State of West Virginia
Office of the Attorney General
State Capitol
Building 1, Room 26-E
Charleston, WV 25305-0220

Patrick Morrisey
Attorney General

(304) 558-2021
Fax (304) 558-0140

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Chairman Rostin Behnam
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Submitted Electronically via CFTC Internet Comment Form

Re: Comments on the CFTC's "Climate-Related Financial Risk RFI" by the Attorneys General of the States of West Virginia, Alabama, Alaska, Arizona, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, Virginia, and Wyoming

Dear Chairman Behnam:

In a recent request for information, the Commodities Futures Trading Commission invited submissions to "better inform [the Commission's] understanding and oversight of climate-related financial risk as pertinent to the derivatives markets and underlying commodities markets." Request for Information on Climate-Related Financial Risk, 87 Fed. Reg. 34,856, 34,856 (June 8, 2022). The Commission tells us it will use this information in "potential future actions," including new guidance, interpretations, policy statements, or regulations. *Id.* It also might help drive the CFTC's "participation in any domestic or international fora," though the Commission doesn't say what "fora" it has in mind. *Id.*

Though the Commission couches its request in quintessential agency-speak, we think its meaning is obvious: the CFTC is poised to pursue the same misguided agenda that other regulators have embraced under the present administration.

But as we explain below, if the CFTC tries to implement a mandatory disclosure scheme or any similarly onerous regulatory framework related to climate change, that effort would be unlawful and otherwise problematic for at least three basic reasons. *First*, under the major questions doctrine, the Commission would be acting beyond its authority. *Second*, a disclosure

scheme would create substantial First Amendment concerns given the compelled speech that it would entail. And *third*, courts would find climate-related Commission action to be arbitrary and capricious.

For these reasons, the Commission should conclude its foray into climate emissions regulation and return to ensuring fair, competitive, and liquid derivatives markets.

BACKGROUND

According to the Commission, "the effects of climate change and the transition to a low-carbon economy present emerging climate-related financial risks." 87 Fed. Reg. at 34,857. The effects might manifest as "physical risks and transition risks." *Id.* These risks, the CFTC says, could in turn "directly or indirectly impact Commission registered entities, registrants, and other market participants as well as the derivatives markets and the underlying commodities markets themselves." *Id.* The Commission further predicts, without citation, that climate-related financial risk could cause "heightened market volatility, disruptions of historical price correlations, and challenges to existing risk management assumptions." *Id.* So, as one Commissioner wrote, the CFTC intends to be "at the forefront of financial regulatory efforts" to head off these perceived risks. *Id.* at 34,861 (Statement of Support of Commissioner Christy Goldsmith Romero).

A CFTC-subcommittee-authored report in 2020 describes these concerns more pointedly. *See* MKT. RISK ADVISORY COMM., CFTC, MANAGING CLIMATE RISK IN THE U.S. FINANCIAL SYSTEM (2020), https://perma.cc/TZD7-JE5Z. There, the chair of the sub-committee decried the "political inertia" that he thought created "fundamental flaw in the economic system"—namely, a "lack of appropriate incentives to reduce GHG emissions." *Id.* at xix. While conceding that China emits significantly more GHG, the report largely blames the United States for climate change. *Id.* at 3. The subcommittee therefore calls on "U.S. regulators and financial institutions" to assume a "mission of prudent climate risk management." *Id.* at 8. Even though climate-related policies largely "lie beyond the purview of financial regulators," the report insists that financial regulators should refocus their powers. *Id.* at 120. Regulations should now "actively promote, and in some cases require, better understanding, quantification, disclosure, and management of climate-related risks" by all "market participants." *Id.*

The sweeping language in both the request for information and the related subcommittee report tracks President Biden's philosophy on climate risk. In May 2021, the President signed Executive Order 14030. *See* Executive Order 14030 on Climate-Related Financial Risk, 87 Fed. Reg. 27,968 (May 20, 2021). Among other things, the order commands the federal bureaucracy to undertake a new "comprehensive, Government-wide strategy" to address climate-related issues. *Id.* The CFTC and other financial regulators must now prioritize climate policy. So the Commission, starting with this request for information, appears poised to take regulatory action to "support[] the orderly transition to a low-carbon economy." 87 Fed. Reg. at 34,858.

