U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

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Lesley A. Field
Acting Administrator
Office of Federal Procurement Policy
Office of Management and Budget
Washington, DC 20503

John M. Tenaglia
Principal Director
Defense Pricing and Contracting
Office of the Secretary of Defense
U.S. Department of Defense
Defense Pentagon
Washington, DC 20301

Jeffrey A. Koses
Senior Procurement Executive
U.S. General Services Administration
1800 F Street NW
Washington, DC 20405

Karla S. Jackson
Assistant Administrator for Procurement
National Aeronautics and Space Administration
300 E Street SW
Washington, DC 20546

Via https://www.regulations.gov

Re: FAR Case 2021-015
Proposed Rule, Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk; 87 Fed. Reg. 68312-68334 (November 14, 2022)

Dear Ms. Field, Mr. Tenaglia, Mr. Koses, and Ms. Jackson:

The U.S. Chamber of Commerce appreciates the opportunity to comment on the Federal Acquisition Regulatory Council's proposal ("Proposed Rule") to require significant and major contractors to make climate-related disclosures and to require major contractors to set targets to reduce greenhouse gas ("GHG") emissions. Under the proposal, satisfying these requirements would be a condition of eligibility for federal government contracts.

The Chamber represents a broad spectrum of businesses, including federal contractors large and small, that provide products and services across industries such as aerospace and defense, telecommunications, information technology, engineering services, food and hospitality, pharmaceuticals, biotechnology, healthcare, energy, and many more. We continue to actively collaborate with our members and other stakeholders to promote practices, policies, and technology innovations across industry and

government that address our shared climate challenges, particularly to reduce greenhouse gas emissions at the pace of innovation.

It is vital that citizens, governments, and businesses work together to reduce the risks associated with climate change and ensure that America is on the path to a sustainable and prosperous future. American companies are already playing a crucial role in developing innovations and approaches to reduce GHG emissions and spurring evolution of climate disclosures. Companies are also increasingly reporting more information to the public about their efforts to reduce their GHG emissions. Many have also made forward-looking statements and commitments to reduce their emissions over time. These commitments have helped drive progress to address climate change over the last decade. While industry is making significant progress, regulatory decisions must always be informed by a careful analysis of the available alternatives, outcomes, and cost-benefit tradeoffs to ensure that optimal policies are implemented. Such regulatory decisions also must be made within the bounds of agencies' legal authorities. We are concerned that the Proposed Rule fails to strike the right balance.

While the Federal Acquisition Regulatory Council ("Council") seeks to further the worthwhile end of mitigating the potential effects of global climate change, the Proposed Rule itself is an inappropriate and inefficient means of doing so, for several reasons.

First, the Proposed Rule would impose immense costs on government contractors of all sizes, costs that would be passed on to the government and ultimately to taxpayers. This would undermine rather than advance the goal of an economic and efficient system of contracting that underpins the Federal Property and Administrative Services Act ("Procurement Act"). Detailed disclosure of climate-risk assessment processes and risks, inventorying and disclosing scope 1, 2, and 3 GHG emissions, developing and implementing "science-based" emissions-reduction targets, and paying fees to the private entities to whom the Council requires many of the disclosures be submitted, among other things, would require thousands of employee hours and saddle contractors with billions of dollars in added implementation and compliance costs. The government's acquisition costs would rise as a consequence, and some contractors, and companies in the supply chain, would likely drop out of the market entirely, weakening the competitive forces that keep prices down. The Council substantiates no offsetting benefits to speak of. Although the Council suggests that the proposed disclosures "may" lead to a reduction in GHG emissions, the Proposed Rule provides no evidence that that would actually happen. Even if it did, the Council provides no "reasoned determination that the benefits of the intended regulation justify its costs."[1]

Second, the Council's pursuit of goals beyond economic and efficient contracting exceeds its legal authority. While the Council can promulgate specific, output-

[1] Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,736 (Oct. 4, 1993).

related standards to help ensure that the government acquires the goods and services it needs at appropriate prices, the Council has no authority to use government contracts as a vehicle for furthering climate policies. The Council's attempt to do that here not only exceeds the Council's statutory authorization, but also raises significant issues under the Constitution. The Proposed Rule would compel contractors to speak on matters of significant public debate, and would force contractors to associate with, and likely follow, the speech "guidelines" of certain private climate organizations whom the Council would deputize to do most of the standard setting and verification. This unusual arrangement would violate contractors' First Amendment rights and would transgress longstanding legal limitations on delegating legislative and rulemaking authority to private entities.

Third, and finally, the Proposed Rule violates the Administrative Procedure Act ("APA") in several respects. Most significantly, the Council's cost-benefit analysis is deeply flawed. The Council vastly underestimates the costs. It misreads or overlooks estimates, relies on stale data, ignores millions of dollars of costs altogether, and inconsistently and inaccurately frames the costs that it does consider. For example, the Council alludes to benefits from potential GHG reductions, but fails to acknowledge or quantify the costs required to create such reductions. As documented below, the actual costs of the Council's proposal will *exceed $1 billion per year*.[2] The benefits side of the ledger fares no better. The cost savings the Council cites are speculative and unlikely to materialize. The Council also fails to grapple with (or adequately acknowledge) the duplicative, and even conflicting, requirements the Securities and Exchange Commission (SEC) is simultaneously proposing to impose on public companies.

Other aspects of the proposal are equally flawed. The Council fails to account for the disproportionate burden that the Proposed Rule would impose on small businesses, both directly as federal contractors and indirectly as suppliers of major contractors. The rule would outsource most of the standard setting to private entities that the federal government does not control, regulate, or monitor. It would require contractors, at significant cost, to collect and analyze data to fill out detailed mandatory filings. It would undermine national-security interests. It would set compliance deadlines that are impossible to meet. It would require contractors to set science-based targets, even if they do not have a viable plan to meet the targets in the short timeframe allowed, and it would do all of this without the Council having adequately considered numerous less restrictive ways of pursuing the Council's interests.

These and other flaws counsel in favor of abandoning the proposal and starting again. The Chamber would welcome the opportunity to work with the Council on identifying a constructive path forward.

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[2] *See infra* Part III.A.1.

I. The Proposed Rule is immensely costly and is contrary to the Procurement Act's goals of an economic and efficient system of government contracting.

The Proposed Rule would saddle government contractors with *billions* of dollars in costs,[3] exclude firms that are fully capable of meeting the government's procurement needs from the procurement process and *increase* procurement costs to the Government. This is "worlds away" from what the procurement laws, in particular the federal Procurement Act, are "all about—creating an 'economical and efficient system' for federal contracting."[4]

A. The Proposed Rule is exceptionally burdensome.

As discussed in greater detail below,[5] the Proposed Rule would impose significant burdens on government contractors, who would be required to divert thousands of employee hours from productive activities—the efficient provision of property and services to the government—to compiling and disclosing information related to climate change.[6] This would be an enormously costly distraction. By the Council's own estimate, the Proposed Rule would require nearly 6,000 contractors to implement systems and policies for inventorying and publicly disclosing scope 1 and scope 2 GHG emissions.[7] These disclosures alone would add hundreds of thousands of dollars to annual total compliance costs for each contractor,[8] resulting in nearly $1 billion in total costs in the first year of implementation alone.[9]

For many firms, those costs would just be the start. For so-called "major" contractors—contractors that receive more than $50 million in government contracts[10]—the Proposed Rule would also require an annual "climate disclosure."[11] In conjunction with the private reporting standards the proposal incorporates, that disclosure would encompass 11 "key climate-related financial disclosures," including: governance systems; processes for identifying, assessing, and managing risks; identification of climate risks and their financial impacts and required expenditures; climate-related scenario analysis; how climate-related risks and opportunities are influencing business strategy and financial planning; disclosure of targets and goals; scope 1, 2, and "relevant" scope

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[3] *See, e.g.*, Proposed Rule, 87 Fed. Reg. 68,312, 68,324 (Nov. 14, 2022) (conceding more than $3 billion in added costs over the next 10 years); *infra* Part III.A.1 (documenting more than $1 billion in costs *per year*).
[4] *Georgia v. President of United States*, 46 F.4th 1283, 1296 (11th Cir. 2022) (quoting 40 U.S.C. § 101).
[5] *See infra* pp. 17-21.
[6] *See, e.g.*, RIA 37-38 tbls. 9-10.
[7] *See* Proposed Rule, 87 Fed. Reg. at 68,321.
[8] *See* RIA 22-29, 33-36 & tbls. 6-7.
[9] *See infra* pp. 17-21.
[10] Proposed Rule, 87 Fed. Reg. at 68,313.
[11] *Id.*

3 GHG emissions; and progress towards targets.[12] Major contractors would have to submit this disclosure by filling out the questionnaire of a private entity—CDP—and by paying CDP thousands of dollars in fees.[13] The Proposed Rule would further require major contractors to develop "science-based targets" for reducing GHG emissions in accordance with specific and stringent requirements developed and maintained by a private entity, the Science Based Targets initiative ("SBTi") (which is not subject to the legal and political constraints that apply to federal administrative agencies)[14] and to have those targets "validated" by the same entity. All in all, these additional requirements would tack millions of dollars onto each "major" contractor's total annual compliance spending.

Scope 3 disclosure alone would be a massively burdensome undertaking and very well may be impossible for contractors to accomplish. Scope 3 emissions, also known as value-chain emissions, are GHG emissions occurring both upstream and downstream of a contractor's operations. Calculation methods for scope 3 categories are immature, highly variable, use many assumptions and estimates, and continue to evolve. Many scope 3 categories, moreover, lack accessible and reliable source data, resulting in emissions calculations that are based on unvalidated assumptions and often use gross estimates, thereby significantly reducing their meaning and value. To track such emissions on a level concomitant with the liability that would attach to the public disclosure of this information, contractors would need to seek to amend their contracts with customers, suppliers (including many small businesses), and other third parties to require the sharing of climate-related data—a process that could impact thousands of contracts, require "tens of thousands of hours" of a contractor's employee time, and place an enormous burden on the small businesses that supply major contractors.[15] Because the Proposed Rule does not address third-party compliance, contractors will struggle to obtain emissions information from sub-contractors and other third parties (including, in some instances, foreign governments), who may resist any attempt to contractually require their cooperation in the absence of a prime-contract obligation.[16]

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[12] CDP, *CDP Technical Note on the TCFD* 9-23, https://cdn.cdp.net/cdp-production/cms/guidance_docs/pdfs/000/001/429/original/CDP-TCFD-technical-note.pdf?1512736184.

[13] Proposed Rule, 87 Fed. Reg. at 68,314 (requiring a major contractor to "submit[] its annual climate disclosure by completing those portions of the CDP Climate Change Questionnaire that align with the TCFD as identified by CDP"); CDP, *Admin Fee FAQ*, https://www.cdp.net/en/info/admin-fee-faq.

[14] Proposed Rule, 87 Fed. Reg. at 68,314.

[15] ConocoPhillips Comments 14 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

[16] At least some contractors would therefore reasonably expect to be in a position to submit only incomplete scope 3 emissions data. Any final rule must include a safe harbor for cases in which it is impracticable, unduly burdensome, or unreasonably costly to obtain and submit complete scope 3 data.

This information-gathering process alone would cost millions of dollars, and that is just the first step. On an annual basis, to properly inventory scope 3 emissions, a contractor would need to: retain outside consultants; dedicate at least one full-time employee in the supply-chain department to track emissions related to goods purchased; task a full-time environmental specialist to interpret GHG-disclosure guidance for the business and develop tools for data management; enlist the IT department for data acquisition and management; develop local environmental teams to inventory local scope 3 emissions; update lifetime emissions of its products and services; and dedicate a steering committee to review progress and review reports.[17] This would be an enormous burden, as documented by commenters in an ongoing rulemaking of the SEC, but is not accounted for at all in the Council's estimates.

