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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.

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THE ADMINISTRATIVE STATE

“The administrative state describes a form of government that uses an extensive professional class to provide oversight over government, the economy and society. It stands in stark contrast to a representative democracy with limited powers and reach.’”¹ Federal administrative agencies have aroused the ire of Americans who seek limited government as these agencies serve as the enforcement and regulatory wing of the legislative branch.² In our complex system of governance, federal agencies are composed of employees who are skilled in highly specialized areas of the law.³ Due to their high profile and decision-making powers, agencies such as the Environmental Protection Agency (EPA) and Securities and Exchange Commission (SEC) are familiar entities to many Americans, especially those who are in the businesses of finance and electricity generation.⁴

As our nation expanded and industrialized, trade became further reaching, and consumer transactions grew well beyond a local general store. The necessity for federal decision-making bodies with a well-developed understanding of various factors affecting American life also grew. However, this specialized knowledge coupled with regulatory power required that the powers given to these agencies be reasonably tailored to prevent unnecessary overextension of the authority provided to these agencies.

It is for that reason that the powers of an agency are granted to it through an “enabling act” passed by Congress that details the purpose of the agency. However, the enabling act alone is not a carte blanche of power; administrative agencies must act pursuant to some statutory power that has been granted to them by Congress. Furthermore, in enacting regulations, federal administrative agencies must note the specific statutory authority under which the agency is proposing the rule.

In some instances, the administrative agency’s enabling act is ambiguous. In such cases, administrative agencies have interpreted their authority to include powers which Congress did not intend, resulting in litigation challenging the agencies’ authority.

This article explores the Supreme Court’s recent decision in the case West Virginia v. EPA, which emphasized that under the Major Questions Doctrine, when a federal administrative promulgates broad economic regulations pursuant to an ambiguous grant of authority, Congress must have explicitly granted the agency the authority to do so. It then analyzes the Major Questions Doctrine in the context of the SEC’s Proposed Rule, which mandates disclosure of greenhouse gas emissions metrics for companies that are tagged as “ESG funds.”

5. 5 U.S.C. § 559.
7. 5 U.S.C § 706(2)(C).
10. See West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).
This Article concludes that the SEC is acting beyond the scope of authority granted to it by Congress. Due to a lack of clear congressional authorization, if the Proposed Rule were to be litigated, the Supreme Court would likely find that the SEC has acted outside of the scope of authority granted to it under the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Act of 1933, and the Securities and Exchange Act of 1934 and strike down the proposed rule.

HOW THE CLEAN POWER PLAN AND THE AFFORDABLE CLEAN ENERGY PLAN LED TO WEST VIRGINIA v. EPA

In June of 2022, the question of appropriate boundaries for federal agencies was taken up by the Supreme Court in West Virginia v. EPA. On the final opinion day of the 2021-2022 Supreme Court Term, Chief Justice John Roberts, in a 6-3 opinion, declared that the EPA does not have the power to essentially end coal power production within the United States.\(^\text{12}\)

The background and procedural history of West Virginia v. EPA is a complex narrative that reads like a legal drama filled with vitriolic political attacks, unprecedented legal actions, and the improper utilization of an obscure statutory provision.\(^\text{13}\) A six-year-long legal ping-pong match culminated in the Supreme Court rejecting an attempt at broad interpretation of ambiguous statutory powers by the EPA and revitalized the public discourse on the proper role of federal administrative agencies.

The Obama administration adopted the Clean Power Plan in 2015.\(^\text{14}\) The Clean Power Plan was a key component of President Obama’s policy commitment to shifting the American energy market toward clean energy by reducing reliance on coal-powered energy.\(^\text{15}\) The purpose of the Clean Power Plan was to combat climate change by limiting carbon pollution caused by coal plants.\(^\text{16}\) The objective of the Clean Power Plan was to be enforced by empowering the EPA to regulate the greenhouse gas production of already existing coal power plants by setting strict carbon dioxide emissions regulations.\(^\text{17}\) The long-term goal of the plan was to move away from the usage of coal power plants by shifting the production of electricity primarily to wind and natural gas.\(^\text{18}\) The Clean Power Plan provided the EPA with broad

\(^{12}\) See West Virginia v. EPA, 142 S. Ct. 2587, 2614-16 (2022).
\(^{13}\) See H.R. REP. NO. 114-171, 4 n.11 (2015); see also Standards of Performance for New Stationary Sources, 40 C.F.R § 60 (2015).
\(^{15}\) See id.
\(^{16}\) See id.
\(^{17}\) See id.
\(^{18}\) See id.
powers to regulate the production of American energy throughout the states.\textsuperscript{19} However, in the initial proposal of the Clean Power Plan, the EPA was skeptical that Congress had granted the agency proper statutory authority to enact broad regulations which would require “generation shifting,” a process through which coal is phased out and replaced by renewable energy sources by imposing hardline emissions caps and reporting requirements.\textsuperscript{20} The hardline emissions caps would make the production of most coal powered electricity nearly impossible without a massive investment in technology to limit emissions and thus would make compliance so expensive that coal power plants would be unable to operate within the limits imposed by EPA under the Clean Power Plan.\textsuperscript{21}

\textbf{ADMINISTRATIVE STRIFE REGARDING THE CLEAN POWER PLAN AND CONFLICTING INTERPRETATIONS OF SECTION 111(D)}

Although uncertain of the scope of the agency’s authority to enact the Clean Power Plan Final Rule, the EPA relied on the powers that appeared to have been granted under Section 111(d) of the Clean Air Act.\textsuperscript{22} On June 25th, 2013, President Obama sought to encourage the EPA to begin regulating coal power plants by issuing a presidential memorandum informing the EPA that, under his interpretation of the 1970 Clean Air Act, the agency had the power to “issue standards, regulations, or guidelines, as appropriate, that address carbon pollution from modified, reconstructed, and existing power plants and build on State[s’] efforts to move toward a cleaner power sector” under Section 111(b) and (d) of the Clean Air Act.\textsuperscript{23}

Such reliance would prove to be detrimental to the EPA in future litigation.\textsuperscript{24} Under Section 111(d) of the Clean Air Act, the EPA Administrator is authorized to create regulations that establish a method for States to submit a plan to the EPA that creates standards of performance for certain existing energy plants and the production of certain air pollutants by those sources.\textsuperscript{25} But from its inception, the enactment of the Clean Power Plan was on uncertain authority. Between 1975 and 2015, the EPA had only utilized Section


\textsuperscript{21} See West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).

\textsuperscript{22} See 42 U.S.C. § 7411(d) (2012).


\textsuperscript{24} See generally West Virginia v. EPA, 142 S. Ct. 2587 (2022).

111(d) of the Clean Air Act to regulate pollutants five times. Therefore, the EPA’s reliance on Section 111(b) and (d) is notable in particular because of the novelty of the application of Section 111(d) to permit the EPA to regulate pollutants, especially when such regulation would require large-scale changes to the American energy market, namely the phasing out of coal power.

In response to President Obama’s permissive nod to the EPA to begin regulating coal power plants under the Clean Power Plan, the EPA proposed “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units” in the Federal Register. The proposed rule was intended to permit the EPA to craft regulations that would result in a 30% reduction in carbon dioxide emissions by 2030. This reduction in carbon dioxide emissions was to be obtained through the EPA setting “[s]tate-specific emission rate–based CO2 goals.”