In this first step, CFTC has asked for public comment on eight categories of climate-related interest spanning 34 multi-part questions. These include (1) data for climate modeling, (2) scenario analysis and stress testing for market participants, (3) climate risk management, (4)

compelled disclosure of climate risks, (5) voluntary carbon markets, (6) climate risks from digital assets, (7) climate related risks for "financially vulnerable communities," (8) public-private partnerships and (9) capacity and coordination standards. 87 Fed. Reg. at 34,859-60. The questions preview where and how the Commission intends to force an "orderly [green] transition." *Id.* at 34,858. They contemplate new potential disclosure and reporting requirements (including carbon-emission specific requirements). They forecast new mandates for risk assessment (including risk modeling that could effectively punish carbon-intensive industries). They hint at new restrictions pertaining to climate-related hedges. They contemplate new policies designed to benefit preferred constituencies (styled in the request as "financially vulnerable communities"). And so on.

Two of the four Commissioners expressed alarm about the suggestions baked into the request. Commissioner Summer K. Mersinger has "strong concerns" about items that "extend beyond the scope of [the CFTC's] statutory jurisdiction." 87 Fed. Reg. at 34,861. Poking into environmental regulation "causes confusion about the role that Congress has tasked the CFTC to perform in [its] governing statute." *Id.* She therefore identifies at least seven areas in the request where the Commission seems to overstep. *Id.* at 34,861-62. Meanwhile, Commissioner Caroline D. Pham cautions that the Commission "must be mindful of [its] statutory mandate," too. *Id.* at 34,862. The Commission, she explains, is neither a "prudential banking regulator" nor "a primarily disclosures-based market regulator." *Id.* By losing sight of its proper identity in the name of climate change, the Commission could "dilut[e] [its] limited resources and potentially stray[] from [its] core expertise and responsibilities into areas already tasked to others." *Id.*

ANALYSIS

We see several substantial legal problems with any proposal to effect broad climate-related regulation through the CFTC. We address each in turn.

I. CFTC Climate Rules Could Improperly Implicate Major Questions Without A Clear Mandate From Congress.

In *West Virginia v. Environmental Protection Agency*, the Supreme Court confirmed that Congress—not a federal administrative agency—has the power to decide major issues. 142 S. Ct. 2587 (2022). There, the Court rejected a "broader conception of EPA's authority" that could have empowered the agency to transform the nation's power grid through an ambiguous provision of the Clean Air Act. *Id.* at 2600. Although EPA's "regulatory assertion[] had a colorable textual basis," the agency needed to identify something more than a "merely plausible textual basis" for it to accomplish "radical or fundamental change to a statutory scheme." *Id.* at 2609 (cleaned up). The Court insisted that EPA "must point to clear congressional authorization for the power it claims." *Id.* (cleaned up). By looking for this express text, the doctrine "ensur[es] that, when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not 'exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond' those the people's representatives actually conferred on them." *Id.* at 2620 (Gorsuch, J., concurring).

"The major questions doctrine" operates as a "distinct" constraint on agency power. *West Virginia*, 142 S. Ct. at 2609. And for several reasons, we doubt that the actions to which the Commission alludes here could satisfy the doctrine's demands.

