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Launch of Financial Services Committee Republican ESG Working Group

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On February 3, the Chair of the House Financial Services Committee, Patrick McHenry, **announced** the establishment of a nine-person Republican ESG Working Group to “combat the threat to our capital markets posed by those on the far-left pushing environmental, social, and governance (ESG) proposals.” The group is to be led by Oversight and Investigations Subcommittee Chair Bill Huizenga. The press release states that the working group will examine ways to “rein in the SEC’s regulatory overreach; reinforce the materiality standard as a pillar of our disclosure regime; and hold to account market participants who misuse the proxy process or their outsized influence to impose ideological preferences in ways that circumvent democratic lawmaking.”

McHenry stated that “[t]his group will develop a comprehensive approach to ESG that protects the financial interests of everyday investors and ensures our capital markets remain the envy of the world. Financial Services Committee Republicans as a whole will continue our work to expand capital formation, hold Biden’s rogue regulators accountable, and support American job creators.” Huizenga added that “[t]he SEC’s climate disclosure rule is a prime example of this overreach that would have a wide-ranging impact on hard working Americans across all walks of life. I look forward to leading our committee’s ESG working group, which will focus on promoting strong, vibrant capital markets, while defending the interests of all retail investors.”

Taking the Temperature: The creation of the working group is yet another example, if one were needed, of the partisan divide in the U.S. on the subject of ESG. This announcement follows the **establishment of the Congressional Sustainable Investment Caucus on January 25, a Democrat-led initiative that aims to “bring together Members of**

Congress with experts to better understand sustainable investing and inform policy making that provides investor protections and transparency of information to market participants.” Two aspects of Representative McHenry’s announcement bear mention. First, the press release seems to claim that the Working Group’s approach is in line with Supreme Court precedent, observing that “last year, the Supreme Court ruled in *West Virginia vs EPA* that government bureaucracies cannot arbitrarily expand their own regulatory reach.” While the Supreme Court, invoking the Major Questions Doctrine developed in its separation of power jurisprudence, held that an Environmental Protection Agency rule exceeded the EPA’s authority under the Clean Air Act, the decision rests squarely on the rule in question relative to the EPA’s authority under the statute at issue. The Court found that the EPA effected a “fundamental revision of the statute,” going from “ensuring the efficient pollution performance of each individual regulated source,” whether it be coal, gas or another power source, to “demand[ing] much greater reductions in emissions based on a very different kind of policy judgment: that it would be ‘best’ if coal made up a much smaller share of the national electricity generation.” Although the decision plainly is potentially relevant in cases challenging agency rulemaking, claiming the mantle of *West Virginia* without regard to the arguably unique facts of that case says little about the likelihood of the SEC’s climate disclosure rule – the apparent main focus of the Working Group’s dissatisfaction – surviving legal challenges. Which raises the second point, namely the Working Group’s goal of “rein[ing] in the SEC’s regulatory overreach.” In its recent 2023 examination priorities letter, the SEC Division of Examinations [made clear](#) that ESG-related advisory services and funds will remain an area of significant focus. And, the SEC’s final climate-related disclosure rule is expected to be issued in April 2023. In our view, however, attacks on the SEC rule or its examination priorities miss the crux of the issue. As we have [commented](#), whether or not the SEC climate rule survives as proposed, or in modified form, or even if it is invalidated via court challenges (an outcome we think is unlikely given the SEC’s investor protection mandate), companies need to consider and report on material risks, developments and opportunities, whether arising from climate issues, social impact movements, or other forces. Likewise, asset managers need to consider those same issues when making investment decisions as well as reporting on the sustainability characteristics of their investment portfolios – issues that have put them at the [forefront](#) of calling for greater issuer disclosure on ESG-related matters.