The science-based-targets requirement will compound that burden immensely. Contractors would need to develop targets for reducing scope 1, scope 2, and two-thirds of scope 3 GHG emissions to a level that is "consistent with the level of decarbonization required to keep global temperature increase to 1.5°C."[18] These targets must meet the SBTi's detailed criteria for what constitutes a "science-based" target, including the portion of scope 3 emissions that need to be addressed by a contractor's targets, the duration of the target period, and the annual reductions to be achieved for each "scope." Setting these targets would require contractors—with the assistance of retained consultants and experts—to complete approximately 50 pages of written questions (posed by the private entity SBTi) and to perform numerous complex calculations.[19] Some of the questions are multi-part, such as one question that asks—when a scope 3 target must be set—for the submitter to calculate scope 3 emissions across 15 different categories over at least one calendar year.[20] The SBTi also charges a validation fee starting at $9,500 for large companies and $1,000 for small and medium businesses.

Setting a science-based target is just the start—*meeting* it would require major contractors to incur additional costs, costs that are not accounted for in the Proposed Rule. The proposal anticipates that major contractors would undertake good-faith efforts to meet the targets and "monitor progress on reaching the target[s]."[21] This would require major contractors to develop decarbonization strategies, implement emission-reduction measures, and spend capital to drive progress towards the targets. Achieving reductions in scope 3 emissions would be particularly onerous since those emissions are not under the control of the contractor, and therefore the contractor has much less

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[17] Williams Companies Comments 14 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

[18] SBTi Criteria and Recommendations § V.I (Oct. 2021), https://sciencebasedtargets.org/resources/files/SBTi-criteria.pdf.

[19] SBTi Near-Term Target Submission Form and Guidance (Dec. 2021).

[20] *Id.*

[21] Proposed Rule, 87 Fed. Reg. at 68,318.

ability, if any, to reduce them. These, too, are weighty burdens for which the Council must fully and carefully account in promulgating the Proposed Rule.

B. The costs of the Proposed Rule would undermine efficient government contracting.

The massive burden imposed by the Proposed Rule would undermine, rather than further, the Procurement Act's goals of economic and efficient contracting. To begin, contractors would "pass on" much of the "regulatory" costs to the federal government (and, ultimately, to taxpayers) through higher contract bids.[22] This would make the procurement system *less* economical and efficient, as the government would end up paying more—to offset contractors' increased compliance costs—for the same property and services. By the Council's own (mistaken)[23] estimate, contractors would be saddled with hundreds of millions of dollars of added costs every year[24]—costs that would ultimately be baked into the prices the government pays for property and services.

Economy and efficiency would also suffer because of a reduced pool of potential contractors. Under federal regulations, government "[p]urchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only."[25] The Proposed Rule would significantly shrink that pool of eligible contractors, as any noncompliance with the proposal could render a contractor not "responsible."[26] Some contractors would voluntarily drop out of the market rather than make climate-related certifications that could later be second-guessed in False Claims Act lawsuits that can be costly even when they are baseless. This culling of eligible providers would degrade economy and efficiency in two ways.

First, by "exclud[ing] contractors who are otherwise capable of meeting an agency's needs,"[27] the Proposed Rule would decrease competition. This "works against the [Procurement] Act's oft-repeated priority of achieving 'full and open competition' in the procurement process,"[28] and would lead to higher contract prices.

Second, and relatedly, a decrease in eligible contractors would decrease the procurement options available to the government. As federal law recognizes, a "variety of

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[22] *Acadia Motors, Inc. v. Ford Motor Co.*, 44 F.3d 1050, 1056 (1st Cir. 1995); *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979) (noting that pollution-control regulations imposed without regard to cost of compliance could lead to the "doubling or tripling [of] the cost of motor vehicles to purchasers").

[23] *See infra* pp. 17-21.

[24] *See* RIA 41.

[25] 48 C.F.R. § 9.103(a).

[26] *See* RIA 45.

[27] *Georgia*, 46 F.4th at 1297.

[28] *Id.*

products or services" can perform similar "functions."[29] Typically, the government benefits from this optionality, as it can choose the product or service that is *most* suitable to its particular needs. The Proposed Rule, however, would take many of these options away, leaving the government with fewer choices and potentially less efficient products and services.

C. There are no offsetting benefits to the vast costs that the Proposed Rule would impose.

The Chamber believes that American businesses can and must play a vital role in creating innovative solutions and reducing GHG emissions to protect our planet. We've outlined a comprehensive approach to climate solutions[30] and are fully engaged in international dialogue. However, the most effective solutions are those achieved through collaboration between government and businesses, not by unilateral regulation, in this case under the Procurement Act, which is designed to create "an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services."[31] The Council does not identify any offsetting gain in economy or efficiency in government contracting that would flow from the Proposed Rule to offset its tremendous costs.

The Council suggests that "[c]ompanies who are required to publicly disclose their GHG emissions and climate risks *may* be prompted to thoroughly investigate their operations and supply chains, which *may*, in turn, reveal opportunities to realize efficiencies,"[32] but that is "sheer speculation."[33] Aside from observing that "increased public transparency and accountability *may* prompt suppliers to take action following a 'what gets measured gets managed' mantra,"[34] the Council offers no evidence to suggest that contractors would actually curtail their emissions beyond reductions that would otherwise occur. The Council, to be sure, speculates that emissions reductions would lead to cost savings,[35] but that assertion undermines the rationale for the Council's proposal. The Procurement Act is entirely premised on the understanding that "full and open competition" leads to better quality and lower price.[36] Accordingly, if reducing emissions creates cost savings, competitive and market pressures are likely to have *already* driven contractors to take steps to realize those savings, rendering additional regulation unnecessary at best and overtly burdensome at worst. This is an important part of the analysis that the Council completely ignores. It cannot reasonably claim that the Proposed Rule would reduce contractors' own costs without first explaining why the

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[29] 41 U.S.C. § 3306(a)(1).
[30] https://www.uschamber.com/climate-change/our-approach-to-climate-change.
[31] 40 U.S.C. § 101.
[32] Proposed Rule, 87 Fed. Reg. at 68,319 (emphases added).
[33] *Sorenson Commc'ns, Inc. v. FCC*, 755 F.3d 702, 708-09 (D.C. Cir. 2014).
[34] Proposed Rule, 87 Fed. Reg. at 68,318 (emphasis added).
[35] *Id.* at 68,319.
[36] 41 U.S.C. § 3306(a)(1).

competitive procurement process—together with contractors' competition for private sector customers—has not already incentivized companies to take the proposed measures.

The Council also asserts that the Proposed Rule would somehow mitigate "supply chain vulnerabilities,"[37] but, again, the Council lacks any evidence to support that assertion. The Council observes that, in 2012, "Superstorm Sandy caused widespread damage to logistics and transportation networks throughout the Northeast, leading to major fuel shortages for agencies to overcome while providing critical Federal services."[38] Yet the Council does not explain how knowledge of the precise level of GHG emissions from thousands of contractors—along with hundreds of millions of dollars of other company-by-company disclosures—would have eliminated or reduced the harms that Hurricane Sandy inflicted on the supply chain. Indeed, the Council does not identify any step that anyone—government or contractor—would have taken in light of an annual climate disclosure that would have better "prepared[]" it for a destructive hurricane.[39] To the extent the Council suggests that the Proposed Rule would make hurricanes less likely or severe—by mitigating climate change—that suggestion is equally devoid of evidentiary support. Even if the rule *were* to prompt contractors to meaningfully reduce their GHG emissions (beyond the work that companies are *already* doing to address climate change), climate change is a *global* phenomenon. As the Council itself asserts, "[i]n the absence of more significant *global mitigation efforts*, climate change is projected to impose substantial damages on the U.S. economy, human health, and the environment."[40] The Council presents no evidence that the Proposed Rule would make any discernable difference in global emissions, and thus to global climate change.

II. The Proposed Rule exceeds the Council's legal authority.

The Council's pursuit of other goals—beyond efficiency in government contracting—exceeds the Council's statutory authority and raises significant constitutional issues.

A. The Council does not have statutory authorization to set climate standards.

The goal of the Proposed Rule is clear: "The objective of this rule is to implement the E.O. [14030]," which "target[s] ... a net-zero emissions economy by no later than 2050."[41] The Council emphasizes that "public and standardized disclosure" is "[t]he

[37] RIA 11.
[38] *Id.* at 12.
[39] *Id.*
[40] Proposed Rule, 87 Fed. Reg. at 68,319.
[41] *Id.* at 68,234-35.

foundation to properly analyze and mitigate climate risks" and "promot[e] environmental justice."[42] And "[m]itigating the effects of climate change by reducing emissions can provide important economic, ecological, and social benefits."[43] These may be commendable goals, but they have nothing to do with efficient government contracting, and the Council, therefore, has no authority to pursue them. Other matters, such as reductions in GHG emissions, are reserved to other agencies, such as the EPA.[44]

Congress has never authorized the Council to require contractors to address climate change as a condition of all procurement contracts. As the Eleventh Circuit recently explained in striking down a similar attempt to leverage the government's procurement authority to pursue other objectives—there, COVID-19 vaccination—the statutory procurement scheme "establishes a framework through which agencies can articulate specific, output-related standards to ensure that acquisitions have the features they want."[45] That is the extent of the federal government's contracting authority. As noted, the Procurement Act seeks to create "an economical and efficient system" for "[p]rocuring and supplying property and nonpersonal services."[46] In line with that purpose, federal law generally requires agencies, in seeking goods and services providers, to use "competitive procedures" to "obtain full and open competition."[47] As part of those procedures, an acquiring agency must "specify its needs" and "develop specifications" that allow contractors to competitively bid "with due regard to the nature of the property or services to be acquired."[48] Once bids are submitted, an agency must award the contract "based solely on the factors specified in the solicitation."[49] These procedures may be "dry," the Eleventh Circuit has explained, but "they show what the Procurement Act is all about—creating an 'economical and efficient system' for federal contracting," a system where the federal government can obtain the specific products and services it needs at low cost.[50] That is, to paraphrase the Eleventh Circuit, "worlds

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[42] *Id.* at 68,312.
[43] *Id.* at 68,319.
[44] *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007) ("the Clean Air Act authorizes EPA to regulate greenhouse gas emissions [that] contribute to climate change").
[45] *Georgia*, 46 F.4th at 1295; *see also Louisiana v. Biden*, 55 F.4th 1017, 1026 n.25 (5th Cir. 2022) (recognizing the "compelling case" made by the Eleventh Circuit in *Georgia*). The Sixth Circuit recently reached the same conclusion, holding that the government's power to create an "'economical and efficient system' of procurement [] is internally focused, speaking to government efficiency, not contractor efficiency." *Kentucky v. Biden*, 57 F.4th 545, 553 (6th Cir. 2023). It explained that "the plain text of the Procurement Act does not confer the authority to promulgate a rule ... that simply makes contractors more efficient" but only rules that make "the government's *system of entering into contracts* for ... goods and services ... more efficient." *Id.* at 553-54 (emphasis added).
[46] 40 U.S.C. § 101.
[47] 41 U.S.C. § 3301(a).
[48] *Id.* § 3306(a)(1).
[49] *Id.* § 3701(a).
[50] *Georgia*, 46 F.4th at 1296.

away" from conferring a general authority on every agency to insert a term in every contract establishing climate-change standards.