First, if CFTC uses its regulatory authority over exchange-traded derivatives[1] to try to address climate change, that effort would constitute the kind of "extravagant statutory power" that the Supreme Court addressed in *West Virginia*. 142 S. Ct. at 2609. Just in financial terms, CFTC's regulatory actions produce a gargantuan effect. In the United States alone, 15.4 billion derivatives contracts were traded on American exchanges in 2021. *See Global futures and options trading hits another record in 2021*, FIA (Jan. 19, 2022), https://bit.ly/3CwtKhm. These contracts are worth nearly $100 trillion in traded value (and accordingly, traded risk) over the course of a year. *See* Issahaku Salifu, *The Role of Over-the-Counter (OTC) Derivatives in Global Financial Crisis and Corporate Failures in Recent Times and its Regulatory Impacts*, 6 EUR. J. OF ACCT., AUDITING AND FIN. RSCH. 53, 54-55 (2018). This figure is several multiples the size of the entire U.S. economy. *See, e.g.,* Abha Bhattarai, *Economy shrinks 1.4% in first 3 months of year, raising recession fear*, THE WASH. POST (Apr. 28, 2022, 5:21 p.m.). So regulations spanning the derivatives market have a substantial economic impact.

Second, Congress has already considered whether CFTC's power should encompass climate policy—and it rejected such an expansion. *See, e.g.,* H.R. 2454, 111th Cong. § 112 (2009) (proposing new requirements for carbon and emissions allowances); H.R. REP. NO. 111-137, at 420 (2009) (describing new Section 351-58 of the Commodity Exchange Act (7 U.S.C. § 2)); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 667-68 (2010) (discussing the role then considered, and since rejected, for independent agencies including CFTC in the climate regulatory space). Congress's choice to repeatedly reject proposals like these—especially on an issue of public importance like this—provides another clue that CFTC would be taking on a major question should it seek to reorder our nation's derivatives markets to address climate change. *See West Virginia*, 142 S. Ct. at 2614; *see also King v. Burwell*, 135 S. Ct. 2480, 2488 (2015).

Third, any CFTC policy or rulemaking that would aim to produce an "orderly transition to a low-carbon economy," 87 Fed. Reg. at 34,858, would constitute a "fundamental revision" of the Commodity Exchange Act, the Commission's enabling statute, *West Virginia*, 142 S. Ct. at 2596. The CEA is a "remedial statute that serves the crucial purpose of protecting the innocent individual investor—who may know little about the intricacies and complexities of the commodities market—from being misled or deceived." *Loginovskaya v. Batratchenko*, 764 F.3d 266, 270 (2d Cir. 2014) (quoting *CFTC v. R.J. Fitzgerald & Co.,* 310 F.3d 1321, 1329 (11th Cir.2002)).

The request for information's tenor is different from the CEA's express aims. CFTC is abandoning its mandates in favor of the present administration's political goals by assuming the

[1] Derivatives are contracts that guarantee future delivery of an underlying asset, for standardized size, at an agreed time. The Commission's jurisdiction includes futures and options on futures where the underlying asset is a commodity. *See* 7 U.S.C. § 2. A buyer of a future pays money to receive the standard amount of underlying asset at a predetermined future date. And option is the right (but not the obligation) to buy or sell a standardized amount of the underlying asset for a specified price at a known future date.

mantle of an environmental regulator. That new focus has little to do with preventing fraud. It is a role that the CFTC has never sought to assume before. And it is an area far afield from the Commission's traditional realms of expertise. *See Burwell*, 135 S. Ct. at 2489. In other words, CFTC efforts to address climate change are novel in every way. That novelty confirms, once more, that this issue constitutes a major question. *Id.* at 2610-12; *see also, e.g.*, Correspondence from Members of Congress to Chairman Rostin Behrman (Sept. 16, 2022), https://bit.ly/3SSl3n8 (observing that the "supplemental information subsections suggest the CFTC is seeking justification to expand its jurisdictional scope and take part in the Biden administration's Green New Deal push").

Because climate regulatory efforts would implicate a major question, CFTC would need to identify a specific clear statement from Congress empowering it to address that question—and it cannot. We recognize that the Commission derives its authority from the CEA, 7 U.S.C. § 1 *et seq.*, and that Act gives the CFTC authority over all contracts for "future delivery" of a commodity that are "executed or traded on an organized exchange," *id.* §§ 2(a)(1), 2(c)(2).[2] Although the CFTC's regulatory powers and jurisdiction are broad, we find it telling that the CEA does not mention climate- or environmental-related regulation in any of the agency's governing provisions. At most, the provisions contemplate that the Commission can act to address *specific* harms that are presently threatening to disrupt aspects of the financial system. That mandate does not greenlight a broad reordering of the entire regulatory "framework," let alone one based on ill-substantiated *potential* harms.

