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Fierce opposition to SEC's sweeping climate regulations comes into focus as public comment period ticks down

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Battle lines are emerging over the SEC's historic proposed climate rule as parties weigh in on the rules' potential reach and impacts. The shape of the inevitable court challenges is also coming into focus in the event SEC's proposal or something similar is eventually adopted. Public comment letters and other correspondence from US senators, congressmen, and other state officials, most of whom are Republicans, provide a window into the substance of these challenges. Some of those letters are excerpted below as the comment period for the proposed rule is scheduled to end on June 17, 2022.

A controversial and extensive proposal. The SEC issued its climate proposal, *The Enhancement and Standardization of Climate-Related Disclosures for Investors* on March 21, 2022. The far-reaching proposed rule would, for the first time, require registrants to disclose their greenhouse gas emissions, exposures to climate change risks, as well as provide extensive climate-related information in their public filings. In defending [the Securities and Exchange Commission's historic risk disclosure proposal](#), SEC Chairman Gary Gensler has repeatedly asserted the need for agency action to mandate climate-related disclosures and emphasized the SEC's core bargain with investing public since the 1930s that investors get to decide which risks to take, as long as public companies provide full and fair disclosures.

Meanwhile, Commissioner Hester Peirce, the lone Republican SEC member voting against the proposed rule, proclaimed her opposition, "This proposal steps outside our statutory limits by using the disclosure framework to achieve objectives that are not ours to pursue and by pursuing those objectives by means of disclosure mandates that may not comport with First Amendment limitations on compelled speech." Peirce's extensive comments, *We are Not the Securities and Environment Commission – At Least Not Yet*, made at the agency's open meeting where the proposed rules were approved, may well provide the blueprint and inspiration for many of those seeking to assert legal challenges to block landmark climate proposal. Many of Peirce's arguments in opposition have been embraced and echoed by her Republican colleagues as well as others.

To date, the SEC has received more than [10,000 public comments](#) to its proposed rule, including 1200 of those being unique letters. Various form letters constitute the remaining comments. Thousands of more comment letters on the proposal are expected as the end of the comment period in mid-June draws near. The original 60-day comment period was recently extended by 30 days after numerous industry associations and trade groups sought additional time. Many of [those organizations](#) argued the proposal's breadth and complexity justified further time to comment.

Some of the most notable comments opposing the proposal have come from lawmakers and public officials, including 19 Republican senators, 40 Republican house members, 22 Republican states attorneys general, as well as a Democratic Senator. Below is a closer look at these comments and the objections that may form the basis for legal challenges to an eventual SEC climate rule will follow.

Nineteen Republican senators assert proposal runs afoul of applicable materiality test. In [a letter](#) urging Chairman Gensler to withdraw the climate proposal, the Republican senators assert that the proposed rules undermine applicable disclosure standards and fail to meet the materiality test as established by the Supreme Court. They note, “The concept of materiality has been described as “the cornerstone” of the disclosure system established by federal securities law. The materiality standard as defined by the U.S. Supreme Court states “there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information available.” The senators also assert, “The proposed new required disclosures fail the materiality test and undermine this important standard. Moreover, requiring the disclosure of non-material information runs afoul of the First Amendment prohibition against compelled speech.”

In their letter, the senators also contend that the proposed rule “is not within the SEC’s mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.” They question where the SEC has derived what they characterize as a “drastic change in authority”.

Forty Republican House members claim proposed rules would smear and shame public companies. The SEC cannot and should not mandate such public disclosures of information that strays from the “core purpose of disclosure, which is to provide investors with the information they need to make informed investment and voting decisions, according to [a letter submitted to the SEC from 40 Republican House members](#). The letter further contends that any additional disclosure information would only be used to smear public companies, and ultimately, the SEC’s actions would act to undermine and shame public companies, not to provide investors with necessary financial disclosures.

The letter concludes with an attack on the legal propriety of the proposed rule stating, “It is the role of Congress – and, importantly, not the role of financial regulators – to set climate-related policy, balancing interests and engaging with stakeholders to appropriately move us to a more energy-efficient nation. This Administration must end its assault on American businesses and the rule of law in the name of an immediate and expensive transition to a “Green New Deal” agenda.”

