “comparable” manner, it begins to look like the agency is dictating “how a company’s board thinks” and expresses itself about these matters.\(^{87}\) And this raises yet another concern for this proposed

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83. Cunningham et al., supra note 39, at 5. Some estimates predict compliance with the proposed mandatory disclosure regime will approach $1 million per firm per year. See, e.g., Cunningham, supra note 76.
84. Cunningham et al., supra note 39, at 3 (stating that one survey included a “Gallup poll of 953 US adult individual investors finding that most prioritized the expected rate of return and risk for potential losses over environmental and other issues”).
85. Id. at 6.
86. See Fact Sheet, supra note 4.
87. Id. See, e.g., Cunningham, supra note 76.
regime—that it may impermissibly compel speech in violation of the First Amendment of the U.S. Constitution.

IV. STATUTORY AUTHORITY AND FIRST AMENDMENT CONCERNS

Even if the SEC implements its proposed mandatory climate-disclosure regime, a number of commentators have expressed skepticism about its ability to survive legal challenges.\(^88\) The principal challenge anticipated for the proposed rule is that its focus on human-caused climate change will render it vulnerable to the U.S. Supreme Court’s “major question” doctrine. Under this doctrine, the Court has refused to grant agencies deference where the subject matter of their rulemaking is too economically or politically important to not be addressed directly by Congress.\(^89\) In *West Virginia v. EPA*, for example, the Court addressed the Environmental Protection Agency’s (EPA) ability to adopt new regulations addressing GHG emissions under the Clean Air Act.\(^90\) In that case, the Court explained that “[a]gencies have only those powers given to them by Congress, and ‘enabling legislation’ is generally not an ‘open book to which the agency [may] add pages and change the plot line.’ We presume that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’”\(^91\) The Court held that the EPA’s proposed rule was just too economically and politically important not to be addressed by Congress directly—and the Clean Air Act simply did not address the issue directly.\(^92\) The SEC’s stated statutory authority for a mandatory climate-change disclosure regime is arguably much weaker than the EPA’s stated authority in *West Virginia*. The SEC’s historical mission has been protecting investors, facilitating capital formation, and fostering fair, orderly, and efficient markets—not protecting the environment.\(^93\) Yet, the SEC relies solely on the vague statement that it


\(^90\) Id.

\(^91\) Id. at 723 (internal citations omitted).

\(^92\) Id. at 725.

has “broad authority to promulgate disclosure requirements that are ‘necessary or appropriate in the public interest or for the protection of investors’” to require all issuers to disclose climate-related information.94 Commentators have noted that Congress did not intend this vague language to grant the SEC broad authority to require mandatory disclosure on any topic of the SEC’s choosing.95 And “[c]limate change is perhaps the most important public policy question of our time.”96 Consequently, since West Virginia “was handed down after the [SEC’s mandatory climate disclosure] Proposal was released, it is difficult to fathom how the SEC has not rethought its position in light of it.”97

But there is another reason—more pertinent to the subject-matter of this Article—for thinking the SEC’s proposed mandatory climate disclosure regime may be invalidated by the courts. As then-Commissioner Hester M. Pierce noted at the time the proposed rule was announced, the SEC’s planned mandatory climate disclosure regime “may not comport with First Amendment limitations on compelled speech.”98 In Citizens United v. Federal Election Commission, the Supreme Court held that corporations enjoy freedom of speech protections under the First Amendment.99 And it has also been established that this protection extends to “the decision of both what to say and what not to say.”100 Of course all mandatory financial disclosures amount to compelled speech, and the courts have granted the government greater leeway in this space where disclosures relate to “‘purely factual and uncontroversial information.’”101 But the previous section of this Article argued that the SEC’s required disclosures are not purely factual and may be quite controversial. Moreover, the nature of many of the disclosure prompts concerning physical and transitional risk may force issuers to either deny the premises of the prompt or make controversial factual or political claims the company would rather avoid. In Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston, the U.S. Supreme Court held that the First

94. The Enhancement and Standardization of Climate-Related Disclosures, supra note 4, at 7.
95. See ANDREW N. VOLLMER, DOES THE SEC HAVE LEGAL AUTHORITY TO ADOPT CLIMATE-CHANGE DISCLOSURE RULES? 10 (2021).
96. Cunningham et al., supra note 39, at 6.
97. Id. at 7.
98. Peirce, supra note 93.
Amendment extends “not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.”

This is not the first time the SEC has faced First Amendment concerns relating to its disclosure rules. In *National Association of Manufacturers v. SEC*, the D.C. Circuit struck down a rule requiring that companies disclose whether any minerals in their products came from areas of conflict in Africa. The court held this disclosure violated the First Amendment because it forced companies “to tell consumers that its products are ethically tainted” and “confess blood on its hands.” Commentators have noted that the “SEC’s climate disclosure mandate is similarly tinged with implicit disapproval of greenhouse gas emissions.” Consistent with the loaded question analysis offered above, others have argued that by “forcing companies to condemn themselves [in the climate space], the [proposed mandatory disclosure regime] promotes one side in a policy debate and violates the First Amendment requirement of viewpoint neutrality.” In other words, “[o]nce mandatory disclosures exceed the bounds of the ‘uncontroversial,’ the government runs too much risk of using compelled speech to influence public debate.”

**CONCLUSION**

There is reason for worry that the SEC’s proposed mandatory climate-disclosure regime will force issuers to answer loaded or question-begging prompts concerning one of the more politically and culturally charged issues of our time. Since most issuers would prefer to stay out of politics and culture wars, the proposed rule arguably places issuers in a no-win scenario. Even a negative response, or one that denies the premises of the questions, will likely inject the registrant into a hotly contested political debate that its shareholders may wish it to avoid. The proposed rule would place firms in this awkward position, despite the fact that the existing rules already compel disclosure of material transitional and physical risk. The

103. *Nat’l Ass’n of Mfrs*, 800 F.3d at 530.
104. *Id.*
106. *Id.*
107. *Id.*
SEC claims that all this is necessary because investors are demanding “enhanced” human-influenced climate change disclosure that is more consistent and comparable. But close inspection reveals the “investors” calling for more climate disclosure are not individual Main Street retail investors who seek a return on their investment, but are predominantly Wall Street institutional investors driven by increased fee-based revenue. By privileging the voices of institutional investors in this space, the SEC appears to be departing from its historical mission of protecting the average investor. Finally, in addition to the worries just noted, there is good reason for concluding that the SEC’s proposed mandatory climate disclosure regime exceeds its statutory authority and perhaps violates the First Amendment.

None of the above should be interpreted as an attempt to take sides in the climate debate. That is not the point. The principal worry raised here is simply that this sphere of discourse is far too contested and politically charged to be the subject of a mandatory financial disclosure regime imposed by a regulatory agency outside the democratic process. If the political will for such a regime exists, then it is for Congress, not the SEC, to act.

108. See The Enhancement and Standardization of Climate-Related Disclosures, supra note 4; Fact Sheet, supra note 4.
109. See, e.g., Professors’ Letter, supra note 77.