II. Major Questions Doctrine Aside, Broad Climate-Related Regulatory Action Would Exceed The Commission's Statutory Authority.

When an agency acts "in excess of [its] statutory jurisdiction, authority, or limitations," that act is void. *See* 5 U.S.C. § 706(2)(C). In reviewing an agency's statutory authority, "the question ... is always whether the agency has gone beyond what Congress has permitted it to do." *Nat. Res. Def. Council, Inc. v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 108 (2d Cir. 2018) (quoting *City of Arlington v. FCC*, 569 U.S. 290, 297-98 (2013)). As "creature[s] of statute," agencies get only the authority that Congress delegated to them. *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002).

A. Congress explained, in detail, exactly what it wanted the Commission to do: "serve the public interests [] through a system of effective self-regulation of trading facilities, clearing systems, market participants and market professionals." 7 U.S.C. § 5. The Commission was empowered "to deter and prevent price manipulation or any other disruptions to market integrity; to ensure the financial integrity of all transactions subject to [the CEA] and the avoidance of systemic risk; to protect all market participants from fraudulent or other abusive sales practices

[2] Commodities include derivatives on traditional agricultural commodities, *see* 7 U.S.C. § 1a(9), foreign exchange derivatives, 7 U.S.C. § 2(c)(2), and a broad catch-all for any "goods and articles [except onions] … in which contracts for future delivery are presently or in the future dealt in." *Id.* § 1a(9). This latter catch-all provision gives the Commission jurisdiction beyond traditional agricultural products, so the CFTC can regulate derivatives on items like natural gas, oil, metals, and carbon when traded on an exchange. Congress has also added derivatives on foreign currency to CFTC's purview.

and misuses of customer assets; and to promote responsible innovation and fair competition among boards of trade, other markets and market participants." *Id.*

Although the Commission mentions these statutory objectives, it does not explain how any potential actions would meet them. Instead, the Commission merely parrots the statutory language. *See* 87 Fed. Reg. at 34,856. We find this lack of concern for statutory constraints deeply troubling.

We think that the actions alluded to within the request for information would extend beyond the Commission's limits. Recall that a statute's words must be read in their context and with a view to their place in the statutory scheme. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). When reading the CEA's purpose along with its enforcement and rulemaking provisions, it becomes obvious that Congress created the CFTC to ensure honest markets and trade integrity. The CEA contains provisions for addressing prohibited transactions, excessive speculation, contracts designed to defraud, trader reporting, and fraud. *See* 7 U.S.C. §§ 6-6t. It also contains sections requiring clearing houses and registered entities to register, empowering the agency to impose monetary penalties, and discussing trading ban violations and trader discipline. *Id.* §§ 7, 9, 12. The scheme, then, shows that the Commission should focus on protecting the "innocent individual investor" from financial harm. *Loginovskaya*, 764 F.3d at 270. Yet climate policy falls outside this risk. And indeed, save for one mention in the context of voluntary carbon markets, 87 Fed. Reg. at 34,860, the Commission does not mention concerns like integrity and fraud in the request for information. Requiring regulated entities to disclose their carbon emissions, for instance, seems an especially poor fit with such concerns.

We are not the only ones to see these problems. Commissioner Mersinger notes, for instance, that the Commission assumes a power to order any regulated entity to disclose data for any reason that might serve the public—but "[i]t does not" have such power. 87 Fed. Reg. at 34,862. Likewise, some questions imply that the Commission should be pushing the market toward investment in less-carbon-intensive technologies. But "nowhere in the CEA did Congress suggest that it is a purpose of the CEA, or the mission of the CFTC, to allocate capital—whether to climate-benefiting projects or otherwise." *Id.* And the Commission seems willing to regulate voluntary carbon markets, digital assets, and underlying commodities in ways that may not pertain to derivatives. *Id.* The Commission has no power to do that, either.