Senator Joe Manchin deeply concerned that proposal targets fossil fuel industry. In [his letter](#) to Chairman Gensler, Democratic Senator Joe Manchin (D-W.Va.) echoes some of the same points of his Republican colleagues, though in somewhat less strident tones. The senator expressed his deep concerns that the proposed rule has the potential to run counter to the SEC’s long-standing commitment to its mission by adding undue burdens on companies. For Manchin, the most concerning piece of the proposed rule is the targeting of the nation’s fossil fuel companies. He observed, “Not only will these companies face heightened reporting requirements on account of their operations, but they will also be subjected to additional scrutiny for the Scope 3 emission disclosures of other companies that utilize their services and products.”

Manchin was also troubled by the potential of overlapping regulatory burdens on certain public companies. He noted that the Environmental Protection Agency (EPA) collects emissions and climate risk data from fossil fuel companies through its Greenhouse Gas Reporting Program (GHGRP) and shares its public reports, stating, “Enacting rules that are seemingly duplicative in nature – particularly for our nation’s energy companies – may add additional burdens that are both timely and costly for publicly traded companies and may also serve to create unnecessary confusion for investors.” As a consequence, Manchin urged the Commissioners to reassess the structure and need for the additional disclosures required by the proposal, and to consider alternative reporting requirements.

22 Republican state attorneys general assert proposal changes SEC mission fundamentally.

West Virginia Attorney General Patrick Morrisey (R-W.Va), on his own behalf and 21 other Republican state attorneys general, [filed a request seeking extension of time](#) to file comments to the proposal. Morrisey asserts that the proposed rules constitute a total reordering of the SEC’s present disclosure regime and fundamentally changes the agency’s mission. In order to provide useful and comprehensive comments, Morrisey contends that the states will need to undertake and synthesize an enormous amount of analysis. That includes:

- Analyzing existing disclosure laws and regulations, most particularly those that define the relevant materiality standard, and evaluating existing disclosure requirements to confirm whether the proposed new requirements are duplicative, contradictory, or otherwise problematic;
- Determining whether the proposed requirements are consistent with the SEC’s obligation to “modernize and simplify” disclosure requirements;
- Measuring the proposed requirements against the First Amendment’s protections against certain forms of compelled speech;
- Comparing the proposed rules to those imposed in foreign markets to ensure that the SEC is not creating a competitive disadvantage for American-traded companies;
- Evaluating existing environmental laws and regulations to determine how the proposed disclosure requirements might undermine, conflict, or otherwise impair those provisions now that the Commission is stepping into this new area.

Morrisey concluded that these tasks are but a part of the legal inquiry that the States must do, and claims that the states and other commenters cannot responsibly perform this work within the initial 60 day comment period. As noted, the comment period was extended for an additional 30 days following this letter’s submission.

Lawmakers probe SEC on the climate proposal’s origins. James Comer (R-Ky), the ranking member of the House Committee Oversight and Reform, along with 18 other Republican House members, [issued a highly unusual request to Chairman Gensler](#) that the SEC provide extensive information and a briefing with regard to the agency’s intent in developing the proposal. As justification, the letter notes concerns that the proposed climate rule would not only require public companies to disclose climate information, but could also impact companies that are not publicly traded or subject to SEC regulation by requiring them to disclose similar information simply because they conduct business with publicly traded companies. The letter further states, “This is another example of the

Biden Administration's attempt to extend the reach of the federal government to promote its radical climate agenda without any consideration of the burden(s) on small businesses.”

Citing the Committee's desire to better understand the intent of the SEC in promulgating the proposed rules and the role that outside groups have played in shaping the climate proposal, the calls for the SEC to provide the following:

- All documents and communications, from January 20, 2021, to present, between or among SEC staff referring or relating to the proposed rules;
- All documents and communications, from January 20, 2021 to present, between or among SEC staff and Brian Deese, the Director of the National Economic Council (NEC) or any other member of the NEC that refers or relates to the proposed rule; and
- All documents and communications, from January 20, 2021, to present, between SEC staff and asset managers, investors, and non-governmental organizations, referring or relating to the proposed rules.

A proposal in the crosshairs. The SEC's historic climate risk proposal has engendered historic and unprecedented opposition as reflected in the noted comments and correspondence. Arguments that the proposed rule goes beyond the SEC's statutory authority, offends the First Amendment, violates applicable materiality standards, as well as a host of other concerns will most likely be reiterated by other commenters, and provide the basis for court challenges in the future. As the June 17, 2022 deadline for submitting comments draws near, there are no signs the opposition to the SEC's proposed climate rule will relent.