On its face, it appeared that Section 111(d) of the Clean Air Act provided the EPA with authority “to regulate emissions of non-criteria, non-hazardous air pollutants from stationary sources through identification of the ‘best system of emission reduction.’” However, the EPA, and later the Supreme Court, recognized that there were two conflicting interpretations of Section 111(d) of the Clean Air Act. In 1990, the Senate and House amended Section 111(d) of the Clean Air Act without reconciling the differences between the House and Senate versions of the amendments, thus leaving two separately worded amendments to the Clean Air Act.

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32. See West Virginia v. EPA, 142 S. Ct. 2587, 2611 (2022).
33. See Legal Memorandum from the EPA for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, 23 (June 18, 2014).
The 1990 Senate amendment to Section 111(d) of the 1970 Clean Air Act stated that the amendment was designed to “exclude the regulation of any pollutant which is ‘included on a list published under [Clean Air Act Section] 112(b).’” But the House amendment to Section 111(d) of the 1970 Clean Air Act “exclude[s] the regulation of any pollutant which is ‘emitted from a source category which is regulated under section 112.’”

The EPA acknowledged that under the Senate version of the amendment to the 1970 Clean Air Act, the EPA could regulate carbon dioxide production as carbon dioxide was not specified as a pollutant under Section 112(b) of the Act. But under the House version, the EPA could not regulate carbon dioxide production because the power plants, which were “sources” under the amendment, were already regulated under Section 112 and as such could not be regulated by the EPA.

Nonetheless, with ambiguities unresolved, the EPA pushed forward with its proposed rule for regulating carbon emissions and justified the regulations by deciding that the Senate amendment ought to govern the EPA’s authority. Under this favorable interpretation of the Senate amendment to Section 111(d), production of carbon dioxide by coal power plants which were already regulated under Section 111(d) would now be subjected to additional regulation by the EPA under the agency’s proposed Clean Power Plan rules.

In the Final Rule for the Clean Power Plan, the EPA decided to forgo conceding that there is a disputed interpretation of the powers granted to regulate non-hazardous air pollutants such as carbon dioxide in the 1990 House and Senate Amendments to Section 111(d) of the Clean Air. In reaching their conclusion, the EPA declared that:

the House amendment and the Senate Amendment should each be read to mean the same in the context presented by this rule: that the Section 112 Exclusion does not bar the regulation under [Clean Air Act] section 111(d)

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37. Id.
38. See Legal Memorandum from the EPA for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units, 26 (June 18, 2014).
39. See id.
of non-[Hazardous Air Pollutants] from a source category, regardless of whether that source category is subject to standards . . . under . . . section 112.41

CONGRESS DISAPPROVES THE CLEAN POWER PLAN

The EPA’s Clean Power Plan Final Rule was published in October 2015.42 Shortly after the rule was published, over four million public comments were received by the EPA regarding the Clean Power Plan.43 Thirty-two states also objected to the Clean Power Plan alleging that the compliance cost was unduly burdensome and that the rule was hastily made.44 In response to an overwhelmingly negative public reception of the Clean Power Plan, Senator Shelley Moore of West Virginia, seeking to nullify the plan, introduced a joint resolution announcing the congressional disapproval of the EPA’s Clean Power Plan.45 Utilizing the Congressional Review Act,46 the Senate formally disapproved the Clean Power Plan on November 17th, 2015, and the House formally passed S.J. Res. 24 thus enacting the formal joint resolution disapproval of the Clean Power Plan on December 1st, 2015.47

The fight over the legitimacy of the Clean Power Plan continued into the oval office. In response to the joint resolution of disapproval of the Clean Power Plan, on December 18th, 2015, President Obama vetoed S.J. Res. 24 emphasizing the utility of the Plan in the battle against climate change.48 With President Obama’s veto of the joint resolution disapproving the Clean Power Plan, the EPA continued to seek the imposition of generation shifting on the American power market.49

42. Id.
44. Id.
49. There have been continual serious doubts about the legitimacy of the EPA’s power to regulate carbon dioxide production of coal plants within a state’s border in order to force power plants to transition to wind, natural gas, and solar energy. The concern was that the EPA is setting itself to become a national power company and is no longer regulating the environment but nationalizing energy production.
The procedural history of West Virginia v. EPA is somewhat complex and spans the course of six years. The first volley of substantive legal action taken in the recent case West Virginia v. EPA begins with a request for a stay on the implementation of the Clean Power Plan. In September 2015, before any Congressional disapproval or presidential veto was made, challengers of the Clean Power Plan brought suit in the D.C. Circuit Court and requested a stay on the implementation of the Clean Power Plan.\(^{50}\)

The State of West Virginia, twenty other states, the Arizona Corporation Commission, the State of Louisiana Department of Environmental Quality, the State of North Carolina Department of Environmental Quality, and Attorney General Bill Schuette on behalf of the People of Michigan all argued in the motion to stay submitted to the D.C. Circuit Court that the Clean Power Plan was an “unprecedented, unlawful attempt by an environmental regulator to reorganize the nation’s energy grid” as states have the right to regulate electricity within their border.\(^{51}\) Furthermore, the opponents of the Clean Power Plan argued that the EPA’s timeline was unreasonable.\(^{52}\) For the states affected to be in compliance with the Clean Power Plan or request an extension, immediate action had to be taken due to the significant investment of time and resources necessary to phase out usage of coal, set caps on carbon dioxide emissions, build necessary infrastructure to shift to usage of renewable resources, and pass substantial legislation and regulations.\(^{53}\)

As litigation commenced, in December 2015 the EPA filed its opposition to the stay request.\(^{54}\) The EPA argued that the Clean Power Plan\(^{55}\) was not as burdensome as the petitioners allege and that states and power plant operators could seek an extension of the deadline to be in compliance with


\(^{52}\) See Motion for Stay, supra note 51, at 2.

\(^{53}\) See id.


the Clean Power Plan until 2018. The EPA also argued that the plan itself did not require the immediate action perceived by the petitioners as the Plan would not need to be implemented until 2022 with a deadline for completion of 2030. Furthermore, the EPA argued that the Clean Power Plan is not an unconstitutional intrusion on regulation that is reserved to another federal agency or the states and that the EPA properly had the authority to implement emission guidelines. The EPA finally concluded that a stay pending judicial review of the Clean Power Plan was not in the public interest due to the impending threat caused by climate change.

On January 21st, 2016, in a per curium order, the D.C. Circuit Court agreed to hear the case but denied the challengers’ request for a stay on the Clean Power Plan without further explanation. No time was wasted on behalf of the challengers. After denial by the Court, the opponents of the Clean Power Plan elevated their grievance by requesting a stay from the United States Supreme Court. The opponents argued that the Clean Power Plan was an unlawful policy that commandeered the States. The opponents also pointed out that, without a stay pending litigation, the Clean Power Plan would force states to utilize substantial economic resources to comply with the carbon emission caps and generation shifting required under the Clean Power Plan.

The Supreme Court agreed with the challengers and granted a stay of the Clean Power Plan. The order only required the support of five justices.