B. We find Commissioner Mersinger's last point especially troubling: CFTC does not have regulatory authority over transactions involving the underlying commodity unless they involve fraud or manipulation. 7 U.S.C. §§ 2(a), 2(c); *see also, e.g.*, *CFTC v. McDonnell*, 287 F. Supp. 3d 213, 227 (E.D.N.Y. 2018); *CFTC v. Zelener*, 373 F.3d 861, 865-66(7th Cir. 2004) (explaining that spot or forward contracts for the underlying asset fall outside CFTC jurisdiction). Many ideas that the CFTC has floated in this request use carbon emissions as a metric for disclosure, risk-management, or stress testing. 87 Fed. Reg. at 34,859. But the CFTC already regulates carbon derivatives markets—so any use of carbon as a separate risk metric for other derivatives would effectively regulate the underlying asset. *Id.* at 34,860 (requesting feedback for the Commission's oversight over voluntary carbon derivatives markets).

Thus, in using carbon for climate rulemaking, the CFTC would violate Congress's express instruction *not* to regulate underlying assets. 7 U.S.C. §§ 2(a), 2(c). For example, the Commission suggests it may require "registered entities and registrants [] to disclose information relating to [greenhouse gas] emissions." 87 Fed. Reg. at 34,859. Yet disclosures about who owns or emits carbon from other derivatives markets would regulate carbon and impact its price. Carbon derivatives traders would gain awareness over carbon ownership and trading and adjust their own strategies accordingly. Similarly, carbon prices would change if CFTC "amend[s] [] minimum capital and liquidity requirements to better recognize climate-related risk." *Id.* If the CFTC starts changing how much risk must be offset because of GHG emissions, supply and demand for carbon will change. Because Congress only gave CFTC permission to regulate *derivatives* markets (unless the underlying asset transaction involves fraud), any attempt to regulate carbon under the guise of risk disclosure necessarily extends beyond the Commission's authority.

III. Certain Requirements Suggested In The Request For Information Could Offend The First Amendment.

Again, the request for information suggests that the Commission is considering broad disclosure requirements, either to the public or directly to the Commission. We think such mandatory disclosure could present First Amendment concerns.

The federal government typically cannot "tell people that there are things they must say." *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 170 (2d Cir. 2020) (cleaned up). Even "requiring content-neutral speech may violate the First Amendment, although it will be subject to a different level of scrutiny than content-based requirements." *Miller v. Mitchell*, 598 F.3d 139, 151 n.14 (3d Cir. 2010). And applying compelled-speech requirements to for-profit businesses is not a constitutional shield, either. *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1177 (10th Cir. 2021) ("[A]s the Supreme Court has recognized, for-profit businesses may bring compelled speech claims."), *cert. granted* 142 S. Ct. 1106 (2022).

Many of us have explained elsewhere how similar disclosure regimes might violate the First Amendment. *See* Letter from Patrick Morrisey, Attorney General, West Virginia, to Vanessa Countryman, Secretary, SEC (June 15, 2022), https://bit.ly/3R8Z8YL. We see no need to repeat those points in full here, but a few points warrant mention again.

In our view, the Commission will need to justify any proposed regulatory actions entailing compelled speech under at least intermediate scrutiny. *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 524 (D.C. Cir. 2015) (applying intermediate scrutiny in invalidating SEC disclosure requirements). Intermediate scrutiny requires the Commission to identify a "substantial" "governmental interest," then establish that the potential action "directly advances" it in a way that "is not more extensive than is necessary." *United States v. Edge Broad. Co.*, 509 U.S. 418, 424 (1993) (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)). The Commission must have drawn "reasonable" conclusions, and the evidence must "fairly support" the Commission's judgment. *Pena v. Lindley*, 898 F.3d 969, 979-80 (9th Cir. 2018). Indeed, even under this relaxed standard, the Commission must summon "*substantial* evidence." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 264 (2d Cir. 2015) (emphasis in original).

