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REGULATION AND COMPLIANCE

Can SEC's climate rule survive the Supreme Court's tough new standard?

By [Jordan Stutts](#) | July 07, 2022, 9:00 p.m. EDT | 6 Min Read

A Securities and Exchange Commission proposal that would require banks and other companies to make disclosures about their carbon emissions may become a test case for how far the Supreme Court will go to rein in the authority of financial regulators.

The SEC's climate risk disclosure proposal, unveiled in March, would require corporations to report publicly on the greenhouse-gas emissions generated by their business activities. It is a key priority for the Biden administration at a time when the conservative majority on the Supreme Court has established new limits on regulators' authority.

Legal experts noted that the SEC has clear legal authority to regulate disclosures of material risks, including the emergence of new financial trends. But they also said the court's narrow interpretation of statutory authority last week in a case involving the Environmental Protection Agency could present difficult legal challenges for the securities regulator.



Chief Justice John Roberts (left) wrote the majority opinion in a recent Supreme Court decision that could have implications for a proposed climate risk disclosure rule pushed by Securities and Exchange Commission Chair Gary Gensler (right). *Bloomberg*

“This court is signaling that it’s not a great fan of administrative action and will tend to shift authority more to Congress, rather than give deference to the agencies,” said Kristina Wyatt, a lawyer who was involved in drafting the SEC’s proposal while serving as senior counsel for climate to the director of the agency’s division of corporation finance.

In a 6-3 decision last week, the Supreme Court struck down an EPA rule from the Obama administration, which sought to force heavy-polluting power plants to reduce emissions and transition to cleaner sources of energy.

Chief Justice John Roberts wrote in the court’s majority opinion that he doubted Congress intended to delegate to the EPA the question of how much coal-based power generation there should be in the coming decades, pointing to the economic and political significance of the agency’s rule.

The decision signals that the Supreme Court may be willing to scrutinize any regulatory proposal that reaches beyond the scope of the authority granted to a federal agency when it was established by Congress, which in most cases occurred decades ago.

SEC Chair Gary Gensler, who took the reins last year, tasked the agency with drafting new rules to account for climate-related risks. The ensuing proposal would represent a landmark shift in how corporations address climate change.

Banking industry groups have asked the SEC to scale back its proposal, arguing that the requirements would be onerous and could conflict with related efforts by bank regulators, while also noting that many banks already provide certain emissions data.

The proposed rules “go far beyond the SEC’s mandate to protect investors” and should “conform to the long-held definition of materiality,” the American Bankers Association said in its public comments, referring to the agency’s authority to regulate disclosures of material risks.

The Bank Policy Institute said in separate comments that it “supports efforts by the SEC to promote consistency, comparability, and reliability” of emissions disclosures, but urged regulators to maintain the “traditional approach of principles-based, rather than overly detailed, disclosure requests.”

The SEC’s proposal has also drawn pushback from Republican lawmakers. After the Supreme Court’s ruling in the EPA case, Sen. Pat Toomey, the top Republican on the Senate Banking Committee, said in an emailed statement: “The SEC should consider itself to have been put on notice.”

Toomey said that the court’s ruling shows that federal agencies “cannot use creative, new interpretations of existing law to pretend they have legal authority to support sweeping policy changes that Congress never intended.”

But Todd Phillips, director for financial regulation and corporate governance at the liberal think tank Center for American Progress, argued that the court's ruling in the EPA case "does not portend anything" for the SEC's proposal.

The SEC "is not trying to solve climate change" using its rulemaking authority, Phillips said.

"The SEC is trying to ensure that investors have adequate information to make investing decisions," he said. "This is not a new question, and it doesn't strike me as a major question. This is what the SEC has been doing since it was created in the 1930s."

Similarly, Thomas Gorman, a partner at the law firm Dorsey & Whitney, said there is "no doubt" that the SEC has the statutory authority to advance the climate disclosure proposal.

The Supreme Court took an "aggressive position" on statutory authority in the EPA case, which should not apply to the SEC's disclosure proposal, said Gorman, who previously served as senior counsel in the SEC's enforcement division.

"If the rule is going to be that statutory authority has to specify what the disclosures are going to be, then [the SEC] won't be able to do anything," he said. "Clearly, that's wrong."

Other observers expressed less confidence about the likely outcome if the SEC rule eventually gets reviewed by the Supreme Court.

Philip Wallach, a senior fellow at the conservative American Enterprise Institute, said the verdict will depend on whether SEC officials "can frame the climate rule as just another building block among their familiar practice."

"The practice of disclosures to investors is pretty well-established in American law. It doesn't have the feel to me of something brand-new and innovative," Wallach said. "The question is: Does the use of this existing regime start to feel so novel and ambitious that it triggers serious concerns from the judiciary?"

[POLITICS AND POLICY](#)

Supreme Court blow to EPA authority could strengthen banks' legal standing

A decision narrowing the power of the Environmental Protection Agency could be enough for other industries, banking included, to push back against novel interpretations of regulatory powers.

By **Brendan Pedersen**

July 1

The SEC sought to craft its proposal in a way that focused squarely on disclosing financially risky information, said Ulysses Smith, environmental, social and governance senior advisor at the law firm Debevoise & Plimpton.

Still, he said, the court's narrow interpretation of statutory authority in the EPA case suggests "it's possible to make a case against almost any regulation that exceeds the authority the agency was delegated."

"There's just no denying what we've seen over the last month or so," Smith said. "The court has been willing to go further than previous courts have, and I think there's a real chance that could happen here as well."

Alexandra Farmer, head of the ESG and impact practice group at the law firm Kirkland & Ellis, pointed to differences between the SEC's proposal and the EPA rule that was struck down last week.

The EPA sought to "change the activities and decisions of companies" using rules "intended to shift electricity generation" to force a transition to cleaner sources of energy, Farmer said, while the SEC's climate rule "is not mandating any action other than disclosure."

Still, the SEC could face legal scrutiny over whether portions of its proposal would require companies to report information that is "immaterial" to making investment decisions, Farmer said.

Wyatt, the former SEC official who was involved in drafting the agency's proposal, argued that the rule "should withstand judicial scrutiny" if the final version resembles the original proposal.

The SEC was "careful to hew closely to statutory authority" under the Securities and Exchange Act, which "clearly gives the agency authority to regulate companies' disclosures to shareholders and investors," said Wyatt, who is now deputy general counsel at the climate data-gathering platform Persefoni.

"That said," Wyatt added, "what this court might do and how it might seek to further curtail the role of administrative agencies is up for question."

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