57. Opposition to Motions for Stay, supra note 54, at 36.
58. See Opposition to Motions for Stay, supra note 54, at 31-33.
59. See Opposition to Motions for Stay, supra note 54, at 50.
60. See Opposition to Motions for Stay, supra note 54, at 70.
64. See Application for Stay, supra note 62, at 41.
The five justices who supported issuing the stay were not listed in the order; however, the dissenters were Justice Breyer, Justice Ginsburg, Justice Kagan, and Justice Sotomayor. Consequently, the five unnamed justices that supported the order were easily uncovered as this was a split along ideological lines: Chief Justice Roberts, Justice Alito, Justice Kennedy, Justice Scalia, and Justice Thomas. These justices who approve the order foreshadow the Court’s ideological split in the majority opinion in *West Virginia v. Environmental Protection Agency*. Notably, this is the first time a stay had been issued by the Supreme Court on a regulation that had yet to be reviewed by a federal appellate court. The issue of federal administrative overreach was one that the court was eager to address.

Now that the Clean Power Plan had been stayed, the EPA’s power to regulate carbon emissions under Section 112 of the Clean Air Act was halted until further judicial action was taken. On September 27th, 2016, the U.S. Court of Appeals for the D.C. Circuit held an *en banc* hearing for *West Virginia v. EPA*. However, before the D.C. Circuit could issue an opinion on the Clean Power Plan, the November 2016 presidential election took place. With the installation of President Trump in January 2017, the EPA shifted its focus to be in line with President Trump’s policy goals and began a process of repealing the Clean Power Plan.

As the EPA now intended to repeal the Clean Power Plan in line with President Trump’s policy objectives, the EPA requested that the D.C. District Court grant an abeyance on the case until the EPA crafts a new policy to replace the Clean Power Plan. In April 2017, the D.C. Circuit Court granted the abeyance, and, in October of 2017, the EPA formally began the repeal of the Clean Power Plan with the intention of replacing the plan with a new policy. The D.C. Circuit Court granted additional abeyance until June of 2018 when the Court informed the EPA that it would no longer delay *West Virginia v. EPA*. The EPA was compelled to repeal and replace the Clean Power Plan through the issuance of a final rule or permit the Court to continue hearing the case.

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69. See Order Granting Stay, supra note 65.
72. *Id.* at 2605.
Shortly after, the EPA proposed the repeal of the Clean Power Plan. In its proposed rule, the EPA argued that the Clean Power Plan was outside of the scope of the powers given to the EPA under Section 111(d) of the Clean Power Plan, which requires that the emissions guidelines created by the EPA for existing sources are based on utilization of the Best System of Emission Reduction. The EPA based their conclusion on the fact that the other EPA Clean Air Act Section 11 guidelines utilize a Best System of Emissions Reduction (BESR). The BESR applies to a single source of pollution emissions, but the Clean Power Plan created carbon dioxide emissions guidelines for large numbers of power sources which would require a complete industry-wide transition to renewable resources rather than regulation of a single source.

In August of 2018, the EPA proposed the Affordable Clean Energy Rule (ACE). ACE was designed to replace the Clean Power Plan with new guidelines for states to craft plans to reduce their greenhouse gas emissions from Existing Electric Utility Generating Units through the utilization of “heat rate improvement measures as the Best System of Emission Reduction.” Furthermore, the EPA argued that under the Major Questions Doctrine, Congress must have made its intent clear that it was delegating authority “of this breadth to regulate a fundamental sector of the economy.” The EPA concluded that Congress had expressly precluded the EPA from employing the generation shifting sought in the Clean Power Plan. On June 20th, 2019 the EPA informed the D.C. Circuit Court that the final rule which repealed the Clean Power Plan and replaced it with the Affordable Clean Energy Rule had been signed by the EPA Administrator.

74. Id.
75. Id.
76. Id.
80. See West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022).
On July 15th, 2019, the EPA and the petitioners in West Virginia v. EPA asked the D.C. Court of Appeals to dismiss the proceedings as moot, arguing that the final rule published by the EPA effectively repealed the Clean Power Plan. In an en banc hearing on September 17th, 2019, the D.C. Court of Appeals granted the petitioners’ and EPA’s motion to dismiss the case as moot.

However, the fight over the Clean Power Plan was not over yet. On January 19th, 2021, immediately before President Biden took office, the D.C. Court of Appeals consolidated twelve petitions for review of the EPA’s repeal of the Clean Power Plan and replacement with the Affordable Clean Energy Rule. The D.C. Court of Appeals rejected the EPA’s claim in the Affordable Clean Energy Rule that under the Major Questions Doctrine, the “best system of emissions reduction [set by the Agency] must be supported by a clear[]statement from Congress.” Furthermore, the D.C. Circuit Court held that the Affordable Clean Energy Rule which contained the repeal of the Clean Power Plan was decided by a gross misinterpretation of the Clean Air Act as the EPA properly has the authority to regulate American Power Plants. The court further declared that Section 7411(d) can be reasonably interpreted to permit the EPA to create methods of emission reductions which include generation shifting. Finally, the court ruled that under Section 7411(d), the EPA does have the statutory authority to regulate carbon dioxide emissions produced by power plants. Consequently, the D.C. Circuit Court vacated the EPA’s repeal of the Clean Power Plan and remanded the Plan to the EPA and also vacated and remanded ACE to the EPA.


86. See id. at 959 (“[T]here is no question that the regulation of greenhouse gas emissions by power plants across the Nation falls squarely within the EPA’s wheelhouse. The Supreme Court has ruled specifically that greenhouse gasses are ‘air pollutants’ covered by the Clean Air Act”).

87. See id. at 951.

88. See id. at 988.

89. See id. at 995.
On February 12th, 2021, as the EPA was now in the process of deciding if the Agency should craft another rule under Section 111(d) and to prevent the reinstatement of the Clean Power Plan, the EPA made a motion requesting that the D.C. Appellate Court stay the mandate for the vacatur of the Clean Power Plan Repeal Rule until the EPA can craft a new rule for replacement of ACE. On February 22nd, 2021, the D.C. Circuit Court of Appeals granted the motion for a stay regarding the vacatur of the Clean Power Plan Repeal Rule until the EPA can craft a new rule. Concerned that the Clean Power Plan would go back into effect under President Biden’s administration, opponents of the Clean Power Plan filed petitions for certiorari. The Supreme Court then granted certiorari and consolidated the cases.

WEST VIRGINIA V. EPA ARRIVES AT THE SUPREME COURT

The Supreme Court was presented with the question, “whether the ‘best system of emission reduction’ identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act.” The EPA contended that none of the petitioners had Article III standing, which “demands that an actual controversy persist throughout all stages of litigation.” The Supreme Court squarely addressed the issue and concluded that the state petitioners were injured by the D.C. Court of Appeals’ judgment which vacated ACE and reinstated the Clean Power Plan. Since the states were subject to the regulations imposed by the Clean Power Plan, they were injured. Furthermore, the Court concluded that the case was not moot because the EPA had not asserted that the Agency will refrain from employing emissions limitations based on generation shifting and therefore the activity over which the case is being litigated has not ceased.