What the procurement laws' text and structure demonstrate, the major questions doctrine confirms. The major questions doctrine is a "common sense" principle of statutory interpretation that teaches that Congress does not delegate to agencies highly consequential powers—including the power to resolve "major questions"—in "modest words, vague terms, or subtle devices."[51] To the contrary, when Congress "wishes to assign to an agency decisions of vast economic and political significance," Congress "speak[s] clearly."[52]

This is a major questions case. In arguing that the procurement laws empower the Council to "shift markets," "be a catalyst for adoption of new norms and global standards," "provide insights into the entire U.S. economy," and "achieve the target of a net-zero emissions U.S. economy by no later than 2050,"[53] the Council is claiming to have "'discovered in [ ] long-extant statute[s] an unheralded power' representing a 'transformative expansion in its regulatory authority.'"[54] The Council was established to assist in the direction and coordination of government-wide procurement practices in accordance with the Office of Federal Procurement Policy Act. Accordingly, the Council's authority has traditionally been understood to be limited to implementing the Procurement Act's framework "through which agencies can articulate specific, output-related standards to ensure that acquisitions have the features they want."[55] The rule as proposed here would turn this regime on its head. Instead of setting standards that would apply given "the specific needs in a given project,"[56] the Council has asserted the authority to set baseline climate standards for all federal contractors, in pursuit of goals related to global climate change. There are many reasons to be "skeptic[al]" of such sweeping regulatory authority.[57]

The sheer magnitude of the economic consequences of the Proposed Rule provides further reason for concern. As the Supreme Court has emphasized, Congress does not lightly confer on an agency the authority to regulate a "significant portion of the American economy"[58] or to require "billions of dollars in spending" by private entities.[59] However, that is the exact authority that is claimed in the Proposed Rule. By the

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[51] *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).
[52] *Id.* at 2605 (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).
[53] RIA 2, 10.
[54] *West Virginia*, 142 S. Ct. at 2610 (cleaned up) (quoting *Util. Air*, 573 U.S. at 324).
[55] *Georgia*, 46 F.4th at 1295.
[56] *Id.* at 1297.
[57] *West Virginia*, 142 S. Ct. at 2609 (quoting *Util. Air*, 573 U.S. at 324).
[58] *Id.* at 2608 (quoting *Util. Air*, 573 U.S. at 324).
[59] *King v. Burwell*, 576 U.S. 473, 485 (2015); *accord West Virginia*, 142 S. Ct. at 2621 (Gorsuch, J., concurring).

Council's own estimate, the Proposed Rule would hit federal contractors with more than $3 billion in added costs over the next 10 years.[60]

The "political significance" of the Proposed Rule is cause for additional skepticism.[61] If Congress intended to empower the Council to resolve the proper handling of climate-related issues—issues of "'earnest and profound debate' across the country"—it would have provided clear congressional authorization to that effect.[62]

Yet, Congress did not do so. The Council claims to have located this authority in three statutory provisions of the Procurement Act and related laws, 40 U.S.C. § 121(c), 10 U.S.C. chapter 137, and 51 U.S.C. § 20113, but none of these are apposite. The various provisions of Chapter 137 of Title 10 have been repealed and transferred. None of the transferred provisions come close to authorizing an agency to require climate-related disclosures as part of the government's procurement process. Section 121(c) and section 20113 are similarly unavailing. Section 121(c) permits GSA to "prescribe regulations to carry out this subtitle," and section 20113 similarly permits NASA to issue rules "governing the manner of its operations and the exercise of the powers vested in it by law." These generic grants of authority are not the type of "clear[]" congressional authorization that one would expect for the type of "highly consequential" authority asserted here[63]—the authority to condition all government contracts on pursuit of a global climate policy unmoored from the specific products or services the government seeks to acquire. Indeed, when "Congress *wants* to further" such a "policy among federal contractors through the procurement process—beyond full and open competition—it enacts *explicit* legislation."[64] Congress, for example, has passed specific statutes requiring "contractors for services to pay their employees the federal minimum wage,"[65] prohibiting the government from "contracting with any company that has criminally violated air pollution standards,"[66] and permitting agencies to "refuse to contract with firms that fail to meet certain cybersecurity qualifications."[67] Congress has taken no such steps with regard to climate change.

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[60] Proposed Rule, 87 Fed. Reg. at 68,324.
[61] *West Virginia*, 142 S. Ct. at 2605 (quoting *Util. Air*, 573 U.S. at 324); *accord id.* at 2620 (Gorsuch, J., concurring) (quoting *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022)).
[62] *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *accord West Virginia*, 142 S. Ct. at 2614; *id.* at 2620 (Gorsuch, J., concurring).
[63] *Georgia*, 46 F.4th at 1296.
[64] *Id.* at 1297 (emphases added).
[65] *Id.* (citing 41 U.S.C. § 6704).
[66] *Id.* (citing 42 U.S.C. §§ 7413(c), 7606).
[67] *Id.* (citing 41 U.S.C. § 4713).

The Executive Order that the Council cites[68] cannot, of course, supply the legal authority that Congress withheld;[69] instead, it further confirms that the Proposed Rule would effect what the Chief Justice has characterized as a "workaround" to circumvent Congress.[70] As the Chief Justice observed during oral argument,

> [A]s more and more mandates, [from] more and more agencies come into place, it's a little hard to accept the idea that this is particularized to this thing, that it's an OSHA regulation, that it's a CMS regulation, that it's a *federal contractor regulation*. It seems to me … that the government is trying to work across the waterfront and it's just going agency by agency. … I don't know that we should try to find … [w]hat specific thing … to say … we're doing this because this is a *federal contractor*[.] *It seems to me that the more and more mandates that pop up in different agencies, … I wonder if it's not fair for us to look at the … general exercise of power by the federal government and then ask[,] why doesn't Congress have a say in this[?]*[71]

As the Chief Justice suggested, if—to quote the Executive Order—the Executive Branch wants to "act to mitigate [climate-related financial risk] and its drivers, while … spurring the creation of well-paying jobs and achiev[ing] [its] target of a net-zero emissions economy by no later than 2050,"[72] then it needs to obtain authorization to do so from Congress.

B. The Proposed Rule would violate the Constitution.

The Proposed Rule also raises First Amendment and non-delegation problems, which further counsel against adoption.

1. The Proposed Rule would infringe First Amendment rights.

The First Amendment "prohibits the government from telling people what they must say"[73] or with whom they must associate.[74] The Proposed Rule would violate these rights by forcing companies to engage in costly speech on a matter that is the subject of much political debate, to publicly associate with the political messages of a private organization, and to subject themselves to that organization's speech "guidelines." That

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[68] Proposed Rule, 87 Fed. Reg. at 68,312 (citing Exec. Order No. 14,030, 86 Fed. Reg. 27,967, 27,967 (May 20, 2021)).

[69] 86 Fed. Reg. at 27,970 ("Nothing in this order shall be construed to impair or otherwise affect … the authority granted by law to an executive department or agency, or the head thereof … .").

[70] Tr. of Oral Argument 79:14-81:12, *NFIB v. Dep't of Lab.*, No. 21A244 (U.S. Jan. 7, 2022).

[71] *Id.* (emphases added).

[72] Exec. Order No. 14040, 86 Fed. Reg. at 27,967.

[73] *Rumsfeld v. F. for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006).

[74] *Janus v. Am. Fed'n of State Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018).

the proposal arises in the contractor setting does not insulate it from First Amendment scrutiny; while the government has discretion in choosing its contracting partners, it may not reject a bid based on the contractor's exercise of its First Amendment rights.[75] Yet, that is exactly what the Proposed Rule would do.

Here, the Proposed Rule would explicitly disqualify from government procurement major contractors who decline to make "available on a publicly accessible website" certain statements regarding climate change,[76] including by completing the CDP Climate Change Questionnaire. This is a direct infringement on contractors' First Amendment rights.[77] Addressing climate change is an important issue that is the subject of robust political debate, including not only the specific consequences of climate change but also the responsibilities that corporations have to address it. By requiring contractors to annually "describe[] the entity's climate risk assessment process and any risks identified,"[78] and publicly commit to a science-based target even if they do not have technological or cost-effective means to achieve it, the Proposed Rule would force contractors into the middle of this debate, compelling them to discuss, at significant cost, issues that are often highly complex and fraught with uncertainty and controversy. The government's interests "*as contractor*" in no way justify this compulsion.[79]

The speech compulsion at issue here also raises heightened First Amendment concerns because the compelled speech would be used to "stigmatize" companies and attempt to "shape their behavior."[80] In *National Association of Manufacturers v. SEC*, for example, the SEC promulgated a rule requiring public companies to disclose whether certain "conflict minerals" used in their products originated in countries affected by the conflict in the Democratic Republic of the Congo by stating whether or not their products were "DRC conflict free."[81] The Commission had argued that the "conflict free" disclosure requirement survived First Amendment scrutiny because it served a legitimate interest—it might cause companies to "boycott mineral suppliers having any connection to this region of Africa," which would "decrease the revenue of armed groups in the DRC and their loss of revenue [would] end or at least diminish the humanitarian crisis there."[82]

The D.C. Circuit, however, disagreed. It dismissed the Commission's logical chain as "entirely unproven and rest[ing] on pure speculation."[83] It held that the

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[75] *See, e.g.*, *Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378, 385 (5th Cir. 2006).
[76] Proposed Rule, 87 Fed. Reg. at 68,314.
[77] The Proposed Rule goes further than the proposed SEC rule, as the Proposed Rule would require public disclosures from public and private companies alike.
[78] Proposed Rule, 87 Fed. Reg. at 68,314.
[79] *Bd. of Cnty. Comm'rs, Wabaunsee Cnty. v. Umbehr*, 518 U.S. 668, 678 (1996).
[80] *Nat'l Ass'n of Mfrs. & U.S. Chamber of Com. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015).
[81] *Id.* at 545-47.
[82] *Id.* at 525.
[83] *Id.* at 525-26.

Commission's attempt to leverage a disclosure regime to "stigmatize" companies to "shape [their] behavior" made the speech compulsion even "more constitutionally offensive."[84] The same logic applies here. The Council describes a disclosure regime whose benefits are, at best, highly speculative. It openly states that one of the principal benefits of the regime is "increased public transparency *and accountability*," *i.e.*, public pressure and stigma.[85] It must be expected that some parties will use contractors' disclosures about emissions and their plans to address them as a basis to criticize the contractors or to call for increased regulation or other concerted action, whether by regulators or by the contractors themselves.[86] The conflict-free disclosure requirement failed in nearly identical circumstances, and this proposal faces a similar fate.

The Proposed Rule raises other First Amendment concerns as well. As discussed, the proposal would require contractors to submit "science-based" targets to a private organization, SBTi, for validation. Once a contractor's targets are validated, SBTi "publish[es] [the targets] on [its Companies taking action page] and ... partner websites."[87] That, in effect, forces contractors to associate with SBTi and its messages. While some contractors may wish to associate with SBTi's particular messages—for example, its message that "climate science sends a clear warning that we must dramatically curb temperature rise to avoid the catastrophic impacts of climate change"—others may prefer to "eschew association" with SBTi and its causes,[88] or simply prefer not to directly or publicly engage in this policy debate. The Council cites no reason why all major contractors should be forced to associate with a particular private action organization.

Potentially even more problematic, the Proposed Rule appears to subject contractors to SBTi's "communications guidance." SBTi is the only authority, under the Proposed Rule, that could validate (or renew validation of) a company's targets. SBTi makes clear that companies "*must* follow [SBTi's] guidance" about public communications.[89] Companies, for example, "may not claim to be net-zero in scopes 1 and 2 only,

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[84] *Id.* at 530.

[85] Proposed Rule, 87 Fed. Reg. at 68,318 (emphasis added).

