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Isaiah P. Harlan

This article discusses the 2022 Supreme Court case West Virginia v. EPA in which the Supreme Court utilized the Major Questions Doctrine to analyze the EPA’s Clean Power Plan. After detailing the litigation leading up to and the ultimate decision in West Virginia v. EPA, I describe the SEC’s proposed rule requiring enhanced environmental disclosures and analyze the cited statutory authority in the proposed rule. Based upon the statutory and case law analysis that I have done, I conclude that the SEC has acted outside of the scope of its congressionally delegated authority.

ESG Factors in Municipal Securities Disclosures: Toward a Materiality Concept

Justin Marlowe

State and local governments in the United States finance most of their infrastructure investment with debt instruments known as municipal bonds. The federal government does not directly regulate when or how municipal issuers access the municipal bond market, and only indirectly regulates the content of municipal borrowers’ disclosure to investors. A consequence of that unique regulatory structure is that municipal borrowers have wide discretion on whether to disclose falling property values, rising crime rates, and other long-term threats to their ability to repay investors. This is at odds with the ever-expanding information needs of investors who seek to align their holdings of municipal bonds with environmental, social & governance (ESG) investment principles. ESG investment requires detailed information about climate adaptation efforts, gender pay equity, cybersecurity, and factors not found in typical municipal disclosures. This raises a natural question: When is an ESG factor material to municipal bond investors, such that it would compel an issuer disclosure under the current municipal market regulatory framework? This article considers three potential approaches to this question. Following a review of the empirical literature on ESG risks in the municipal securities market, it suggests that municipal ESG concerns do not meet a materiality threshold from the regulated markets, but that certain ESG factors do meet the efficient market test and the creditworthiness test standards found else-where in securities law.