The Court stated that Congress must have clearly authorized the EPA to create emissions regulations through the employment of generation shifting for the EPA to have the power to do so. The Supreme Court laid out the basic framework of the major questions doctrine analysis stating, “[t]he

90. See Respondents’ Motion for a Partial Stay of Issuance of the Mandate in American Lung Ass’n v. EPA, No. 19–1140 etc. (CADC), p. 4).
94. West Virginia v. EPA., 142 S. Ct. 2587, 2606 (2022) (quoting Hollingsworth v. Perry, 570 U.S. 693, 705 (2013)).
96. See id.
97. Id. at 2607.
98. See id. at 2609.
agency instead must point to ‘clear congressional authorization’ for the power it claims.” 99 The Court also discusses the inception of the major questions doctrine, which was developed due to agencies repeatedly using authority outside of the scope of what would have reasonably been granted by Congress. 100 In this case, the EPA was utilizing Section 111(d) to grant itself the expansive power to “restructure the American energy market . . . .” 101 The EPA went beyond its scope of authority by attempting to reduce the carbon dioxide emissions of coal plants under the Clean Power Plan through improving the “overall power system” 102 and forcing generation shifting rather than improving individual source carbon dioxide emissions, a power which had been granted to the EPA under Section 111(d). 103 The Court substantially doubted that Congress intended to give the EPA the authority to determine the future of coal power generation. 104 The Court also made it clear that Congress had long been aware of the harms that greenhouse gas poses to the environment but has continually refused to amend the Clean Air Act to issue explicit authority to the EPA to adopt a carbon cap-and-trade scheme as seen in the Clean Power Plan. 105

The Court stated that it was skeptical that Section 111 of the Clean Air Act allowed the EPA to create carbon dioxide emissions caps through generation shifting, therefore the EPA must show “clear congressional authorization” to do so. 106 While the EPA pointed to other portions of the Clean Air Act which permit a cap-and-trade system for minimizing pollution, the “system of emission reduction” in Section 111 does not state that a cap-and-trade system is authorized to limit emissions. 107 Congress made it clear in amending the National Ambient Air Quality Standards section of the Clean Air Act that the cap-and-trade system could be used by the States to comply with the Section. 108 However, Congress made no such indication that a cap-and-trade system would be permitted under Section 111 of the Clean Air Act. 109 The Court concluded that Congress could not have intended to provide the EPA with sufficiently broad power to require generation shifting, stating that “[a]
decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.\textsuperscript{110} The Court then reversed and remanded the decision made by the D.C. Circuit Court.

\textbf{EFFECT OF WEST VIRGINIA V. EPA}

American energy producers stood on edge waiting for the Supreme Court’s decision. After a contentious seven-year legal battle questioning the authority of the EPA to regulate carbon dioxide production through generation shifting, the Supreme Court declared that the EPA was acting beyond the scope of authority granted to the Agency by Congress under Section 111(d) of the Clean Air Act and that authority to enact large scale regulation must come from an explicit grant of power by Congress.\textsuperscript{111}

The Supreme Court formally gave a name to judicial review of an agency’s attempt to utilize an apparent sweeping authority based on a new interpretation of a statute that has no indication as to the level of authority intended to be granted: the \textit{Major Questions Doctrine}.\textsuperscript{112}

The Major Questions Doctrine as applied in 	extit{West Virginia v. EPA} requires that an agency show “clear congressional authorization” when attempting to assert a previously non-existent power under an older statute.\textsuperscript{113} Note, however, that the concept and application of the Major Questions Doctrine is not particularly novel and is likely to see a strong resurgence as litigators and legal scholars question the current status of many powerful federal agencies.\textsuperscript{114}

\textbf{OTHER TIMES THE MAJOR QUESTIONS DOCTRINE HAS BEEN APPLIED TO FEDERAL AGENCIES}

While the term “Major Questions Doctrine” employed by the Supreme Court in \textit{West Virginia v. EPA} was esoteric to most, the question of congressional intent to grant a broad power under an ambiguous statute has previously been applied to earlier federal agency attempts to acquire broad power.\textsuperscript{115}

\begin{itemize}
\item \textsuperscript{110} \textit{Id.} at 2616.
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{112} \textit{See West Virginia}, 142 S. Ct at 2594 (“Under that doctrine, it determined, a clear statement is necessary for a court to conclude that Congress intended to delegate authority ‘of this breadth to regulate a fundamental sector of the economy.’”).
\item \textsuperscript{113} \textit{Id.} at 2614 (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
\item \textsuperscript{114} \textit{See, e.g.,} Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014).
\item \textsuperscript{115} \textit{See id.; see also} MCI Telecomm. Corp. v. AT&T, 512 U.S. 218, 229 (1994).
\end{itemize}
In 2014, the Supreme Court applied the Major Questions Doctrine to a new EPA regulation in *Utility Air Regulatory Group v. EPA*. In that case, the Supreme Court held that intensive scrutiny must be employed “[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy.’” The Court also reasoned that if Congress intends to grant broad power to an agency, it will do so unambiguously. The Supreme Court determined that the EPA had misinterpreted the Clean Air Act by requiring permits for stationary sources based on the source’s emission of greenhouse gas as the power to do so was not the intent of Congress in providing limited authority to the EPA under the Clean Air Act.

The EPA is not alone in having its actions questioned as being outside of statutory permissions by the Supreme Court. Under 47 U.S.C. § 203(a) communications common carriers are required to file tariffs with the Federal Communications Commission (FCC). Section 203(b)(2) permits the FCC to modify requirements made by § 203. The FCC utilized § 203(b)(2) to legitimize an order which would make the filling of tariffs with the FCC optional for all nondominant long-distance phone service providers. The only dominant long-distance phone service provider was American Telephone and Telegraph Co. (AT&T), which was unfairly disadvantaged by the exemption. This became the source of litigation in *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*

The Supreme Court concluded that § 203(b)(2) permitted the FCC to make less substantial changes to the tariff filing requirement but did not give it carte blanche to make large “fundamental” changes to the tariff filings, such as the waiving the requirement for all nondominant long-distance phone service providers. The Court reasoned that when Congress enacted the Communications Act in 1934, it did not intend to permit the FCC to fundamentally change substantive portions of § 203(a) of the Communications Act of 1934. The Supreme Court also took issue with the idea that the FCC could introduce an entirely new regulation, namely the abolition of tariff filing requirements for nondominant long-distance phone service providers

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117. *Id.* at 324 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
118. *See id.* at 324.
119. *See id.* at 333.
121. *See MCI Telecomm. Corp.*, 512 U.S. at 221.
122. *See id.*
123. *See id.*
124. *See id.*
126. *See id.* at 231.
under §203(a). The Court maintained that such regulation or deregulation is properly done by Congress, not the FCC. As illustrated, the Major Questions Doctrine will likely continue to be applied by the Supreme Court when the authority of a federal agency to enact a regulation is litigated.

A BRIEF PRIMER ON ESG AND SECURITIES REGULATIONS

As the global business market enters an era of stakeholder capitalism, in which businesses attempt to craft value for the general public rather than shareholders alone, increased demands on enhanced disclosures by businesses have come to the forefront. While stakeholder demands have traditionally been left to private ordering, the Securities and Exchange Commission has recently proposed the Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance. The Proposed Rule has created a buzz in the legal community regarding the SEC’s authority to enact a regulation which requires the reporting of various environmental and social factors to an agency that traditionally focuses on securities regulation. This is especially controversial because SEC regulations are designed to provide disclosure to prospective and current investors, however, such disclosure has typically been focused on the financial aspects of the corporation, not its carbon footprint.