[86] *See* Western Energy Alliance Comments 4-6 (June 15, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022-20131418-301593.pdf); *see also, e.g.*, Basit Mahmood, *There are 100 Companies Responsible for Climate Change, Activist Says*, Newsweek (Sept. 8, 2020), https://www.newsweek.com/climate-change-xr-extinction-rebellion-fossil-fuels-climategreenhouse-gasses-emissions-1530084; Alastair Marsh & Danielle Bochove, *Dear Bank CEO, You are Cordially Invited to Defund this Pipeline*, Bloomberg (July 1, 2021), https://www.bloomberg.com/news/articles/2021-07-01/how-climate-activists-pressure-banks-to-defund-the-oil-industry; Andrew Edgecliffe-Johnson, *Activists Target Public Relations Groups for Greenwashing Fossil Fuels*, Financial Times (Jan. 11, 2022), https://www.ft.com/content/f90562d6-6673-457a-901e-257eb4578d98.

[87] SBTi, *Set a Target*, https://sciencebasedtargets.org/step-by-step-process (last visited Feb. 13, 2023).

[88] *Janus*, 138 S. Ct. at 2463.

[89] SBTi, *FAQs*, https://sciencebasedtargets.org/faqs (Question: "Can we include the SBTi in our communications materials?") (last visited Feb. 13, 2023) (emphasis added).

or scope 3 only."[90] They may not "include any additional details that are not approved by SBTi when communicating [about] [their] target language." They may not talk about "carbon neutrality," unless their claim has been "validated by the SBTi." They may not even "[s]uggest that offsets ... will be counted by [the company] to achieve [its own] near-term science-based targets."[91] SBTi admits that, practically speaking, it "cannot police all communications about science-based targets all the time," but it pledges to try. When SBTi "see[s] a company ... [allegedly] mispresenting their science-based target(s) or commitment(s) in their external communications, [SBTi] will make contact" and demand a "correction."[92] Making such demands is permissible for a private organization that exercises no governmental power, but the Council does not explain how the government, consistent with the First Amendment, could subject companies to such detailed policing of their speech.

2. The Proposed Rule raises significant non-delegation problems.

The Proposed Rule's reliance on private entities to develop, revise, and enforce its provisions raises other constitutional issues. As the Supreme Court has long recognized, delegation of governmental authority to private entities is "delegation in its most obnoxious form";[93] "[f]ederal lawmakers cannot delegate regulatory authority to a private entity."[94]

Yet, the Proposed Rule would do exactly that. In contrast to the SEC's proposed disclosure requirements, which are "modeled in part" on recommendations of the Task Force on Climate-Related Financial Disclosure (TCFD), and "draw[] upon" the GHG Protocol,[95] the Proposed Rule would outsource to private climate organizations the authority to determine the content of the disclosures required for significant and major contractors to be eligible for government contracts. In conducting an inventory of their GHG emissions, for example, contractors would be required to "follow the GHG Protocol Corporate Accounting and Reporting Standard,"[96] a standard created by two private entities, the World Resources Institute and the World Business Council for Sustainable Development.[97] Major contractors would further be required to make an annual climate

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[90] SBTi, *SBTi Communications Guide for Companies and Financial Institutions Taking Action* 12, https://docs.google.com/document/d/1wAce1et-yyML_y_a-NyUVyr9oPep9hC5jo8ikCbiHrY/edit (last visited Feb. 13, 2023).
[91] *Id.* at 2.
[92] *FAQs*, SBTi, *supra* note 89.
[93] *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).
[94] *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated on other grounds*, 575 U.S. 43 (2015); *Ass'n of Am. R.Rs.*, 575 U.S. at 62 (Alito, J., concurring) ("there is not even a fig leaf of constitutional justification" for delegations of regulatory authority to "private entities").
[95] 87 Fed. Reg. at 21,345.
[96] 87 Fed. Reg. at 68,313.
[97] Greenhouse Gas Protocol, *About Us*, https://ghgprotocol.org/about-us.

disclosure that "align[s] with ... recommendations" of the TCFD,[98] a private entity created by the private Financial Stability Board,[99] and whose recommendations have expanded over time and are the subject of annual Status Reports that include additional insights and which may lead to future changes.[100] Because these private entities are not subject to the procedural requirements with which federal agencies must comply, they will be able to change their requirements and recommendations—and therefore the eligibility requirements for federal contracts—without any opportunity for the affected industry to participate in a notice-and-comment process.

Major contractors, moreover, would make these TCFD-recommended disclosures, not by submitting them to the government, but by "completing those portions of the CDP Climate Change Questionnaire that align with the TCFD as identified by CDP,"[101] a "not-for-profit charity."[102] CDP can and does change the "TCFD-aligned" questions in its Questionnaire.[103] Finally, major contractors would be required to set emissions-reduction targets that meet the detailed science-based requirements established by the SBTi, a private "partnership between CDP, the United Nations Global Compact (UNGC), the World Resources Institute (WRI), and the World Wide Fund for Nature (WWF, also known as the World Wildlife Fund)."[104] Once set, the targets must be submitted to, and validated by, the SBTi. This is a private delegation (including to foreign-influenced entities) several times over.

The Constitution does not permit the government to jettison its authority in this way. As the Fifth Circuit recently put it, "[b]y delegating unsupervised government power to a private entity, [the government] violates the private non-delegation doctrine."[105] A number of Justices of the Supreme Court recently expressed the same concern about a rule of the Department of Health and Human Services that required State Medicaid plans to be certified as "actuarially sound" by "actuaries who meet the qualifications of the American Academy of Actuaries and follow the practice standards established by the Actuarial Standards Board, which is a private entity."[106] Although the

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[98] 87 Fed. Reg. at 68,313.

[99] TCFD, *About*, https://www.fsb-tcfd.org/about/.

[100] TCFD, *Final Report: Recommendations of the Task Force on Climate-Related Financial Disclosures* (June 2017), https://assets.bbhub.io/company/sites/60/2021/10/FINAL-2017-TCFD-Report.pdf; TCFD, *Implementing the Recommendations of the Task Force on Climate-related Financial Disclosures* (Oct. 2021), https://assets.bbhub.io/company/sites/60/2021/07/2021-TCFD-Implementing_Guidance.pdf; TCFD, *Publications*, https://www.fsb-tcfd.org/publications/ (showing Status Reports for 2018, 2019, 2020, 2021, and 2022).

[101] 87 Fed. Reg. at 68,314.

[102] CDP, *Who We Are*, https://www.cdp.net/en/info/about-us.

[103] *See* CDP, *How CDP Is Aligned to the TCFD*, https://www.cdp.net/en/guidance/how-cdp-is-aligned-to-the-tcfd.

[104] 87 Fed. Reg. at 68,314-15.

[105] *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, 53 F.4th 869, 890 (5th Cir. 2022).

[106] *Texas v. Commissioner*, 142 S. Ct. 1308, 1308 (2022) (Alito, J., joined by Thomas and Gorsuch, JJ., respecting the denial of certiorari).

Court denied certiorari, Justice Alito, joined by Justices Thomas and Gorsuch, explained that HHS had unconstitutionally delegated regulatory authority to a private actuarial group: "What was essentially a legislative determination—the actuarial standards that a State must meet in order to participate in Medicaid—was made not by Congress or even by the Executive Branch but by a private group."[107] The Proposed Rule suffers from the same infirmity. It has given a group of private entities unrestrained discretion to determine the climate disclosures that other private entities must make to participate in the federal procurement process.

The private delegation contemplated by the proposal raises significant due-process problems as well. Due process does not permit a "self-interested actor" to wield regulatory power over other private parties.[108] Yet that is exactly what the Proposed Rule would allow. CDP and SBTi are private organizations with their own private missions. There is no constitutional basis to give them regulatory power over other private organizations.

III. The Proposed Rule is arbitrary and capricious for a multitude of reasons.

Besides being contrary to the goals of the Procurement Act and otherwise unlawful, the Proposed Rule is arbitrary and capricious in several ways.

A. The Council's cost-benefit analysis is deeply flawed.

Given the importance of economy and efficiency in the procurement process, the Council has an obligation to determine "as best it can" the economic implications of the Proposed Rule.[109] Here, the Council's cost-benefit analysis is fundamentally flawed.

1. The Council underestimates the costs.

The Council has failed to adequately consider the costs of the requirements that the Proposed Rule would impose. For inventorying scope 1 and scope 2 emissions, for example, the Council estimates that each contractor would incur initial internal compliance costs of only $6,608 and annual ongoing compliance costs of only $5,003.[110] Yet, there is no support for those estimates. The Council's analysis is based entirely on an "Impact Assessment" of a rule in the United Kingdom that has little relevance to the Council's proposal.[111] Since 2018, "all quoted UK companies" have been required "to

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[107] *Id.* at 1309.

[108] *Ass'n of Am. R.Rs. v. Dep't of Transp.*, 821 F.3d 19, 23 (D.C. Cir. 2016); *see also Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805 (1987) (warning of the "potential for private interest to influence the discharge of public duty").

[109] *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

[110] *See* RIA 35.

[111] *See id.* at 34.

report on scope 1 and 2 emissions."[112] The cited impact assessment simply estimates that a parent corporation would devote about one hour for "Chief Executive and Senior Officials," 14 hours for "Corporate Managers," and 70 hours for "Administrative Professionals" to collect and process climate-related information from subsidiaries.[113] The impact assessment does not estimate the costs of actually calculating scope 1 and scope 2 emissions, but only of collecting and processing information that is already available—it has little relevance here. Far more relevant are comments from the related SEC rulemaking that directly estimate the cost of inventorying scope 1 and scope 2 emissions. The Society for Corporate Governance, for example, reports an estimate of "$300,000 annually in staff time for ... [s]cope 1 data collection and reporting" alone.[114] That estimate is *more than 50 times* the Council's, and is in line with other estimates that the Council cites but fails to factor into its analysis.[115]

The Council's external-cost estimates are also far off the mark. The Council, for example, estimates that a non-small business would retain a consultant for 409 hours to help prepare an initial inventory of scope 1 and scope 2 emissions.[116] Yet, the Council pegs the consultant's hourly rate at only $140 per hour.[117] There is no basis for that estimate. The Council repeatedly adopts other estimates made by the SEC in its related rulemaking,[118] but abandons the Commission's estimate of $400 for the hourly cost of outside experts. The Council states that "a $140 hourly rate is used in lieu of a $400 hourly rate since [its] rule does not contemplate a need for auditors,"[119] but the Commission's $400 estimate is not limited to auditors.[120] The Council is relying on stale data. Throughout its analysis, the Council repeatedly cites comments submitted in response to the SEC's "Request for Information" issued in March 2021.[121] The SEC began receiving a new round of comments in April 2022, a full year later, when it issued its proposed rule. Since then, the Commission in other rules has adjusted "for inflation"

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[112] UK Department for Business, Energy & Industrial Strategy, *Mandating Climate-Related Financial Disclosures by Publicly Quoted Companies, Large Private Companies and Limited Liability Partnerships (LLPs)* 17 (Jan. 10, 2021).

[113] *See id.* at 30.

[114] Society for Corporate Governance Comments 91 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

[115] *See* RIA 24 (noting estimate of $372,000 in internal costs for scope 1 and scope 2 reporting, along with other climate-related data reporting); *id.* at 26 (noting estimate of $174,000 for internal costs for sustainability report with scope 1 and scope 2 disclosures).

[116] *See* RIA 35.

[117] *Id.* at 34.

[118] *See, e.g.*, *id.* at 30, 34, 37.

[119] *Id.* at 30.

[120] *See The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 87 Fed. Reg. 21,334, 21,458 (Apr. 11, 2022).

[121] *See, e.g.*, RIA 22, 28, 30, 36, 37.

its standard estimate for the hourly rate of outside consultants.[122] That estimate is now $600[123]—*more than four times the Council's*.

