

MEMORANDUM

To: Members of the Committee on Financial Services

From: Financial Services Majority Staff

Date: January 12, 2024

Re: January 18, 2024, Subcommittee on Oversight & Investigations Hearing Entitled “Oversight of the SEC’s Proposed Climate Disclosure Rule: A Future of Legal Hurdles”

On Thursday, January 18, 2024, at 10:00 a.m. in Room 2128 of the Rayburn House Office Building, the Subcommittee on Oversight and Investigations (Subcommittee) will hold a hearing entitled “Oversight of the SEC’s Proposed Climate Disclosure Rule: A Future of Legal Hurdles.” Testifying at the hearing will be:

- Charles Crain, Vice President, Domestic Policy, National Association of Manufacturers
- Lawrence Cunningham, Special Counsel, Mayer Brown
- Bill Schultz, Vice President, Schultz Fruitridge Farms, Inc.
- George Georgiev, Associate Professor of Law, Emory University School of Law

This hearing will examine the Securities and Exchange Commission’s (SEC) proposed climate disclosure rule, including the limited economic analysis used by the SEC to develop the rule and the rule’s impact on U.S. businesses. The Subcommittee will review the proposed rule as part of the aggressive regulatory agenda the SEC has been pursuing under the direction of Chair Gensler and the cumulative impact of rushed rulemaking on our markets.

Background

On March 21, 2022, the SEC released a 500-page climate disclosure rule that would replace voluntary sustainability reports with mandatory disclosures that require detailed emissions data and climate risk management strategies. Over 15,000 comment letters were submitted in response to the proposal, many of which discuss the inadequate economic analysis provided by the SEC. Amid criticism of the overly prescriptive rule and concerns relating to its statutory authority, the SEC has yet to finalize the proposed rule.

In 2022, the Supreme Court in *West Virginia v. EPA* clarified the limitations of certain agency action.¹ Article I, Section I of the United States Constitution vests “all legislative powers” in Congress. However, the Biden Administration has largely relied on executive action to advance its policy agenda that it could not otherwise move through the legislative process. The Court reaffirmed the position that a government agency’s rulemaking authority is not unlimited and that

¹ *West Virginia v. EPA*, 597 U.S. __ (2022).

the major questions doctrine requires a government agency to point to a “clear” congressional authorization for its actions.

On October 31, 2023, the U.S. Court of Appeals for the Fifth Circuit held that the SEC acted “arbitrarily and capriciously, in violation of the Administrative Procedure Act, when it failed to respond to petitioners’ comments and failed to conduct proper cost-benefit analysis” on the share repurchase disclosure rule.² The Fifth Circuit’s ruling emphasizes the need for the SEC to prepare thoughtful and adequately analyzed rules. Notwithstanding these decisions, the SEC, at the direction of Chair Gensler, continues to push through an aggressive regulatory regime, that implicates the issues raised in *West Virginia v. EPA* and *U.S. Chamber of Commerce v. SEC*.

² U.S. Chamber of Commerce v. SEC, 85 F.4th 760, (5th Cir. 2023).