BEFORE CATCHING THE SEC’S ATTENTION, ESG RATINGS WERE PIONEERED BY A WALL STREET INDEX COMPANY

“[E]nvironment, social, and governance,” as mentioned by the Proposed Rule, is commonly abbreviated as ESG. ESG goals are primarily based on a company’s continued commitment to transitioning to a carbon-neutral

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127. See id. at 234.
128. See Id.
economy and addressing climate change. However, ESG investor activism did not occur organically; the multinational index company MSCI pioneered the use of unregulated metrics in determination of a company’s investment worthiness based on ESG ratings. These ratings award scores for internal governance practices and dedication to shifting toward a carbon-neutral business model. While MSCI is not the only index company that promotes ESG investing, MSCI is the Wall Street powerhouse for investors seeking ESG-tagged funds. MSCI provides ESG ratings for more than 8,500 companies to socially and environmentally conscious investors. MSCI claims that climate change is a serious issue and that investors must join in the fight against climate change by investing in companies that are taking steps to create a future with minimal carbon emissions.

MSCI’s ESG ratings are similar to a credit rating. The ESG ratings are crafted using a “rules-based methodology,” which determines the ESG score of a company on a scale of AAA (highest) to CCC (lowest). MSCI’s approach to ESG ratings is not based on any objective regulatory framework, but the alphabetical ratings appear to draw on the existing credibility of the longstanding method of business credit ratings. Business credit ratings are not issued by a governmental agency, but rather the ratings are provided to investors by credit rating companies that are heavily regulated by the SEC’s Office of Credit Ratings. Generally, business credit ratings will range from AAA (highest) to D (default); thus, enabling investors to better understand the predetermined creditworthiness of a business and the

136. See id.
137. See id.
139. See id.
140. See Simpson et al., supra note 135.
142. See Simpson et al., supra note 135.
144. See About the Office of Credit Ratings, U.S. Sec. & Exch. Comm’n (Feb. 1, 2022), https://www.sec.gov/about/division-offices/office-credit-ratings/about-office-credit-ratings [https://perma.cc/4PJW-LFRN] (the Commission states that the SEC Office of Credit Ratings was established by the Dodd-Frank Act).
potential risk for default.\textsuperscript{145} However, ESG ratings are not subject to regulatory oversight, but still the ratings have a large impact on the decisions of carbon-conscious investors.\textsuperscript{146}

THE SEC’S ADOPTION OF ESG INVESTMENT PRINCIPLES

What was once an environment-focused sustainability score promulgated by a private entity is now being explored by the SEC. Despite the lack of federal regulations regarding the current ESG rating framework, namely the lack of objective, quantifiable metrics relevant to the financial purposes of investing, the SEC intends to impose greenhouse gas reporting requirements on ESG-tagged funds without regulating the existing system by which such funds are scored.\textsuperscript{147}

On June 17th, 2022, the SEC published the proposed rule “Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices” (“Proposed Rule”).\textsuperscript{148} The Proposed Rule is designed to amend the Investment Company Act of 1940 and the Investment Advisers Act of 1940.\textsuperscript{149} Under the Proposed Rule, investment companies and investment advisors will be required to provide clients with substantially more detailed data on the ESG investment practices utilized by these advisors and companies. SEC Commissioner Hester M. Peirce provided a summary of the proposal, stating that the Proposed Rule mandates certain companies to report:

[C]limate-related risks; climate-related effects on strategy, business model, and outlook; board and management oversight of climate-related issues; processes for identifying, assessing, and managing climate risks; plans for transition; financial statement metrics related to climate; greenhouse gas (“GHG”) emissions; and climate targets and goals.\textsuperscript{150}


\textsuperscript{146} See Simpson et al., supra note 135.


\textsuperscript{148} Id.

\textsuperscript{149} Id.

Commissioner Peirce’s summary is particularly worthy of note, as the Proposed Rule amounts to over 500 pages. Commissione... bring to light the most legally problematic aspects of the proposal.

The SEC claims that the Proposed Rule will protect investors by assisting in clarifying ESG practices as marketed by advisors, as there is not currently a uniform method of disclosure for funds marketed as “ESG” to investors. The SEC also claims that this Proposed Rule is necessary due to an increased demand by investors for funds that consider ESG principles. In response to this increased demand, asset managers are marketing ESG funds to investors, but these funds are not producing reliable information detailing their commitment to ESG principles. Furthermore, the SEC claims that advisors who market ESG funds are potentially aggrandizing the actual ESG practices of the company or fund through “greenwashing”, and that without a unified system of disclosure, investors are tasked with uncovering the company’s or fund’s actual commitment to ESG principles. Alas, the very same goal could be accomplished without federal overreach if ESG index companies simply share the sought-after, non-financial material information with investors.

The SEC states that to accomplish the goals of the Proposed Rule, it will set “minimum disclosure requirements for any fund that markets itself as an ESG-Focused Fund, and require[ ] streamlined disclosure for Integration Funds that consider ESG factors as one of many factors in investment selections.” Furthermore, the SEC also seeks to impose a data analysis requirement that requires Inline Extensible Business Reporting Language data to be used to attach a fund’s ESG disclosures so that investors can readily evaluate the ESG disclosures of a given fund. The Proposed Rule does not consider the cost of compliance in obtaining the software programs and data analytics required to comply with the Proposed Rule.

153. See id. at 36658.
154. Greenwashing is the practice of making a company appear to be more environmentally conscious than it is.
155. See supra note 11 at 36658.
157. Id.
Throughout the Proposed Rule, the costs of compliance continue to grow. Not only is the SEC intent on imposing strict reporting requirements on ESG-focused funds, but the SEC also adds that ESG funds which engage with the “environment” element of ESG must disclose “two greenhouse gas (‘GHG’) emissions metrics” in their annual reports. The SEC claims that these greenhouse gas disclosures will allow investors to better understand the carbon footprint of an ESG-Focused Fund and investigate if the climate disclosures made by the fund are accurate compared to the fund’s reported greenhouse gas metrics, as required by the Proposed Rule. Finally, the SEC states that, for funds which consider ESG factors when selecting investments, those funds must “disclose to investors (1) how they incorporate ESG factors into their investment selection processes and (2) how they incorporate ESG factors in their investment strategies.”

**The Statutory Authority Cited by the SEC in the Proposed Rule**

The SEC proposal is approximately 107 pages in length, and the Commission cites the four major securities acts: the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Act of 1933, and the Securities Exchange Act of 1934. The Commission claimed that the Proposed Rule is properly within the scope of the SEC’s powers under:


The Commission did not have any specific authority which grants it the power to promulgate greenhouse gas emissions disclosures. The following section provides a general overview of each source of statutory authority that the SEC relied on in enacting the Proposed Rule. It is important to note that

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158. *Id.*

159. *See id.*

160. *Id.* at 36660.


