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The Honorable Allison Herren Lee
Acting Chair
Securities and Exchange Commission
100 F St. NE
Washington, DC 20549

Re: March 15, 2021 Remarks for the Center for American Progress Regarding Compulsory Environmental, Social, and Governance Statements

Dear Acting Chair Lee:

As the Attorney General of the State of West Virginia, I write to you concerning your remarks on March 15, 2021, before the Center for American Progress regarding potential future regulations issued by the Securities and Exchange Commission to compel public companies to make certain statements regarding environmental, social, and governance matters. There is a significant constitutional obstacle to the unprecedented and dangerous course you charted in your remarks. If the Commission proceeds down this pathway, States and other interested stakeholders will not hesitate to go to court to oppose a federal regulation compelling speech in violation of the First Amendment.

Today, the confluence of private competition for customers and for investors yields a vast amount of voluntary statements on a host of environmental, social, and governance issues. We live in an information marketplace where Americans have broad access to data and facts. As such, the Commission should stick to its core mission of requiring statements on matters that are material to future financial performance—not statements on issues that drive a political agenda.

Fundamentally changing the Commission's mission would allow it to compel collection and disclosure of information to help some customers and investors advance prejudice and animus towards groups and activities they disfavor. This is a very real and immediate concern, as demonstrated by the Boycott, Divestment, Sanctions movement that targets the nation of Israel. Another problem is that elected officials could push the Commission to compel costly and unjustified collection and disclosure of information solely to satisfy activists. For example, to get support from activists that oppose consumption of meat for moral or environmental reasons, candidates may promise to appoint or confirm commissioners amenable to requiring companies to state in securities filings how much meat is eaten in company cafeterias. Going beyond requiring

companies to disclose information that is material to future financial performance will unavoidably politicize the Commission, detracting and distracting from its other work.

Your proposal for the Commission to compel statements on additional issues including workforce diversity, the numbers of part time and full time workers, workforce expenses, workforce turnover, political contributions, contributions to tax-exempt organizations, and dues paid to trade associations, is misguided. Your proposal would in fact create a system with an unlimited number of additional mandatory statements. This is federal overreach and political activism at its worst.

Indeed, in proceedings flowing from a suit filed by the Natural Resources Defense Council in the 1970s, the Commission received submissions of "over 100 different 'social matters' . . . in which 'ethical' investors were said to be interested." 40 Fed. Reg. 51,656, 51,666 (Nov. 6, 1975). These included: "company activities undertaken without a goal of profit maximization," "charitable contributions," "community activities," "commitment to the 'human community'," "'good things a company has done'," "energy conservation," "receipt of federal subsidies," "registrant's impact on the world food crisis," "foreign investments," "nature of operations in South Africa," "U.S.-Soviet trade," "employment practices in foreign facilities," "registrant's participation in the 'flight of companies making hazardous goods to foreign countries'," "registrant's participation in the Arab boycott," "products made in foreign countries," "foreign military goods contracts," "purchases from, and sales to, communist countries," "activities which would be illegal in the U.S. but which are conducted abroad," "registrant's impact on unemployment," "effects on the unionized work force of company policies and technology," "employee relations other than wages, hours, and working conditions," "the psychological work environment," "pension and health protection," "management opportunities for women and minorities," "employee benefits, relations, and satisfactions," "discrimination against persons less than six feet tall," "lobbying efforts," "political influence," "political contributions," "product-by-product financial statements," "tobacco products manufactured," "alcoholic beverages produced," "gambling equipment manufactured," "strip mining," "defense contracts and military goods produced," "nuclear energy production," "tax loophole savings," "all state and federal tax returns," and "racial justice." 40 Fed. Reg. at 51,666 n.72. Requiring companies to provide information that is not truly material to future financial performance would open up a Pandora's box.

Fortunately, the First Amendment stands in the way of your proposal. In a series of cases from 2015 to 2020, the Supreme Court issued decisions that have the effect of requiring federal securities regulations that compel speech to withstand strict scrutiny under the First Amendment.

Strict scrutiny is the highest First Amendment standard and imposes three requirements. First, the regulation must advance a compelling government interest; second, it must be directly and substantially related to advancing that end; third, it must use the least restrictive means. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). This is a high bar for the government, and it is the "rare case[]" in which a regulation "withstands strict scrutiny." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444 (2015).

In *Reed v. Town of Gilbert*, the Court held that strict scrutiny applies to the type of content-based speech regulation at issue here. 576 U.S. 155, 159 (2015). According to Justice Breyer, the holding in *Reed* "inevitably involve[s]" the "governmental regulation of securities." *Id.* at 177. In

NIFLA v. Becerra, the Court again applied strict scrutiny in a case dealing directly with compelled speech. 138 S. Ct. 2361, 2365-66 (2018). And most recently in an opinion by Justice Kavanaugh, the Court reaffirmed the same standard. *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (citing *Reed* for its holding that "content-based laws are subject to strict scrutiny"). Concurring in part and dissenting in part in that case, Justice Breyer again remarked that this affects "the regulation of securities sales" because, "the regulatory spheres in which the Securities and Exchange Commission . . . operate[s]" is "defined by content." *Barr* at 2360.

First Amendment strict scrutiny is an unmistakable roadblock for your proposal because merely meeting a "demand" for company statements is not a compelling government interest. And while protecting investors from fraud and deceptive practices in the issuance and trading of public securities will likely be held to be a compelling government interest, it is highly unlikely courts will find requiring statements of the kind you propose to directly and substantially serve that end. Moreover, the Commission would be hard-pressed to demonstrate that mandating companies to issue statements regarding environmental, social, and governance matters which are not material to future financial performance constitutes the least-restrictive means for investors to obtain such information. Private competition for customers and investors already leads companies to issue statements on a wide variety of matters of public interest without government compulsion.

It would be preferable for you and the Commission to recognize now that the First Amendment stands in the way of the plans you outlined. If not, these issues will be raised during rulemakings that proceed down this path.

West Virginia citizens will not support efforts to allow "mission creep" in all of the federal agencies simply to advance a President's political agenda. When you mandate statements unrelated to protecting against fraud, for example, you ignore what is already accessible in the public marketplace on sensitive topics, and needlessly transform securities enforcement into political activism.

West Virginia will not permit the unconstitutional politicization of the Securities and Exchange Commission. If you choose to pursue this course, we will defeat it in court.

Sincerely,

Patrick Morrisey
West Virginia Attorney General