Using more realistic estimates substantially increases the predicted costs of the Proposed Rule. For the 1,578 non-small business contractors, for example, the Council estimates initial scope 1 and 2 compliance costs of about $100 million (1,578 contractors x $63,868/contractor).[124] Adjusting for the rate for consultants and a more accurate measure of internal costs, that number should really be $860 million (1,578 contractors x ($300,000 internal costs + (409 consultant hours x $600/hour))). Of course, that does not account for the other flaws in the scope 1 and 2 estimates described above, or account for the costs to small businesses, which would be hundreds of millions of dollars in additional costs.

The Council also underestimates the costs of inventorying scope 3 emissions and making annual climate disclosures. To estimate the relevant costs, the Council simply averages the internal and external costs reported by certain commenters in response to the SEC's Request for Information in March 2021.[125] Yet, the responses to the SEC's RFI generally reported costs of *voluntary* disclosures. In voluntary disclosures, companies typically omit information that they determine not to be meaningful.[126] The proposed *mandatory* disclosures would be significantly more burdensome. Take just one of the Council's datapoints: the Williams Companies.[127] The Council relies on a Williams report of $445,800 for annual climate disclosures.[128] However, the Council cites a June 2021 comment discussing Williams' then-current voluntary reporting. Williams subsequently submitted a June 2022 comment explaining that if it were required to report scope 3 emissions (which is not included in its voluntary reporting), that would add "more than $1 million" to its compliance costs[129]—more than tripling the Council's flawed estimate. Rather than costing less than $309 million in the initial year of

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[122] *Listing Standards for Recovery of Erroneously Awarded Compensation*, 87 Fed. Reg. 73,076, 73,133 n.549 (Nov. 28, 2022).
[123] *Id.*
[124] *See* RIA 35.
[125] *See id.* at 36.
[126] *See, e.g.*, American Chemistry Council Comments 21-23 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm) (explaining that the SEC's proposal "adopts a false equivalence" between voluntary disclosures, where companies freely choose from among "an incredibly diverse set of frameworks and metrics that meet the unique needs of [their] different sectors or audience[s]" and a mandatory "one-size-fits-all standard" that doesn't take into account the "sheer diversity of different operational contexts" or "a company's unique climate risk profile").
[127] *See* RIA 36.
[128] *See id.*
[129] Williams Companies Comments 14 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

compliance,[130] then, the scope 3 inventory alone would cost contractors more than $670 million in the first year (more than $1 million x 671 major contractors). Furthermore, even the Council's underestimated "internal personnel costs" and "external consultant" costs[131] fail to account for the minimum $2,950 fee that companies must pay CDP simply to file their annual climate disclosure.[132]

Even more flawed is the Council's estimate of the cost to develop science-based emissions-reductions targets. The Council's estimate consists in its entirety of the $9,500 fee that SBTi charges to validate targets every five years.[133] Yet, the Council inexplicably ignores the costs of developing those targets before they are presented to SBTi (not to mention any further costs that may arise if SBTi does not validate them as submitted). SBTi reports that target development takes 24 *months*;[134] it requires answering about 50 pages of often complex, technical questions and following hundreds of pages of technical guidance concerning scenario analyses and modeling.[135] The Council nonetheless assumes that it would cost *nothing* to develop an emissions-reductions target and gather the information necessary to complete the process. That assumption is obviously wrong. If it costs companies more than $1 million to simply calculate their scope 3 emissions,[136] it would cost multiples of that amount to analyze all of the emissions and to model and plan for significant reductions.

The Council's failure to consider the costs of *implementing* the targets is even more problematic. SBTi requires companies to revalidate their targets every five years, and "is currently undergoing a process to track company progress against targets."[137] The Council cannot reasonably require contractors to commit to implementing certain climate targets—claiming benefits from those reductions—but then ignore the costs that contractors would incur in attempting to meet the targets. Those massive costs, which include developing decarbonization strategies and funding emission-reduction measures for both scope 1 and 2 emissions, as well as a large percentage of scope 3

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[130] *See* RIA 38.
[131] Proposed Rule, 87 Fed. Reg. at 68,322.
[132] CDP, *Admin Fee FAQ*, https://www.cdp.net/en/info/admin-fee-faq.
[133] *See* RIA 37.
[134] *FAQs*, SBTi, *supra* note 89.
[135] *Supra* pp. 5-6; *see* SBTi, *SBTi Near-Term Target Submission Form and Guidance* (Dec. 2021), *available at* https://sciencebasedtargets.org/step-by-step-process#submit; SBTi, *SBTi Corporate Manual* (Dec. 2021), https://sciencebasedtargets.org/resources/files/SBTi-Corporate-Manual.pdf; SBTi, *Target Validation Protocol* (Apr. 2020), https://sciencebasedtargets.org/resources/legacy/2019/04/target-validation-protocol.pdf; SBTi, *SBTi Criteria and Recommendations* (Oct. 2021), https://sciencebasedtargets.org/resources/files/SBTi-criteria.pdf; SBTi, *How-To Guide for Setting Near-Term Targets* (Dec. 2021), https://sciencebasedtargets.org/resources/files/SBTi-How-To-Guide.pdf; *see also* SBTi, *Cement Science Based Target Setting Guidance* (Sept. 2022), https://sciencebasedtargets.org/resources/files/SBTi-Cement-Guidance.pdf (example of sector-specific guidance).
[136] *Supra* pp. 4-5.
[137] *FAQs*, SBTi, *supra* note 89.

value-chain emissions—over which the contractor has limited control—must be factored into the Council's analysis.

For example, to achieve their targets, Tesco switched to 100% renewable electricity in the UK and Ireland and invested £8 million in onsite generation in Asia;[138] Pfizer constructed a wind turbine;[139] and Norwegian packing company Elopak replaced all HVAC gas valves and installed a new print line.[140] Especially high implementation costs are likely to arise from two scope 3 categories in particular—"Use of Sold Products" for energy intensive products, and "Purchased Goods and Services" (supplier emissions)—due to the cost associated with redesigning products and driving reductions in the supply chain to meet near-term and long-term targets. Many companies would likely need to establish "engagement" targets with their suppliers or customers—this means getting suppliers or customers to set their *own* science-based targets, thereby significantly expanding the number of entities setting science-based targets and imposing additional costs on suppliers and customers (many of whom are small businesses). These are significant costs—millions of dollars for each contractor—that the Council simply ignores.

In fact, it may not even be possible for some contractors to meet the reduction targets that the Council would require them to set. For example, businesses in the energy sector would have to have their proposed GHG-reducing investments approved by state public utility commissions, whose primary goal is not to mitigate the effects of global climate change but to ensure that energy remains affordable and reliable for consumers.[141] No good can come from forcing a company to publicly commit to emissions-reduction targets that are impossible to meet.

The Council fails to consider other costs as well, including the burdens that the Proposed Rule would impose on non-contractors. Because scope 3 reporting necessarily requires coordination with upstream and downstream third parties, the Proposed Rule would require contractors to demand that suppliers, sub-contractors, end users

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[138] *Case Study – Tesco*, SBTi, https://sciencebasedtargets.org/companies-taking-action/case-studies/tesco.

[139] *Case Study – Pfizer*, SBTi, https://sciencebasedtargets.org/companies-taking-action/case-studies/pfizer.

[140] *Net-Zero Case Study – Elopak*, SBTi, https://sciencebasedtargets.org/companies-taking-action/case-studies/case-study-elopak.

[141] Jake Duncan & Dr. Robert Klee, *Transforming Utility Regulation to Achieve Climate Goals*, Institute for Market Transformation (June 23, 2020), https://www.imt.org/news/transforming-utility-regulation-to-achieve-climate-goals/ ("[U]tilities are increasingly being asked to invest heavily in renewable energy, energy efficiency, storage, and new technologies so that jurisdictions can meet climate goals. This puts utilities in a bit of a bind. Not only does it go against the traditional utility business model that has been around for 100 years but even if a utility wants to change the way it operates, it can be hard to get regulatory approval," from state utility commissions, which "have historically had a narrow focus on affordability, safety, and reliability.").

(including the federal government), and others collect and provide information about their own GHG emissions, imposing a burden on those other entities that likely is commensurate with the scope 1 and 2 burdens on contractors. Many entities up- and downstream from major contractors are likely to be small businesses that do not have the resources to provide such information to the requesting contractor. The Proposed Rule would likewise impose burdens on third parties that would be affected by contractors' implementation of emissions-reductions targets. For example, in some circumstances—where a contractor sets scope 3 GHG emissions goals that require reducing product usage—the government itself may be restricted in its ability to use a procured product, or to buy a new one. The Council must expect, moreover, that all or most of these costs will ultimately be passed on to the customer imposing them: the procuring government agency.

Finally, the Council fails to consider the costs arising from the interaction between its Proposed Rule and the SEC's proposed climate-disclosure rule. The SEC has downplayed the costs of its own proposal by suggesting that certain disclosure requirements are triggered only if a company sets emissions-reductions targets.[142] But, here, the Proposed Rule would *require* certain contractors to set emissions-reductions targets, which for public companies would trigger the full suite of proposed SEC disclosure requirements—along with the litigation risks that come with them. These, again, are massive additional costs that the Council must include in its assessment.

2. The Council overestimates the benefits that it claims would result from the Proposed Rule.

The Council errs on both sides of the ledger; just as its cost estimates are too low, its benefits estimates are too high.

The Council wrongly assumes that requiring contractors to make climate-related disclosures would "provid[e] economic and other benefits to the contractors themselves," such as "improving employee morale," improving "brand reputation," and boosting a company's competitive advantage.[143] This assumption is flawed on numerous levels. First, the Council mistakenly extrapolates from *voluntary* disclosures.[144] Companies that chose to voluntarily disclose climate-related information may do so in part because their labor and product markets make it in their self-interest to do so. There is no reason to assume that the asserted benefits would materialize for companies that are *required* to make such disclosures. Indeed, if it were in their self-interest to do so, those companies would presumably *already* be voluntarily disclosing such information. The Council, second, suggests that the Proposed Rule would increase a contractor's competitive advantage over companies that do not make climate-related

[142] *See, e.g.*, 87 Fed. Reg. at 21,345, 21,347.
[143] 87 Fed. Reg. at 68,320.
[144] *Id.*

disclosures[145]—but that makes no sense, because *all* significant and major contractors would be required to make the same disclosures.

The Council also does not explain how the Proposed Rule would meaningfully reduce *aggregate global* emissions, the actual driver of climate change. More fundamentally, adoption of the rule may not be based on "benefits" that fall outside the purposes for which the Council is authorized to adopt a rule in the first place. The Council is authorized to act for the limited purpose of promoting efficiency and economy in procurement; in assessing the reasonableness and appropriateness of its action, and of the costs it is imposing, the Council may weigh in the balance only those benefits that it is authorized to pursue (and which it has the expertise to assess). Put differently, an objective that is *ultra vires* counsels *against* agency action; it may not be counted as a benefit that justifies agency action.

The Council suggests that "[t]o the extent" there is "alignment" between its proposal and the SEC's climate-disclosure proposal, contractors "will benefit from greater standardization of climate-related disclosures."[146] The problem, though, is that the two proposed rules are not aligned, and this misalignment would only add to the compliance burden companies are facing.[147] For instance, the SEC proposal would require companies to disclose scope 3 emissions "if material," whereas the Council's proposal would require the disclosure of "relevant" scope 3 emissions. (The Council does not define "relevant.") The SEC, moreover, would require scope 1 and scope 2 disclosures based on the organizations included in a company's consolidated financial statements, whereas the Proposed Rule would require disclosures based on the organizational boundaries set by the GHG Protocol.[148] Far from "benefit[ing]" contractors, this overlap would force contractors to prepare two *separate* emissions reports and disclosures.[149] This is the opposite of "efficient."[150]

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[145] *See* RIA 13.

