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The SEC's Climate Disclosure Rule: Critiquing the Critics

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Climate change is an existential phenomenon, which entails a wide variety of physical risks as well as sizeable but underappreciated economic risks. In March 2022, the U.S. Securities and Exchange Commission (SEC) moved to address some of the information gaps related to the effects of climate change on firms by proposing a rule that requires public companies to report detailed and standardized information about important climate-related matters for the benefit of investors and markets. Though the rule proposal was welcomed by many market participants, it was also met with a level of opposition that was unusual in both its intensity and consistency. Instead of following standard practice and engaging with the specific policy judgments made by the SEC in an effort to improve the final rule through constructive notice-and-comment rulemaking, many critics chose to attack every aspect of the rule proposal and the SEC's very decision to pursue a climate disclosure rule. The critics disputed the SEC's statutory authority and motivations, questioned the materiality of information about the economic impacts of climate change, and advanced certain novel administrative and constitutional law theories that had gained traction in other, unrelated contexts. Unless the SEC yields to pressure and abandons the climate disclosure project, these same arguments will serve as the basis for the widely predicted litigation against the final rule.

This Article presents an original analysis of some of the principal challenges to the SEC's climate disclosure rule and, ultimately, finds them unpersuasive. A close review of the features of the traditional disclosure regime, many of them long forgotten, and of the features of the SEC's rule, many of them distorted by the critics, suggests that the rule is in keeping with longstanding regulatory practice. In short, the SEC has the statutory authority to act, its motivations are neither improper nor novel, materiality, when properly understood, does not present an obstacle, and theories pertaining to ?major questions? and ?compelled speech? are misplaced in this context.

The Article contributes to the debate on climate-related disclosure in two ways. First, it draws attention to the flawed legal and policy arguments against the SEC's climate disclosure initiative and the distracting rhetoric that has accompanied them. And, second, it highlights the rule's core function, which is to put in place an information-generating framework to help capital markets and capital market participants?the primary intended beneficiaries of SEC regulation?with the climate-related economic challenges that lie ahead.

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