163. *See id.*
a reviewing court will not merely interpret each statutory provision in isolation, but rather will consider the context of the statute as a whole.\textsuperscript{164}

**SEC Authority Under the Investment Company Act of 1940**

Broadly, 15 U.S.C. § 80a-8 provides the SEC with the authority to oversee the registration of investments and the required contents of an investment registration statement.\textsuperscript{165} 15 U.S.C. § 80a-24 provides the mechanics of alternative registration of a security pursuant to the Securities Act of 1933 and provides a grant of authority for the SEC to adopt rules to enforce the alternative registration of securities.\textsuperscript{166}

15 U.S.C. § 80a-30 requires that investment companies which are registered with the SEC maintain certain records, but more importantly provides a restraint on the Commission’s authority under § 80a-30(a)(2). This subsection states that the SEC shall “minimize the compliance burden on persons required to maintain records,”\textsuperscript{167} as well as consider the costs which arise due to the maintenance of information the SEC is requiring the person to retain.\textsuperscript{168}

15 U.S.C. § 80a was squarely addressed in the House Conference Report on the National Securities Markets Improvement Act of 1996 (HR 3005).\textsuperscript{169} The House Conference Committee, concerned about the effect of Commission regulations on the free markets, requested that 15 U.S.C. § 80a be amended to require the Commission to consider the impact of a proposed rule on the efficiency of the market.\textsuperscript{170} Based only on the canons of statutory interpretation, from a plain meaning interpretation of the language contained in 15 U.S.C. § 80a-30(a)(2), the congressional intent is clear that under the rulemaking authority vested in the SEC, Congress did not intend for the Commission, under any amendment to the existing securities laws, to have broad environmental regulatory powers.\textsuperscript{171} Based on the plain language of the statute, Congress sought to impose preventative guardrails to avoid the imposition of economically burdensome compliance requirements by the Commission.\textsuperscript{172} Further Congressional Records also support the proposition that Congress’s intent is clear that the SEC must consider the economic impact of

\textsuperscript{164} See Nat’l Assn. of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 666 (2007) (“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”) (quoting FDA v. Brown & Williamson Tobacco Corp, 529 U.S. 120, 132-33 (2000)).


\textsuperscript{171} See id.

\textsuperscript{172} See id.; see also 15 U.S.C. § 80a-30(a)(2).
rulemaking initiatives. In the 1996 initial House Report on the National Securities Markets Improvement Act of 1996, the House Committee adds a clarification that when the SEC proposes new rules, to have properly considered the efficiency of the proposed rule, the Commission is required to take into account the efficiency of the rule by “analyz[ing] the potential costs and benefits of any rulemaking initiative, including, whenever practicable, specific analysis of such costs and benefits.”

As cited by the SEC in the proposed rule, Section 80a-38 merely provides that the regulations established by the SEC are effective upon publication or other methods. This statute is not considered significant for the purposes of this article. Based on an analysis under the Major Questions Doctrine, as considered by the Supreme Court in *EPA v. West Virginia*, there is no clear grant of authority from Congress to the SEC to enact the proposed rule under the Investment Company Act of 1940 as cited by the Commission.

SEC AUTHORITY UNDER THE INVESTMENT ADVISERS ACT OF 1940

As for the Investment Advisers Act cited by the Commission, 15 U.S.C. 80b, § 80b-203 provides that investment advisers must be registered with the SEC and that the SEC may take disciplinary action against advisers who violate SEC rules. However, 15 U.S.C. § 80b-3 requires that advisers maintain records for each private fund advised containing “information as the Commission . . . determines is necessary[,] . . . for the protection of investors or for the assessment of systemic risk . . . .” Under the proposed rule, which requires that companies disclose two greenhouse gas metrics as well as extensive information about how the companies are committed to ESG principles, an additional burden is placed on advisers to retain swaths of environmental disclosure information unrelated to “the protection of investors” in the *economic* sense as emphasized by Congress in the 1996 initial House Report on the National Securities Markets Improvement Act of 1996.  

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176. 15 U.S.C. § 80b-3 (c)(1)).
15 U.S.C. § 80b-211 serves as the enabling statute under the Investment Advisers Act and grants the SEC the authority to enforce the Act as well as carry out the Commission’s other duties. 181 There is no record of the Commission being granted power by Congress to compel greenhouse gas disclosures as any function meeting the regulatory purpose of the Commission. 182

15 U.S.C. § 77a-5 is the anti-fraud provision of the Securities Act of 1933, which prohibits the sale of securities that have not yet been registered. 183 15 U.S.C. § 77a-6 provides the mechanics of registration of a security under the Securities Act. 184 15 U.S.C. § 77a-7 details the requirements of the registration statement that must be filed for securities and further defines the requirements in Schedule A. 185 Schedule A to 15 U.S.C. § 77g lists thirty-two registration statement requirements; of the thirty-two requirements enumerated in Schedule A, no mention of environmental risk assessment or environmental impact is made. 186

**SEC Authority Under the Securities Act of 1933**

15 U.S.C. § 77a-10 covers the information to be included in the prospectus but makes no mention of environmental-related disclosures. But it does grant the SEC the authority to mandate that the prospectus include other information the SEC believes to be necessary for “the public interest or for the protection of investors.” 187 However, broad terms such as “public interest” and “protection of investors” do not include environmental activism. 188 In fact, in *Natural Resources Defense Council, Inc. v. Securities and Exchange Commission*, the Commission denied a petition to craft a rule which would compel the disclosure of corporate environmental policies. 189 In defending the denial of the petition, the SEC admitted that promulgation of environmental protection disclosure rules is outside the scope of the Commission’s authority under the guise of public interest and that when acting pursuant to the Securities Exchange Act, the Commission is only vested with the authority to compel the disclosure of financial information. 190

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182. 15 U.S.C. § 80b-11(a) (this section details the statutory power granted to the Commission under Title 15).
188. 15 U.S.C. § 77j(c).
Furthermore, in addition to contradicting past statements by the Commission on the limitation of their authority,\textsuperscript{192} the proposed rule contravenes existing SEC rules about the substance of the prospectus under § 77j(c). 17 C.F.R. § 230.421(c) requires that the information included in the prospectus must be “clearly understandable.”\textsuperscript{193} Yet the complex and technical nature of environmental science and regulations does not lend itself to readily tangible conceptualization. The requirement that companies both measure and disclose their carbon footprint, Scope one, Scope two, and Scope three greenhouse gas emission metrics\textsuperscript{194} as described in the proposed rule would be best understood by an ecologist, not the average American investor.\textsuperscript{195} 

15 U.S.C. § 77a-19 provides the SEC with the authority to carry out the Securities Act.\textsuperscript{196} Curiously, § 77a-19 (d)(2)(D) also declares that states and the federal government ought to cooperate to substantially reduce “costs and paperwork to diminish the burdens of raising investment capital . . . .”\textsuperscript{197} However, following § 77a-19 would compel opposition to the proposed rule by the states and federal government as such bodies are compelled to reduce barriers to “raising investment capital.”\textsuperscript{198} 

It is important to note that a critical way companies raise capital is through the issuance of stocks and bonds. Therefore, for a large corporation to comply with the proposed rule, and thus raise capital without violating the disclosure requirements under the proposed rule,\textsuperscript{199} the estimated cost burden of capturing climate-related disclosure data, training employees in environmental matters, and making changes to contracts to obtain climate data from third parties could amount to a compliance cost of more than $100,000,000 for certain companies.\textsuperscript{200} 

\textsuperscript{193} 17 C.F.R. § 230.421(c) (2023). 
\textsuperscript{195} See Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. at 36678 (explaining the carbon footprint calculation stating that the carbon footprint calculation requires “the total carbon emissions associated with the fund’s portfolio, normalized by the fund’s net asset value and expressed in tons of CO2 e per million dollars invested in the fund”). 
\textsuperscript{197} 15 U.S.C. § 77s(d)(2)(D). 
\textsuperscript{198} See id. 
\textsuperscript{199} See Enhanced Disclosures by Certain Investment Advisers and Investment Companies About Environmental, Social, and Governance Investment Practices, 87 Fed. Reg. at 36659. 
\textsuperscript{200} See Tom Quaadman, Comment Letter on Proposed Rule, Supplemental Comments, Securities and Exchange Commission; The Enhancement and Standardization of Climate-Related Disclosures for Investors, U.S. SEC. & EXCH. COMM’N 11 (Nov. 1, 2022),
Furthermore, the cost of compliance for small businesses could lead them into bankruptcy. Many small businesses affected by the proposed rule would be required to hire climate consultants and engage in costly environmental impact analyses. The Commission estimates that the cost of compliance for a small entity to include environmental disclosure information on their prospectus would range between $234,960 and $588,380. Depending on the average earnings of a business subject to the Proposed Rule (which the rule does not take into account), the cost of compliance is more than just a “burden,” the price would effectively operate as a complete barrier to entry, especially for smaller businesses.