[146] RIA 15.

[147] This violates the Council's duty to "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations." Exec. Order No. 13,563, § (1)(b)(2), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011).

[148] *Compare* Proposed Rule, 87 Fed. Reg. at 68,318 ("[A] significant and major contractor ... must follow the GHG Protocol Corporate Accounting and Reporting Standard ... to complete a GHG inventory of the [s]cope 1 and [s]cope 2 emissions."), *with* 87 Fed. Reg. at 21,384 ("A company following the GHG Protocol would base its organizational boundaries on either an equity share approach or a control approach. Our [the SEC's] proposed approach, however, would require a registrant to set the organizational boundaries for its GHG emissions disclosure using the same scope of entities, operations, assets, and other holdings within its business organization as those included in, and based upon the same set of accounting principles applicable to, its consolidated financial statements.").

[149] The divergent reporting proposed by the SEC and the Council could also confuse investors and further undermine the SEC's goal of "enhancing investor protection." 87 Fed. Reg. at 21,429.

[150] 40 U.S.C. § 101.

The uses to which the Council suggests the government would put the proposed climate disclosures are too vague and uncertain to justify the imposition of billions of dollars of costs on government contractors. This does not accord with the Council's duties under the Paperwork Reduction Act, which requires it to certify that the proposed collection of information "is necessary for the proper performance of the functions of the agency, including that the information has practical utility."[151] "Practical utility means the *actual*, not merely the *theoretical or potential*, usefulness to or for an agency, taking into account its accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects ... in a useful and timely fashion."[152] Yet, the Council has not shown that the information that it would require major and significant contractors to disclose is actually—as opposed to potentially—useful, or that the government would even be able to process the information in a useful and timely fashion.

The Council claims that the government will use the required disclosures "to inform development of policies and programs to reduce climate risks and GHG emissions associated with Federal procurement activities, and to incentivize and enable technologies critical to achieving a national economy and industrial sector that are resilient to the physical and transition risks of climate change and net zero emissions by 2050."[153] Also, it says, "GSA will provide periodic recommendations on further actions to reduce supply chain emissions, based on information and data collected through supplier disclosures pursuant to this FAR rule and other publicly available information."[154] Even if the Council had the authority to compel disclosures to help the government develop strategies to reduce greenhouse gas emissions—which it does not—the government's surmise that compelling these disclosures might, in some undetermined way and degree, "inform" the government's policymaking on the issues of climate change and GHG emissions does not justify such a costly rule, nor demonstrate its practical utility. It is not reasonable to impose billions of dollars of costs on government contractors because the government might potentially find some of the information they produce relevant to climate policymaking at some unknown future date.

Evidence from the SEC rulemaking undercuts the notion that the required disclosures would provide useful information. For example, as numerous commenters explained, "the reality is that [scope 3] methodologies continue to be under development and, in its current state, [s]cope 3 GHG data is of limited reliability."[155] There is simply

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[151] 44 U.S.C. § 3506(c)(3)(A); *see* 5 C.F.R. § 1320(d)(1)(iii) ("To obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that the proposed collection of information ... [h]as practical utility.").

[152] 5 C.F.R. § 1320.3(*l*).

[153] 87 Fed. Reg. at 68,323, 68,326.

[154] *Id.*

[155] Comments of T. Rowe Price 4 (June 16, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

"no uniform methodology or approach" to calculating scope 3 emissions, and thus, it would be "highly unlikely that Scope 3 GHG disclosures [would] provide comparable, useful, material, climate-related information."[156] Scope 3 emissions are duplicative of the scope 1 and scope 2 emissions reported by other companies, thus imposing a burden that would not offer helpful information. Moreover, companies often serve both government and private-sector contracts, but GHG disclosures are generally company-wide. Suppose, for instance, that two contractors each operate a facility that produces products to fill a $51 million government contract, but the second contractor *also* operates other facilities that serve $5 billion in private-sector contracts. The second contractor would report much higher GHG emissions, but the vast majority of those emissions would be due to its nongovernment work. The Council does not explain how knowing contractors' total GHG emissions would provide any useful information or otherwise help the government in awarding a contract.

The Council also has not shown that the government has the capacity to review and respond to the mountains of data that the Proposed Rule would require contractors to provide to the government. The proposal estimates that it would cost the government $47,000 a year just to *obtain* major contractors' annual climate disclosures from CDP,[157] and projects an implausibly low $200,000 for analyzing the data once received. Yet, it does not identify who would conduct this analysis—$200,000 would not cover the annual compensation of two federal employees with requisite expertise—nor does it identify offices in the contracting agencies that have this type of specialized knowledge. Assuming this data is even provided to individual contracting agencies, it seems doubtful that anyone at the Department of Education, for example, or Veterans' Affairs, has the capability to review and analyze the reams of data that their contractors would submit. The proposal makes no account at all for the costs to the government of actually acting upon the data once obtained and analyzed. At a time when government agencies regularly assert that they have insufficient budget and staff to discharge the responsibilities assigned by Congress, it is highly doubtful they could make any meaningful

[156] *Id.*; *see also* Comments of Investment Adviser Association 15 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm) ("We believe it is premature at this point to require disclosure of Scope 3 GHG emissions due to data gaps and the absence of agreed-upon measurement methodologies."); Comments of the Investment Company Institute 15 (June 16, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm) ("A large majority of our members believe that the Commission should not require companies to report Scope 3 emissions at this time, because of significant data gaps and the absence of agreed-upon methodologies to measure Scope 3 emissions. These deficiencies seriously undermine the ability of most companies to report consistent, comparable, and verifiably reliable data.").

[157] Proposed Rule, 87 Fed. Reg. at 68,323.

inroads in actually using this costly and voluminous data.[158] Simply, the Council cannot impose billions of dollars of costs on government contractors without demonstrating, as required by the Paperwork Reduction Act, that the government has the capacity to analyze the required disclosures and put the information to actual productive use.

Finally, to the extent that the Council believes that the rule would instead yield benefits by requiring contractors to collect and consider the information for themselves, that goal could be achieved by less drastic and less costly alternatives, including the option of requiring companies to maintain internal records of their climate-related information, rather than by requiring them to make costly and unnecessary disclosures.

B. The Proposed Rule would disproportionately harm small businesses.

The Proposed Rule would have serious adverse effects on small businesses, exacerbating a disturbing trend in which "the number of small businesses doing business with the federal government has plummeted over the past decade."[159]

The Council simply assumes that the costs on small businesses would be half those of large businesses because small businesses have fewer employees, buildings, vehicles, and the like, so the "level of effort" required would be less.[160] That is wrong. As the Office of Advocacy of the U.S. Small Business Administration explained in connection with the SEC proposal, small businesses would need to "allocate larger shares of their technological, financial, and staff resources" to come into compliance with climate rules than larger firms.[161] Many small businesses have less developed climate-

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[158] The Council also does not address the problem under the Anti-Deficiency Act of agencies paying staff to conduct climate-related activities for which Congress has not provided appropriations. *See* 31 U.S.C. § 1341.

[159] Sarah Treuhaft et al., *Fewer and Fewer Small Businesses Are Getting Federal Contracts*, National Equity Atlas (Sept. 28, 2021), https://nationalequityatlas.org/federalcontracts?_sm_au_=iHVZZ5NcvTsM2FvFFcVTvKQkcK8MG; *see* Steven Koprince, *Number of Small Businesses Awarded Federal Government Contracts Has Dropped 12.7% in Four Years*, SmallGovCon (Aug. 19, 2021), https://smallgovcon.com/reports/number-of-small-businesses-awarded-federal-government-contracts-has-dropped-12-7-in-four-years/?_sm_au_=iHVZZ5NcvTsM2FvFFcVTvKQkcK8MG (noting that in FY 2020 the number of small businesses awarded government contracts dropped 12.7% over the past four years and that the number of small businesses awarded prime contracts dropped 32% between FY 2009 and FY 2018). Just last month, the Department of Defense reported that small business participation in the defense industrial base has declined by over 40 percent in the past decade, in part due to regulatory burdens. U.S. Dep't of Defense, *Small Business Strategy* 5 (Jan. 2023), https://media.defense.gov/2023/Jan/26/2003150429/-1/-1/0/SMALL-BUSINESS-STRATEGY.PDF.

[160] RIA 30.

[161] Small Business Administration Advocate Comments 5 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm); *see* U.S. Chamber of Commerce Foundation, *The Regulatory Impact on Small Businesses: Complex. Cumbersome. Costly.* 5, https://www.uschamberfoundation.org/smallbizregs/assets/files/Small_Business_Regulation_Study.pdf (Mar. 2017) (explaining that

disclosure programs than their larger peers. "Representatives from the biotechnology, plastics, and equipment manufacturing industries," for example, have reported to the Office of Advocacy "that small businesses in their industries have not traditionally tracked GHG emissions or other climate-related metrics," and would thus need to build out reporting programs from scratch.[162] This would be a massive undertaking that the Council must factor into its analysis.

Small businesses would also be affected indirectly if "major contractors" were required to comply with the scope 3 and science-based targets provisions of the Proposed Rule. As noted, major contractors would need to gather scope 3 supplier-emissions data from all of their subcontractors, many of whom are small businesses. Similarly, as part of the science-based target-setting requirement, many major contractors would likely be led to adopt the "engagement target" option specified by SBTi. Under this approach, discussed above, contractors would press suppliers and customers to set their own science-based targets, thereby proliferating the number of entities that must incur the costs to achieve stringent science-based targets.

The Council's failure to adequately consider impacts on small business is particularly problematic here for at least two reasons. First, because "[t]he COVID-19 pandemic has dramatically impacted American small businesses, ... efforts to reduce the regulatory burden on small entities [is] more important than usual."[163] Second, the benefit from imposing the Proposed Rule on small businesses is, at best, minuscule. "An individual small business has a relatively small carbon footprint," and "[t]aking climate action is not easy for small businesses," which "often lack the resources needed to invest in their journey to net zero."[164] There is simply no reason to impose these massive costs on "the lifeblood of the U.S. economy."[165]

"[t]he complexity of the federal ... regulatory system[] creates disproportional cost burdens on small businesses" and citing report commissioned by SBA Office of Advocacy for proposition that "small firms bear a regulatory cost 36% higher than the cost of regulatory compliance carried by larger firms, measured in dollar cost per employee"); Nicole V. Crain & W. Mark Crain, "The Impact of Regulatory Costs on Small Firms," https://dair.nps.edu/bitstream/123456789/3664/1/SEC809-MKT-10-0055.pdf (Sep. 2010) (report commissioned by SBA Office of Advocacy).

[162] Small Business Administration Advocate Comments 5 (June 17, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

[163] Office of Advocacy, *Small Businesses Benefit from Reduced Regulatory Burden in FY 2021* (Apr. 5, 2022), https://advocacy.sba.gov/2022/04/05/small-businesses-benefit-from-reduced-regulatory-burden-in-fy-2021/.

[164] Maria Mendiluce, Johan Falk, & Kristian Rönn, *How Big Businesses Can Help Their Suppliers Cut Emissions*, Harvard Business Review (Apr. 8, 2022), https://hbr.org/2022/04/how-big-businesses-can-help-their-suppliers-cut-emissions.