At least at this stage, we see no way for the Commission to sustain the regulatory actions it has hinted at under intermediate scrutiny. The Commission appears to believe that ambiguously defined risks threaten the market, but it has been able to offer only conjecture. Even if these risks are real, the Commission does not say how items like carbon disclosures would *directly* advance a governmental interest that falls within the Commission's authority. At best, proposals like carbon disclosures and the like could only *indirectly* influence the market by driving investors away from disfavored industries. And the Commission has not explained why less restrictive means—for instance, by employing the regulatory tools it already has available—would fail to address the problem without the need for compelled speech on a controversial subject.

At least without concrete evidence supporting the need for the actions it proposes, we urge the Commission not to undertake any climate-related regulatory action that would include a compelled-speech element.

IV. Climate-Related Regulatory Actions Would Be Arbitrary and Capricious.

The Administrative Procedure Act requires agencies to engage in "reasoned decisionmaking." *Michigan* v. *EPA*, 576 U.S. 743, 750 (2015). Agency actions must be "set aside" if they are "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A). *See also, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020). Agency rules can be arbitrary and capricious if the agency (1) relies on factors that Congress did not intend, (2) ignores an important aspect of the problem, (3) offers an explanation counter to evidence, or (4) does something simply unrecognizable as the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

For several reasons, we think climate-related regulatory efforts of the sort referred to in the request for information could not survive an APA challenge.

A. The Commission is relying on impermissible factors. The agency's job is not to resolve society's ills, but to address the problems that Congress put before it.

The CEA requires that CFTC consider only five factors in rulemaking: "(A) considerations of protection of market participants and the public; (B) considerations of the efficiency, competitiveness, and financial integrity of futures markets; (C) considerations of price discovery; (D) considerations of sound risk management practices; and (E) other public interest considerations." 7 U.S.C. § 19(a)(2); *see also Inv. Co. Inst. v. CFTC*, 720 F.3d 370, 377 (D.C. Cir. 2013). So Congress did not expressly ask CFTC to consider climate when promulgating rules for derivatives markets.

Nor did Congress implicitly ask the Commission to think about climate. Although CFTC hopes to project "climate" onto all its statutory rulemaking factors—as when it talks of "climate-related financial risk"—this legislative revisionism does not work. 87 Fed. Reg. at 34,857. "Words that can have more than one meaning are given content [] by their surroundings." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 466 (2001). And price discovery, risk management, market protection, and competitiveness all appear together as statutory factors. As we explained already,

their joint appearance shows that Congress wanted CFTC to make rules with the market's framework and integrity—not climate or other social externalities—in mind. 7 U.S.C. § 19(a)(2).

When Congress wants an agency to consider climate risk, it knows how to do so. *See, e.g.*, 42 U.S.C. § 4332(F) ("[W]here consistent with the foreign policy of the United States, lend appropriate support to initiatives … designed to … prevent[] a decline in the quality of mankind's world environment."). True, an agency can still consider additional "relevant" factors even when not expressly listed. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222-26 (2009). But at the risk of thrice repeating ourselves, climate policy is irrelevant to CFTC's regulatory purpose of "protecting the innocent individual investor … from being misled or deceived." *Loginovskaya*, 764 F.3d at 270. If the Commission believes otherwise, it has failed to explain that connection. *See Encino Motorcars, LLC v. Navarro,* 579 U.S. 211, 221 (2016) (An agency must "give adequate reasons for its decisions."). It cannot claim a right to act whenever an issue might indirectly affect markets. Were that the rule, then the Commission's power would be limitless.