SEC AUTHORITY UNDER THE SECURITIES AND EXCHANGE ACT OF 1934

Turning to the final paragraph of legal authority cited by the SEC in the Proposed Rule, the SEC cites the Securities and Exchange Act of 1934, 15 U.S.C. § 78b-13. Section 13 requires that issuers of registered securities file accurate quarterly reports with the SEC and keep accurate records. Subsection 5 of 15 U.S.C. § 78b-13 provides that the SEC may exercise its authority under the Act when done in the public interest or to protect investors. However, as the Supreme Court concluded in Nat. Res. Def. Council, Inc. v. SEC, promulgation of environmental disclosure regulations does not fit within a legitimate exercise of authority by the Commission to act in the public’s interest.

THE PROPOSED RULE LIKELY CONFLICTS WITH THE 17 C.F.R. § 230.421(C) PLAIN ENGLISH REQUIREMENT AND MARKET EFFICIENCY STATUTES

15 U.S.C. § 78b-15 covers the registration requirements of brokers and dealers as well as penalties for brokers or dealers who violate the Exchange Act. The importance of this citation by the SEC is found in section 78b-15 (n)(1), which allows the SEC to decide what information must be made

https://www.sec.gov/comments/s7-10-22/s71022-20148911-315866.pdf
https://perma.cc/DW2Z-RZ6R.

201. See id.
203. See 15 U.S.C. §77s(d)(2)(D) (originally enacted as § 77a-19 (d)(2)(D)(1933)).
204. See U.S. Ct. of Appeals for the Dist. of Columbia Cir., supra, note 61.
205. See 15 U.S.C. § 78m(f)(5)
206. See 15 U.S.C. § 78m(f)(5)
207. See Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1039 (D.C. Cir. 1979) in which the D.C. Circuit Court accepts the SEC’s argument that the commission lacks the authority to create rules which are not within the scope of authority granted to it by its “organic statutes.”
available from a broker to a retail investor before the purchase of an investment product.\textsuperscript{208} However, in subsection (n)(3)(B)(i), the SEC limited the type of information it may demand brokers provide to investors.\textsuperscript{209} 15 U.S.C. § 78o(n)(3)(B)(i) states that information required to be given to an investor “shall . . . be in a summary format; and . . . contain clear and concise information about . . . investment objectives, strategies, costs, and risks . . . .”\textsuperscript{210} Section 78o(n)(3)(B)(i), in addition to 17 C.F.R. § 230.421(c)’s requirements, effectively operate as preventive measures designed to curtail the intensive esoteric disclosures required under the Proposed Rule.

The measurement of carbon output as required by the Proposed Rule utilizes a complicated mathematical formula in which metric tons per year of carbon dioxide are calculated by multiplying the metric tons of each greenhouse gas emitted per year by the global warming potential of each calculated greenhouse gas as determined by the EPA.\textsuperscript{211} The intensive formulaic environmental science required to be shared with investors to comply with the Proposed Rule is substantially beyond the general investor’s business acumen and thus does not comply with the requirement for “clear and concise information”\textsuperscript{212} under § 78o.\textsuperscript{213}

15 U.S.C. § 78w provides the SEC with the power to make rules necessary to enforce Chapter 15. However, similar to 78o(3)(B)(i), which requires the information given to an investor to be comprehensible, 15 U.S.C. § 78w(a) also imposes a limiting principle which requires that the SEC consider how a rule would affect competition.\textsuperscript{214} It states “[t]he Commission . . . shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this [chapter].”\textsuperscript{215} The National Securities Markets Improvement Act of 1996 amends the Securities Act of 1933 and speaks directly on this subsection.\textsuperscript{216} Under the Section 106 amendment to 15 U.S.C. § 78b (the Securities Act of 1933), Congress sought to require that when the SEC intends to impose

\textsuperscript{209} See 15 U.S.C. § 78o(n)(1).
\textsuperscript{213} Any further explanation of the intensive environmental data analysis required to calculate carbon emissions under the proposed rule would derail the purpose of this note, which is focused on the usurpation of authority by a federal agency that is attempting regulation substantially beyond the bounds of authority granted to it by Congress. The intention in including such scientific information is to illustrate that the SEC is acting considerably outside of the scope of the Commission’s statutory powers.
regulations acting under the powers of 15 U.S.C. § 77b, the Commission must take into consideration the necessity of the regulation and “whether the action will promote efficiency, competition, and capital formation.”

One of the stated purposes of the amendments to the Securities Act of 1933 under the National Securities Markets Improvement Act of 1996 was to reduce the burden of the existing securities regulations so that the markets could operate more efficiently. The imposition of multi-million dollar environmental reporting requirements for publicly traded companies and the burden on small businesses to decapitalize growth efforts and instead allocate substantial financial resources to measuring carbon output is unlikely to promote efficiency of the markets as intended by Congress.

15 U.S.C. § 78-ll requires that filings made to the SEC be made in such a way that the filing can be entered into the EDGAR System, which is the SEC’s electronic data collection platform.

Related limiting statutes indicate that it is unlikely Congress intended for the SEC to have the authority to enforce environmental reporting requirements.

The final source of statutory authority cited by the SEC in the proposed rule is 44 U.S.C. § 3506-3507. Those provisions give a general grant of authority for federal agencies to collect information, but do not specify what information is appropriate for each agency to collect. However, limiting statutes such as 44 U.S.C. § 3506(c)(3)(A) require that the agency certify the information it seeks to collect “is necessary for the proper performance of the

218. See 142 Cong. Rec. D1056-03, 1057 (daily ed. Oct. 21, 1996) “H.R. 3005, to amend the Federal securities laws in order to promote efficiency and capital formation in the financial markets, and to amend the Investment Company Act of 1940 to promote more efficient management of mutual funds, protect investors, and provide more effective and less burdensome regulation.”
220. See Mike Joyce, Sharan Faulkner & Jake Jacoby, Comment Letter on Proposed Rule, Supplemental Comments, Securities and Exchange Commission; The Enhancement and Standardization of Climate-Related Disclosures for Investors, 5, (June 17, 2022). [https://perma.cc/2ZHT-C87V] (“Our members agree with other commenters that the scope of the proposed rule is so broad that the burdens presented by this rule alone may actually discourage companies from entering public markets.”).
functions of the agency, including that the information has practical utility\textsuperscript{224} and that collection of such information “reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency . . . .”\textsuperscript{225} The proposed rule is “manifestly contrary to the statute”\textsuperscript{226} under 44 U.S.C. § 3506(c)(3)(A) and (C) in that large-scale collection of greenhouse gas emissions metrics is unlikely to be determined by a court to be a requirement for the SEC to serve its purpose as an agency which deals primarily in protecting investors and regulating securities.\textsuperscript{227}

Application of the Major Questions Doctrine Indicates That the SEC Has Acted Outside of the Scope of Authority Granted to It by Congress in Enacting the Proposed Rule