[165] Office of Advocacy, *Small Businesses Generate 44 Percent of U.S. Economic Activity*, U.S. Small Business Administration (Jan. 30, 2019), https://advocacy.sba.gov/2019/01/30/small-businesses-generate-

C. The Proposed Rule would undermine national security interests.

The Council also fails to evaluate the impacts of the Proposed Rule on military readiness and national security. Two-thirds of the federal government's more than $600 billion dollars in contract obligations are allocated to the Department of Defense. The vast majority of the products supplied through these contracts have national security implications. In 2020, for example, the top five defense services and products included aircraft, combat ships, guided missiles, gas turbine and jet engines, and drugs and biologicals.[166] The importance of military contracting is even more pronounced now, given the substantial military aid that the United States is currently providing in the conflict in Ukraine. Yet the Proposed Rule would create significant problems that would be specific to defense contractors. Military and defense products' "use phase" GHG emissions (Category 11) are nearly impossible to accurately calculate, given how sensitive this information is for national security reasons. Defense products, moreover, are designed to government specifications and subject to various national security considerations that severely limit contractors' ability to comply with scope 3 disclosure requirements or to implement product emission reductions to achieve science-based targets.[167]

Additionally, to the extent the Council's proposed rule is designed to reduce scope 3 emissions in the defense contracting industry, that would pose a serious risk to national security. For example, as two former Chairmen of the Joint Chiefs of Staff have noted, the United States military is "the single largest consumer of fuel in the United States, if not the world. It uses fuel to power tanks, helicopters and fighter jets, run surveillance, electrify barracks, heat military installations and enable numerous other operations. Fuel is necessary to the United States military in times of war and in times of peace to make sure the military is ready for war, for peacekeeping missions, to deter future threats and to prevent terrorism."[168] While the former Chairmen recognized that "it is important to continue to look for 'greener' ways to fuel the military," they emphasized that the military cannot "go it alone and unilaterally strip itself of higher-performing fossil fuels" because that "would weaken our armed forces while strengthening those of other countries."[169] In other words, the military cannot safely reduce reliance

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44-percent-of-u-s-economic-activity/; Martin Rowinski, *How Small Businesses Drive the American Economy*, Forbes (Mar. 25, 2022), https://www.forbes.com/sites/forbesbusinesscouncil/2022/03/25/how-small-businesses-drive-the-american-economy/?sh=575521824169.

[166] GAO, *A Snapshot of Government-Wide Contracting For FY 2021*, https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2021-interactive-dashboard.

[167] Adding new disclosure requirements that impact legacy procurements for products that have been delivered for many years or even decades to the federal government could disadvantage existing prime contractors and their respective supply chains.

[168] *Amici Curiae* Brief of General (Retired) Richard B. Myers and Admiral (Retired) Michael G. Mullen, in Support of Defendants-Appellants 21, *City & County of Honolulu v. Sunoco LP*, Nos. 21-15313, 21-15318 (9th Cir. July 26, 2021), ECF No. 49.

[169] *Id.* at 22.

on fossil fuels through unilateral government contracting decisions; "reduction in fossil fuel use can be accomplished only through comprehensive international, multi-lateral negotiations and treaties."[170] The Council must not impose requirements on defense contractors that could compromise national security and defense objectives.

The Proposed Rule would, to be sure, allow individual contractors to request exemptions from certain of the proposal's requirements, but there is no provision for these exemptions to be granted on an industry-wide basis, and in any event exemptions have just a one-year duration. That is not sufficient. Only through a blanket exemption for national security procurements could the Proposed Rule avoid placing debilitating burdens on the security and self-defense of the United States and its allies.

D. The Proposed Rule is impermissibly tethered to the decision-making of private organizations.

The Council also does "not act rationally when it blindly tethers its decisionmaking to that of" a number of private entities, "because such faith in another [entity's] decisionmaking fails to account for the very real possibility that the other [entity] [will] act[] improperly or irrationally."[171] Here, the Proposed Rule would require contractors' GHG inventories to "follow the GHG Protocol Corporate Accounting and Reporting Standard," require annual climate disclosures to "align[] with recommendations of the TCFD" and be submitted through the "CDP Climate Change Questionnaire," and require emissions-reduction targets to be set according to the criteria established by the SBTi, and be validated by SBTi.[172] Yet, the Council has entirely failed to articulate its *own* independent reasons for why the various standards it has adopted wholesale from those private organizations are appropriate. None of these organizations, for example, have been formed or administered to improve procurement in particular, or even to incorporate climate considerations into procurement. The standards of these organizations, moreover, were designed to operate as *voluntary* disclosure standards (CDP and SBTi) and recommendations (TCFD) to generate industry best practices toward climate change; the standards were *never* crafted for use in mandatory compliance programs. The Council therefore has no reason to posit that these standards are suited to the Council's objectives.

Consider the science-based emissions targets. The Proposed Rule would require *all* major contractors to validate such targets with SBTi. However, SBTi states that emissions reductions for certain industries are too "complex" for it to validate targets

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[170] *Id.*

[171] *Foster v. Mabus*, 895 F. Supp. 2d 135, 148 (D.D.C. 2012); *see also, e.g.*, *Nat. Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1413 (D.C. Cir. 1985) ("DOE may not rely without further explanation on an unelaborated order from another agency.").

[172] 87 Fed. Reg. at 68,313-14.

from those industries at this time.[173] For fossil fuels, for example, SBTi "has engaged a consultant to facilitate a panel of independent external experts to complete an independent review of the draft oil and gas methods and guidance,"[174] but SBTi has yet to establish targets in the "fossil fuel sector."[175] This also applies to automakers (who already are subject to regulation of GHG emissions by standards set by the EPA and the State of California)[176] and a multitude of other sectors. Aluminum, aviation original equipment manufacturing,[177] chemicals, construction, healthcare, steel, and transportation, to name a few, all lack the SBTi sector guidance[178] that is needed to address the unique abatement challenges in these industries. (While SBTi offers generic guidance for some (but not all)[179] companies that do not have sector-specific guidance, that generic guidance does not take into account the unique emissions-reductions challenges facing specific industries.)[180] The Council does not explain why the SBTi framework is a good fit for companies in the many, major sectors of the U.S. economy for which the SBTi itself has not identified a satisfactory approach. To the extent the Council is relying on forthcoming SBTi industry-specific guidance, the Council does not—and cannot—explain how it found guidance that does not yet exist to be reasonable and appropriate.

Additionally, in sharp contrast to other standards commonly referred to in FAR orders and rules,[181] such as SAE, RTRA, ISO, and ASTM standards, the SBTi standards are not consensus-based. They represent the views of a single nongovernmental organization and have received little input from significant industry sectors, such as the aerospace and defense industry, which receive the largest share of federal government contracts. Accordingly, the SBTi standards, while voluntarily adopted by some

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[173] SBTi, *FAQs*, *supra* note 89 (Question: "What is the SBTi's policy on fossil fuel companies?").
[174] *Id.*
[175] *Id.*
[176] *Id.* (Question: "What is the SBTi's policy regarding automakers?").
[177] SBTi has released guidance for the "Aviation Sector," but this guidance applies to "airlines and users of aviation services"—not aviation equipment manufacturers. SBTi, *Science-Based Target Setting for the Aviation Sector* 4 (Aug. 2021), https://sciencebasedtargets.org/resources/files/SBTi_AviationGuidanceAug2021.pdf.
[178] *See* SBTi, *Sector Guidance*, https://sciencebasedtargets.org/sectors.
[179] *See, e.g.*, SBTi, *FAQs*, https://sciencebasedtargets.org/faqs#what-is-the-sbtis-policy-on-fossil-fuel-companies (Question: "What is the SBTi's policy on fossil fuel companies?") (stating, "Due to the developing status of our method, in addition to the existing SBTi policy to pause the validation of fossil fuel sector targets, we are also pausing commitments from these companies," and describing "[c]ompanies that cannot commit to the SBTi until the oil and gas method is finalized").
[180] SBTi, *How-to Guide for Setting Near-Term Targets* (Dec. 2021), https://sciencebasedtargets.org/resources/files/SBTi-How-To-Guide.pdf.
[181] *See, e.g.*, FAR Part 11.101(b); *see also* Off. of Mgmt. & Budget, Exec. Off. of the President, Circular No. A-119, Revised, https://www.whitehouse.gov/wp-content/uploads/2020/07/revised_circular_a-119_as_of_1_22.pdf.

companies and organizations, have not been subjected to the same level of scientific rigor or scrutiny as other standards. Indeed, some standards, such as those for the energy industry, may prove *impossible* to achieve for companies that do not obtain necessary approvals from state public utility commissions.[182] For these and other basic reasons, the Council must reconsider its use of SBTi.[183]

The Council's surrender of its authority to private organizations creates other problems. CDP and SBTi are constantly changing their standards.[184] Some of the changes have been significant; for example, SBTi shortened the maximum number of years of the target from 15 years to 10 years.[185] Those changes are made without following the APA's notice-and-comment requirements. Moreover, the Council has neither explained how it would monitor such changes to ensure they conform to the Council's goals, nor factored such foreseeable future changes into its regulatory cost-benefit analysis.

Finally, the Council does not show that due diligence has been performed on the private organizations to which the Proposed Rule would outsource most of the standard setting in this rulemaking. For example, the Council does not analyze whether SBTi even has the resources to handle the thousands of additional submissions it would receive under the Proposed Rule.[186] In addition, the Council does not examine SBTi's or any of the other private organizations' control, membership, or funding, and performs no analysis of the organizations' goals. Some of those organizations have connections

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[182] *See supra* p. 20; Jake Duncan & Dr. Robert Klee, *Transforming Utility Regulation to Achieve Climate Goals*, Institute for Market Transformation (June 23, 2020), https://www.imt.org/news/transforming-utility-regulation-to-achieve-climate-goals/.

[183] SBTi also arbitrarily excludes certain carbon-reduction strategies from consideration in assessment of a company's progress towards its targets. *See, e.g.*, SBTi, *SBTi Criteria and Recommendations* 7 n.6 (Oct. 2021), https://sciencebasedtargets.org/resources/files/SBTi-criteria.pdf (GHG "removals that are not directly associated with bioenergy feedstock production are not accepted to count as progress towards SBTs or to net emissions in a company's GHG inventory.").

[184] The GHG Protocol is also currently soliciting comments to inform updates of the Protocol. Greenhouse Gas Protocol, *Survey on Need for GHG Protocol Corporate Standards and Guidance Updates*, https://ghgprotocol.org/survey-need-ghg-protocol-corporate-standards-and-guidance-updates.

[185] *Compare* SBTi, *SBTi Criteria and Recommendations* 16 (Apr. 2021), https://sciencebasedtargets.org/resources/files/SBTi-criteria-legacy.pdf, *with* SBTi, *SBTi Criteria and Recommendations* (Oct. 2021), https://sciencebasedtargets.org/resources/?tab=develop#resource.

[186] According to the System for Award Management ("SAM") data summarized in the preamble to the Proposed Rule, there are 964 entities that meet the definition of "major" contractor and are not registered as "small" for their primary NAICS code. SBTi reported in a December 2022 presentation that there are 1,982 companies, including both U.S. and foreign companies, with validated SBTs, including approximately 700 organizations that have used the streamlined target validation route exclusive to small and medium-sized enterprises. Regardless of how many major federal contractors already have SBTi-validated targets, this potential influx of new organizations will place an immense workload on SBTi. Already, the regular SBTi process itself typically exceeds two years. For these and other reasons, the two years the proposal allows for SBTi validation is plainly infeasible.

or funding relationships with foreign governments or foreign nationals, some of whose interests are not aligned with the United States'.[187] The Council does not, and cannot, explain how it furthers the public interest to give such organizations standard-setting authority over U.S. defense contractors and other critical industries and suppliers.