The CEA's "other public interest" factor does not allow the Commission to act on climate, either. 7 U.S.C. § 19(a)(2). Congress does not "alter the fundamental details of a regulatory scheme" by "hid[ing] elephants in mouseholes." *Whitman*, 531 U.S. at 468. The gap-filling "other public interest" factor gives CFTC flexibility to consider inquiry-specific intricacies of market structure and design that the CEA's express rulemaking factors may not cover. The language does not to expand CFTC's reach into climate policymaking. Therefore, the CFTC has implied that it intends to consider factors beyond those Congress intended.

B. Beyond that problem, the request for information improperly singles out climate risks. We see no difference between climate risks and many other scenarios that pose equal or greater danger. For example, economic recession, foreign relations, war, public health crises, and fraud (CFTC's intended area of focus) can all affect the derivatives markets. What makes climate risk so special that the Commission must address it specifically? The public does not know, and the Request never says why the Commission should address climate-related risks with such unique urgency.

C. The Commission's potential efforts would also undermine the Commission's statutory independence. The Commission is inappropriately marching to the command of a President who has ordered a single-minded approach to this issue.

Congress established the CFTC as an independent administrative agency to monitor the nation's commodity derivatives trading. It meant for the Commission to remain "relatively immune from the 'political winds that sweep Washington.'" *CFTC v. Schor*, 478 U.S. 833, 836 (1986) (quoting H.R. Rep. No. 93-975, at 44, 70 (1974)). Unlike executive agencies like the Department of Transportation or State, whose principal officers serve at the pleasure of the President, our system intends independent agencies to be "free from political domination or control," not "subject to anybody in the government" or "to the orders of the President." *Humphrey's Executor v. United States,* 295 U.S. 602, 619, 625 (1935); *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492, 502 (2010).

The climate regulations that the CFTC envisions presents at least two "independent agency" problems.

For one, CFTC is taking these climate-related actions at the behest of President Biden. *See* 87 Fed. Reg. at 27,968. The President is not meant to exercise direct control over independent agency heads like the Commission, as doing so compromises their "independence." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001). Our system ensures that independent agencies like CFTC will faithfully enforce the law through appropriations (from Congress) and for-cause removal (by the President). *Free Enter. Fund*, 561 U.S. at 493 (quoting *Humphrey's Executor*, 295 U.S. at 629). The President also has limited authority to subject independent agencies to regulatory planning *procedure*. Kagan, *supra*, at 2288. But presidents are meant to assert little *substantive* control over independent agency authority outside of addressing "inefficiency, neglect of duty, or malfeasance" by removable directors. *See generally* Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority over Independent Agencies*, 109 GEO. L.J. 637 (2021). Thus, by subjugating itself to the President's will here, the Commission has abandoned one of its central features—and directly contravened the way our federal system is supposed to work.

For another, we see the Financial Oversight Stability Council's involvement as even more problematic. *See* 87 Fed. Reg. at 34,857 (describing how the Commission is responding to the FSOC and its directive to "advance the disclosure of climate-related risk … while achieving a net-zero emissions economy by 2050"). Interagency commissions like the FSOC do not have any executive power. The Commission says it is seeking to "responsibly act on [its] recommendations." *Id.* at 34,858. But as an independent agency, CFTC must act on its own expertise and factfinding. *Humphrey's Executo*r, 295 U.S. at 625. The Commission is not a mere implementing agency for an advisory board without any executive authority.

One sees these principles in action in the Supreme Court's decision in *Free Enterprise Fund*. In that case, Congress established the Public Company Accounting Oversight Board as an inferior oversight board under the SEC. The President could remove SEC Commissioners only for cause, and the PCAOB members could be removed only for cause by SEC Commissioners—but not by the President. This "added layer of tenure protection" made it so "neither the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, ha[d] full control over the Board." *Free Enter. Fund*, 561 U.S. at 495-96. CFTC's relationship to FSOC here is the "direct order" analogy to *Free Enterprise Fund.* Like the unconstitutional insulation of accountability in *Free Enterprise Fund*, any subordination or obligation that CFTC perceives to FSOC—which largely consists of commissioners from various independent agencies—also carries with it a "diffusion of accountability." *Id.* at 497. CFTC is accountable to only Congress's statutory directives.