I. SEC Is Acting Outside of the Scope of Delegated Authority Under the Major Questions Doctrine

Under existing case law, the Supreme Court has maintained a healthy suspicion of federal administrative agencies who claim to act pursuant to an ambiguous statutory grant of power.\textsuperscript{228} A federal agency is only entitled to the authority which has been expressly delegated to it by Congress.\textsuperscript{229} The Court is particularly wary of actions by federal administrative agencies when a proposed rule could produce an unfavorably large economic impact\textsuperscript{230} like the one the proposed rule will have on the American market.\textsuperscript{231} When

\begin{itemize}
\item \textsuperscript{224} 44 U.S.C. § 3506 (c)(3)(A).
\item \textsuperscript{225} 44 U.S.C. § 3506 (c)(3)(C).
\item \textsuperscript{226} Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (noting that an agency’s interpretation will not be given “controlling weight” if the interpretation renders regulations which are “arbitrary, capricious, or manifestly contrary to the statute”).
\item \textsuperscript{227} See Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1039 (D.C. Cir. 1979).
\item \textsuperscript{229} See Stark v. Wickard, 321 U.S. 288, 309 (1944) (“When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.”).
\item \textsuperscript{231} See Mike Joyce, Sharan Faulkner & Jake Jacoby, Comment Letter on Proposed Rule, Supplemental Comments, Securities and Exchange Commission; The Enhancement and Standardization of Climate-Related Disclosures for Investors, 3, (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132528-303019.pdf [https://perma.cc/3MXW-MQM5] (“Specifically, the mandated calculation and reporting of Scope 3 emissions (including 15 all-inclusive categories of upstream and downstream emissions) will impose tremendous administrative costs on companies of all sizes, but may particularly negatively impact smaller companies.”).
\end{itemize}
analyzing the statutes cited by the SEC in the proposed rule.\textsuperscript{232} Congress has not clearly granted the SEC the authority to enact the proposed rule in its current form. Thus, it would likely fail under the Major Questions Doctrine. This is because it is unlikely that Congress intended “[s]uch a sweeping delegation of legislative power”\textsuperscript{233} to be granted to the SEC as such power must be clearly delegated.\textsuperscript{234}

**THE AUTHORITY TO REGULATE ENVIRONMENTAL DISCLOSURE ALREADY BELONGS TO THE EPA**

Congress has already given “[s]uch a sweeping delegation of legislative power”\textsuperscript{235} to the Environmental Protection Agency.\textsuperscript{236} Congress authorized the EPA to collect information regarding greenhouse gas emissions via the Greenhouse Gas Reporting Program.\textsuperscript{237} Under this program, over 7,000 emissions emitting entities are required to report their greenhouse gas emissions in annual reports to the EPA.\textsuperscript{238} As one of the purposes of this collection of emissions data, the EPA states, “[t]his data can be used by businesses and others to track and compare facilities’ greenhouse gas emissions . . . .”\textsuperscript{239} Consequently, the requirement that companies disclose greenhouse gas metrics under the SEC’s Proposed Rule\textsuperscript{240} is merely duplicative as such disclosures are already mandated by the EPA’s Greenhouse Gas Reporting Program. If an investor is sincerely focused on reducing the collective emissions of funds within his or her investment portfolio, the Greenhouse Gas Reporting Program requires annual reporting of emissions from sources that emit more than 25,000 metric tons of CO\textsubscript{2} per year,\textsuperscript{241} thus eliminating the


\textsuperscript{234} See West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022).

\textsuperscript{235} A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935); see West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022).


\textsuperscript{238} See 40 C.F.R. § 98.1 (2009).


\textsuperscript{241} See ENV’T PROT. AGENCY, supra note 97.
necessity of such disclosure to the SEC, an agency which has no specialty in environmental reporting.\textsuperscript{242}

A challenge to the Commission’s proposed rule would likely be similar to the challenge of the EPA’s authority in \textit{West Virginia v. EPA}.\textsuperscript{243} In that case, the petitioners challenged the authority of the EPA to utilize ambiguous statutory authority granted in the Clean Air Act to enact an intensive emissions reduction plan, which involved large-scale generation shifting that would essentially eliminate the American coal mining and coal power industries.\textsuperscript{244} The Supreme Court, in no uncertain terms, made clear that the EPA lacked statutory authority under the Clean Air Act to “restructure the American energy market”\textsuperscript{245} as doing so was substantially beyond the scope of powers granted to the agency by Congress.\textsuperscript{246} The Court arrived at the conclusion in \textit{West Virginia v. EPA} by applying the Major Questions Doctrine, which states that there must be “clear congressional authorization”\textsuperscript{247} for an agency to enact a sweeping rule through the utilization of powers which did not previously exist and contrived through the use of an ambiguous statute without congressional authorization.

In challenging the SEC’s proposed rule, a petitioner has a \textit{prima facie} case under the Major Questions Doctrine as applied in \textit{West Virginia v. EPA}.\textsuperscript{248} As analyzed earlier in this note,\textsuperscript{249} there is no “clear congressional authorization”\textsuperscript{250} for the SEC to enact a rule pursuant to the Securities and Exchange Act or Securities Act which mandates the disclosure of greenhouse gas emissions in annual reports to the SEC or requires the reporting of such in prospectuses.\textsuperscript{251} The attempt to collect environmental information through the Proposed Rule under the guise of “enhanced” investor disclosures is a thin façade for stakeholder capitalism ideology to be administered by a

\textsuperscript{242} See Nat. Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1039 (D.C. Cir. 1979) (admitting that the commission denied the petitioners request to compel environmental information because the Commission’s primary focus is an economic one, not environmental regulation).

\textsuperscript{243} See West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022) (emphasizing that congressional intent to delegate large-scale authority to an administrative agency must be clear and stating, “our precedent counsels skepticism toward EPA’s claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach.”).

\textsuperscript{244} See West Virginia v. EPA, 142 S. Ct. 2587, 2615-16 (2022).

\textsuperscript{245} See \textit{West Virginia}, 142 S. Ct. at 2610.

\textsuperscript{246} Id. at 2613. (concluding that Congress did not intend to permit the EPA to regulate the future of American coal energy).

\textsuperscript{247} Id. at 2614 (citing Utility Air Regul. Grp. v. EPA, 573 U.S. 302, 334 (2014)).

\textsuperscript{248} See id. at 2613.

\textsuperscript{249} See supra pp. 25-36.

\textsuperscript{250} \textit{West Virginia}, 142 S. Ct. 2587 at 2613 (2022).

powerful federal agency. The Commission has veered from one of the most elementary principles of business law, “[a] business corporation is organized and carried on primarily for the profit of the stockholders.”

The SEC’s mission is to protect investors, namely stockholders, and it has been granted appropriate latitude by Congress to do so. However, this ability to protect investors through mandating appropriate and material disclosures is unlikely to justify requiring the reporting of greenhouse emissions metrics with substantial cost to the business entity, especially when such a requirement is already mandated by the EPA. Consequently, the SEC has acted substantially beyond the scope of its authority in the promulgation of the Proposed Rule as Congress has not explicitly granted it the authority to require ESG disclosures and the imposition of such a reporting requirement and such regulation is already preempted by a different federal agency.

253. See generally Investment Advisors Act of 1940; Securities Act of 1933; and Securities Exchange Act of 1934.