E. The proposed implementation timeline is infeasible.

The Proposed Rule's compliance deadlines are also unreasonable. As proposed, the rule appears to require contractors to begin taking actions *on the very day* a final rule is promulgated. Within one year of publication, significant and major contractors must have completed a GHG inventory and must have disclosed their total scope 1 and 2 emissions;[188] the inventory "must represent emissions during a continuous period of 12 months."[189] This could mean that significant and major contractors who do not currently collect scope 1 and scope 2 emissions data would need to begin collecting that data—at the very latest—on the day the final rule is published. Similarly, major contractors must have their emissions-reduction targets validated by SBTi within two years of the final rule's publication.[190] SBTi anticipates a 24-month development period for reductions targets. To have those targets validated, SBTi requires companies to submit GHG emissions data (including scope 3) for one or two years, depending on the base year. Further, if the rule were adopted as proposed, SBTi would receive thousands of new submissions—a flood of requests that would create a substantial backlog and delay in SBTi's review process. Complying with the proposed requirements is thus not immediately possible. The Proposed Rule fails to allow the initial start-up time necessary to comply with the proposed requirements—a start-up time that the Council's own cost projections acknowledge will be unavoidable.

F. The Council fails to adequately consider reasonable, less-restrictive alternatives.

The Council has an obligation under the Administrative Procedure Act to consider reasonable, less restrictive alternatives. There are, however, a number of

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[187] For example, the GHG Protocol is funded by several foreign governments and organizations, including the China Business Council for Sustainable Development; the Dutch Ministry of Foreign Affairs; the German government's International Climate Initiative; and the United Kingdom's Foreign & Commonwealth Office and its Department for Environment, Food and Rural Affairs. Greenhouse Gas Protocol, *Funders*, https://ghgprotocol.org/funders. Several of CDP's funders are foreign organizations, such as the Chinese Zijin Mining Group Co., the Gruppo Ferrovie dello Stato, Italy's state-owned railway, and the National Bank of Kuwait, Ltd. CDP, *How We Are Funded*, https://www.cdp.net/en/info/finance. And one of SBTi's three "core" funders is the Dutch IKEA Foundation. Science Based Targets, *How We Are Funded*, https://sciencebasedtargets.org/about-us/funders.

[188] 87 Fed. Reg. at 68,316.

[189] *Id.* at 68,313.

[190] *Id.* at 68,316.

alternatives that the Council has failed to adequately consider. A few examples are presented here.

First, the Council could require contractors, in lieu of GHG disclosures, to disclose well-known, easily observable characteristics, such as industry membership, company size, sales growth, earnings growth, the value of plant, property, and equipment, and capital expenditures.[191] Contractors typically have this type of information more readily available. Studies have shown that 90% of variation in GHG emissions can be inferred from it.[192] The Council states that "modeled" emissions are not "accura[te]" enough,[193] but the Council does not even attempt to explain why 90% predictive power would not be sufficient for its legitimate purposes. Nor does the Council explain why an extra few percentage points in the accuracy of a GHG emissions estimate would be worth the billions of dollars of costs the Proposed Rule would impose. To be sure, this alternative would not address the legal problems noted above, but it would at least mitigate some of the practical burdens for companies.

Second, the Council could require climate-related disclosures on a less-than-annual basis, for example, every five years. As Professor Daniel J. Taylor of the University of Pennsylvania's Wharton School demonstrated in his comment on the SEC's climate-disclosure rule, "GHG emissions are extremely highly correlated over time (e.g., autocorrelation of 0.977)," meaning that, "on average, next year's GHG emissions will be almost the same as this year."[194] Climate-related risks are also unlikely to change from year to year. In these circumstances, little benefit can arise from requiring every contractor to disclose GHG emissions and climate-related risks every year. Such frequent and broad disclosures provide little marginal value, and the Council could eliminate hundreds of millions of dollars in compliance costs from the proposal by just adopting a longer interval between reports. As with the first alternative, this alternative would not ameliorate the many legal problems with the proposal, but would at least mitigate some of the proposal's compliance burdens.

Third, the Council could require nonpublic disclosure to only the contracting agency. Although such a rule would still suffer significant flaws (including legal defects), it would at least avoid some of the First Amendment issues detailed above and would

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[191] Although much of this information, particularly for public companies, is not likely to be confidential if presented in "top-level" format, appropriate protection for confidential business information would need to be provided. The Council could then aggregate the information submitted without compromising confidentiality for individual companies.

[192] Daniel J. Taylor Study 7 (June 16, 2022) (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

[193] Proposed Rule, 87 Fed. Reg. at 68,326.

[194] Daniel J. Taylor Study 7 (filed at SEC, *Comments for the Enhancement and Standardization of Climate-Related Disclosures for Investors*, File No. S7-10-22, https://www.sec.gov/comments/s7-10-22/s71022.htm).

alleviate concerns about confidential business information.[195] The Council has not explained why *public* disclosure is necessary here; any interest the government has in making informed contracting decisions could be achieved by requiring prospective contractors to submit the required information to the government alone.

Fourth, the Council could broaden the exemptions that it has proposed. At the very least, the Council should exempt "significant" contractors, 64% of whom it acknowledges are small businesses.[196] By limiting the rule to major contractors, the Council would still capture the majority of scope 1 and scope 2 emissions but would significantly alleviate the burden on small business. The Proposed Rule already contains a number of significant exemptions.[197] Many of the exempted organizations have large, important government contracts.[198] If those contracts can be adequately evaluated without the detailed climate disclosures that the Proposed Rule contemplates, so can others, such as regulated utilities and military contractors.[199]

Fifth, instead of delegating authority to private parties to create the standards and provide the platforms for their implementation, the Council could unambiguously spell out what specific climate-related risk disclosures it wants from contractors in a rulemaking. The Council has not itself enumerated the specific climate-related disclosures it would require but instead directs major contractors to "complet[e] those portions of the CDP Climate Change Questionnaire that align with the TCFD *as identified by CDP*."[200] Similarly, the Council could unambiguously spell out in a rulemaking the specific criteria for science-based targets, instead of requiring major contractors to follow SBTi's changing standards and CDP's changing questionnaires. Although such a rule would still exceed the Council's legal authority and suffer from many of the defects detailed above, the independent rulemaking approach would at least avoid some of the issues associated with the Council's reliance on constantly changing standards created

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[195] *Supra* pp. 12-15.

[196] *See* RIA 20.

[197] *See* Proposed Rule, 87 Fed. Reg. at 68,314 (noting exemptions for Community Development Corporations, as well as for Alaska Native Corporations, Indian tribes, Native Hawaiian Organizations, and Tribally owned concerns).

[198] *See, e.g.*, Senate Comm. on Homeland Sec. & Governmental Affairs, Subcomm. on Contracting Oversight, *New Information About Contracting Preferences for Alaska Native Corporations (Part I)* 2, https://www.hsgac.senate.gov/imo/media/doc/SubcommitteMajorityStaffAnalysisofPubliclyAvailableANCData62309.pdf ("Between 2000 and 2008, contract awards to Alaska Native Corporations increased by $4.6 billion, from $508.4 million to $5.2 billion. ... The Department of Defense is by far the largest user of ANC contracts. In total, the Department of Defense spent $16.9 billion on contracts with ANCs from 2000 to 2008 ... .").

[199] Jake Duncan & Dr. Robert Klee, *Transforming Utility Regulation to Achieve Climate Goals*, Institute for Market Transformation (June 23, 2020), https://www.imt.org/news/transforming-utility-regulation-to-achieve-climate-goals/.

[200] Proposed Rule, 87 Fed. Reg. at 68,314 (emphasis added).

by private organizations. An independent rulemaking would also allow the Council to provide the type of clarity and compliance guidance that is currently lacking.[201]

Sixth, if the Council requires climate-related risk disclosures and GHG-emissions disclosures (it should not), the Council should at least grant companies the flexibility to report the risk disclosures and GHG emissions in different ways—for example, through existing public disclosure channels such as company websites and sustainability reports—rather than requiring disclosure exclusively via the CDP. Alternatively, the Council could let companies subject to EPA's GHG Reporting Rules provide a hyperlink to where the company's information appears on EPA's website. This would help reduce costs and still provide the government the information it claims it needs.

Seventh, the Council could limit the science-based target requirement to scopes 1 and 2, rather than including scope 3 emissions. Scope 3 emissions are duplicative of other companies' scope 1 and 2 emissions, and federal contractors have much less ability to reduce those emissions. In addition, many scope 3 emissions are gross estimates due to the lack of available and reliable data sources, making it difficult to measure reductions that are needed to meet the SBTi target requirements.

Finally, the Council could withdraw the Proposed Rule and work to harmonize a new proposal with any requirements adopted by the SEC and with the requirements of the EPA's Greenhouse Gas Reporting Program. Although the Chamber has significant concerns with both the Council's and the SEC's proposals, including the lack of statutory authority for the proposals, there is no reason the federal government should have more than one, single standard for reporting GHG emissions and climate-related risks. The Council should not rush ahead now, potentially saddling contractors with three separate climate-disclosure frameworks.[202]

G. The Council must either withdraw the Proposed Rule or re-propose a new rule for public comment.

To satisfy its rulemaking responsibilities under the APA, the Council will need to address the important matters discussed above that were not accounted for in the Proposed Rule, including various categories of costs that the proposal simply overlooked. The APA requires, additionally, that the Council make this new data and analysis available for public comment before adopting a final rule. This new data and analysis would

[201] The current proposal lacks sufficient detail to help companies comply. For example, the Proposed Rule does not define what disclosures are "relevant" for scope 3 purposes. A comparison of the Proposed Rule to other climate-related rules confirms the less-developed nature of the Council's proposal. The Council's proposal is just 23 pages in the Federal Register; in contrast, EPA's Clean Power Plan for power plant GHG emissions is 304 pages and EPA's methane rules for the oil and gas sector are 146 and 154 pages. 80 Fed. Reg. 64,662 (Oct. 23, 2015) (Clean Power Plan); 86 Fed. Reg. 63,110 (Nov. 15, 2021) (methane standards); 87 Fed. Reg. 74,702 (Dec. 6, 2022) (supplemental methane standards).

[202] *See supra* p. 22.

address the potential impacts and justifications for many crucial aspects of the Proposed Rule, and "the most critical factual material that is used to support [an agency's] position," including "the technical studies and data upon which the agency relies," must have "been made public in the proceeding and exposed to refutation."[203] That is, the Council is foreclosed from "extensive reliance upon extra-record materials in arriving at its cost estimates" concerning the Proposed Rule, unless it provides "further opportunity for comment" on those materials and the Council's analysis of them.[204] Plainly, in light of the discussion in this comment letter alone, a wealth of new data and considerations must be evaluated before a final rule here can be adopted. To properly weigh that information, the Council must reopen the comment period to satisfy the requirements of 5 U.S.C. § 553(c).

Given the concerns expressed above, the Council should abandon this flawed rule entirely. However, if the Council elects to re-propose the rule, the Council must revise its assessment of the rule's justification, and of its costs and benefits, to focus on the benefits that the rule would have for the economy and efficiency of the procurement process, and the Council must weigh *those* benefits against the rule's costs. As explained above, any rule of this kind must be predicated on the benefits that Congress authorized the Council to pursue, not *ultra vires* objectives. This would require a thorough reassessment of the Proposed Rule's justification, resulting in a very different approach that must be presented in a new round of notice and comment.

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The Chamber remains committed to working with the government to address the threat of global climate change.[205] Unfortunately, the Proposed Rule is not the proper way to proceed.

Sincerely,

Martin J. Durbin
President, Global Energy Institute,
and Senior Vice President, Policy
U.S. Chamber of Commerce

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[203] *Chamber of Com. of U.S. v. SEC*, 443 F.3d 890, 899-900 (D.C. Cir. 2006).
[204] *Id.* at 901.
[205] *See, e.g.*, Coalition Letter on the Ratification of the Kigali Amendment to the Montreal Protocol (Sep. 20, 2022), https://www.uschamber.com/environment/coalition-letter-on-the-ratification-of-the-kigali-amendment-to-the-montreal-protocol.