D. The request for information contemplates actions that would run headlong into another statutory requirement: the CEA's requirement that Commission consider the costs and benefits of potential rules, regulations, or orders before issuing them. *See* 7 U.S.C. § 19(a); *see also* 5 U.S.C. § 801(a)(1)(B)(i). Climate-related action would be unlikely to satisfy cost-benefit analysis

because, beyond vague platitudes, the Commission has offered few specifics on the perceived costs and benefits of a climate-focused regulatory action.

Benefits are sketchy. We are doubtful that legal disclosure requirements tied to the derivatives market would have any material effect on climate change, even if that subject were a proper one for the Commission. Relatedly, the agency offers little hard data or evidence that would confirm and quantify the harms that a potential action might address. The Commission's omission prevents it—or anyone else, for that matter—from meaningfully comparing the "benefits" (such as they are) and the costs.

And even the Commission's oblique references to "risk" suggest that concerns may be overstated. For example, "transition risks" are an ordinary part of a functioning economy. As technologies evolve, consumer preferences change, and the economy shifts, "transition risks" always happen. Yet to our knowledge, the Commission has never raised cited "transition" concerns to justify agency regulatory action before. Likewise, a potential to change "minimum capital and liquidity requirements" has been called "premature" by other financial regulators. *See* Christopher Condon, *Janet Yellen Says Higher Bank Capital Rules for Climate Risk Are "Premature,"* BLOOMBERG (Feb. 2, 2022, 2:06 p.m.), https://bloom.bg/3SYYOfj. But the Commission is interested in leaping ahead, anyway.

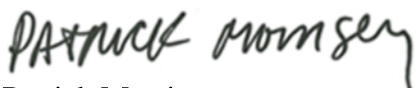
Lastly, costs must be a central consideration. Disclosure requirements, for instance, can easily generate millions or billions in compliance costs, as reflected in the SEC's recent regulatory efforts. *See* SEC, The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21,334, 21,439 (Apr. 11, 2022). Yet the Commission has not asked a single question about the costs of potential regulatory actions, let alone assessed that critical issue on its own.

Thus, the CFTC has described a series of potential regulatory actions that we conclude could not survive a legal challenge under the APA.

CONCLUSION

The CFTC should not act to facilitate "the transition to a low-carbon economy." 87 Fed. Reg. at 34,857. Congress created CFTC to ensure the derivatives markets had sound integrity, not to promulgate climate policy. We urge CFTC to reconsider its proposal.

Sincerely,

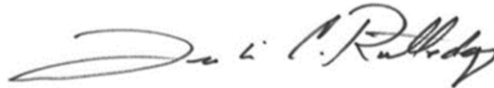


Patrick Morrisey
West Virginia Attorney General

Steve Marshall
Alabama Attorney General

Treg Taylor
Alaska Attorney General

Mark Brnovich
Arizona Attorney General


Leslie Rutledge
Arkansas Attorney General

Christopher M. Carr
Georgia Attorney General

Todd Rokita
Indiana Attorney General

Derek Schmidt
Kansas Attorney General

Daniel Cameron
Kentucky Attorney General

Jeff Landry
Louisiana Attorney General

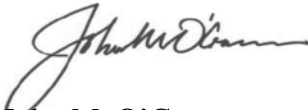
Lynn Fitch
Mississippi Attorney General

Austin Knudsen
Montana Attorney General

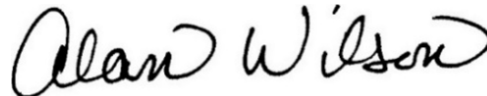
Doug Peterson
Nebraska Attorney General

Drew Wrigley
North Dakota Attorney General

Dave Yost
Ohio Attorney General



John M. O'Connor
Oklahoma Attorney General



Alan Wilson
South Carolina Attorney General

Ken Paxton
Texas Attorney General

Sean D. Reyes
Utah Attorney General

Jason S. Miyares
Virginia Attorney General

Bridget Hill
Wyoming Attorney General